Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Hodge v. *The Queen from the Court of Appeal of Ontario, Canada, delivered 15th December* 1883.

Present :

LORD FITZGERALD.
SIR BARNES PEACOCK.
SIR ROBERT P. COLLIER.
SIR RICHARD COUCH.
SIR ARTHUR HOBHOUSE.

The Appellant, Archibald Hodge, the proprietor of a tavern known as the St. James' Hotel, in the city of Toronto, and who, on the 7th May 1881, was the holder of a license for the retail of spirituous liquors in his tavern, and also licensed to keep a billiard saloon, was summoned before the Police Magistrate of Toronto, for a breach of the Resolutions of the License Commissioners of Toronto, and was convicted on evidence sufficient to sustain the conviction if the magistrate had authority in law to make it.

The conviction is as follows, viz. :—

"CONVICTION.

"Canada : Province of Ontario, County of York, City of Toronto, to wit :—

"Be it remembered, that on the 19th day of May, in the year of our Lord one thousand eight hundred and eighty-one, at the city of Toronto, in the county of York, Archibald G. Hodge, of the said city, is convicted before me, George Taylor Denison, Esquire, Police Magistrate in and for the said city of Toronto, for that he, the said Archibald G. Hodge, being a person who, after the passing of the Resolution hereinafter mentioned, received, and who, at the time of the committing of the offence herein-after mentioned, held a license under the Liquor License Act, for and in respect of the tavern known as the St. James' Hotel, situate on York Street, within the city of

Toronto, on the seventh day of May in the year aforesaid, at the said city of Toronto, did unlawfully permit, allow, and suffer a billiard table to be used, and a game of billiards to be played thereon in the said tavern, during the time prohibited by the Liquor License Act for the sale of liquor therein, to wit, after the hour of seven o'clock at night on the said seventh day of May, being Saturday, against the form of the Resolution of the License Commissioners for the city of Toronto for regulating taverns and shops, passed on the twenty-fifth day of April, in the year aforesaid, in such case made and provided.

"Thomas Dexter, of said city, License Inspector of the city of Toronto, being the complainant.

"And I adjudge the said Archibald G. Hodge, for his said offence, to forfeit and pay the sum of twenty dollars, to be paid and applied according to law; and also to pay to the said Thomas Dexter the sum of two dollars and eighty-five cents for his costs in this behalf; and if the said several sums be not paid forthwith, then I order that the same be levied by distress and sale of goods and chattels of the said Archibald G. Hodge; and in default of sufficient distress, I adjudge the said Archibald G. Hodge to be imprisoned in the common gaol of the said city of Toronto and county of York, at Toronto, in the county of York, and there be kept at hard labour for the space of fifteen days, unless the said sums, and the costs and charges of conveying of the said Archibald C. Hodge to the said gaol, shall be sooner paid."

On the 27th May 1881, a rule Nisi was obtained to remove that conviction into the Court of Queen's Bench for Ontario, in order that it should be quashed as illegal, on the grounds, 1st, that the said Resolution of the said License Commissioners is illegal and unauthorized; 2nd, that the said License Commissioners had no authority to pass the Resolution prohibiting the game of billiards as in the said Resolution, nor had they power to authorize the imposition of a fine, or, in default of payment thereof, imprisonment for a violation of the said Resolution; 3rd, the Liquor License Act, under which the said Commissioners have assumed to pass the said Resolution, is beyond the authority of the Legislature of Ontario, and does not authorize the said Resolution.

It will be observed that the question whether the Local Legislature could confer authority on the License Commissioners to make the Resolution in question is not directly raised by the rule Nisi. On the 27th June 1881, that rule was made

absolute, and an order pronounced by the Court of Queen's Bench to quash the conviction. The judgment of the Court, which seems to have been unanimous, was delivered by Hagarty, C. J., with elaborate reasons, but finally it will be found that the decision of the Court rests on one ground alone, and does not profess to decide the question which on this appeal was principally discussed before their Lordships. The Chief Justice, in the course of his judgment, says :—

"It was stated to us that the parties desired to present directly to the Court the very important question whether the Local Legislature, assuming that it had the power themselves to make these regulations and create these offences, and annex penalties for their infraction, could delegate such powers to a Board of Commissioners or any other authority outside their own legislative body."

And, again, he adds :—

"We are thus brought in face of a very serious question, viz., the power of the Ontario Legislature to vest in the License Board the power of creating new offences and annexing penalties for their commission."

And concludes his judgment thus, referring to the Resolutions :—

"The Legislature has not enacted any of these, but has merely authorized each Board in its discretion to make them.

"It seems very difficult, in our judgement, to hold that the Confederation Act gives any such power of delegating authority, first of creating a *quasi* offence, and then of punishing it by fine or imprisonment.

"We think it is a power that must be exercised by the Legislature alone.

