

In the Privy Council.

No. 32 of 1896.

2,1897

UNIVERSITY OF LONDON W.C.1.
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INSTITUTE OF ADVANCED STUDIES

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APPELLANTS' CASE.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

BETWEEN

THE BREWERS' AND MALTSTERS' ASSOCIATION OF ONTARIO *Appellants,*
AND
THE ATTORNEY-GENERAL FOR ONTARIO . *Respondent.*

In the Matter of Certain Questions referred to the Court of Appeal for Ontario by His Honour the Lieutenant-Governor of Ontario.

Subject:—
Provincial Jurisdiction.
Brewers' and Distillers' Licenses.

CASE FOR THE APPELLANTS.

1. This is an appeal from a decision of the Court of Appeal for Ontario upon a reference to that Court by His Honour the Lieutenant-Governor of Ontario for hearing and consideration of the following questions:—

- (1.) Is sub-section 2 of section 51 of the Liquor License Act, Revised Statutes of Ontario, chapter 194, requiring every brewer, distiller or other person duly licensed by the Government of Canada as mentioned in sub-section 1 to first obtain a license under the Act to sell by wholesale the liquor manufactured by him when sold for consumption within the province a valid enactment?

10 (2.) Has the Legislature of Ontario power either in order to raise a
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revenue for provincial purposes or for any other object within provincial jurisdiction to require brewers, distillers and other persons duly licensed by the Government of Canada for the manufacture and sale of fermented spirituous or other liquors, to take out licenses to sell the liquors manufactured by them and to pay a license fee therefor?

(3.) If so must one and the same fee be exacted from all such brewers, distillers and persons?

2. The enactment referred to and the other enactments in the same statute relevant to the question are as follows:—

Revised Statutes of Ontario 1887 chapter 194 section 2.

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Interpretation.

(Sub-section) 4. "License by wholesale" or "wholesale license" shall mean a license for selling, bartering or trafficking, by wholesale only, in such liquors in warehouses, stores, shops, or places other than inns, ale or beer houses, or other houses of public entertainment, in quantities not less than five gallons in each cask or vessel at any one time, and in any case where such selling by wholesale is in respect of bottled ale, porter, beer, wine or other fermented or spirituous liquor, each such sale shall be in quantities not less than one dozen bottles of at least three half-pints each or two dozen bottles of at least three-fourths of one pint each, 20 at any one time. (R.S.O. 1877, c. 181, s. 2.)

Licenses by Wholesale.

34. The inspector of the license district, in any municipality in which the license applied for is to have effect, shall issue to any applicant, upon a requisition therefor signed by him, and after payment to the inspector of the proper duty thereon, a license for selling fermented, spirituous or other liquors, by wholesale only, in his warehouse, store, shop, or place to be defined in the said license, and situate within the said municipality, and such license shall be deemed a license by wholesale within the meaning and subject to the provisions of sub-section 4 of section 2 of 30 this Act. (R.S.O. 1877, c. 181, s. 25.)
35. Wholesale licenses may be issued at any time during the year after the license commissioners of the district in which such license is to have effect, have directed the same to be granted, and shall be strictly limited to persons who carry on the business of selling by wholesale or in unbroken packages, and any wholesale license so issued shall be and become void in case the holder thereof, at any time during the currency of the said license, directly or indirectly, or by or with any partner, clerk, agent or other person, carries on, upon the premises to which such license applies, the business of a retail dealer in any other goods, wares 40 or merchandise. (R.S.O. 1877, c. 181, s. 26.)

Duties Payable.

41.—(1) The following license duties shall hereafter be payable and shall,

subject to the provisions of the next following three sections, be in lieu of all others, provincial or municipal, that is to say :

1. For each wholesale license \$150.0.

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44.—(1) Over and above the duties for licenses hereinbefore imposed, and any duties which have been or may be imposed by any municipal bye-law, unless the municipality shall by bye-law otherwise provide, there shall be paid, in order to the raising of a revenue for provincial purposes, for the exclusive use of this province, the following additional duties thereon, the whole of which shall form part of the consolidated revenue of the province :

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1. For each wholesale license \$100.00

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License Fund.

