1921

*May 10, 11.
*Oct. 18.

GOLD SEAL LIMITED (PLAINTIFF)..... APPELLANT;

AND

DOMINION EXPRESS COMPANY. DEFENDANT

AND

THE ATTORNEY-GENERAL FOR THE PROVINCE OF ALBERTA. (INTERVENANT)..... RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.

Constitutional law—"Canada Temperance Act," R.S.C. (1906) *c.* 152—*Validity of Part IV, as added by* (*C.*) 1919, 10 *Geo. V., c.* 8—*Proclamation—Essential provisions—Hours of polling—Curative Act of* 1921, 11 & 12 *Geo. V., c.* 20—*Retrospective effect—Civil rights—B.N.A. Act* (1867) *ss.* 91, 91 (2), 92, 121—*"Companies Act," R.S.C.* (1906) *c.* 79—*"Dominion Elections Act,"* 10 & 11 *Geo. V., c.* 46—*"The Liquor Act,"* (*Alta.*) 1916, 7 *Geo. V, c.* 4—*"The Liquor Export Act"* (*Alta.*) 1918, 8 *Geo. V., c.* 8.

Part IV, added to the "Canada Temperance Act" by c. 8, 10 Geo. V, (1919), and prohibiting the importation of intoxicating liquor into those provinces where its sale for beverage purposes is forbidden by provincial law, is *intra vires* of the Dominion Parliament under its general power "to make laws for the peace, order and good government of Canada."

Per Sir Louis Davies C.J.—The validity of that Act can also be supported upon the power of the Dominion by section 91 (2) B.N.A. Act, to make laws for "the regulation of trade and commerce." Duff J. *semble.*

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*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Mignault JJ.

Per Idington J.—Its validity could also be upheld under the powers given to the Parliament of Canada relative to "the criminal law and the procedure in criminal matters," B.N.A. Act, s. 91, s.s. 27.

Held, also, that the Alberta "Liquor Act," though some of its provisions may be *ultra vires*, is still a valid prohibitory Act within the meaning of Part IV of the "Canada Temperance Act."

Held, also, that prohibition of import in aid of temperance legislation is not within the purview of section 121 of the B.N.A. Act, as the object of that section is to ensure that "articles of the growth, produce or manufacture of any one of the provinces" shall not be subjected to any customs duty when carried into any other province. Idington J. *contra*.

Held, also, that the Dominion Parliament can enact laws which may become operative only in certain provinces or which may aid provincial legislation.

Held, also, Duff J. dissenting, that non-compliance with the imperative requirement of sub-section (g) of section 152 of the "Canada Temperance Act," that the proclamation of the Governor in Council for taking the poll should state "the day on which in the event of the vote being in favour of the prohibition, such prohibition will go into force," was fatal to the validity of all subsequent proceedings, including the orders in council bringing prohibition into force.

Per Idington J.—The proclamation was also void on the ground that it extended the hours for taking the poll beyond those expressly provided by the statute, section 101 of the "Dominion Elections Act" not being applicable. Anglin J. *semble*.

Per Duff J.—Under section 109 of the "Canada Temperance Act" and section 153 of the "Canada Temperance Amending Act," the Governor in Council had absolute discretion as to the date on which prohibition shall come into force and he was not authorized to limit the exercise of that discretion by an irrevocable decision at the time of the issue of the proclamation.

Per Sir Louis Davies C.J. and Anglin J.—The provision in Part IV that the prohibition shall be in force "if more than one-half of the total number of votes cast in all the electoral districts are in favour of such prohibition" is satisfied where more than one-half of the total votes cast in the province are in favour of prohibition, although in certain electoral districts there is a majority against prohibition; "in all the electoral districts" does not in the context mean "in each electoral district."

Before judgment was rendered in this case, the Parliament of Canada passed an Act, in 1921, 11 & 12 Geo. V., c. 20, declaring that "no order of the Governor in Council declaring prohibition in force in any province * * * shall be * * * ineffective, inoperative or insufficient to bring prohibition into force at the time thereby declared by reason of any error, defect or omission in the proclamation * * *.

1921

GOLD SEAL LIMITED v. THE ATTORNEY-GENERAL FOR THE PROVINCE OF ALBERTA.

Held, Idington J. dissenting, that this Act was *intra vires* of the Parliament of Canada and had a retrospective effect. The legislative jurisdiction which authorized the "Canada Temperance Amending Act" of 1919 supports also the interpreting statute of 1921. Its validity cannot be impugned on the ground of interference with civil rights; *per* Duff J.—as this legislation, though affecting such rights, was not passed "in relation to" these rights.

Per Idington J. (dissenting).—The curative statute of 1921 cannot retrospectively affect the civil rights of the appellant which rested on provincial law, and these rights must be determined according to the law applicable to the province as it existed before such enactment.

Judgment of the Appellate Division ([1921] 16 Alta. L.R. 113,) affirmed, Idington J. dissenting.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1) dismissing the appellant's action, on a case stated for the opinion of the court raising the question of the validity of Part IV of the "Canada Temperance Act," ch. 8 of 10 Geo. V., 1919, and of the orders in council declaring it in force in Alberta and certain other provinces.

The essential parts of the stated case are the following:

1. The defendant is a body corporate with head office at the City of Toronto, in the Province of Ontario, having an agent and carrying on business at Calgary, in Alberta, and elsewhere throughout the Dominion of Canada.

