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THE LIQUOR LICENSE QUESTION.

THE recent decision in the now celebrated case of *Hodge* v. *The Queen*, is perhaps of more importance than any of the former judgments upon constitutional questions. It is unfortunate that such difficult matters of law as are dealt with in these cases should become entangled with party politics, and that arguments in favor of, or against, the moral quality of governments should be based upon their power of forecasting the decisions of the Privy Council. Mr. Blake was no doubt right in saying, during the debate on the McCarthy Act, that the decision in *Russell* v. *The Queen* did not establish that the Provinces had not the power of regulating the liquor traffic, and he even indicated with precision arguments which could be adduced in favor of the existence of that power, notwithstanding *Russell* v. *The Queen*. But he went no farther, and availed himself of the privilege of his position on the opposition benches, to refrain from the expression of an opinion as to the constitutionality of either the Ontario License Act or the Bill then before the House. (Perhaps even with the added light of *Queen* v. *Hodge* it will be the part of discretion for neither side to be too sure of what the Privy Council will think of the McCarthy Act.) The Government, less fortunate, had to assume one position or the other, and it now appears that they were in error in

law, however much they may be able to justify the Act as a matter of policy.

We will try to state clearly the effect of the present decisions, and to indicate the difficulties still to be dealt with.

By sec. 91 of the B. N. A. Act "It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the *peace, order and good government* of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that, notwithstanding anything in this Act, the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated; that is to say" (omitting the unimportant items):

"(2.) The regulation of trade and commerce.

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

By sec. 92, "In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say:"—(omitting the unimportant items),

"(8.) Municipal Institutions in the Province;

(9.) Shop, saloon, tavern, auctioneer, and other licenses, in order to the raising of a revenue for provincial, local or municipal purposes;

(13.) Property and civil rights;

(15.) The imposition of punishment by fine, penalty or imprisonment, for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in this section;

(16.) Generally, all matters of merely a local or private nature in the Province."

Some canons for the construction of these two difficult sections were laid down in *The Citizens Insurance Company of Canada* v. *Parsons*, *L. R. 7, App. Ca. 96.* It was said that the sections must, in regard to the classes of subjects generally described in sec. 91, be read together, and the language of 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. It was also said that in determining whether an Act was *intra vires* of the local Legislature, the questions to be decided were: First, whether the Act impeached falls within any of the classes of subjects enumerated in sec. 92; Second, If it does not, it can be of no validity, and no other question would then arise; Third, If it does fall within sec. 92 then the further question must be determined, whether the subject of the Act does not also fall within one of the enumerated classes of subjects in sec. 91, and so does not still belong to the Dominion Parliament.

The point decided in *Russell* v. *The Queen*, *L. R. 7, App. Ca. 829*, was that "The Canada Temperance Act" was *intra vires* of the Dominion Parliament. This Act in effect, wherever it is put in force, prohibits the sale of intoxicating liquors, except in wholesale quantities, or for certain specified purposes; regulates the traffic in the excepted cases; makes sales of liquors in violation of the prohibitions and regulations contained in the Act criminal offences; and punishes by fine, and for the third or subsequent offence by imprisonment.

The point decided in *The Queen* v. *Hodge* is, that secs. 4 and 5 of "The Liquor License Act of 1877," Rev. Sts. of Ontario, cap. 181, are *intra vires* of the local Legislature.

Sec. 3 of this Act provides for the appointment of a Board of License Commissioners for each city, county, union of counties, or electoral district, as the Governor-General may think fit, and secs. 4 and 5 are as follows:—

"Sec. 4. License Commissioners may, at any time before the first day in each year, pass a resolution, or resolutions, for regulating and determining the matters following, that is to say:—

"(1) For defining the conditions and qualifications requisite to obtain tavern licenses for the retail, within the municipality, of spirituous, fermented, or other manufactured liquors, and also of shop licenses for the sale by retail, within the municipality, of such liquors in shops or places other than taverns, inns, alehouses, beerhouses, or places of public entertainment.