45.—(1) All sums received from duties on tavern, shop and wholesale licenses, and for transfers and removals thereof and received by the inspector for fines and penalties, shall form the license fund of the license district, for which the Board of License Commissioners has been appointed. (R.S.O. 1887, c. 181, s. 34 (1); 44 V. c. 27, s. 3, 48 V. c. 43, s. 8, *part.*)

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(2) So much of the license fund as is not specially appropriated otherwise, shall be applied, under regulations of the Lieutenant-Governor in Council, for the payment of the salary and expenses of the inspector, and for the expenses of the office of the board and of the officers, and otherwise in carrying the provisions of the law into effect, and the residue, on the 30th day of June in each year, and at such other times as may be prescribed by the regulations of the Lieutenant-Governor in Council, shall be paid over,—one-third to the treasurer of the province, to and for the use of the province, and the other two-thirds to the treasurer of the city, town, village, or township municipality in which the licensed premises are respectively situate;

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49.—(1) No person shall sell by wholesale or retail any spirituous, fermented, or other manufactured liquors without having first obtained a license under this Act authorising him so to do; but this section shall not apply to sales under legal process or for distress, or sales by assignees in insolvency.

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50. No person shall keep or have in any house, building, shop, eating-house, saloon, or house of public entertainment, or in any room or place whatsoever, any spirituous, fermented or other manufactured liquors for the purpose of selling, bartering or trading therein, unless duly licensed thereto under the provisions of this Act;

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51.—(1) Sections 49 and 50 shall not prevent any brewer, distiller, or other

person duly licensed by the Government of Canada for the manufacture of fermented, spirituous, or other liquors, from keeping, having or selling any liquor manufactured by him in any building wherein such manufacture is carried on, provided such building forms no part of and does not communicate by any entrance with any shop or premises wherein any article authorised to be manufactured under such license is sold by retail, or wherein is kept any broken package of such articles.

- (2) Every such brewer, distiller, or other person, shall also first obtain a license to sell by wholesale under this Act the liquor so manufactured¹⁰ by him, when sold for consumption within this Province, under which license the said liquor may be sold by sample, or in original packages, in any municipality, [as well as in that in which it is manufactured; but no such sales shall be in quantities less than those prescribed in subsection 2 of this Act. (R.S.O. 1877, c. 181, s. 41)].

5. Pursuant to the direction of the Court in that behalf the Appellants were represented at the hearing.

6. In the result the Court answered the first two questions in the affirmative and the third in the negative.

7. From this decision the Appellants appeal to Her Majesty in Council. ²⁰

8. The Appellants submit that the decision of the Court of Appeal for Ontario upon the first two questions was erroneous, and that their appeal should be allowed and that the answers to the said first two questions should be reversed, or varied for, amongst others, the following reasons.

REASONS.

1. Because the license referred to in the first question, being issuable of right to every brewer who applies, but so issuable only on payment of the duty, is a license not for regulation, but for revenue.
2. Because such license is a machinery for laying a duty or³⁰ tax which in the case in hand is an indirect tax, being (to adapt the language used in decisions of the board) "a duty which enters at once into the price of the taxed commodity"; and "a tax on a commodity which the brewer deals in and can sell at an enhanced price to his customers." It is therefore not within the second enumeration of clause 92 of the British North America Act; while the use of the machinery of license does not validate the tax, because it is not within the ninth enumeration of the said clause. ⁴⁰
3. Because the Parliament of Canada which has exclusive jurisdiction over the regulation of trade and commerce, the public debt, the raising of money by any mode or

system of taxation (including indirect taxation) and the borrowing of money on the public credit, has always, (as was done by the provinces of Canada and the other provinces before confederation), actually regulated by statute the trade of manufacturing and wholesale vending of spirituous and fermented liquors; laid large duties thereon; created a rigorous system of inspection, supervision, management and control of the business; and provided for the issue of licenses to manufacturers and vendors of the commodities authorising them on certain conditions to make and sell; and has thus so occupied the field and dealt with the subject as to disable a provincial legislature from interfering therewith in the manner attempted by the said clause.

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4. Because for the reasons above indicated the Legislature of Ontario has no power, in order to raise a revenue for provincial purposes, to require brewers and distillers and other persons duly licensed by the Government of Canada for manufacture and sale of fermented, spirituous and other liquors to take out licenses and to pay a license fee for the sale of liquors manufactured by them.
 5. Because (if her Majesty in Council is disposed in order to answer the second alternative of the second question to undertake the enquiry necessary to exhaust all possible objects within provincial jurisdiction) it should for the reasons above indicated be decided that there is no such object for which the Legislature has power to require such persons to take out such licenses and pay such tax.
 6. The Appellants do not contend that the answer to the third question is erroneous.

EDWARD BLAKE.

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CASE FOR THE APPELLANTS.

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