JOHN H. R. MOLSON & AL. (PETITIONERS) ..... } APPELLANTS;

AND

WILLIAM B. LAMBE, *ès-qualité* (INTERVENANT) ..... } RESPONDENT.

1887
Nov. 2 & 3.

1888
March 15.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

Prohibition—Licensed brewers—Quebec License Act—41 *Vic. ch.* 3 (*P. Q.*)—*Constitutionality of*—43 *Vic. ch.* 19 (*D*).

The inspector of licenses for the revenue district of Montreal charged R. a drayman in the employ of J. H. R. M. & Bros., duly licensed brewers under the Dominion Statutes, 43 Vic. ch. 19, before the court of Special Sessions of the Peace at Montreal, with having sold beer outside the business premises of J. H. R. M. & Bros., but within the said revenue district in contravention of the Quebec License Act, 1878, and its amendments, and asked a condemnation of $95 and costs against R. for said offence. Thereupon J. H. R. M. & Bros. and R., claiming *inter alia* that being licensed brewers under the Dominion Statute, they had a right of selling beer by and through their employees and draymen without a provincial license, and that 41 Vic. ch. 3 (P. Q.) and its amendments were *ultra vires*, and if constitutional did not authorize his complaint against R., caused a writ of prohibition to be issued out of the Superior Court enjoining the court of Special Sessions of the Peace from further proceeding with the complaint against R.

Held, Per Ritchie C.J. and Strong, Fournier and Henry JJ., that the Quebec License Act and its amendments were *intra vires*, and that the court of Special Sessions of the Peace at Montreal having jurisdiction to try the alleged offence and being the proper tribunal to decide the question of facts and of law involved, a writ of prohibition did not lie.

Per Taschereau and Gwynne JJ., that the case was one which it was proper for the Superior Court to deal with by proceedings on prohibition.

Per Gwynne J.—The Quebec License Act of 1878 imposes no obligation upon brewers to take out a provincial license to enable them to sell their beer, and therefore the court of Special Sessions of the Peace had no jurisdiction and prohibition should issue absolutely.

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* PRESENT.—Sir W. J. Ritchie C.J. and Strong, Fournier, Henry, Taschereau and Gwynne JJ.

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APPEAL from the judgment of the Court of Queen's Bench for Lower Canada (Appeal side) (1) affirming the judgment of the Superior Court (2).

The proceedings in this case were commenced before the Court of Special Sessions of the Peace sitting in the city and district of Montreal by the issue of a summons and complaint by M. C. Desnoyers, Esq., Police Magistrate, against the appellant Andrew Ryan, upon the complaint of the present respondent, W. B. Lambe, Esq., Inspector of Licenses for the Revenue District of Montreal, charging the said Andrew Ryan with having sold intoxicating liquors without a license.

The declaration is as follows :

"William Busby Lambe, de la cité de Montréal, dans le district de Montréal, Inspecteur des Licences pour le District du Revenu de Montréal, au nom de Notre Souveraine Dame La Reine poursuit Andrew Ryan, de la cité de Montréal dans le dit district de Montréal, commerçant.

" Attendu que le dit Andrew Ryan n'étant muni d'aucune licence pour la vente de liqueurs enivrantes en quelque quantité que ce soit, a, en la dite cité de Montréal, dans le district du Revenu de Montréal, dans le dit district de Montréal, le sixième pour de juin en l'année mil huit cent quatre-vingt deux et à différentes reprises avant et depuis, vendu de la liqueur enivrante, contrairement au Statut fait et pourvu en pareil cas : Par lequel et en vertu du dit Statut, le dit Andrew Ryan est devenu passible du paiement de la somme de quatre-vingt-quinze piastres courant.

" En conséquence le dit Inspecteur des Licenses demande que jugement soit rendu sur les prémises et que le dit Andrew Ryan soit condamné à payer la

(1) M. L. R. 2 Q. B. 381. (2) M. L. R. 1 S. C. 264.

somme de quatre-vingt quinze piastres courant, pour la dite offense, avec les frais."

And the summons is as follows:

Canada,
Province de Québec,
District de Montréal,
Cité de Montréal

"A ANDREW RYAN, commerçant de la cité de Montréal, dans le district du Revenu de Montréal :—

Les présentes sont pour vous enjoindre d'être et de comparaitre devant moi le soussigné Mathias Charles Desnoyers, Ecuyer, Magistrat de Police pour le district de Montréal, à une Session de la Cour des Sessions Spéciales de la Paix, qui se tiendra au Palais de Justice, en la cité de Montréal, dans le dit district, le quinzème jour de juin courant à dix heures de l'avant midi, ou devant tel Juge de Paix ou Juges de Paix pour le dit district, qui sera ou seront alors présent, ou présents, aux fins de répondre à la plainte portée contre vous par William Busby Lambe, Ecuyer, de la cité de Montréal dans le district de Montréal, Inspecteur des Licences pour le district du Revenu de Montréal, qui vous poursuit au nom et de la part de Sa Majesté, pour les causes mentionnées dans la déclaration ci-annexée ; autrement jugement sera rendu contre vous par défaut.

[L. S.] Donné sous mon seing et sceau ce dixième jour de Juin dans l'année de Notre Seigneur mil huit cent quatre-vingt-deux au Bureau de Police dans la cité de Montréal dans le district susdit.

(Signé) M. C. DESNOYERS,
Magistrat de Police."

To which the defendant pleaded as follows:

"The defendant for plea alleges :—

"That he is and was at the time mentioned in the information, a servant and employee of the firm of J.

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H. R. Molson & Bros., brewers of the said city of Montreal, who hold a license from the Dominion of Canada, under the provisions of the Act of the Parliament of Canada, and who have been in business as such brewers in Montreal for over eighty years. That during the whole of the said term and up to the present time it has always been the custom and usage of trade of brewers to send around through the country their drays with beer, which beer was sold by their draymen during their trips to the said customers.

"That on the occasion charged in the said information the said defendant was a servant and drayman of the said firm of J. H. R. Molson & Bros.

"That if the said defendant sold any beer whatsoever he so sold it as the agent and as the drayman of the said J. H. R. Molson & Bros., and under and by virtue of their authority under the said license, and sold it according to the custom and usage of trade in the said province ever since the brewers were first established therein.

"That the said John H. R. Molson & Bros. being licensed under the provisions of the said Act of the Parliament of Canada, are not liable to be taxed either by or through their employees or draymen under the provisions of any Act passed by the Legislature of Quebec.

"And defendant further saith that he is not guilty in manner or form as set forth in the said information and summons.

"Wherefore, defendant prays the dismissal of the said prosecution."

The following is an extract from the register of proceedings as printed in the case:—

Canada,
Province of Quebec,
District of Montreal,
City of Montreal.

SPECIAL SESSIONS.

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MOLSON v. LAMBE.

The fifteenth day of June, 1882,

Present: MATHIAS C. DESNOYERS, Esquire, Police Magistrate for the District of Montreal.

WM. B. LAMBE, *Complainant*, against ANDREW RYAN, *Defendant.* } On charge of selling liquor without a license.

Defendant by attorney and pleads not guilty.

Mr. BOURGOUIN, *for Prosecution.*

Mr. KERR, *for Defendant.*

The counsel for defence fyles a plea in writing, and the case is continued to the 1st September next, 1882.

Friday, 1st September, 1882.

Present: MATHIAS C. DESNOYERS, Esq., P.M.

WM. B. LAMBE, and ANDREW RYAN, } Selling liquor without license. (Continued from the 15th June.)

Wednesday, 6th September, 1882.

Present: MATHIAS C. DESNOYERS, Esq., P. M.

WM. B. LAMBE, and ANDREW RYAN. } Selling liquor without a license. Continued from 1st September. Continued to the 8th.

Friday, 8th September, 1882.

Present: MATHIAS C. DESNOYERS, Esq., P. M.

WM. B. LAMBE, and ANDREW RYAN. } Selling liquor without a license. (Continued from the 6th.) *En délibéré.*

(A true copy)

M. C. DESNOYERS, P. M.

Before any decision was given in this case, which is still under advisement, J. H. R. Molson, J. T. Molson and Andrew Ryan doing business under the firm of J. H. R. Molson & Bros., applied by petition to the Superior Court for a writ of prohibition to prohibit the said M. C. Desnoyers, Police Magistrate, from further proceeding upon the said summons and complaint, on the ground that Ryan committed no offence whatever

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against any act of the local legislature :—

(*a.*) Because there is no act of the legislature of the Province of Quebec, which authorizes the said complaint and prosecution.