2. The plaintiff, Gold Seal Limited, is a body corporate and politic duly incorporated by letters patent of the Government of Canada, under the Companies' Act, being Chapter 79, Revised Statutes of Canada, 1906, and amendments thereto.

3. The said letters patent of the plaintiff, Gold Seal Limited, were granted the 8th day of November, 1916, and contain *inter alia* the following provisions:

(1) 16 Alta. L.R. 113 sub. nom. Gold Seal Co. v. Dominion Express Co.

(a) To engage in and carry on in Canada or elsewhere the business of wholesale and retail grocers, wholesale and retail druggists, bonded or other warehousemen, general traders, wholesale and retail merchants, brewers, maltsters, distillers, manufacturers, importers, exporters, packers or bottlers, distributors of all kinds of wines, spirits, malt liquors and of aerated, mineral and artificial waters and other drinks, of teas, coffees, baking powders, fruits, spices, drugs, all kinds of tobaccos and accessories of the tobacco business and any and all other articles and things which may be conveniently dealt in by the Company in connection with above businesses.

(b) To do all such other things as are incidental or conducive to the attainment of the above objects. The operation of the Company to be carried on throughout the Dominion of Canada and elsewhere.

* * *

5. The plaintiff has at all times since its incorporation carried on an interprovincial business throughout Canada as importer and exporter and distributor of all kinds of wines, spirits and malt liquors and has carried on the business of warehousemen in connection with its said goods.

* * *

8. On the 1st day of February, 1921, the plaintiff in the ordinary course of its business pursuant to bona fide transactions in liquor with persons in the Province of Alberta, Saskatchewan and Manitoba, respectively, duly tendered to the defendant as such common carrier the following goods:

* * *

1921

GOLD SEAL LIMITED v. THE ATTORNEY-GENERAL FOR THE PROVINCE OF ALBERTA.

10. Each of the said packages was plainly labelled so as to show the actual contents thereof and the name and address of the plaintiff, the consignor thereof, and each of the said packages was addressed to a bona fide person, the actual consignee thereof, at his private dwelling house, to be dealt with in a lawful manner, viz.: as a beverage, all of which was within the knowledge of the defendant at the time of the tender to it of the said package.

12. Each of the packages mentioned in paragraph 8 hereof contained intoxicating liquor as defined by the Canada Temperance Act.

13. The defendant has not only refused to carry the goods of the plaintiff as aforementioned but has notified the plaintiff that hereafter it will not carry any such wines, spirits, malt liquors or other intoxicating liquors from the plaintiff at Vancouver in the province of British Columbia to any person or persons or corporation in the Provinces of Alberta or Saskatchewan or Manitoba and that it will not carry any such wines, spirits, malt liquors or other intoxicating liquors from the plaintiff at Calgary in the Province of Alberta to any person or persons or corporation in the Province of Saskatchewan or Manitoba.

14. In addition to the tenders for carriage of the goods before mentioned on the 1st day of February, 1921, the plaintiff in the ordinary course of its business tendered to the defendant at Vancouver in the Province of British Columbia for delivery to the plaintiff's warehouse at Calgary, Alberta, the following goods:

* * *

16. Each of the packages mentioned in paragraph 14 hereof contained intoxicating liquor as defined by the Canada Temperance Act.

17. The defendant has notified the plaintiff that hereafter it will not carry any intoxicating liquors of any kind whatsoever to the plaintiff's warehouse at Calgary, Alberta, whether tendered for carriage by the plaintiff or any other corporation or person and whether to be used for export from Calgary, Alberta, to places where such liquors may be lawfully received or not.

18. The plaintiff is unable to procure any other means of conveyance for any of the goods herein mentioned.

19. The plaintiff is unable to carry on its business as an importer and exporter of intoxicating liquors by reason of the defendant's refusal to carry its goods.

20. The plaintiff has suffered damage in loss of profits on the said goods tendered to the defendant as aforementioned in the sum of $7,260.00, and will continue to suffer damage so long as the defendant refuses to carry intoxicating liquor for the plaintiff.

21. The defendant has refused and continues to refuse to carry the said or any intoxicating liquors to the plaintiff at Calgary, Alberta, and has refused and continues to refuse to carry said or any intoxicating liquors from the plaintiff at Calgary, Alberta, to any person in the provinces of Manitoba or Saskatchewan and has refused and continues to refuse to carry the said or any intoxicating liquors from the plaintiff at Vancouver in the Province of British Columbia to any person in the Province of Alberta on the sole ground that having regard to the provisions of the Canada Temperance Act being chapter 152 of the Revised Statutes of Canada 1906 as amended, and the Dominion Elections Act, chap. 46 of 10-11 George V., and orders-in-council, proclamations and pro-

1921

GOLD SEAL LIMITED v. THE ATTORNEY-GENERAL FOR THE PROVINCE OF ALBERTA.

ceedings in the next paragraph hereof mentioned, the defendant could not lawfully carry the said or any intoxicating liquors into the Provinces of Alberta or Saskatchewan or Manitoba.

The questions of law stated for the opinion of the court are:

1. Having regard to all matters and things mentioned in this case and having regard to the Canada Temperance Act as amended, the Dominion Elections Act, the proclamations and orders-in-council and notices and proceedings referred to in this case, is the defendant prohibited in law from receiving and carrying intoxicating liquors from a point outside the Province of Alberta to the plaintiff's warehouse at Calgary, Alberta, for reshipment in the ordinary course of business to places in Canada outside the Province of Alberta or in foreign countries where the same may be lawfully received?