"In all these questions of ***ultra vires*** the powers of our Legislature, we consider it our wisest course not to widen the discussion by considerations not necessarily involved in the decision of the point in controversy.

"We, therefore, enter into no general consideration of the powers of the Legislature to legislate on this subject ; but, assuming this right so to do, we feel constrained to hold that they cannot devolve or delegate these powers to the discretion of a local Board of Commissioners.

"We think the Defendant has the right to say that he has not offended against any law of the Province, and that the convictions cannot be supported."

The case was taken from the Queen's Bench on appeal to the Court of Appeal for Ontario,

under the Ontario Act, 44 Vict., ch. 27, and on the 30th June 1882 that Court reversed the decision of the Queen's Bench, and affirmed the conviction.

Two questions only appear to have been discussed in the Court of Appeal, 1st, that the Legislature of Ontario had not authority to enact such regulations as were enacted by the Board of Commissioners, and to create offences and annex penalties for their infraction; and, 2nd, that if the Legislature had such authority, it could not delegate it to the Board of Commissioners, or any other authority outside their own legislative body.

This second ground was that on which the judgment of the Court of Queen's Bench rested.

The judgments delivered in the Court of Appeal by Spragge, C. J., and Burton, J. A., are able and elaborate, and were adopted by Patterson and Morrisson, J. J.s, and their Lordships have derived considerable aid from a careful consideration of the reasons given in both Courts.

The Appellant now seeks to reverse the decision of the Court of Appeal, both on the two grounds on which the case was discussed in that Court and on others technical but substantial, and which were urged before this Board with zeal and ability. The main questions arise on an Act of the Legislature of Ontario, and on what have been called the Resolutions of the License Commissioners.

The Act in question is Chapter 181 of the Revised Statutes of Ontario, 1877, and is cited "as the Liquor License Act."

Sect. 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 Lieutenant Governor may think fit, and Sects. 4 and 5 are as follow:—

"Sect. 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 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 on 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.

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

Sect. 43 prohibits the sale of intoxicating liquors from or after the hour of seven of the clock on Saturday till six of the clock on Monday morning thereafter.

Sect. 51 imposes on any person who sells spirituous liquors without the license by law required, or otherwise violates any other provision of the Act, in respect of which violation no other punishment is prescribed, for the first offence a penalty of not less than twenty dollars and not more than fifty dollars, besides costs, and for the second offence imprisonment with hard labour for a period not exceeding three calendar months.

Sect. 52. For punishment of offences against Sect. 43 (requiring taverns, &c., to be closed from seven o'clock on Saturday night until six o'clock on Monday morning), a penalty for the first offence of not less than twenty dollars

with costs, or fifteen days imprisonment with hard labour, and with increasing penalties for second, third, and fourth offences; and Sect. 70 provides that where the Resolution of the License Commissioners imposes a penalty it may be recovered and enforced before a magistrate in the manner and to the extent that bye-laws of municipal corporations may be enforced under the authority of the Municipal Act.

License Commissioners were duly appointed under this statute, who, on 25th April 1881, in pursuance of its provisions, made the Resolution or Regulation now questioned in relation to licensed taverns or shops in the city of Toronto, which contains (*inter alia*) the following paragraphs, viz.,—

"Nor shall any such licensed person, directly or indirectly as aforesaid, permit, allow, or suffer any bowling alley, billiard or bagatelle table to be used, or any games or amusements of the like description to be played in such tavern or shop, or in or upon any premises connected therewith, during the time prohibited by the Liquor License Act, or by this Resolution, for the sale of liquor therein.

"Any person or persons guilty of any infraction of any of the provisions of this Resolution shall, upon conviction thereof before the Police Magistrate of the city of Toronto, forfeit and pay a penalty of twenty dollars and costs; and in default of payment thereof forthwith, the said Police Magistrate shall issue his warrant to levy the said penalty by distress and sale of the goods and chattels of the offender; and in default of sufficient distress in that behalf, the said Police Magistrate shall by warrant commit the offender to the common gaol of the city of Toronto, with or without hard labour, for the period of fifteen days, unless the said penalty and costs, and all costs of distress and commitment, be sooner paid."

The Appellant was the holder of a retail license for his tavern, and had signed an undertaking, as follows:—

"We, the undersigned holders of licenses for taverns and shops in the city of Toronto, respectively acknowledge that we have severally and respectively received a copy of the Resolution of the License Commissioners of the city of Toronto to regulate taverns and shops, passed on the 25th day of April last, hereunto annexed, upon the several dates set opposite to our respective signatures hereunder written, and we severally

and respectively promise, undertake, and agree to observe and perform the conditions and provisions of such resolution.

" 2nd May, Tavern. A. C. HODGE. (L.S.)"

He was also the holder of a billiard license for the city of Toronto to keep a billiard saloon with one table for the year 1881, and, under it, had a billiard table in his tavern.

