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UNIVERSITY OF LONDON
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26 MAY 1953
INSTITUTE OF ADVANCED
LEGAL STUDIES

In the Privy Council.

No. 32 of 1896.

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.

ADDITIONAL PAPER.

[Report of the Judgment in the case of *Regina* v. *Halliday*, 21 A.R. 42, referred to in their Lordships' Reasons for the Judgment appealed from in this case.]

Court of Appeal for Ontario.

JUDGMENT in the case of *Regina* v. *Halliday*, 21 A.R. 42, December 22nd, 1893.

Boyd, C.—

Section 61 of the Ontario License Act, R.S.O. ch. 194, is identical with section 76 of the Liquor License Act of Canada, 1883 (46 Vic. ch. 30). The whole act of the Dominion, assuming to regulate the liquor traffic, was declared 10 *ultra vires* by the Privy Council, upon a statutory case submitted. See note, 4 Cartwright, p. 342. It follows that the regulation of the liquor traffic is a matter of provincial competence. To this effect both Ritchie, C.J., and Fournier, J., express themselves that since *Severn* v. *The Queen*, 2 S.C.R. 70, the course of decision in the Privy Council has removed any doubt as to the power of provincial legislatures to pass laws regulating the sale of liquors (whether wholesale or retail), in *Molson* v. *Lambe*, 15 S.C.R. 253. This was a brewer's case, the question being as to the capacity of the Quebec Legislature to require a license to be taken out by brewers duly licensed to manufacture by the Dominion. The Act in question declared that whoever sold intoxicating liquors in any 20 quantity must have a provincial license.

Ramsay, J., in the Court below, said this was to be defended under the B.N.A. Act, sec. 92, sub-sec. 9, and amounted to an impost by way of license for the purpose of raising revenue on the ordinary trade of a brewer. He referred to *Severn v. The Queen*, as an isolated and compromised judgment of a divided

Court, and the majority of the Court held, as did the Supreme Court, that the Act was constitutional.

Mr. Justice Strong (now the Chief Justice of the Supreme Court) took substantially the same view in *Severn* v. *The Queen*, and I think the course of decision has been to displace the authority of that case, and to authenticate the opinions of Ritchie and Strong, JJ., the dissentient justices.

In 1889 the same question as to the effect of *Severn* v. *The Queen*, came before the full Court of Nova Scotia, and the majority of the Court held that the Severn case was practically overruled. No mention is made by the Maritime Judges of the prior case of *Molson* v. *Lambe*, 15 S.C.R. 253, which was, I 10 suppose, not then published: *Regina* v. *McDougall*, 22 N.S. 462.

So the Court of Queen's Bench in Quebec, in appeal, held, in 1890, that the local legislature might authorise municipalities to levy a tax for local purposes on wholesale liquor dealers: *McManamy* v. *Sherbrooke*, M.L.R. 6 Q.B. 409.

R. S. O. ch. 194, sec. 51, requires brewers, distillers, &c., to obtain a license to sell by wholesale, treating them, though manufacturers, as also wholesale dealers. To this no valid objection can now be raised, it appears to me, because of it being an interference with trade. In one aspect it may be so, but in another aspect it is a means of raising revenue for local and provincial purposes, and of police regulation for the preservation of order. The legislation is justified, under 20 the B. N. A. Act, sec. 92, sub-secs. 8 and 9. The Liquor License Act is properly classified in the statutes under the head of municipal matters, and the whole object of the enactments in question is to exercise supervision over the sale and consumption of spirituous and fermented liquors, imposing license fees for the purpose of defraying the expenses of such local government, with a surplus for other municipal and provincial purposes (sec. 45). Besides, the defendant has taken the provincial license, has submitted to its terms and cannot complain if it is enforced. This was the important question argued.

As to the conviction in Appeal: I think the police magistrate was clearly right in holding that the stock-cellar was a "warehouse" within the meaning of 30 section 61. The case of *Regina* v. *Hill*, 2 Moo. & Rob. 458, may be used, if needed, to affirm this view.

As to the facts: It was found by the magistrate that the offence had been committed of allowing beer to be consumed by drinking in the cellar of the defendant's brewery, and the only point relied on or before the local judge in appeal was, that there was no "warehouse" connected with the brewery; but, in my view, the conclusion of the magistrate should be affirmed.