(*b.*) Because the pretended act of the legislature, upon which such prosecution is founded is not an act of the legislature of the Province of Quebec, but purports to have been made and enacted by Her Majesty the Queen, Her Majesty the Queen having no right or title to pass acts binding on the Province of Quebec.

(*c.*) Because the pretended act intituled "The Quebec License Law of 1878," under which the said prosecution is instituted, is entirely illegal, null and void and unconstitutional, the same not being passed by the proper body gifted with legislative powers upon the subject in the Province of Quebec.

(*d.*) Because the said act purports to treat of and regulate criminal procedure.

(*e.*) Because the penal clause is by fine and imprisonment.

(*f.*) Because your said petitioner Andrew Ryan being in the employ and being the drayman of your other petitioners, and acting under their orders, the act of your petitioner Ryan selling the said intoxicating liquor, to wit, beer, was the act of your other petitioners, co-partners, who in their license from the Government of the Dominion of Canada, were authorized and empowered so to sell such intoxicating liquor.

(*g.*) Because your said petitioners, co-partners, being licensed brewers, had the right of selling by and through their employees and draymen, without any further license whatsoever, under the provisions of the Quebec License Act of 1878.

(*h.*) Because the Legislature of the Province of Quebec have no right whatsoever to limit or interfere with the traffic of brewers duly licensed by the Government of Canada.

That under these circumstances the said court of Special Sessions of the Peace and the said Mathias C. Desnoyers have unlawfully and improperly taken jurisdiction over the said Andrew Ryan, your petitioner, and the other petitioners, and that it has become necessary for them for their own preservation to apply for a writ of prohibition to prohibit the said court of Special Sessions of the Peace, sitting at the said city of Montreal, and the said Mathias C. Desnoyers from taking jurisdiction over them your petitioners, and further proceedings on the said summons and complaint.

The respondent, in his quality of inspector of licenses, intervened to support the complaint and to contest the writ of prohibition, and after issue joined and admissions filed by the parties of the matters of fact set forth in the proceedings, the Superior Court held

that the Quebec License Act of 1878 and its amendments were constitutional and that a writ of prohibition did not lie on appeal to the Court of Queen's Bench for Lower Canada (Appeal side) the judgment of the Superior Court was confirmed, but the holding that prohibition did not lie was reversed.

W. H. Kerr Q.C. for the appellants and *Geoffrion* Q. C. and *N. H. Bourgouin* for the respondent.

In addition to the points of argument and authorities relied on in the court below (1), the learned counsel for the appellants cited Lloyd on Prohibition (2); High on Mandamus (3); and counsel for the respondent cited *Simard* v. *Corporation du comté de Montmorency* (4); High on Extraordinary Legal Remedies (5); *Griffith* v. *Rioux* (6); *Dion* v. *Chauveau* (7); and *Lapointe* v. *Doyon* (8); *Côté* v. *Paradis* (9).

SIR W. J. RITCHIE C.J.—In view of the cases determined by the Privy Council, since the case of *Severn* v. *The Queen* (10) was decided in this court, which appear to me to have established conclusively that the right and power to legislate in relation to the issue of licenses for the sale of intoxicating liquors by wholesale and retail belong to the local legislature, we are bound to hold that the Quebec License Act of 1878, and its amendments are valid and constitutional. By that act sec. 2 the sale of intoxicating liquors without license obtained from the government is forbidden. By section 1 the words "intoxicating liquors" mean *inter alia* ale, beer, lager, &c. Section 71 provides, that whosoever without license sells in any quantity whatsoever intoxicating liquors in any part of this province muni-

(1) M. L. R. 2 Q. B. 328.
(2) Pp. 29-30.
(3) Sect. 781.
(4) 8 Rev. Leg. 546.
(5) Pp. 550-558.
(6) 6 Leg. News 214.
(7) 9 Q. L. R. 220.
(8) 10 Q. L. R. p. .
(9) 1 App. Cas. 374.
(10) 2 Can. S. C. R. 70.

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cipally organized is liable to a fine of $95.00 if such contravention takes place in the City of Montreal. And section 196 of 41 Vic. ch. 3, provides for the courts which shall have power to try actions or prosecutions for breach of this law in these words:

All actions or prosecutions, where the amount claimed does not exceed one hundred dollars, may be, optionally with the prosecutors, brought before the Circuit Court, but without any right of evocation therefrom to the Superior Court, or before two Justices of the Peace in the judicial district or before the judge of the sessions of the peace or before the court of the recorder or of the police magistrate or before the district magistrate; but if the amount claimed exceeds one hundred dollars they shall be brought before the Circuit Court or the Superior Court, according to the competency of the court, with reference to the amount claimed.

The code of procedure by article 1031 provides for the issue of writs of prohibition in these words:— "Writs of prohibition are addressed to courts of inferior jurisdiction whenever they exceed their jurisdiction."

The only question that I can discover that we have to determine in this case is: Had the police magistrate before whom the complaint was made by the inspector of licenses for the district of Montreal and who issued the summons in this case jurisdiction over the matter of this complaint and jurisdiction and authority to try the offence charged in the declaration or information and summons? If he had, no prohibition in my opinion can be awarded. On this point, it seems to me, the authorities are clear and conclusive. In the *Mayor of London* v. *Cox* (1) Willes J. delivering the opinion of the judges in the House of Lords says:—

In cases where there is jurisdiction over the subject matter, prohibition will not go for mere irregularity in the proceedings, or even a wrong decision of the merits, *Blaquiere* v. *Hawkins* (2).

And again he says:—

The proceeding in prohibition, therefore, does not stand upon the footing of an action for a wrong in a prohibition for want of juris-

(1) L. R. 2 H. L. 276. (2) Doug. 378.

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diction for the question is not whether the party or the court has done a wilful wrong, but "whether the court has or has not jurisdiction." *Ede* v. *Jackson* (1).

And again:

The law upon this question of discretion is thus stated in the judgment of the Queen's Bench, in *Burder* v. *Veley* (2). If called upon we are bound to issue a writ of prohibition as soon as we are duly informed that any court of inferior jurisdiction has committed such a fault as to found our authority to prohibit, though there may be a possibility of correcting it by appeal * * * *

The question then remains, what are the defects that authorize and require us to issne the writ of prohibition? The answer is, that they are in every case of such a nature as to show a want of jurisdiction to decide the case before them: *Gardner* v. *Booth* (3). In whatever stage that fact is made manifest to us, either the crown or one of its subjects, we are bound to interpose.

Lord Cranworth says (4), delivering judgment in the House of Lords in the same case:—

Where an inferior court is proceeding in a cause which arises on a subject over which it has jurisdiction, no prohibition can be awarded till the party sued in the inferior court sets up a defence on some ground raising an issue which the inferior court is incompetent to try. Until that is done no ground for prohibition has been shewn.

Prohibitions by law are to be granted at any time to restrain a court to intermeddle with or execute anything which by law they ought not to hold the plea of (5). In *Toft* v. *Reyner* (6), it was held that the court had no power to issue a prohibition to the judge of a county court, in a matter that was within his jurisdiction. In this case it was stated that the plaintiff had already recovered judgment against the defendant in an action for the same debt in the borough court of Cambridge, and that his goods had been taken and sold under that judgment and the plaintiff who was present admitted such statement to be true. A prohibition was moved for to restrain the county court judge on the ground that the matter being *res judicata*

(1) Fortesc. 345.
(2) 12 A. & E. 263.
(3) 2 Salk. 543.
(4) P. 293.
(5) 2 Inst. 602.
(6) 5 C. B. 162.

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he had no jurisdiction, that his jurisdiction ceased when the defendant's plea was admitted to be true, but per Wilde C.J.:—

Whether the plea was good or bad was a matter of law which he was bound to decide and his decision was final.

Adding:

A mistake in that respect would, ordinarily speaking, be matter of error; but the act creating these county courts has taken away that form of remedy; there is no ground therefore, for granting a prohibition, which lies only where the inferior court has assumed to to act without or beyond its jurisdiction.

And Maule J. says:—

This might have been error, if the writ of error had not been taken away in these cases; and that shows that it is not ground for a prohibition.

And Williams J. says:

I am of the same opinion. The ground of this application is neither more or less than that the judge of the county court, in deciding what it was competent for him to decide, has made a mistake in point of law; and that clearly is not a case in which prohibition lies.

In *Ellis* v. *Watt* (1) per Maule J:

Your application is for a prohibition which can only be granted when the inferior court had not jurisdiction to proceed.