* * * *

A. A. McGillivray K.C., for the appellant.—Sections 152 *et seq.*, added to the "Canada Temperance Act" in 1919 by 10 Geo. V., c. 8 are *ultra vires* of the Dominion Parliament. *Russell* v. *The Queen* (1); *Hodge* v. *The Queen* (2); *Attorney General for Ontario* v. *Attorney General for Dominion* (3); *City of Montreal* v. *Montreal Street Railway* (4); *Attorney General for Manitoba* v. *Manitoba Licence Holders' Association* (5); because

(a) they are designed to aid provincial prohibition legislation;

(1) [1882] 7 App. Cas. 829.
(2) [1883] 9 App. Cas. 117.
(3) [1896] A.C. 348.
(4) [1912] A.C. 333.
(5) [1902] A.C. 73.

(b) The initial step for bringing the prohibitive section (No. 154) into force is a resolution of the provincial legislature;

(c) Such a resolution is *ultra vires* of a provincial legislature;

(d) The amendments apply only to certain provinces—those in which a local prohibition law is in force. As legislation dependent on the "Peace, order and good government" provision of sec. 91 of the British North America Act (*Russell* v. *The Queen* (1), Dominion prohibition legislation to be valid must extend to the whole of Canada;

(e) The "liquor evil" is dealt with, not as a matter of Dominion wide importance, but as a matter of local importance in each province affected. *Attorney General for Ontario* v. *Attorney General for Canada* (2).

(f) The amendments interfere with free export and import as between provinces of articles which are the produce or manufacture of one of them, contrary to section 121 of the British North America Act;

(g) The amendments interfere with the civil rights of the individual citizen safeguarded by the provincial law to have intoxicating liquor in his private dwelling-house.

(II) that, if valid, upon a proper construction the prohibitive section, No. 154—one of the added sections—does not forbid the importation of intoxicating liquor intended for export;

(III) that sec. 154 has not been brought into force in Alberta, Saskatchewan or Manitoba,

(a) because there was not in force in such province a valid law prohibiting the sale of intoxicating liquors for use as a beverage; or,

(1) 7 App. Cas. 829. (2) [1896] A.C. 348

1921

GOLD SEAL LIMITED v. THE ATTORNEY-GENERAL FOR THE PROVINCE OF ALBERTA.

(b) because the requisite majority for prohibition has not been obtained; or,

(c) because essential steps prescribed for bringing s. 154 into force were not taken.

(d) because the proclamation of the governor in council for taking the poll did not state the day on which prohibition would go into force.

(e) because the proclamation contained different hours of polling than those specified in the statute.

IV. Retrospective operation ought not to be given to the curative statute of 1921 unless Parliament has by clear and unambiguous words made the Act retrospective. *Young* v. *Adams* (1); *Midland Railway Co.* v. *Pye* (2); *Taylor* v. *The Queen* (3); *Boulevard Heights Ltd.* v. *Veilleux* (4); *Smithies* v. *National Association of Operative Plasterers* (5); *Harding* v. *Commissioners of Stamps for Queensland* (6); *Ex parte Wilson* (7); *The Queen* v. *The County Council of Norfolk* (8).

The curative statute of 1921 can have no effect upon this case, as this court can only give the judgment which the court appealed from should have given, on the law as it stood at the date of delivering judgment. *Boulevard Heights* v. *Veilleux* (4); *Lemm* v. *Mitchell* (9)

H. H. Parlee K.C., for the respondent intervenant. The "Canada Temperance Amending Act" of 1919, is *intra vires* of the Dominion Parliament. *Attorney-General for Ontario* v. *Attorney General for Canada* (10); *Russell* v. *The Queen* (11).

(1) [1898] 67 L.J.P.C. 75.
(2) [1861] 30 L.J.C.P. 314.
(3) [1876] 1 Can. S.C.R. 65, at pp. 80, 81.
(4) [1915] 52 Can. S.C.R. 185.
(5) [1908] 78L.J.K.B. 259, at p.268.
(6) [1898] 67 L.J.P.C. 144.
(7) [1898] 67 L.J.Q.B. 935.
(8) [1891] 60 L.J.Q.B. 379, at p. 380.
(9) [1912] 81 L.J.P.C. 173.
(10) [1896] A.C. 348, at p. 371.
(11) 7 App. Cas. 829 at p. 842.

This statute does not interfere with any matters of a local or private nature.

The proclamation is not invalid, as it is in conformity with section 109 of the "Canada Temperance Act" and section 153 of the "Canada Temperance Amending Act."

The "Liquor Act" of Alberta being, as a fact, an Act in force in that province, the governor in council could issue the necessary proclamation. *The Queen* v. *Burah* (1); *Gold Seal Limited* v. *Dominion Express Company* (2).

The objections and grounds of error taken are not open to the appellant as, the vote being favorable to prohibition, the governor in council declared the Amending Act in force and the prior proceedings are not open to attack. *Ex parte Tippett* (3); *The Queen* v. *Hicks* (4); *Reg.* v. *Shavelear* (5).