He did permit this billiard table to be used as such within the period prohibited by the Resolution of the License Commissioners, and it was for that infraction of their rules he was prosecuted and convicted.

The preceding statement of the facts is sufficient to enable their Lordships to determine the questions raised on the appeal.

Mr. Kerr, Q.C., and Mr. Jeune, in their full and very able argument for the Appellant, informed their Lordships that the first and principal question in the cause was whether "The Liquor License Act of 1877," in its 4th and 5th Sections, was *ultra vires* of the Ontario Legislature, and properly said that it was a matter of importance as between the Dominion Parliament and the Legislature of the Province.

Their Lordships do not think it necessary in the present case to lay down any general rule or rules for the construction of the British North America Act. They are impressed with the justice of an observation by Hagarty, C. J., "that in all these questions of *ultra vires* it is "the wisest course not to widen the discussion "by considerations not necessarily involved in "the decision of the point in controversy." They do not forget that in a previous decision on this same statute (*Parsons* v. *The Citizens Company*) their Lordships recommended that, "in per- "forming the difficult duty of determining such "questions, it will be a wise course for those on "whom it is thrown to decide each case which "arises as best they can, without entering more

" largely upon the interpretation of the statute " than is necessary for the decision of the par- " ticular question in hand."

The Appellants contended that the Legislature of Ontario had no power to pass any Act to regulate the liquor traffic; that the whole power to pass such an Act was conferred on the Dominion Parliament, and consequently taken from the Provincial Legislature, by Sect. 91 of the British North America Act, 1867; and that it did not come within any of the classes of subjects assigned exclusively to the Provincial Legislatures by Sect. 92. The class in Sect. 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.

The sole question there 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 provinces as should locally adopt it. It was not doubted that the Dominion Parliament had such authority under Sect. 91, unless the subject fell within some one or more of the classes of subjects, which by Sect. 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 Sect. 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 Appellant's Counsel principally relied. 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 subject 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."

It appears to their Lordships 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 principle which that case and the case of The Citizens Insurance

Company illustrate is, that subjects which in one aspect and for one purpose fall within Sect. 92, may in another aspect and for another purpose fall within Sect. 91.

Their Lordships proceed now to consider the subject matter and legislative character of Sects. 4 and 5 of "The Liquor License Act of 1877, "cap. 181, Revised Statutes of Ontario." That Act is so far confined in its operation to municipalities in the Province of Ontario, and is entirely local in its character and operation. It authorizes the appointment of License Commissioners to act in each municipality, and empowers them to pass, under the name of Resolutions, what we know as bye-laws, or rules to define the conditions and qualifications requisite for obtaining tavern or shop licenses for sale by retail of spirituous liquors within the municipality; for limiting the number of licenses; for declaring that a limited number of persons qualified to have tavern licenses may be exempted from having all the tavern accommodation required by law, and for regulating licensed taverns and shops, for defining the duties and powers of license inspectors, and to impose penalties for infraction of their Resolutions. 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.

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 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, Sects. 4 and 5, seem to come within the heads Nos. 8, 15, and 16 of Sect. 92 of British North America Statute, 1867.

Their Lordships are, therefore, of opinion that, in relation to Sects. 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.

Assuming that the Local Legislature had power to legislate to the full extent of the Resolutions passed by the License Commissioners, and to have enforced the observance of their enactments by penalties and imprisonment with or without hard labour, it was further contended that the Imperial Parliament had conferred no authority on the Local Legislature to delegate those powers to the License Commissioners or any other persons. In other words, that the power conferred by the Imperial Parliament on the Local Legislature should be exercised in full by that body, and by that body alone. The maxim *delegatus non potest delegare* was relied on.

It appears to their Lordships, however, that the objection thus raised by the Appellants is founded on an entire misconception of the true character and position of the Provincial Legislatures. They are in no sense delegates of or acting under any mandate from the Imperial Parliament. When the British North America Act enacted that there should be a Legislature for Ontario, and that its Legislative Assembly

should have exclusive authority to make laws for the province and for provincial purposes in relation to the matters enumerated in Sect. 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by Sect. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the Local Legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion, would have had under like circumstances to confide to a municipal institution or body of its own creation authority to make bye-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect.

It is obvious that such an authority is ancillary to legislation, and without it an attempt to provide for varying details and machinery to carry them out might become oppressive, or absolutely fail. The very full and very elaborate judgment of the Court of Appeal contains abundance of precedents for this legislation entrusting a limited discretionary authority to others, and has many illustrations of its necessity and convenience. It was argued at the bar that a Legislature committing important regulations to agents or delegates effaces itself. That is not so. It retains its powers intact, and can, whenever it pleases, destroy the agency it has created and set up another, or take the matter directly into its own hands. How far it shall seek the aid of subordinate agencies, and how long it shall continue them, are matters for each Legislature, and not for courts of law, to decide.