Writs of prohibition are, therefore, framed to restrain inferior courts in cases where the cognizance of the matter belongs not to such courts, but, this is the first time I have heard it propounded that they can be used to restrain courts from intermeddling with matters over which they are specially authorized to take cognizance and hold plea. Can there be a doubt as to the Police Magistrate having authority to hear and determine this matter? If so, how is it possible for the Police Magistrate to decide whether or not there was a breach of the License Law by the sale of intoxicating liquors without license contrary to the provisions of the Quebec License Act until he hears the case? If the defendant's contentions are correct, which I more than doubt, and he establishes them before the Police

(1) 8 C. B. 615.

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Magistrate, he will have furnished a defence and be entitled to acquittal. If not correct and the recorder holds they do not amount to a defence he will be bound to convict and the defendant will be left to any remedy he may have by way of appeal or otherwise as he may be advised. It was in my opinion unquestionably for the Police Magistrate to say whether the sale if proved was lawful or unlawful, which question it is clear is quite impossible for him to determine without hearing the case, and whether his determination was right or wrong either in matter of law or of fact, it was no question of jurisdiction. The justice may give an erroneous decision either of law or of fact, or of both, though no person has a right to assume that he will do so, and if he does, if he acts within his jurisdiction his decision is conclusive, unless appealed against, and whether appealable or not it is no case for prohibition.

To determine, in the case before us, whether Ryan has been guilty of a breach of the license act, questions of fact as well as of law are, by defendant's own showing, necessarily involved, the determination of which is now in progress of trial before a tribunal having jurisdiction over the subject matter in controversy, and the only ground on which prohibition appears to me to be asked is the assumption that the judge will decide, not only the questions of law, but those of fact, incorrectly against the defendant. There certainly is no usurpation of jurisdiction in this case, and no issue which the inferior court is incompetent to try; on the contrary, the only issue in the case, namely, whether the defendant was, or was not, guilty of selling liquor without a license, contrary to the provisions of the Quebec license act of 1878, could only be tried under, and by virtue of, the section before referred to, and under which section, in my opinion, M. C. Desnoyers, the police magistrate, had unquestionable jurisdiction,

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and constituted the legal and proper tribunal to deal with any alleged infringement of the said act, and therefore no cause is shown to justify the issue of a writ of prohibition, and this appeal should be dismissed with costs.

STRONG J.—Apart altogether from the reasons given by the Court of Appeal, and from the other points raised and argued here, and exculsively for the reasons and upon the authorities stated and referred to by me in a judgment delivered in the case of *Poulin* v. *Quebec* (1), to which I now desire to add a reference to the cases and authorities collected in Short on Informations (2), a work recently published, I am of opinion that a writ of prohibition did not lie in the present case and that this appeal should therefore be dismissed with costs.

FOURNIER J.—La demande d'un bref de prohibition adressé à la cour des Sessions spéciales de la Paix du district de Montreal, avait pour but d'empêcher cette cour d'entendre et juger une poursuite dirigée contre un nommé Ryan, employé des appelants, brasseurs et distillateurs, pour avoir vendu des liqueurs enivrantes distillées par eux, sans être muni d'une licence à cet effet en vertu de l'acte des licences de Québec. Les principales raisons invoquées au soutien de cette demande sont, 1o. que la province de Québec n'avait pas le pouvoir de passer l'acte des licences au nom de Sa Majesté. 2o. que le dit acte établit des peines, en cumulant l'amende et l'emprisonnement. 3. que le dit acte est *ultra vires* en autant qu'il affecte le commerce et qu'il impose une taxe sur l'industrie des appelants, laquelle n'est soumise à aucune licence provinciale.

La première objection, que la législature n'avait pas le pouvoir d'édicter les lois au nom de Sa Majesté à été abandonnée. Sur la seconde qui dénie à la législature

(1) 9 Can. S. C. R. 185. (2) See p. 436 & seq.

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le pouvoir de prononcer des peines comportant l'emprisonnement et l'amende à la fois, je partage entièrement l'opinion exprimé à cet égard par l'honorable juge Cross. La s.s. 15 de la sec. 92 de l'acte B. N. A., donnant le pouvoir de punir par amende, pénalité ou emprisonnement, a conféré le pouvoir de cumuler ces divers châtiments aussi bien que de les imposer séparément. Les raisonnements de l'honorable juge pour établir cette proposition me paraissent concluants et je me borne à y référer.

Quant à la constitutionalité de l'acte des licences de 1878, question si souvent discutée devant les tribunaux depuis quelques années, elle doit être considérée comme finalement réglée par le cas spécial soumis à cette cour en vertu de l'acte 47 Vict. ch. 32 (1), porté plus tard en appel au Conseil Privé de Sa Majesté. La décision rendu sur cette question fait maintenant loi sur le sujet. Il n'est plus permis d'élever de doute sur le pouvoir exclusif des législatures de passer des lois règlant les licences pour la vente des boissons enivrantes, ni sur la constitutionalité de l'acte des licences de Québec de 1878. Cette dernière question a été portée devant cette cour dans la cause de la *Corporation de Trois-Rivières* v. *Sulte* (2), et la validité de la loi y a été reconnue.

Cette loi, par la sec. 196 donnant une juridiction complète à la cour des Sessions Spéciales de la Paix pour entrendre et juger la poursuite intentée devant elle contre le nommé Ryan, il ne peut pas y avoir lieu de faire émaner un bref de prohibition pour empêcher cette cour d'exercer sa juridiction.

L'appel doit être renvoyé avec dépens.

HENRY J.—This is an action brought by the respondent Lambe as inspector of licenses for the revenue dis-

(1) *In re* Liquor License Act, 1883; Cassels's Digest, p. 219.
(2) 11 Can. S. C. R. 25.

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trict of Montreal, against Andrew Ryan for an alleged breach of the license law of the Province of Quebec, in having sold spirituous liquors without license and contrary to law.

In addition to the general plea of non-guilty Ryan pleaded a justification as the servant and employee of the firm of J. H. R. Molson & Brothers, doing business as brewers under a license as such brewers from the Dominion Government to sell the liquors brewed and manufactured by them at Montreal.

The questions to be decided in the action were arranged to be submitted for the decision of the justice who issued the writ, and were substantially embodied in admissions signed by the counsel of both parties, and are in substance the points raised by the pleas in this action.

The case was submitted for the consideration of the justice, but before any decision by him a writ of prohibition was issued by the Superior Court; and, after argument before that court, the learned judge decided substantially that the local license act of 1878, did not supersede the act of the Dominion as to brewers' licenses, and that Ryan was justified in selling beer as he did, but inasmuch as the justice had jurisdiction to decide the matters of fact and law and that as the decision of the justice could be reviewed by a higher court by means of a writ of *certiorari* the court quashed the writ of prohibition. That judgment was affirmed, but apparently for other reasons, by the Court of Appeal at Montreal, and from the latter judgment an appeal was taken to this court.

The question then is as to the applicability of the writ of prohibition to the circumstances of this case.

The writ of prohibition is an extraordinary judicial writ issuing out of a court of a superior jurisdiction and directed to an inferior court for the purpose of

preventing the inferior tribunal from usurping a jurisdiction with which it is not legally vested. It is an original remedial writ, and is the remedy afforded by the common law against the incroachments of jurisdiction by inferior courts; and is used to keep such courts within the limits and bounds prescribed for them by law. Such being the object, and I may say the only one, it should be upheld where it can be legitimately employed.

Blackstone says: (1).

A prohibition is a writ issuing properly out of the Court of King's Bench, being the King's prerogative writ, but for the furtherance of justice it may be now also had in some cases out of the Court of Chancery, Common Pleas or Exchequer, directed to the judge and parties of a suit in any inferior court commanding them to cease from the prosecution thereof upon suggestion that either the cause originally or some collateral matter arising therein does not belong to that jurisdiction but to the cognizance of some other court.

High on Extraordinary Remedies (2) says:

The court does not lie for grievances which may be redressed in the ordinary course of judicial proceedings. * * Nor is it a writ of right granted *ex dubito justitiae*, but rather one of sound judicial discretion, to be granted or withheld according to the circumstances of each particular case. Nor should it be granted except in a clear case of want of jurisdiction in the court whose action it is sought to prohibit.

On an application for the writ the want of jurisdiction about to be exercised should be clearly shown, and regardless of the law and facts to be considered by the court sought to be prohibited the sole question is as to its jurisdiction to deal with them. If that is not clearly shown the issue of the writ would be unjustifiable.

I have carefully considered the petition for the writ of prohibition in this case and the admissions of the counsel but neither contains any allegation of the want of jurisdiction of the justice who issued the writ between the original parties, and therefore it must be

(1) 3 Black. Comm. 111. (2) P. 606.

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presumed that such jurisdiction existed. See Short on Prohibition (1). If so, there is no justification shown for the issue of the writ of prohibition. Besides I hold that under the law the justice before whom the case was originally brought had ample jurisdiction to try all the issues raised before him, and no court by prohibition could prevent him from the performance of the duty imposed upon him by law by a decision on the matter of fact and law involved.