The curative Act of 1921 has been made applicable to pending litigation; *Boulevard Heights* v. *Veilleux* (6); *Quilter* v. *Mapleson* (7); and the Supreme Court of Canada is bound to consider the effect of this amending statute.

It was the intention of the Parliament of Canada, when it passed the Act of 1921, to make the same retrospective.

THE CHIEF JUSTICE.—After the argument in this appeal, and after giving much consideration to the several points raised by the counsel for the appellant,

(1) [1878] 3 App. Cas. 889.
(2) 16 Alta. L.R. 113.
(3) [1892] 31 N.B. Rep. 139.
(4) [1886] 19 N.S.R. 89.
(5) [1886] 11 O. R. 727.
(6) 52 Can. S.C.R. 185.
(7) [1882] 9 Q.B.D. 672.

1921

GOLD SEAL LIMITED v. THE ATTORNEY-GENERAL FOR THE PROVINCE OF ALBERTA.

The Chief Justice.

I reached the conclusion that his contention must prevail, viz.: that the requirement of subsection (g) of sec. 152 of the "Canada Temperance Amending Act," 1919, (10 Geo. V., c. 8) was imperative and that non-compliance with it rendered all subsequent proceedings invalid. That section provided that

> in any proclamation to be issued by the Governor in Council for taking the votes of all the electors in all the electoral districts of the province for or against the prohibition of the importation or the bringing of intoxicating liquors into the province, such proclamation shall set forth * * (g) the day on which, in the event of the vote being in favour of the prohibition, such prohibition will go into force.

No such day was stated in the proclamation in question in this case and, in my opinion, its absence was fatal to the validity of all subsequent proceedings.

This conclusion of mine was concurred in by the majority of the court, but, before judgment was delivered Parliament intervened and passed the Act of 1921, 11 & 12 Geo. V., c. 20, which declared:—

> I. No proclamation heretofore or hereafter issued under Part IV of the Canada Temperance Act, as enacted by chapter eight of the Statutes of 1919, second session, shall be deemed to be void, irregular, defective or insufficient for the purpose intended merely because it does not set out the day on which, in the event of the vote being in favour of the prohibition, such prohibition shall go into force, provided it does state that such prohibition shall go into force on such day and date as shall by order in council under section 109 of the Canada Temperance Act be declared.
>
> 2. No order of the Governor in Council declaring prohibitions in force in any province, whether heretofore passed or hereafter to be passed, shall be or shall be deemed to have been ineffective, inoperative, or insufficient to bring prohibition into force at the time thereby declared by reason of any error, defect, or omission in the proclamation or other proceedings preliminary to the vote of the electors, or in the taking, polling, counting or in the return of the vote or in any step or proceeding precedent to the said order, unless it appear to the court or judge before whom the prohibition is in question that the result of the vote was thereby materially affected.

This statute made no exception from its application of proceedings in any suit pending at the time of

its passage and however unjust this may seem to be, it cannot affect the validity of the Act itself. This Act, in my opinion, is perfectly constitutional, and being so cannot be called into question by us. It cured what I held to be the fatal defect in the proclamation. That being cured, I feel bound to uphold the validity of the proceedings bringing into operation the provisions of the Act of 1919, 10 Geo. V, c. 8, prohibiting the importation into the province of Alberta of intoxicating liquors. It was admittedly not competent for the local legislature to pass such an Act and, in my judgment, the Parliament of Canada, under its general power "to make laws for the peace, order and good government of Canada," and under its enumerated powers in sect. 91 (2) (B.N.A. Act) "for the regulation of trade and commerce" had such power.

On all the other points raised by the appellant in the argument of this case, I have reached the conclusion that the appeal fails and must be dismissed.

Under all the circumstances of this case, however, I think that the appellant company is entitled to be paid its costs throughout.

IDINGTON J. (dissenting).—The appellant is a company incorporated under the "Companies' Act," being chapter 79 of the Revised Statutes of Canada, 1906, for the following purposes amongst others:— (See page 426).

The respondent is a common carrier for hire also incorporated, for the purpose of so carrying from and to all points in Canada through which the Canadian Pacific Railway runs.

1921

GOLD SEAL LIMITED v. THE ATTORNEY-GENERAL FOR THE PROVINCE OF ALBERTA.

Idington J.

Each of the said parties hereto had been carrying on its said respective business when the Alberta "Liquor Act" was passed and the amendments thereto were also passed and also when the "Liquor Export Act" of said province and amendments in question herein were passed.

The appellant's head office is in the City of Vancouver in British Columbia and there it has a private warehouse and it also, at the time in question herein, had a branch office and private warehouse in the City of Calgary in the Province of Alberta.

The admitted facts of the stated case so far as necessary to present what has to be acted upon in deciding this appeal, are stated therein as follows:—
(See page 426).

The trouble between these parties arises solely out of the question of the validity of certain enactments by the respective legislatures of Alberta and Saskatchewan and Manitoba and supplementing same, the observance or rather non-observance of the provisions of the "Canada Temperance Act," c. 152 of the R.S.C. 1906, as amended, and the failure to observe same in the orders in council, proclamations and proceedings to carry same out; and possibly also the "Dominion Election Act," chapter 46 of 10 & 11 Geo. V.