Their Lordships do not think it necessary to pursue this subject further, save to add that, if bye-laws or Resolutions are warranted, power to

enforce them seems necessary and equally lawful. Their Lordships have now disposed of the real questions in the cause.

Many other objections were raised on the part of the Appellant as to the mode in which the License Commissioners exercised the authority conferred on them, some of which do not appear to have been raised in the Court below, and others were disposed of in the course of the argument, their Lordships being clearly of opinion that the Resolutions were merely in the nature of municipal or police regulations in relation to licensed houses, and interfering with liberty of action to the extent only that was necessary to prevent disorder and the abuses of liquor licenses. But it was contended that the Provincial Legislature had no power to impose imprisonment or hard labour for breach of newly created rules or bye-laws, and could confer no authority to do so. The argument was principally directed against hard labour. It is not unworthy of observation that this point, as to the power to impose hard labour, was not raised on the rule Nisi for the Certiorari, nor is it to be found amongst the reasons against the appeal to the Appellate Court in Ontario.

It seems to have been either overlooked or advisedly omitted.

If, as their Lordships have decided, the subjects of legislation come within the powers of the Provincial Legislature, then No. 15 of Section 92 of the British North America Act, which provides for "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," is applicable to the case before us, and is not in conflict with No. 27 of Section 91; under these very general terms, "the imposition of punishment by imprison-

" ment for enforcing any law," it seems to their Lordships that there is imported an authority to add to the confinement or restraint in prison that which is generally incident to it,—" hard " labour;" in other words, that " imprisonment " there means restraint by confinement in a prison, with or without its usual accompaniment, " hard " labour."

The Provincial Legislature having thus the authority to impose imprisonment, with or without hard labour, had also power to delegate similar authority to the municipal body which it created, called the License Commissioners.

It is said, however, that the Legislature did not delegate such powers to the License Commissioners, and that therefore the Resolution imposing hard labour is void for excess. It seems to their Lordships that this objection is not well founded.

In the first place, by Sect. 5 of the Liquor License Act, the Commissioners may impose penalties. Whether the word " penalty " is well adapted to include imprisonment may be questioned, but in this Act it is so used, for Sect. 52 imposes on offenders against th e provisions of Sect. 43 a penalty of 20 dollars or 15 days' imprisonment, and for a fourth offence a penalty of imprisonment with hard labour only. " Penalty " here seems to be used in its wider sense as equivalent to punishment. It is observable that in Sect. 59, where recovery of penalties is dealt with, the Act speaks of " penalties in money." But, supposing that the " penalty " is to be confined to pecuniary penalties, those penalties may, by Sect. 70, be recovered and enforced in the manner, and to the extent, that bye-laws of municipal councils may be enforced under the authority of the Municipal Act. The word " recover " is an apt word for pecuniary remedies, and the word " enforce " for remedies against the person.

Turning to the Municipal Act, we find that, by Sect. 454, Municipal Councils may pass bye-laws for inflicting reasonable fines and penalties for the breach of any bye-laws, and for inflicting reasonable punishment by imprisonment, with or without hard labour, for the breach of any bye-laws in case the fine cannot be recovered. By Sects. 400 to 402 it is provided that fines and penalties may be recovered and enforced by summary conviction before a Justice of the Peace, and that, where the prosecution is for an offence against a municipal bye-law, the Justice may award the whole or such part of the penalty or punishment imposed by the bye-law as he thinks fit; and that, if there is no distress found out of which a pecuniary penalty can be levied, the Justice may commit the offender to prison for the term, or some part thereof, specified in the bye-law. If these bye-laws are to be enforced at all by fine or imprisonment, it is necessary that they should specify some amount of fine and some term of imprisonment.

The Liquor License Act then gives to the Commissioners either power to impose a penalty against the person directly, or power to impose a money penalty, which, when imposed, may be enforced according to Sects. 454 and 400–2 of the Municipal Act. In either case, the Municipal Act must be read to find the manner of enforcing the penalty, and the extent to which it may be enforced. The most reasonable way of construing statutes so framed is to read into the later one the passages of the former which are referred to. So reading these two statutes, the Commissioners have the same power of enforcing the penalties they impose as the Councils have of enforcing their bye-laws, whether they can impose penalties against the person directly, or only indirectly as the means of enforcing money penalties. In either case, their resolution must, in order to give

the Magistrate jurisdiction, specify the amount of punishment. In either case, their resolution now under discussion is altogether within the powers conferred upon them.

Their Lordships do not think it necessary or useful to advert to some minor points of discussion, and are, on the whole, of opinion that the decision of the Court of Appeal of Ontario should be affirmed, and this appeal dismissed, with costs, and will so humbly advise Her Majesty.