After his decision a review of it may be had by a Superior Court as pointed out in the judgment of the Superior Court; but under the law as to the writ of prohibition that writ could not be interposed even if his judgment would be unappealable or could not in any way be reviewed by a higher court.

I will not discuss the merits of the case as between the original parties, as they should in the first place be disposed of by the justice, the only tribunal, in my opinion, at present having power to deal with them. I think therefore the appeal in this case should be dismissed and the judgments of the two courts below affirmed with costs.

TASCHEREAU J.—Upon the question of prohibition I dissent from the majority of the court and I think with the court below that the writ of prohibition lies in such a case as the present. It will be remarked that although the judgment of the Court of Queen's Bench is reversed on the question of prohibition yet the appellant fails on his appeal.

On the merits of the case the majority of the court being of opinion that no writ of prohibition lies in the present case it is useless for me and I think wrong to express an opinion, as what I would say about it would be merely *obiter dictum.*

(1) P. 446 and case there cited *Yates* v. *Palmer.*

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GWYNNE J.—The questions involved in this case are:

1. As to the procedure by writ of prohibition according to the law prevailing in the Province of Quebec; and

2. As to the proper determination, upon the merits, of the issue joined in the proceedings in prohibition, this latter question depending upon the validity and construction of an act of the legislature of the Province.

The judgment of Willes J. delivering the unanimous opinion of the judges consulted by the House of Lords in *The Mayor of London* v. *Cox* (1), and which is an authoritative and almost an exhaustive treatise upon all questions of prohibition under the law of England, affirms as well established law, that the courts that may award prohibition being informed either by the parties themselves or by any stranger that any court temporal or ecclesiastical, doth hold plea of that whereof they have no jurisdiction, may lawfully prohibit the same as well after judgment and execution as before; that in whatever stage of the proceeding in the inferior court; whether on the face of the complaint itself or by collateral matter set up by way of plea to that complaint, or in evidence in the course of the proceedings in the inferior court, or by affidavit, the fact is made to appear to the court having power to award prohibition that the case is of such a nature as to show a want of jurisdiction in the inferior court to decide the particular case, prohibition lies either at the suit of a stranger or of a party even though there might be a remedy by appeal from the judgment of the inferior tribunal, citing upon this latter point *Burder* v. *Veley* (2); *a fortiori* if in the particular proceeding in the inferior court there be no appeal from the judgment

(1) L. R. 2 H. L. 239. (2) 12 A. & E. 263.

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of that court prohibition will lie, and to an application for a prohibition, or upon the determination of an issue, whether of law or of fact, joined in the proceedings in prohibition, it cannot be urged as a sufficient objection to the writ going absolutely that in case of a conviction by the inferior tribunal the party might have a remedy by *certiorari* to quash the conviction; indeed, the writ being issuable at the suit of a stranger as well as of a party shows that the right to it could not be affected by any such suggestion. In the above case of *The Mayor of London* v. *Cox*, Willes J. referring to the writ being issuable at the suit of a stranger says:

In this respect prohibition strongly resembles *mandamus*, where the Court of Queen's Bench exercises a discretion as to whether the writ shall go, but the writ once granted must be met by a return showing a legal answer.

And he adds:

The writ however, although it may be of right, in the sense that upon an application being made in proper time, upon sufficient materials, by a party who has not by misconduct or laches lost his right, its grant or refusal is not in the mere discretion of the court, is not a writ of course, like a writ of summons in an ordinary action, but is the subject of a special application to the court upon affidavit which application, and the proceedings thereupon, are now regulated by the Act 1 Wm. 4 ch. 21.

Before that act the declaration on prohibition was *qui tam*, and it supposed a contempt in disobeying an imaginary precedent writ of prohibition.

The act of William 4th enacted that:

It shall not be necessary to file a suggestion on any application for a writ of prohibition, but such application may be made on affidavits only; and in case the party applying shall be directed to declare in prohibition before writ issued, such declaration shall be expressed to be on behalf of such party only, and not as heretofore on behalf of the party and of His Majesty, and shall contain and set forth in a concise manner so much only of the proceeding in the court below as may be necessary to show the ground of the application without alleging the delivery of a writ or any contempt, and shall conclude by praying that a writ of prohibition may issue; to which declaration the party, defendant may demur or plead such matters by way of traverse or otherwise, as may be proper to show,

that the writ ought not to issue, and conclude by praying that such writ may not issue; and judgment shall be given that the writ of prohibition do or do not issue as justice may require, and the party in whose favor judgment shall be given, whether on non-suit, verdict, demurrer or otherwise, shall be entitled to the costs attending the application and subsequent proceedings and have judgment to recover the same.

The practice under this statute seems to have been in accordance with the ancient usage, that when upon the affidavits filed for and against the application it clearly appeared that the jurisdiction of the inferior court to adjudicate in the particular case could not be questioned, the court would neither grant the rule nor put the parties to the expense of a declaration and proceedings in prohibition, so in like manner if it should clearly appear that the writ ought to go absolutely, it was granted at once without requiring a declaration in prohibition; but if it appeared open to doubt whether the writ should or should not be finally granted, if the question was arguable, and always upon the demand of the party against whom the application was made, then the applicant was ordered to declare in prohibition in order that the points to be argued should be brought before the court in the shape of precise issue either of law or of fact upon record. See *Lloyd* v. *Jones* (1); *In re Chancellor of Oxford* (2); *In re Dean of York* (3); *Mossop* v. *G. N. Ry. Co.* (4); *In re Aykroyd* (5); *Remington* v. *Dolby* (6).

Subsequently the practice upon applications for writs of prohibition to issue, addressed to judges of the county courts, was regulated by 13-14 Vic. ch. 61, and 19-20 Vic. ch. 108, the 42nd section of which latter act enacts that:

When an application shall be made to a Supreme Court or a judge

(1) 6 C. B. 81.
(2) 1 Q. B. 972.
(3) 2 Q. B. 39.
(4) 16 C. B. 585.
(5) 1 Ex. 487.
(6) 9 Q. B. 178.

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thereof for a writ of prohibition to be addressed to a judge of a county court, the matter shall be finally disposed of by rule or order, and no declaration or further proceedings in prohibition shall be allowed.

Now the practice in the Province of Quebec is regulated by the code of civil procedure, the 1031st article of which code enacts that writs of prohibition are applied for, obtained and executed in the same manner as writs of *mandamus* and with the same formalities, thus placing the proceedings for writs of prohibition in all respects upon the same footing as writs of *mandamus*, which, in some respects, as said by Willes J. in the *Mayor of London* v. *Cox* (1), "they strongly resemble." Now the procedure in the cases of *mandamus* by the code of civil procedure is as stated in article 1023, as follows:—

The application is made by petition supported with affidavits setting forth the facts of the case and presented to the court or judge who may thereupon order the writ to issue and such writ is served in the same manner as any other writ of summons.

And article 1024 enacts that:

"The proceedings subsequent to the service are had in accordance with the provisions contained in the first section of this chapter."

Which provisions are; that the defendant may set up against the petition such preliminary exceptions, or exceptions to the form as they deem advisable, and the plaintiff may demur to the pleas set up in defence; that the defendant is bound to appear on the day fixed in the suit, and if he fails to do so, the petitioner proceeds with his case by default; within three days from the filing of the answer the petitioner must proceed to prove the allegations of the petition in the same manner as proof is made in ordinary cases, and after closing of his proof and within a further delay of two days the defendant is bound to adduce his proof—as soon as the proof of the defendant is closed the petitioner may be allowed to produce evidence in rebuttal, if there is occasion for it; if he does not, either of the parties may inscribe the cause upon the merits,

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giving the opposite party notice of at least one day before the day fixed.