"(2) For limiting the number of tavern and shop licenses respectively, and for defining the respective times and localities within which, and the persons to whom, such limited number may be issued within the year from the first day of May in one year till the thirtieth day of April inclusive of the next year.

"(3) For declaring that in cities a number not exceeding ten persons, and in towns a number not exceeding four persons, qualified to have a tavern license, may be exempted from the necessity of having all the tavern accommodation required by law.

"(4) For regulating the taverns and shops to be licensed.

"(5) For fixing and defining the duties, powers, and privileges of the Inspector of Licenses of their district.

"Sec. 5. In and by any such resolution of a Board of License Commissioners the said Board may impose penalties for the infraction thereof."

Let these points, for the sake of clearness, appear in parallel columns:—

Russell v. *The Queen.*	*The Queen* v. *Hodge.*
Powers of Parliament.	*Powers of Leg. Assembly.*
1. To prohibit altogether the liquor traffic.	1. To define the conditions and qualifications requisite to obtain licenses
2. To partially prohibit and to regulate that which is not prohibited, when the object is to secure "peace, order and good government."	2. To limit the number of licenses. 3. To define the persons to whom licenses shall be issued. 4. To regulate the taverns and shops licensed.

A careful comparison of the gist of the decisions thus stated will do much towards removing the difficulty that surrounds the subject; but in order to get a full apprehension of the points involved it will be necessary to consider the arguments which are given in support of the decisions.

"The sole question" in *Russell* v. *The Queen* (as pointed out in *The Queen* v. *Hodge*) "was whether it was competent to the Dominion Parliament, under its general powers, to make laws for the peace, order and good government of the Dominion, to pass the Canada Temperance Act, 1878, which was intended to be applicable to the several Provinces of the Dominion, or to such parts of the Province as should locally adopt it. It was not doubted that the Dominion Parliament had such authority under sec. 91, unless the subject fell within some one or more of the classes of subjects which by sec. 92 were assigned exclusively to the Legislatures of the Provinces.

"It was, in that case, contended that the subject of the Temperance Act properly belonged to No. 13 of sec. 92, "Property and Civil Rights in the Province," which it was said belonged exclusively to the Provincial Legislature, and it was on what seems to be a misapplication of some of the reasons of this Board in observing on that contention that the applicant's counsel principally replied. These observations should be interpreted according to the subject matter to which they were intended to apply.

"Their Lordships, in that case, after comparing the Temperance Act with laws relating to the sale of poisons, observe that: 'Laws of this nature designed for the promotion of public order, safety or morals, and which subjects those who contravene them to criminal procedure and punishment, belong to the subject of public wrongs rather than to that of civil rights. They are of a nature which fall within the general authority of Parliament to make laws for the order and good government of Canada.'

"And again:—'What Parliament is dealing with in legislation of this kind is not a matter in relation to property and its rights, but one relating to public order and safety. That

is the primary matter dealt with, and though incidentally the free use of things in which men may have property is interfered with, that incidental interference does not alter the character of the law.'

"And their Lordships reasons on that part of the case are thus concluded:—'The true nature and character of the legislation in the particular instance under discussion must always be determined, in order to ascertain the class of subject to which it really belongs. In the present case it appears to their Lordships, for the reasons already given, that the matter of the Act in question does not properly belong to the class of subjects, 'Property and Civil Rights' within the meaning of subsection 13.'"

From these extracts it will be seen that the only point urged as against the constitutionality of the Canada Temperance Act, 1878, was, that the subject dealt with came under the heading "Property and Civil Rights in the Province." It was held that it did not.

The Queen v. *Hodge* turned upon entirely different parts of the statutes. The Provincial jurisdiction was upheld because the subjects dealt with by the Ontario License Act were included under the headings:—(8) "Municipal Institutions in the Province," (15) "The impositions of punishment," &c., and (16) "generally all matters of merely a local or private nature in the Province;" and because they were not included under the heading "(2) The Regulation of Trade and Commerce."