Shortly and in plain English, if the carrying of said liquor in question so tendered for carriage would have been against the law as claimed by the Government of Alberta it would have been, the respondent must be excused for its refusal, but if the legislative provisions in question, or any of them, were so *ultra vires* the legislatures of Alberta, Saskatchewan or Manitoba as to be ineffective as excuses, then in whole or in part as the case may turn out the respondent is not excused.

The questions raised are somewhat involved and may be made very confusing. It will be observed that the appellant, desirous of testing the various questions of right it sets up, made a series of tenders of shipment of liquor to the respondent and thus got a series of refusals.

The parties agree to submit their disputes to the Alberta court in the shape of a stated case, from which I have adopted above several paragraphs as setting forth essentially what is in dispute; to be illuminated so far as I can see by supplementing thereto the story of relevant law as I understand the decisions of the court above bearing thereon.

Beginning with the latest decision of said court directly bearing upon a very important part of the questions involved, we find that the Province of Manitoba passed in the year 1900 an Act for the suppression of the liquor traffic in that province.

In due course a test case was submitted to the Court of King's Bench for Manitoba by the Attorney General of that province and the Manitoba Licence Holders Association in which the question of its constitutional validity was threshed out. That court held that the legislature had exceeded its powers in enacting "The Liquor Act" as a whole.

On appeal to the Judicial Committee of the Privy Council that court reversed said decision and held that the Legislature had jurisdiction to enact said "Liquor Act." It is reported in *Attorney General of Manitoba* v. *Manitoba Licence Holders' Association* (1). In that Act there was the following clause:—

(1) [1902] A.C. 73.

1921

GOLD SEAL LIMITED v. THE ATTORNEY-GENERAL FOR THE PROVINCE OF ALBERTA.

Idington J.

119. While this Act is intended to prohibit and shall prohibit transactions in liquor which take place wholly within the Province of Manitoba, except under a licence or as otherwise specially provided by this Act, and restrict the consumption of liquor within the limits of the Province of Manitoba, it shall not effect and is not intended to affect bona fide transactions in liquor between a person in the province of Manitoba and a person in another province or in a foreign country, and the provisions of this Act shall be construed accordingly.

This was probably the result of the judgment of the Judicial Committee of the Privy Council in the case of *Attorney General of Ontario* v. *Attorney General for the Dominion* (1), where in answer to the following question

(4) has a provincial legislature jurisdiction to prohibit the importation of such liquors into the province? that court answered as follows:—

Their Lordships answer this question in the negative. It appears to them that the exercise by the provincial legislature of such jurisdiction in the wide and general terms in which it is expressed would probably trench upon the exclusive authority of the Dominion Parliament.

These judgments seem to settle much if duly observed in prohibition legislation.

But unfortunately the Legislature of Alberta after passing, in 1916, an Act taken evidently from said Manitoba Act containing same clauses as above quoted relative to importation, saw fit in 1918 to pass another Act in substitution of the former and not only omitted said section but attempted thereby and by numerous amendments to render importation impossible despite the above cited judgment of the Court above. At the same session the legislature enacted by ch. 8 an Act called "The Liquor Export Act," attempting thereby to prohibit the export thereof.

(1) [1896] A.C. 348.

I cannot refrain from suggesting that the exportation of all the liquor in or coming into Alberta from that province ought to be held as an aid in promoting the prohibition of the use of said liquor in Alberta which is all that the legislature of that province can be legitimately concerned about.

Passing that practical view of the matter I submit that the constitutional aspect of the subject matter thus brought forward seems but the counterpart of the importation question expressly passed upon by the judgment above quoted from the *Ontario Case* (1).

In short I agree with the result reached by the Alberta Court in the case of *Gold Seal Limited* v. *The Dominion Express Co.* (2), holding that Act *ultra vires*.

That brings me to the consideration of the possible bearing of what is involved herein of section 121 of the B.N.A. Act, which reads as follows:—

> 121. All articles of the growth, produce, or manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces.

This section has not, so far as I know, received anything but a casual consideration by any of the courts having to deal with such questions as are involved herein.

Indeed until the Alberta Acts, to which I have above referred, there was no legislation in which the rights established by said section would seem to have been plainly disregarded.

In the argument before us herein a reference to said section caused the inquiry to be made as to the facts of whether or not any of the said goods tendered for carriage had been of the "growth, produce, or manufacture of any one of the provinces."

(1) [1896] A.C. 348. (2) 16 Alta. L.R. 113.

921

GOLD SEAL LIMITED v. THE ATTORNEY-GENERAL FOR THE PROVINCE OF ALBERTA.

Idington J.

That fact was admitted and subsequently made to appear in a consent filed by leave of this court so far as appears therein.

Hence the question arises whether or not this section does not render *ultra vires* any effort by either local legislatures or parliament to override the said provision.

I incline to hold that it does unless in the possible case of an enactment by Parliament in the exercise of its exclusive jurisdiction over criminal law.

Certainly no single province, nor all combined, can override the plain meaning of the language used.

And when we turn to the "Regulation of Trade and Commerce," I think there are many decisions shewing that the powers to be exercised thereby are not applicable to anything that is likely to be involved in the meddling with this provision.

There may be, however, times when the products of a province may be infected with, for example, some contagious disease rendering it absolutely necessary, as matter of public safety, to forbid transportation across the lines bounding a province or a district therein.

It seems to me that the true and only remedy for such a condition of things would be the exercise by Parliament of its powers resting in its jurisdiction over criminal law and procedure in criminal matters.