In accordance with the practice so prevailing in the Province of Quebec, John Henry R. Molson, John Thomas Molson and Adam Skaife, trading in partnership as brewers, under the name of John H. R. Molson & Brothers, who were not parties to the proceedings in the inferior court hereinafter mentioned, and Andrew Ryan, who was the sole party named in such proceedings, presented their petition to the Superior Court for the district of Montreal, wherein, in short substance, they alleged that the said Messrs. Molson & Brothers were duly licensed by the Dominion Government, under and in pursuance of an act of the Dominion Parliament, to carry on the trade and business of brewers in the Province of Quebec; that they carried on such their trade and business in the city of Montreal; that it always has been and is the custom of the trade of brewers in the Province of Quebec for brewers to send out their draymen for the purpose of delivering to their customers the beer manufactured by the said brewers; that the petitioner Andrew Ryan is, and for some time has been, the servant and drayman of the said Messrs. Molson & Brothers, employed by them, according to the said custom of the trade of brewers, to sell and deliver for and on their behalf, to their customers, the beer manufactured by them, the said Messrs. Molson & Brothers, in quantities not less than in dozen bottles, containing not less than three half pints each, and in kegs holding not less than five gallons each; that on the 10th of June, 1882, William Busby Lambe of the city of Montreal, exhibited an information and complaint against the said Andrew Ryan before Mathias C. Desnoyers, police magistrate of the said city of Montreal, and procured a summons to be signed by the said

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police magistrate, addressed to the said Ryan, whereby he was commanded to appear before the said police magistrate at a session of the court of Special Sessions of the Peace, to be held in the court house of the said city of Montreal, on a day therein named, to answer the said information and complaint of the said Lambe,—

For that he ,the said Ryan not having any license for the sale of intoxicating liquors in any quantity whatever, had in the said city of Montreal, on the 6th day of June, A.D. 1882, and upon divers occasions before and since sold intoxicating liquors contrary to the statute in such case made and provided, whereby and in virtue of the said statute the said Andrew Ryan had become liable to the payment of a fine of the sum of ninety-five dollars; which sum that the said Ryan should be condemned to pay for the said offence, the said Lambe prayed judgment.

The petition further alleged that the said Ryan appeared to said summons and complaint, and pleaded thereto as follows:—

"That he is and at the time mentioned in the said information was a servant and employée of the firm of J. H. R. Molson & Brothers, brewers, of the city of Montreal, who hold a license from the Dominion Government under the provisions of an act of the parliament of Canada, and who have been in business as such brewers in Montreal for eighty years, that during the whole of the said term, and up to the present time it has always been the custom and usage of the trade of brewers to send around through the country their drays with beer, which beer was sold by their draymen during their trips to the said customers. That on the occasion charged in the said information the said Ryan was the agent, servant, and drayman of the said firm of J. H. R. Molson & Brothers.

That if he, the said Ryan, sold any beer whatever, he so sold it as the agent and drayman of the said J. H. R. Molson & Bros., and under and by virtue of their authority under the said license, and sold it according to the custom and usage of trade in the said province

ever since brewers were first established therein.

That the said John H. R. Molson & Brothers being licensed under the provisions of the said act of the parliament of Canada, are not liable to be taxed either by or through their employees and draymen under the provisions of any act passed by the legislature of the province of Quebec, and the said Ryan further alleged that he was not guilty in manner or form as set forth in the said information and summons, wherefore he prayed dismissal of the said prosecution."

The petition then alleges that, notwithstanding the said plea of the said Ryan to the jurisdiction of the said police magistrate, and otherwise, the said police magistrate took jurisdiction over the said Ryan and proceeded with the said case, and that after certain admissions made in the said case (the nature of which will appear further on) the said case was taken in advisement.

The petition then insists that the act, under which the said prosecution was instituted, namely, the Quebec License Law of 1878 and its amendments are unconstitutional, illegal, null and void, and moreover that they do not apply to, and that the said court of Special Sessions of the Peace have no jurisdiction to try, the said Ryan for the pretended offence so charged against him and the petitioners' grounds for this contention are stated (among others for it is not necessary to set these all out) to be.

1st. That there is no act of the legislature of the province of Quebec which authorizes the said complaint and prosecution.

6th. Because the petitioner Andrew Ryan being in the employ and being the drayman of the other petitioners, the act of the petitioner Ryan in selling the said beer was the act of the said other petitioners copartners who by their license from the Government of

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the Dominion of Canada were authorized and empowered so to sell such intoxicating liquor.

7th. Because the petitioners, the said Messrs. Molson and Brothers, being licensed brewers had the right of selling by and through their employees and draymen without any further license whatsoever under the provisions of the Quebec License Act of 1878; and

8th. Because the Legislature of the Province of Quebec have no right whatever to limit or interfere with the traffic of brewers duly licensed by the Government of Canada.

"Wherefore the petitioners prayed remedy and that a writ of our Lady the Queen of prohibition to the said court of Special Sessions of the Peace sitting in the city of Montreal, and to the said Mathias C. Desnoyers, police magistrate for the city of Montreal, holding the said court, do issue to prohibit the said court and the said Desnoyers from further proceedings upon the said summons and complaint."

Upon this petition the writ of prohibition issued as prayed and in the form prescribed by the 1031st and 1023rd articles of the Code of Civil Procedure, and having been duly served upon the police magistrate and the court of Special Sessions of the Peace, the said William B. Lambe in his quality of inspector of licenses for the district of Montreal, was permitted to intervene under the provisions of the articles of the Code of Civil Procedure in that behalf, 154 to 158 inclusive, and pleaded that by the 71st section of the Quebec License Act of 1878, whoever, without being licensed for that purpose, should sell in the city of Montreal in any quantity whatever any intoxicating liquors is liable for each offence to a fine of ninety-five dollars; and that the said Andrew Ryan, on the 6th day of June, 1882, in the city of Montreal sold intoxicating liquor as alleged in the complaint laid before the

police magistrate; that the said Andrew Ryan admitted the sale in question, before the said police magistrate; that the said Quebec License Law of 1878 and its amendments are constitutional, that it was in due form passed by the Legislature of the Province of Quebec in conformity with the British North America Act of 1867; that by force of the 92nd section of the said British North America Act the Legislature of the Province of Quebec has the right to pass the license law in question; that assuming the said John H. R. Molson & Brothers, brewers, to have the right in virtue of the license which they have to sell without any other license beer of their own manufacture, still the said Andrew Ryan had no right to hawke it about through the city of Montreal or to sell it outside of the premises of the said brewers without being provided with the license required by the Quebec License Law. That moreover the said Molson & Brothers themselves have no right in virtue of their license to sell their beer outside of their premises without a license of the Province of Quebec. That in virtue of the 196th section of the said Quebec License Law of 1878, every action or prosecution in which the sum demanded does not exceed $100, may be tried before the police magistrate, and that the said Mathias C. Desnoyers was such police magistrate. That under these circumstances the prosecution instituted against the said Andrew Ryan was legally instituted and came under the jurisdiction of the said police magistrate, who had in consequence the right to hear and decide it.

To this intervention the petitioners pleaded in answer:—

That the so-called license law of the Province of Quebec of 1878, referred to in the said intervention as well as its amendments is unconstitutional, inasmuch as the same was passed *ultra vires* of the Province of Quebec, and that each, all, and every of the said clauses

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referred to in the said intervention and *moyens d'intervention* are unconstitutional and *ultra vires* of the said Province of Quebec. And the said petitioners aver as they have already in their said petition averred, that even supposing that the said license law and its amendments are valid and constitutional, yet the said petitioners, Molson & Brothers, being duly licensed brewers at the said city of Montreal and the said petitioner, Andrew Ryan, being in their employ, and their agent, were, under their said license, under the provisions of the Dominion Acts of Parliament, justified and entitled to sell the beer according to the usage and custom of trade in the said province.

And the petitioners admitting the prosecution, defence, and admissions set up in the said intervention denied the liability of the said Andrew Ryan to the penalty claimed from him, and, also, denied the jurisdiction of the said court of Special Sessions and of the said police magistrate to take jurisdiction of the said cause.

To this the intervenant replied insisting that all the allegations of his said intervention were well founded in law.

The parties to the said cause in prohibition were thus at issue.

Now, the admissions referred to in the said intervention as having been made in the said cause in the said inferior court before the said police magistrate, are precisely the same as have also been made in the cause in prohibition for the determination of the issues joined between the parties to that proceeding, and are as follows:—

1. That the firm of John H. R Molson and Brothers are brewers in Montreal and have carried on their business for a number of years past, and that they were duly licensed brewers under a license issued by the Dominion Government under and by virtue of the act 43 Vic ch. 19, intituled: "The Inland Revenue Act of 1880."

2. That the said Andrew Ryan was at the time of the offence alleged, in the information, to have been

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committed by him, in the employ of the said firm of John H. R. Molson and Brothers, as drayman, and that he was paid his wages as such drayman by a monthly salary, and by a commission on the moneys by him collected for the sale of beer manufactured by the said Molson & Brothers in the brewery mentioned in their said license.

3. That the sale in question was made outside of the said brewery, but in the revenue district of Montreal, and that the said Andrew Ryan, as drayman of the said firm, sold to a buyer who had not given his order at the office of the said firm, at the domicile of the said buyer.

4. That it has been the immemorial custom and usage in the said city of Montreal for a drayman employed by brewers to sell and furnish beer to customers of the said brewers, in the same manner as the said sale was effected without taking out a license.