Osler, J.A.:—

This is an appeal by the Attorney-General from the judgment of the County Judge of Wellington, quashing a conviction of the defendant made by the police 40 magistrate of the town of Guelph. The appeal derives any importance solely from the objection, first raised by the respondent in this Court, that sections 51 (2) and 61 of the Liquor License Act are *ultra vires* the Provincial Legislature, the defendant being a brewer and the holder of a license to manufacture beer, etc., from the Dominion Government.

He relies upon *Severn* v. *The Queen*, 2 S.C.R. 70, and certainly if we could now act upon that case without regard to more recent decisions, we should have no difficulty in upholding the judgment by which the conviction has been quashed. It has not been, in terms, overruled by the Judical Committee of the Privy Council, and it may be said that, although it could 50 be explained or distinguished, it could not be overruled by the Court which

decided it. Nevertheless, the grounds on which it rested appear to have been considerably weakened, if not entirely demolished, as the Federal Act has become more extensively discussed and perhaps better understood. These grounds were: (1) That the imposition of a license by the local government upon a person carrying on the trade of a brewer and the manufacture of beer, and who already held an excise license from the Dominion Government, was an interference with the exclusive powers of Parliament as to the regulation of trade and commerce, under section 91, clause 2, of the B. N. A. Act, and could not be regarded merely as the exercise of a police power; (2) that the right conferred upon 10 the local legislatures by section 92, clause 9, to deal exclusively with shop, tavern, auctioneer, and other licenses, did not extend to licenses to brewers, or other licenses which were not of a local or municipal character; and (3) —which is perhaps included in, or covered by, the last ground—that such licenses were not authorised by section 92, clause 2, as an exercise of a power of direct taxation within the province in order to the raising of a revenue for provincial purposes—in short, that they were indirect taxation.

The first ground seems no longer sustainable in the face of *Hodges* v. *The Queen*, 9 App. Cas. 117, which affirms the power of the local legislatures to regulate the sale and disposal of intoxicating liquors, and the later case of *Bank* 20 *of Toronto* v. *Lambe*, 12 App. Cas. 575, which is also directly opposed to the view that a local license fee, whether upon brewers or upon bankers, would be an interference with trade and commerce. As to the other grounds, the last mentioned case affirms the power of the legislature to impose a direct tax upon a bank, or other commercial corporation, carrying on business within the Province, and inferentially, therefore, that a license fee imposed upon a person carrying on the trade of brewer and wholesale vendor of ale is not indirect taxation, but comes within the 2nd clause of the 92nd section of the Act, and is *intra vires* provincial legislation.

Further, this view of the effect of these decisions is taken by the Supreme 30 Court itself in *Molson* v. *Lambe*, 15 S.C.R. 253; and no one can read the report of the argument and discussion before the Judicial Committee upon the question of the validity of the Dominion Licensing Acts of 1883 and 1884, which were ultimately declared by that body to be *ultra vires* the Dominion Parliament, without seeing that the legitimate consequence of their decision is to affirm the power of the provincial authority to impose a license or tax upon a brewer or manufacturer of beer, and to regulate the mode of carrying on the business or trade. I think, therefore, that the sections in question are *intra vires*.

And I am also of opinion that the place in which the liquor was given away and consumed was a warehouse within the meaning of section 61 of the Liquor 40 License Act. It was a place where the liquor kept for sale was stored, and that seems enough to constitute it a warehouse, though it might also properly enough have been designated a cellar. I see no reason to hold that the warehouse mentioned in that Act must necessarily be some place away from or not under the same roof as the manufactory or brewery.

The judgment of the police magistrate, which, besides being right in law, exhibits—what one is sorry to observe too often wanting in these liquor prosecutions—some plain common sense, must, therefore, be restored, and the conviction affirmed. But as the defendant has once been acquitted of the offence by a competent Court, I think that, as the Crown has thought it worth while to 50 pursue him further, he ought not to be visited with the costs of the appeal.

Hagarty, C.J.O., and Maclennan, J.A., concurred.

Appeal allowed without costs.

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