Their Lordships said:—"The clause in sec. 91, which the Liquor License Act, 1877, was said to infringe, was No. 2, "The Regulation of Trade and Commerce," and it was urged that the decision of this Board in *Russell* v. *Regina* was conclusive—that the whole subject of the liquor traffic was given to the Dominion Parliament, and consequently taken away from the Provincial Legislature. 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 again :—"The subjects in the opinion of their Lordships seem to be all matters of a merely local nature in the Province, and to be similar to, though not identical in all respects with, the powers then belonging to municipal institutions under the previously existing laws passed by the local parliaments.

"Their Lordships consider that the powers intended to be conferred by the Act in question, when properly understood, are to make regulations in the nature of police or municipal regulations, of a merely local character. for the good government of taverns, &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 regulations 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.

"The subjects of legislation in the Ontario Act of 1877, secs. 4 and 5, seem to come within the heads Nos. 8, 15, and 16, of sec. 92 of British North America Statute, 1867.

"Their Lordships are, therefore, of opinion that, in relation to secs. 4 and 5 of the Act in question, the Legislature of Ontario acted within the powers conferred on it by the Imperial Act of 1867, and that in this respect there is no conflict with the powers of the Dominion Parliament."

Let these grounds of decision now be stated together. The two Acts were held to be *intra vires* because :—

Canada Temperance Act.

1. The subjects are included under "laws for the peace, order and good government of Canada in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislature of the Provinces."
2. The subjects are not included under "Property and Civil Rights in the Province."

Ontario License Act.

1. The subjects are included under :
   (*a*) "Municipal Institutions in the Province."
   (*b*) "The imposition of punishment, &c."
   (*c*) "Generally all matters of a merely local or private nature in the Province."
2. The subjects are not included under "The Regulations of Trade and Commerce."

The next question with which their Lordships will have to deal will no doubt be the constitutionality of the McCarthy Act. Upon a question which has evoked so much contrary opinion among the ablest men in the Dominion, and which has become so much entangled with party politics, it would not be useful for us to offer a confident opinion. We may, however, indicate the arguments which occur to us pro and con. Against the Act will be urged the following :—

1. The Privy Council has decided that the subjects dealt with by the Ontario License Act are of a municipal, local and private nature, and by the B. N. A. Act the Legislatures have exclusive jurisdiction in respect of such matters.

2. The Privy Council has decided that the subjects dealt with do not relate to trade and commerce.

3. The only ground, therefore, upon which the Dominion jurisdiction can be supported is, that the law is one for the "peace, order and good government of Canada." But Parliament has not power to enact all laws for these pnrposes, but only such as may be in relation to all matters *not coming within the classes of subjects by this Act assigned exclusively* to the Legislatures of the Provinces." It has already been shewn that the subject of this Act is a matter "assigned exclusively to the Legislatures."

4. It cannot be that the same power is vested in both legislative bodies. It has been held to be vested in the local Legislatures. The Dominion Parliament can have no jurisdiction.

5. The *Citizens Ins. Co.* v. *Parsons* is a parallel case. It was there said that the Dominion Parliament might have power to require all insurance companies to take out a license before engaging in business, and yet it was decided that the local Legislature had power to regulate contracts between the companies and individuals. So here the Dominion Parliament has power to prohibit the traffic altogether, but the local Legislature have the power of regulation in the absence of prohibition.

6. A case much in point was suggested in the judgment in the Insurance Co. case at page 117. "Suppose," it was said, "the Dominion Parliament were to incorporate a company, with the power, among other things, to purchase and hold lands throughout Canada in mortmain, it could scarcely be contended, if such company were to carry on business in a Province where a law against holding land in mortmain prevailed (each Province having exclusive power over 'property and civil rights in the Province') that it could hold land in that Province in contravention of the Provincial legislation; and if a company were incorporated for the sole purpose of purchasing and holding land in the Dominion, it might happen that it could do no business in any part of it, by reason of all the Provinces having passed mortmain Acts, though the corporation would still exist and preserve its status as a corporate body."