5. That the Local Legislature of Quebec have refunded to the brewers licensed by the Dominion Government the amount of the license fee imposed by the act of the Local Legislature upon such brewers, owing to and after the decision in the case of Severn and the Queen decided in the Supreme Court of Canada at Ottawa.

Now proceedings in prohibition having been regularly instituted in accordance with the provisions of the Code of Civil Procedure of the Province of Quebec, by a writ and declaration in prohibition to which an answer has been filed and a replication thereto, and issue having been joined in such proceedings upon the matters to be determined by the Superior Court in which such proceedings were instituted, it is obvious that these issues so joined, whatever they were and whether of law or of fact, must be determined by the court in which such proceedings are pending. That

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court cannot evade the responsibility of passing its judgment upon those issues, by a suggestion that the points raised or any of them, are points which the inferior court, (whose jurisdiction under the facts and circumstances pleaded is disputed,) is competent itself to decide, and that if it should pronounce an erroneous judgment, then an application may be made to the Superior Court to interfere by *certiorari*. It is out of the question to suppose that the law, which provides such a precise procedure for bringing to issue in the Superior Court the questions to be determined in prohibition cases, could sanction such a mode of dealing with them.

In the present case, the facts pleaded being admitted, the only questions to be determined were questions of law involving the construction and validity of a statute of the Province of Quebec, of which statute, the act complained of and brought under the notice of the inferior court was alleged to be an infringement. It seems to be nothing short of a repudiation of those rights (which are of the essence of, and the inalienable prerogative of a superior court of common law) to say that the inferior court, whose jurisdiction in the given case was disputed, was as competent as the Superior Court to determine those question of law.

If the jurisdiction of an inferior court over a particular state of facts depends upon the construction and validity of an act of a Provincial Legislature, and if issues be joined in a proceeding in prohibition properly instituted in a Superior Court, raising a question as to the construction and validity of such provincial act, how is it possible to contend that the Superior Court in which such issue is pending can evade the duty of determining it? In *Brymer* v. *Atkins* (1), it is said to

(1) 1 H. Bl. 188.

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be an ancient and essential maxim of common law, that not merely courts of common law of inferior jurisdiction, but that all courts of special jurisdiction, created by act of parliament must be limited in the exercise of that jurisdiction by such construction as the courts of common law, that is to say the Superior Courts, may give to the statute. Upon this principle a question having arisen in *Gare* v. *Gapper* (1), upon a motion for a writ of prohibition after sentence in an ecclesiastical court in a matter of tythe, whether the court had not proceeded upon an erroneous construction of an act of parliament, the applicant was directed to declare in prohibition that the question of the construction of the statute, which involved some doubt should be brought up for solemn adjudication, (the court thus directing that to be done in the particular case, which, in the case before us, has been done by the authority of the Code of Civil Procedure in the province of Quebec), and the question having been raised by a demurrer to the declaration in prohibition, it was adjudged that the construction of the statute by the ecclesiastical court was erroneous, and that therefore the prohibition should go, although after sentence and although the objection did not appear upon the face of the libel in the ecclesiastical court, but was collected from the whole of the proceedings in that court, *Gould* v. *Gapper* (2).

Now in the case before us the questions raised by the issue joined in the proceeding in prohibition are :—

1. Does the Quebec License Act of 1878 and its amendments impose any obligation upon brewers duly licensed as such by the Dominion Government to carry on the trade of brewers in the Province of Quebec, to take out any, and if any, what license required by such the

(1) 3 East 472. (2) 5 East 345.

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Quebec License Acts to entitle the brewers to dispose of the subject of their trade and of their manufacture within the said province?

2 If the provincial statute does impose such obligation, is the statute, *quoad* the imposition of such obligation, *intra vires* of the Provincial Legislature? and

3. Is the sale and delivery by brewers in the city of Montreal, through the agency of their draymen, of the beer manufactured by them to their customers at the dwelling houses or places of business of the latter under the circumstances appearing in the proceedings in prohibition here, an infringement of the Quebec License Act of 1878, subjecting the brewers' drayman to the penalty imposed by the 71st or any other section of such license act? Every one of these questions must be answered in the affirmative to give to the police magistrate in the city of Montreal jurisdiction over the act complained of and the person charged with having committed it. And these questions were, by the procedure of the Province of Quebec in prohibition cases, as much before the Superior Court for its determination as they would have been before the Superior Court in England if, as in *Gould* v. *Gapper*, the parties applying for a writ of prohibition had been ordered to declare, and had declared in prohibition, and issues had been joined thereon for the express purpose of obtaining the judgment of the Superior Court upon the questions, which, in the present case, equally as in *Gould* v. *Gapper*, involved the construction of the statute in virtue of which the inferior court could only have had, if it had, any jurisdiction over the subject matter or the person who had done the act complained of.

The manner in which the Superior Court dealt with these issues so joined in a proceeding duly instituted according to the course and practice of the court was this: It adjudged the Quebec License Act in question to be

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intra vires of the Provincial Legislature, but declined to adjudicate upon the questions whether it did or not impose any obligation upon brewers duly licensed as such by the Dominion Government under the Dominion Act 43 Vic. ch. 19, to take out any, and if any, what license from the Provincial Government to entitle them to dispose of the subject of their trade manufactured by them? or whether the sale and delivery by Messrs. Molson & Brothers through the agency of their drayman of the beer manufactured by them, to their customers at the dwelling houses or places of business of the latter, under the circumstances appearing in the proceedings in prohibition, was an infringement of the Quebec License Act of 1878 and its amendments, subjecting their drayman Ryan to the penalty imposed by the 71st section of the said act.

The learned judge presiding in the Superior Court referred these questions to the police magistrate; thereby submitting in effect to the court of inferior jurisdiction the determination of the issues joined in a proceeding duly instituted in the Superior Court, intimating, as a reason for so doing, that the petitioner Ryan, if condemned in the inferior court, might then apply to the Superior Court by writ of *certiorari*. But the writ of *certiorari* is a mode merely of informing the court of the particulars of the question brought up by that writ for its decision and it only issues after judgment while we have already seen it is the inalienable right of the superior courts of common law to entertain and decide all questions affecting the jurisdiction of the courts of common law of inferior, and indeed of all courts of special limited jurisdiction, by proceedings in prohibition at whatever stage the proceedings in the inferior court may be. And when issue is joined in proceedings in prohibition duly instituted, as they have been here, the court in which

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they have been so instituted becomes so seized of the issues that it is the inalienable right of the litigants to have judgment upon these issues rendered by the court, and in the proceeding in which the issues are joined. That the Superior Court therefore has erred in the judgment rendered by it, whatever may be the proper judgment to be rendered upon the questions raised, cannot, I think, admit of a doubt. Upon appeal to the Court of Queen's Bench at Montreal in appeal that court dismissed the appeal, a majority of the learned judges of that court against two dissentients, holding that although the proceedings in prohibition were duly instituted, the judgment of the Superior Court which declined adjudicating upon the issues joined therein is free from error. In support of this judgment, the case of the *Charkieh* decided in the Court of Queen's Bench in England (1) is relied upon, but a reference to that case will show that it is not at all analogous to the present case.

That was not a case presenting to the court for its decision certain issues joined in proceedings in prohibition duly instituted. It was not a case raising a question as to the proper construction of a statute upon which depended the jurisdiction, if any, which an inferior court had, under the circumstances of the particular case, all the material facts of which appeared upon the record in the Superior Court, and upon admissions of the parties. If upon an application for a prohibition in England, in a similar case to the present one, the applicant had been directed to declare in prohibition, and if he had done so, and if by the pleadings to that declaration issues had been joined raising questions similar to those raised in the present case such a case, would have been analogous to the present, but in such case there can be no

(1) L. R. 8 Q. B. 197.

doubt that the Court of Queen's Bench would have decided and finally determined all the issues, to raise which the applicant for the writ of prohibition had been directed to declare in prohibition. But the question was not at all as to the jurisdiction of a court of common law of inferior jurisdiction, which are questions peculiarly within the cognizance of a superior court of common law to decide, and the question which was raised was disposed of on the rule *nisi* for a writ of prohibition as we have seen to be the practice in England when the court entertains no doubt as to the point raised, and for that reason does not require the party to declare in prohibition; the rule was to show cause why a writ of prohibition should not issue to prohibit the High Court of Admiralty, itself a high court of record having jurisdiction in all matters relating to international and maritime law, and expressly by 24 and 25 Vic. ch. 10 "over any claim for damage done by any ship"—from further proceeding with a cause of damage instituted by or on behalf of the owners of the steamship Batavier against the *Charkieh*, which was alleged on affidavit to be a steamship of the Egyptian Government; and the sole ground of the application was that she was the property of a foreign government.