The section, in my opinion, adds to the difficulties in the way of any provincial legislature seeking to bar the importation of liquor not alone from another country, which the court above expressly decided in the *Attorney General for Ontario* v. *The Attorney-General for the Dominion* (1), such legislation could not do, but also from one province where manufactured into another.

(1) [1896] A.C. 348.

Again there is, by virtue of the recent decisions of the Judicial Committee of the Privy Council in the *Great West Saddlery Company* v. *The King* (1), and other cases heard together therewith, established the doctrine that a legal entity created by virtue of the provisions in the "Dominion Companies Act" above cited, has rights, despite local legislation, such as no individual citizen would think of asserting.

It adds to the strength of appellant's case so far as Alberta and much of Saskatchewan legislation is concerned.

Until recently it had been generally supposed to be quite clear that corporations created by Parliament in virtue of its exclusive jurisdiction, for the due execution of any of the specific purposes, falling within the enumerated classes of subjects defined in section 91, of the B.N.A. Act, as, for example, banks and others, could be assigned such rights over property and civil rights as Parliament chose to confer.

On the other hand it had been as generally assumed that other corporate creations of Parliament rested upon its residuary powers alone and could not, as regards property and civil rights, exceed in capacity the powers of the private citizen when operating in any province, unless so far as the legislature of the province so concerned, in virtue of its exclusive authority over property and civil rights, had otherwise enacted.

Hence at a very early date the decision in the *Citizens Insurance Co.* v. *Parsons* (2), maintained the right of a provincial legislature to declare, by virtue of its said exclusive power over property and civil rights, the contractual capacity of any insurance company opera-

(1) [1921] 2 A.C. 91. (2) [1881] 7 App. Cas. 96.

1921

GOLD SEAL LIMITED v. THE ATTORNEY-GENERAL FOR THE PROVINCE OF ALBERTA.

Idington J.

ting in the province and the effective limitations of its contract and conditions therein, whether the company had been incorporated by the Dominion Parliament or elsewhere.

That I respectfully submit was an exercise by a provincial legislature of a power as great as or greater than to refuse a company, unless licensed, the right to assert its pretensions in the courts of its province.

The item of "Regulation of Trade and Commerce" in the enumeration of the class of exclusive powers assigned Parliament was pressed then and therein as it has been in numerous cases since, without availing the companies anything.

It was again brought forward in the *John Deere Plow Co.* v. *Wharton* (1).

The reasoning upon which the court proceeded is now declared, in the recent judgment above referred to, to have rested upon said item No. 2 of the British North America Act, though upon considering it in same cases when before us I doubted that intention, for reasons I set forth in that case (2).

The pith of all that was necessarily involved in the *John Deere Plow Case* (1), was the refusal of the authorities in British Columbia to register the company unless and until it changed its name. I humbly conceived that it was not necessary in order to rectify such a wrong to hold that the item 2 of sec. 91 was the basis of the existence of all Dominion corporations save in specified cases otherwise covered by the enumeration of classes in said section.

Unfortunately the judgment of the court above in said *Great West Saddlery Case* (3) and other cases makes it clear that there can no longer be any hope of

(1) [1915] A.C. 330.

(2) [1919] 59 Can. S.C.R. 19, at pp. 30, 31.

(3) [1921] 2 A.C. 91

resting the creation of such corporations upon anything save in said item No. 2, relative to "trade and commerce," and that we cannot properly shrink from the very grave consequences of such a departure from the old view that the basis of such incorporation as there in question was the residual power of Parliament and not the item No. 2 relative to the regulation of trade and commerce as now asserted.

It is not our province to reconcile the view taken in the *Parson's Case* (1) and other cases with the latest exposition and decision pursuant thereto, but to apply the latest decision when no way of escape therefrom seems possible as bearing upon the issues raised herein.

It would therefore seem clear that a Dominion incorporation such as appellant, engaged merely in the import and export business, cannot by virtue of local legislation be debarred from carrying on its business.

Honestly doing such as it professes to have been doing could not necessarily infringe upon the prohibition of the local law against the consumption or selling of intoxicating beverages in the Province of Alberta.

Neither would the carrying by respondent for appellant to another province be necessarily against, or a violation of, the prohibitory legislation thereof, so long or far as such legislation could be held *intra vires*.

For the several foregoing reasons I am of the opinion that the refusal of the respondent to carry appellant's goods in question cannot be upheld unless by virtue of some enactment of Parliament.

It is contended by respondent that such legislation had been effectively enacted at the time in question.

(1) 7 App. cas. 96.

1921

GOLD SEAL LIMITED v. THE ATTORNEY-GENERAL FOR THE PROVINCE OF ALBERTA.

Idington J.

Have each and all of the foregoing difficulties in the way of a provincial legislature, rendering illegal such service as the respondent herein was asked by appellant to perform, been so overcome by Dominion legislation which has become effective and is not *ultra vires*.

That seems to me the crucial question herein.

10 Geo. V, ch. 8 amending the "Canada Temperance Act," if its several provisions for bringing it into force had been duly observed, in my opinion would have had such effect so far as Alberta was concerned.

The tender made for carriage of such goods from British Columbia into any of the other provinces in question herein, wherein said amendment has not been made effective, or elsewhere permitting of lawful carriage there of course stands good.

The appellant raises many objections to the validity of the proceedings to bring the amendment into effect.