From this it may fairly be argued that the Dominion Parliament may, in addition to its power of abolishing the liquor traffic, have power to incorporate a company to deal in liquor, but could not give it any license which would avail as against Provincial regulations.

In favor of the constitutionality of the Act will be urged:

1. According to the canons of construction in *The Citizens Insurance Co.* v. *Parsons* it is not sufficient to find that an Act does fall within some of the classes of subjects assigned to the Legislatures (and this is all that *Hodge* v. *The Queen* determines), but, if that is found, then "the further question must be determined, whether the subject of the Act does not also fall within one of the enumerated subjects in sec. 91, and so does not still belong to the Dominion Parliament (and this question was not decided in *The Queen* v. *Hodge*).

2. It was also said in *The Queen* v. *Hodge* that "the principle which that case (*Russell* v. *The Queen*) and the case of the Citizens Insurance Company illlustrates is, that subjects which in one aspect and for one purpose fall within sec. 92, may, in another aspect and for another purpose, fall within sec. 91."

3. Admitting then that with a view to the raising of a revenue the Provincial Legislatures have a regulating power, the Dominion, for the purpose of securing "peace, order and good government" have also the same power, in which case the Dominion law would supersede that of the Legislative Assembly. It was said in *Queen* v. *Hodge* that the objects aimed at by the Ontario License Act were to preserve "peace and public decency, and repress drunkenness and disorderly and riotous conduct." These are matters in respect of which the local Legislature may legislate, not directly, but only if they arise incidentally, and as ancillary to some ulterior object over which it has jurisdiction. The local Legislature has power to issue licenses, and may in connection with that subject of jurisdiction provide that its licensees may be of a certain class and shall conduct themselves in a certain manner—a peaceable, orderly and proper manner. On the other hand, the Dominion Parliament has jurisdiction to legislate directly as to all matters respecting peace, order and good government, and its laws upon these subjects will supersede local laws.

4. There is no antagonism in the fact that a local statute may be valid in the absence of any Dominion Act upon the subject, and yet be subject to be superseded by such an Act. In *L'Union St. Jaques de Montreal* v. *Helisle*, *L. R. 6 P. C. 31*, the Quebec Statute, 33 Vic., c. 58, which relieved a particular society from extreme financial embarrassment by the imposition of forced commutations of the existing rights of two annuitants, was held to be valid; but at the same time Lord Selborne said:—The hypothesis was suggested in argument of a law having been previously passed by the Dominion Legislature to the effect that any association of this particular kind throughout the Dominion, on certain specified conditions, assumed to be exactly those which appear upon the face of this statute, should thereupon, *ipso facto*, fall under the legal administration in bankruptcy or insolvency. Their Lordships are by no means prepared to say that if any such law as that had been passed by the Dominion Legislature, it would have been beyond their

competency; nor that, if it had been so passed, it would have been within the competency of the Provincial Legislature afterwards, to take a particular association out of the scope of a general law of that kind, so competently passed by the authority which had power to deal with bankruptcy and insolvency."

We will await the unravelling of the difficulty with much interest. With the expediency of centralization or decentralization, of course, we have nothing to do.

THE JUDICATURE ACT.

ANOMALIES and inconsistencies, hallowed and protected by time, supported by education devoted to the portrayal of their necessity, and fortified by a natural skrinking from the effort requisite to a change, are long-lived, surviving many an exposure and departing at last amid the lamentations of those who expended more effort in finding reasons for their existence than would have been necessary for the advance. What reason could ever have been assigned for the existence, side by side, of a court of equity and a court of law, other than the familiar historical reason that the former gradually acquiring its jurisdiction, no attention was paid to symmetry or consistency. No law-giver, however inventive, could devise such an anomaly. If his imagination did, in a wandering moment, conceive the idea, his reason would at once rebel against the thought. If a court is to be entrusted with the administration of justice it would *a priori* appear irrational to erect another court to enjoin its proceedings when its jurisdiction appeared to be inadequate. The obvious course would be to invest the original court with the requisite power to do ample justice in all cases within its jurisdiction.