Blackburn J. in giving judgment says:

Taking every fact brought before us on the part of the persons applying for the prohibition to be true, the case would be this; that the Khedive of Egypt is a Sovereign Prince—as I assume for the present purposes, although that may be disputed hereafter; and is owner of the vessel in question; she was sent to this country for repairs—a collision then takes place in the Thames at the time the vessel was his property, and his officers were on board and in possession of her. Now the question arises whether the Court of Admiralty, having jurisdiction to administer maritime law and international law against foreign vessels, could proceed with the cause for damage, be cause by international law, such a ship is privileged, and cannot be proceeded against in a foreign court. There is authority for saying that courts of justice cannot proceed against a sovereign or a state,

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and I think there is also authority for saying they ought not to proceed against ships of war or national vessels; and it is obviously desirable that this rule should be established, otherwise, wars might be brought on between two countries. But there is another question – what is the liability of a vessel which is the property of a foreign state, when she causes damage by a collision to another vessel, she not being a ship of war, but a ship which happens to be national property and apparently employed on a mercantile adventure? Does the circumstance of her being the property of a foreign state oust the jurisdiction of the Court of Admiralty? Now, (he says), we are asked to prohibit the Court of Admiralty entertaining that which Lord Stowell, perhaps the highest authority upon these matters, declared was a difficult question of international law. It seems to me that this question can be better decided by a court which has almost a peculiar jurisdiction over matters relating to international law. It does seem to me that the Court of Admiralty has jurisdiction to determine the facts, and to decide whether international and maritime law do allow the circumstances stated to be a defence to a claim against the Charkieh; and if that court is wrong in its judgment the Privy Council can set it right, and their decision would be final. I do not see how it can be said that the Court of Admiralty is exceeding its jurisdiction in entertaining the suit as a question of international law; and taking that view of it, I think the court ought not to be prohibited.

It thus appears that the court refused to interfere by prohibition because the sole question raised was one of international law which the High Court of Admiralty and not the Court of Queen's Bench had peculiar jurisdiction to administer, subject only to an appeal to quite a different court from the Court of Queen's Bench, the judgment of which appeal court was by law final and conclusive. The court in fact did decide the only point presented to it, namely, that the fact of the Charkieh, being the property of a foreign sovereign, did not oust the jurisdiction of the High Court of Admiralty over the claim for damage to the Batavier, but in the present case, although it has always been the undoubted right of the superior courts of common law to enquire into and adjudicate upon all complaints against inferior temporal courts for acting without, or in excess of their jurisdiction, when duly brought before

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them by proceedings in prohibition, and although it is the undoubted duty of such courts towards the litigants in such proceedings in prohibition to decide all issues joined therein between the parties thereto, yet the Superior Court, in which the proceedings in prohibition in the present case were pending, declined to exercise such its right and to discharge such its duty. It is obvious therefore that between the present case and that *in re* the Charkieh, there was no analogy whatever. The case must therefore now be dealt with upon its merits.

If the provisions of the Quebec License Act now under consideration are identical with the provisions of the Ontario Act, 37 Vic. ch. 32, in respect of the point in question we must be bound by the judgment of this court in *Severn* v. *The Queen* (1) which is no more at variance with the judgments rendered in *Russell* v. *The Queen* (2); *Hodge* v. *The Queen* (3); *In the matter of the acts of the Dominion Parliament*, 46 *Vic. ch.* 30 *and* 47 *Vic ch.* 32 (4), and *Sulte* v. *The Corporation of Three Rivers* (6), than were those judgments at variance, as they were at one time erroneously supposed to be, with the judgment in *The City of Fredericton* v. *The Queen*. All of those judgments rest upon the foundation that laws which make, or which empower municipal institutions to make, regulations for granting licenses for the sale of intoxicating liquors in taverns, shops, &c., and for the good government of the taverns and shops so licensed, and for the preservation of peace and public decency in the municipalities, and for the repression of drunkenness, and disorderly and riotous conduct, and imposing penalties for the infraction of such regulations, are laws which, as dealing with subjects of a purely local, municipal, private and domestic character, are *intra vires* of the Pro-

(1) 2 Can. S. C. R. 70.
(2) 7 App. Cas. 829.
(3) 9 App. 117.
(4) Cassells's Dig. 543.
(5) 9 Can. S. C. R. 25.
(6) 3 Can. S. C. R. 505.

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vincial Legislature. But *Severn* v. *The Queen* proceeded wholly upon the construction of item 9 of sec. 92 of the British North America Act, and in that case the late learned chief justice of this court, Sir William B. Richards, held, and a majority of this court concurred with him, that the obligation imposed by the Ontario act, 37 Vic. ch. 32 upon brewers to take out a provincial license to enable them, to dispose of the beer manufactured by them was in effect an obligation in restraint of the manufacturing by them of the article of their trade, which in virtue of a license from the Dominion Government, issued upon the authority of an act of the Dominion Parliament, they were authorized to carry on, and that the item 9 of sec. 92 of the British North America Act did not authorize the Provincial Legislatures to impose any such obligations upon brewers. That the words "and other licenses" in that item in connection with the preceding words, "shop, saloon, tavern "and auctioneers" must be construed, having regard to the general scope of the scheme of confederation, as referring to licenses *ejusdem generis* with the preceding licenses spoken of in the item, such as licenses on billiard tables, victualling houses, houses where fruit, &c., are sold, hawkers, peddlers, livery stables, intelligence offices, and such like matters of purely municipal character, and that those words could not consistently with a due regard to the intent of the framers of the scheme of confederation, as appearing in the British North America Act, be construed as giving to the Provincial Legislatures power to put a restraint upon the manufacture of an article of a trade authorized to be carried on by an act of the Dominion Parliament. So understanding the judgment in *Severn* v. *The Queen*, whether it be in point of law, sound or otherwise, it may well stand consistently with, and is not shaken by *Russell* v. *The Queen*, or any other of the above cases, and it is still a judgment binding upon this

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court and all courts in this Dominion. But the question still remains to be considered, namely, whether the provisions of the Quebec License Act of 1878 are, upon the point under consideration, so identical with the provisions of the Ontario Act as to make the judgment in *Severn* v. *The Queen* (1) applicable in the determination of the present case. The two acts when compared appear to be very different, and so great is this difference as regards the point under consideration as to convey to my mind the idea that the draftsman of the Quebec Act of 1878, framed it with the object of complying with the judgment in *Severn* v. *The Queen* (1), which had been rendered five or six weeks before the passing of the act, and to avoid its being open to the objection of *ultra vires*, which that judgment had pronounced the Ontario Act to be open to. The Ontario Act, while professing to have no intention to interfere with any brewer, distiller or other person duly licensed by the Government of Canada for the manufacture of spirituous liquors, in the manufacturing such liquors, did nevertheless in effect do so by enacting that to enable any such brewer, distiller, &c., to sell the liquor manufactured for consumption within the Province of Ontario, he should first obtain a license to sell by wholesale under sec. 4 of the act. The "license by wholesale," and which brewers were thus required to take out, was a license to sell in quantities not less than five gallons in each cask or vessel at any one time, or in 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, at any one time, *in any other place than inns, ale or beer houses, or other places of public entertainment*, and the act imposed a penalty upon brewers and distillers in case they should sell the liquor manufactured by them respectively without taking out such wholesale license.

Now the Quebec Act of 1878 and its amendments

(1) 2 Can. S. C. R. 70.

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contain no provision of such or the like nature as that in the Ontario Act upon, which the judgment in *Severn* v. *The Queen* (1) proceeded, and when we refer to the act in virtue of which license fees or duties had been collected from brewers in the Province of Quebec before the judgment in *Severn* v. *The Queen* (1), which license fees, as appears in the pleadings and admissions in the case now before us, were refunded by the Provincial Government in consequence of, and in submission to, that judgment, we find that the only authority under which such license fees so refunded had been collected was contained in sections 12, 13 and 14 of 36 Vic. ch. 3 as amended by 37 Vic. ch. 3, and that there is no similar enactment or provision contained in the act of 1878 or its amendments, while that act repeals all the previous acts; a fact which seems to confirm the view I have taken, that it was the intention of the Provincial Legislature in passing the License Act of 1878 to comply with the judgment of this court in *Severn* v *The Queen* (1).

There is no such license as the "wholesale license" of 36 Vic. ch. 3, required to be taken out by the act of 1878 or its amendments. All the licenses (as regards the sale of intoxicating liquors) which the License Act of 1878 as amended requires to be taken out are licenses:—

1. To keep an inn and for the sale of intoxicating liquors therein. The word "inn" being defined to be a house of entertainment, wherein intoxicating liquors are sold.