In the first place its counsel points out that the same is only applicable to a

> province in which there is at the time in force a law prohibiting the sale of intoxicating liquors for beverage purposes.

Although, for the reasons I have pointed out, the legislation in Alberta on the subject has exceeded I had almost said, all bounds, by enacting provisions that seemed in conflict with the law so declared by the court above in the *Ontario Case* (1), and in other respects which I need not repeat, yet when all these unwarranted attempts are blotted out there still remains a substantial enactment of what was taken from the Manitoba Act held valid, to constitute what might answer to the descriptive terms I have quoted as the basis for a further Dominion Act such as 10 Geo. V, ch. 8.

(1) [1896] A.C. 348.

Another objection taken is that Parliament cannot supplement and aid provincial legislation. I am of the opinion that it can and in doubtful cases of the respective jurisdiction of the provincial legislature and Dominion Parliament it is often advisable that there should be concurrent legislation to overcome such doubt or difficulty.

Again it is contended that Parliament cannot enact a law which may only become operative in a part of Canada.

I am quite unable to understand such a contention in face of the fact that the "Canada Temperance Act," which distinctly provided for counties and other municipalities by the votes of the electors, bringing same into force it should then and there become effective, and such conditional legislation was upheld in the *Russell Case* (1).

The condition of its becoming operative is by this amendment made dependent upon the vote of the electorate of the province to be affected, instead of being confined to that of the county or other municipality in question, rendering it so.

The conditional character of the legislation is in principle the same. And there is a very good reason for Parliament providing such a course. It requires the support of public opinion in any district affected by such legislation in order to render its enforcement effective, instead of becoming a mockery leading to evil results of a most undesirable kind.

Indeed it may be doubted whether or not the support of a bare majority of those voting can be relied upon as a safe guide in that respect. That, however, is a question with which we are not concerned. All we have to deal with is the existence of the power to enact such a conditional form of legislation.

(1) 7 App. Cas. 829.

1921

GOLD SEAL LIMITED v. THE ATTORNEY-GENERAL FOR THE PROVINCE OF ALBERTA.

Idington J.

A number of other objections of less import made by counsel for appellant seem to me answered by the same mode of reasoning I have adopted as to one or more of the foregoing objections which I have specifically dealt with out of respect to the arguments presented.

Assuming for argument's sake, as has been suggested, that parts of the Alberta Acts trespass on the field of criminal law, when the Dominion Parliament which is possessed of absolute power over "criminal law and procedure in criminal matters," sees fit to pass an enactment which, with the rest of the "Canada Temperance Act," may well fall within and be attributed to an exercise of that source of its jurisdiction for so enacting though their Lordships in the court above in the *Russell Case* (1), assigned another as preferable, the room for dispute seems to me ended.

Even if to enforce that enacted within the reserved power of "peace, order and good government" I submit the powers given relative to "criminal law and procedure in criminal matters" may be relied upon as well as the other, if inherently applicable.

There remains a further ground of objection taken by the appellant that the right of export is not touched by the amendment in question and hence the importation for the mere purpose of export is for a commercial purpose within the meaning of the amendment, sec. 154, s.s. 3.

This certainly is a fairly arguable point but I incline to think, having regard to what subsection (c) of section 154 regarding the transportation of liquor through the province and a doubtful import of the word "commercial" when read in connection with the

(1) 7 App. Cas. 829.

rest of the proviso in which it appears, it was the evident purpose of the amendment, read as a whole, to exclude any other form of export but that provided by through transportation.

The final point made that the statutory provisions made for the amendment coming into force have not been duly followed seems to me fatal to the said proceedings.

The amended Act in question expressly provides that the Governor in Council

> may issue a proclamation in which shall be set forth
>
> (a) The day on which the poll for taking the votes of the electors for and against the prohibition will be held;
>
> (b) that such votes will be taken by ballot between the hours of nine o'clock in the forenoon and five o'clock in the afternoon of that day;
>
> (c) the day on which, in the event of the vote being in favour of the prohibition, such prohibition will go into force.

It seems to me idle to try to minimize the effect of these provisions and to try to justify such plain departures therefrom as were taken by extending, in the case of Manitoba and part of Alberta, the hours for taking the poll and also failing in each of the three provinces to declare when the Act was to come into force.

In the case of Manitoba the extension of the hours for taking the poll was directed by the proclamation in absolute disregard of the express provisions in subsection (b) above quoted.

In the case of Alberta the disregard thereof was the work of a returning officer who presumed to assert, contrary to the fact, in his notice to the electors, that the extended hours had been named by the proclamation.

Can such elections be held to be in due conformity with the imperative basic conditions precedent, laid down in the statute as the only method of procedure which should be taken to enable the constituted authorities to take steps for bringing that statute into force and rendering it effective?

1921

GOLD SEAL LIMITED v. THE ATTORNEY-GENERAL FOR THE PROVINCE OF ALBERTA.

Idington J.

The word "shall" used in declaring what such a proclamation should, if ventured on, contain, shews the peremptory nature of the enactment.

That governed items therein from (a) to (g) and the only permissive thing, in way of adding thereto, was as follows

(h) any further particulars with respect to the taking and summing up of the votes of the electors as to the Governor in Council sees fit to insert therein,

which was not acted upon.