In Manitoba the constitution of the Court of Queen's Bench, most unfortunately, became the work of able lawyers —able and therefore educated—educated, and therefore imbued with the system in which they had been trained, and in which for many years they had worked. If some intelligent Indian had been Attorney-General he would have constituted the court and told it to hear both sides and do justice, giving it full power to do so. As it is, we have an anomaly more glaring than ever existed in England or Ontario. The curious spectacle is here presented of the Court of Queen's Bench by its injunction restraining proceedings in the Court of Queen's Bench—the Chief Justice on Monday awarding an injunction, practically, to restrain the Chief Justice from doing injustice on Tuesday. Sometimes, too, where the pleadings are in the common law style, the court finds itself unable to give full effect to the equitable doctrines applicable to the case until the appearance of the pleadings has been altered.

In England and Ontario all these incongruities have been abolished and a strong reaction in favor of common sense as against the conservatism of learning has set in. Why, in Manitoba, should the administration of law be any longer hampered by their existence?

PLEADING AND PRACTICE.

We are inclined to think that the matter rests largely with the judges. There are many amendments of the law embraced in the Judicature Acts of England and Ontario not connected with the fusion of law and equity, and some of these will have to be dealt with, if at all, by the Legislature. But the assimilation of the pleading and practice, and also, we think, the application of equitable principles whenever requisite, are within the jurisdiction of the judges.

Con. Stat. cap. 31, sec. 20, provides that "The judges of the said Court of Queen's Bench, or any two of them, of whom the Chief Justice shall be one, may, from time to time, make all such general orders, or rules, as may seem

expedient for regulating the offices of the officers of the said court, and for prescribing and securing the due performance of their duties, and for settling the forms and the practice and procedure, and adapting them to the circumstances of this Province; and more especially the nature and form of the process and pleadings, the taking, publishing, using and hearing of testimony, the examination of parties to suits or actions, *viva voce* or otherwise, the allowance and amount of costs, and every other matter and thing deemed expedient for better obtaining the ends of justice with despatch and inexpensively, and advancing the remedies of suitors; and may, from time to time, suspend, repeal or revise any such orders or rules; but no such orders or rules shall have the effect of altering the principles or rules of decision of the said court."

There seems here to be given, not merely the power, but an express invitation to remodel the pleadings and practice, as may be "deemed expedient for *better* obtaining the ends of justice with despatch, and inexpensively." So much, therefore, of the Judicature Acts as relates to pleading and practice may be dealt with by the judges, but of course the Legislature may also take the matter in hand.

RULES OF DECISION.

In England and Ontario it was necessary to increase the jurisdiction of each of the courts, and also to provide for the rule of decision in cases where conflict had existed. With this view, after dealing particularly with various classes of subjects, it was enacted that: "Generally in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the rules of equity and the rules of law with reference to the same matter, the rules of equity shall prevail." It may not be quite clear, in the absence of legislation, what should be done in Manitoba in case of conflict. While the dual system of pleading prevails, it seems natural and proper to apply common law principles where the record contains common law pleadings, and equitable principles where counsel read from a bill and answer.

But if this irrational guide were to desert us, and the pleadings should be assimilated, which set of principles would prevail? For example, in an action by a *cestui qui trust* against his trustees, in respect of property held upon an express trust, could the defendant plead successfully the Statute of Limitations? Or what would be done in the case of a tenant for life, without impeachment of waste, being guilty of equitable waste? And, more especially, we would require to know how the courts would regard a period named for completion of a real estate purchase, whether it would be taken as of the essence of the contract or not. Perhaps it would be advisable that there should be legislation in respect of these matters, and more especially as the judges are prohibited from making any rules which "shall have the effect of altering the principles or rules of decision of said court."