2. For the sale of intoxicating liquors in a club.

3. For the sale of intoxicating liquors in a restaurant or railway buffet.

4. For a steamboat bar—for the sale therein of intoxicating liquors.

5. For the sale of intoxicating liquors at the mines or in any mining district or division.

(1) 2 Can. S. C. R. 70.

6. A retail liquor shop license.

7. A wholesale liquor shop license, and

8. A license to sell for medicinal purposes or for use in divine worship in municipalities in which a prohibitory by-law is in force.

Now by 43–44 Vic. ch. 11, a wholesale liquor shop is that wherein is sold at one time intoxicating liquors in quantities not less than two gallons imperial, or one dozen bottles of not less than one pint imperial measure each; and a retail liquor shop is defined to be that wherein are sold at any one time intoxicating liquors in quantities not less than one pint imperial measure. Now those licenses are required to be taken out for the sole purpose of enabling the Provincial Government to raise a revenue for the purposes of the province. That this must be held to be the sole object of the Quebec License Act of 1878 and its amendments, appears not only from item 9 of sec. 92 of the British North America Act, but from an act of the Provincial Legislature, 46 Vic. ch. 5, passed for the express purpose of remedying what the Legislature conceived to be a defect by reason of its not being so stated in the acts of 1878 and 1880. By this act 46 Vic. it is declared:—

That the duties payable for licenses imposed by sec. 63 of the Quebec License law of 1878, as replaced by sec. 17 of the act 43-44 Vic. ch. 11, were so imposed in order to the raising of a revenue for the purposes of this province under the powers conferred upon the Legislature of this Province by the 9th paragraph of sec. 92 of the British North America Act of 1867.

Now the Provincial Government cannot, under the acts in question, raise any revenue by the issue of any licenses other than those expressly named in the acts as subjected to duty, and a person not engaged in a business, which by the acts or one of them is subjected to a license tax, cannot be compelled to take out, and consequently cannot be punished for not taking out, one of the licenses upon which a duty or tax is imposed by

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the acts. In order to raise a revenue by taxation of any kind, the thing to be taxed must be expressly stated in the act imposing the tax. But none of the licenses named in the acts relate to the business of a brewer. His business is to manufacture beer and to sell the beer manufactured by him. The acts impose no tax upon his business, he cannot, therefore, be compelled to contribute to the provincial revenue by taking out, nor can he be punished for not taking out, a license authorizing him to keep an inn, a restaurant or railway buffet, a steamboat bar or a retail or wholesale liquor shop, none of which nor all of them together, if taken out, would enable him to carry on the business of a brewer or authorize him to dispose of the article manufactured by him. The Messrs. Molson & Brothers, although they should be possessed of every one of the above named licenses would be as liable for the act which is the subject of prosecution in the inferior court now under consideration, as they are now not having any of such licenses. Brewers therefore are not required, by the acts in question, in order to carry on their business, to take out any of the licenses which, for the purpose of raising a revenue, are subjected to a fee or tax. The intervenant in his pleading in intervention contends that admitting that the said Molson & Brothers are entitled in virtue of their license from the Dominion Government to sell the beer of their manufacture without any other license, still Andrew Ryan had no right to hawk or peddle the beer through the city of Montreal, and to sell it outside of the premises of the said brewers, without being supplied with the license required by the Quebec License Act, and that moreover the Messrs. Molson & Brothers themselves had no right to sell their beer outside of their premises without a license of the Province of Quebec, but as brewers are not, nor is their business, taxed by the acts in question, and they are not required by any

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of the acts to take out a license from the Provincial Government to enable them to carry on their trade and as none of the licenses, which are by the acts subjected to a tax or duty, would give them any greater authority to sell their beer on the premises where it is manufactured any more than elsewhere, they must have the same right to sell and deliver the beer manufactured by them at the residences or places of business of their customers whether they be licensed inn, restaurant or steamboat, barkeepers or others equally as at the premises where the beer is manufactured, unless the provision in the acts as to peddlers license applies which is the only license which can be referred to in the pleadings in intervention: but apart from the absurdity of brewers by delivering their beer to their customers at their residences or places of business being deemed to be peddlers, the act expressly provides that no person is obliged to take out a license to peddle and sell goods, wares, &c., of their own manufacture excepting drugs, medicines and patent remedies whether peddled and sold by himself or his agents or servants.

Mr. Geoffrion, however, contended that although none of the licenses, named in the act, authorized to be done the act which is the subject of the prosecution instituted against Ryan, nevertheless the penalty sought to be recovered is exigible; but the object of imposing a penalty is to prevent the revenue being defrauded by a party doing without a license that, for doing which the act has required a license to be taken out, upon which for the purposes of revenue a tax is imposed. Accordingly the provincial statute 46 Vic. ch. 5 already referred to, and which was passed, as stated in the preamble, because doubts had arisen as to the constitutionality of certain provisions contained in the Quebec License Act of 1878 and the amendments thereto, and that it was expedient to make such

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provision as would ensure the collection of the revenue derivable from the duties imposed and payable for the different licenses specified in the above mentioned act as amended; and which, to remove the above doubts, declared that the duties payable for licenses imposed by the Quebec License Act of 1878 as amended by the act of 1880 were imposed in order to the raising of a revenue for the purposes of the Province, enacted that

Any person neglecting or refusing to pay the license duty payable by him shall be liable for such neglect or refusal to a fine equal to the amount of such duty and one half of such amount added thereto.

Now this provision (although in a statute passed since the prosecution in the present case was instituted, still as the statute was passed for the purpose of declaring the intent of the act of 1878 and its amendments) throws much light if such were necessary upon the construction to be put upon the 71st clause of the act of 1878, under which the prosecution in the present case was instituted, for the persons, who are subjected to penalties for infringing an act passed for the purpose of raising a revenue for the use of the province by the imposition of a tax upon certain licenses are, by legislative declaration, shown to be those only who neglect or refuse to pay the license duty payable by them respectively; now these must be persons who assume to do some or one of the acts for the doing of which the statute has required a license to be taken out upon which a specific duty has been imposed. The doing anything for the doing of which there is no license specified in the act nor any duty imposed can never be held to be an infringement of the act.

The 71st sec. of the act of 1878 as amended by the act of 1880 enacts that:

Any one who keeps, without a license to that effect still in force as hereinabove prescribed, an inn, restaurant, steamboat bar, railway buffet or liquor shop for the sale by wholesale or retail of intoxicating liquors or sells in any quantity whatsoever intoxicating liquors in any part whatsoever of this province, municipally organized, is liable for each contravention to a fine of $95, if such contravention

takes place in the city of Montreal, and $75 if it has been committed in any other part of the organized territory; and if the contravention takes place in the new organized territory, the penalty is $35 —any one who keeps without a license to that effect still in force as by law prescribed a temperance hotel is liable for each contravention to a fine of $20.

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Now in view of the object of the act being to raise a revenue for the purposes of the province by a tax upon certain licenses particularly specified in the act, required to be taken out for the doing certain things mentioned in such licenses respectively, the plain construction of the above section, is that any person who in any part of the Province of Quebec, which is municipally organized, shall in contravention of the act do any of those things enumerated in the section as only authorized to be done under a license as in the act prescribed, without the license as prescribed by the act appropriate to the things done shall be liable, &c.; and if the contravention takes place in new organized ter ritory the penalty is $35.

There can be no contravention of the act unless the thing done is a thing for the doing which one of the licenses particularly specified in the act upon which a duty is imposed is required to be taken out. If there be no license specified in the act for authorizing to be done the thing complained of, the doing such thing is no contravention of the act, and there being no license specified in the act for the doing what Ryan has been prosecuted for doing, neither he nor the Messrs. Molson & Brothers, whose servant only Ryan was, in doing what is complained of, is so liable to any prosecution as for an infringement of the act. The act in fact imposes no obligation upon brewers to take out any license to enable them to dispose of the beer manufactured by them, which is the simple character of the act complained of; in this respect, it differs in its frame, and as it appears to me designedly, from the Ontario Act which was under consideration in *Severn*

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v. *The Queen* (1), but as it imposes no tax upon brewers disposing of the beer manufactured in the manner complained of, the inferior court had no jurisdiction in the matter of the prosecution instituted against the Messrs. Molson & Brothers' drayman, and the prohibition should be ordered to be issued from the Superior Court absolutely as prayed for with costs to the petitioners in all the courts.

Appeal dismissed with costs.

Solicitors for appellant: *Kerr, Carter & Goldstein.*

Solicitor for respondent: *N. H. Bourgouin.*