Combined with these two matters—pleading and practice, and rules of decision—there are found in the Judicature Acts various provisions which are of much value, but which we have said are separable from the main object of the Acts, the fusion of law and equity. Among these may be ennumerated:

JOINDER OF CAUSES OF ACTION.

Multifariousness "has ceased to be an objection by the express enactment of the Judicature Act." A plaintiff may unite in the same suit, as many unconnected causes of action as he may have and may choose to combine. This statement is subject to some qualification, but it is sufficiently accurate for our present purpose. A defendant may, however, in case he alleges that the causes of action cannot be conveniently disposed of in one action, move for an order excluding one or more of the causes of action which the plaintiff may have joined. The death of the demurrer for multifariousness would be a relief to the minds of many a perplexed pleader. The cases are numerous where such demurrers have been allowed and overruled, but among all the combinations there is never any case like the one in hand, for the progression of combinations of causes of action is worse than geometrical. Figures are absolute and their

combinations calculable, but allegations are shaded off on every side by distinctions and qualifications, and are not subject to the rules of the multiplication table.

JOINDER OF PARTIES.

All persons may be joined as plaintiffs in whom the relief claimed is alleged to exist, whether jointly, severally or *in the alternative*; and all persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally or *in the alternative*. For example, the plaintiffs were the the trustees of a charity, and deeming themselves libelled by words published by the defendant, united in bringing one action for the separate torts. *Booth* v. *Briscoe, L. R. 2 Q. B. D. 496.* So also, the plaintiff made a contract with one defendant acting as agent for his co-defendant. An action against the principal upon the contract, and in the alternative, if it should appear that the agent acted without authority, against the agent for falsely representing himself as duly authorized, was sustained. *Honduras Inter-Oceanic Railway Company* v. *Lefevre and Tucker, L.R. 2 Ex. D. 301.* In the large number of cases, of which the latter is a good example, the present law is unsatisfactory. The plaintiff brings his action upon the contract against the principal. If he be defeated, on the ground that the agent had no authority, he should, by the judgment of the court, be entitled to succeed against the agent for the false representation. But let him try to recover, and the agent will now bestir himself, and probably prove that he had all the authority which the plaintiff, unassisted, was unable in the former action to shew he possessed.

THIRD PARTY CLAUSES.

A most excellent feature of the Acts is the power given to a defendant who claims to be entitled to contribution or indemnity, or any other remedy or relief, over against a third party, to notify such person of the pendency of the action, and thus bind him by the result. The person notified, may, if he so desire, appear in the action and take an active part in the defence; but, whether he do so or not, he is estopped

by the judgment from disputing any matter determined by it. The lack of some such decision has often worked great injustice. A surety may be sued and may be unaware of the existence of some defence, which, when in his turn he sues the principal, may bar his recovery. In any case the surety ought not to be required, in the first instance, to stand the brunt of the attack. He should be in a position to require the principal to fight at first or not at all.

COSTS.

All the statutes with reference to costs following the verdict, obtaining certificates from the judge, etc., are susperseded. All costs are, as they should be, in the discretion of the judge or court. The rights of trustees, mortgagees, or other persons to costs out of a particular estate or fund to which they would be entitled under the old practice, are, however, expressly reserved.

We would commend these matters to the Government as subjects which should be dealt with at the ensuing sittings of the Legislature. If it be thought that there is not sufficient time for the preparation of an Act which would effect a complete fusion and substitute a new practice, there can be, at all events, no difficulty in giving the public the benefit of the other provisions above referred to.

COMMUNICATIONS.

To the Editor Manitoba Law Journal.

SIR,

In your article on the Statutes, in your first number, you do the late Queen's Printer a very great injustice when you lay to his charge the blunders they contain, or the delay in publication. I desire it to be perfectly understood, that I am in no way responsible either for the delay or the blunders.

Yours, etc.,

RICE M. HOWARD.
Late Queen's Printer.

WINNIPEG, 6th Feb., 1884.