I cannot find existent in the legislation providing for this peculiar election, or elsewhere, any curative or validating enactment anticipating and providing for such gross or any departures from the express provisions of Parliament requiring the hours stated of voting (nine to five) to be observed and the date of the coming into force to be named.

The only such enactment cited and relied upon is section 101 of the "Dominion Elections Act" assented to 1st July, 1920, which by its first subsection enacted as follows:—

101. (1). Whenever under the Canada Temperance Act a vote is to be taken, the procedure to be followed shall, in lieu of the procedure therein directed, be the procedure laid down in this Act with such modifications as the Chief Electoral Officer may direct as being necessary by reason of the difference in the nature of the question to be submitted, and with such omissions as he may specify on the ground that compliance with the procedure laid down is not required.

This was enacted two months after the respective proclamations for Alberta and Saskatchewan, calling the election for taking the required poll, to bring into force the amendment in question to the "Canada Temperance Act," had been issued.

In each of these proclamations the hours named within which the votes were to be taken were nine o'clock in the forenoon and five o'clock in the after-

noon. In the case of Manitoba the proclamation was issued on the 14th of Aug., 1920, and the hours named within which the votes were to be taken were, as to urban polling subdivisions, between six o'clock in the forenoon and six o'clock in the afternoon, and as to rural polling subdivisions, eight o'clock in the forenoon and six o'clock in the afternoon. The said section 101 could not by its terms be made applicable to such a change of the said imperative conditions I quote, and the Chief Electoral Officer never attempted to so apply it—though acting thereon in other regards not in question.

It is to be observed that the hours within which voting must take place had been peremptorily fixed by the enactment and that no one can now tell what the exact result would have been had that been adhered to; and also that the delegated duty of fixing the time when its result was, if favourable, to become law was imperatively required to be declared by order-in-council previous to such voting and stated in the proclamation calling the election.

These departures from the express conditions of bringing the statutes into effect were, to my mind, fatal errors and rendered ineffective the attempt to bring the Act into force in said three provinces, and thus left the appellant's tenders of goods for carriage by respondent so effective, at the time when made, as to entitle the appellant to succeed therein.

It is true that Parliament has, after the argument herein and pending the delivery of judgment thereon, enacted a statute for the purpose of curing the effect of such errors.

1921

GOLD SEAL LIMITED v. THE ATTORNEY-GENERAL FOR THE PROVINCE OF ALBERTA.

Idington J.

Clearly that statute cannot retrospectively affect the civil rights of appellant though Parliament proceeds in a general way therein to deal with pending cases as if possessed with plenary powers over property and civil rights. With great respect I cannot so hold or maintain the attempt to take away the rights of a litigant which must be determined by the relevant law of the province bearing thereon where its cause of action arose, and, I submit, cannot be properly affected by any enactment of Parliament.

There might arise cases of corporate bodies created within and by virtue of the powers assigned specifically by the enumerated items of section 91 of the B.N.A. Act to the Dominion alone, and solely dependent for their civil rights thereon, when a judgment founded thereon might be affected by retrospective legislation, but this is not such a case. The appellant's rights herein rested entirely, save as to the important fact of its incorporation, on provincial law, as to property and civil rights which were, save as to its incorporation, not conferred by Parliament and over which it is powerless either to impair or take away. I do not think the destruction of limitation of any of the powers of the legal entity of appellant can be held as within the purview of the said Act. I cannot conceive that Parliament intended to discriminate against a creation of its own when clearly it intended all to be treated alike. Private citizens and provincial or other than Parliament's non-corporate creations, clearly could not be affected by such legislation.

It would, in my view, be improper to express any opinion as to the effect of this curative legislation beyond dealing with the civil rights of the parties hereto.

1921

GOLD SEAL LIMITED v. THE ATTORNEY-GENERAL FOR THE PROVINCE OF ALBERTA.

Idington J.

In my opinion the appellant is entitled to have the judgment from us which the court below should have pronounced, or, in other words, determine the civil rights of the parties by the law applicable to the province as it stood before this enactment.

We have no jurisdiction to determine otherwise.

It is suggested by the intervenant's counsel in a supplementary factum, that though we have by the "Supreme Court Act" to declare the law as the court below should have done, yet this amendment by Parliament which created the court and so defined its limitations of jurisdiction, must have intended by this enactment to have changed, for the purposes of this case, that limitation.

I do not find in the Act in question any such intention either express or implied.

The Act, so far as I can understand it, was to my mind so framed in this regard by reason of haste and accidental oversight of the limited powers of Parliament over property and civil rights.

Let us assume for a moment that Parliament had at any time enacted, quite independently of this conditional form of legislation, by way of referendum, as I conceive would be quite competent for it, if rested on its exclusive jurisdiction over criminal law, a statute prohibiting the import or export of liquor, and pretended therein to deal with the rights theretofore acquired by any one over property or civil rights resting solely upon the provincial legislation in virtue of the exclusive jurisdiction of the provincial legislatures over property and civil rights; and to take such rights away by merely making such enactment retrospective, as is attempted by the Act in question herein, how long would argument in support of such legislation be listened to by any court acquainted with the B.N.A. Act?

1921

GOLD SEAL LIMITED v. THE ATTORNEY-GENERAL FOR THE PROVINCE OF ALBERTA.

Idington J.

Of course if Parliament acting upon item No. 2 and asserting an obvious intention to destroy or limit the powers of its creature resting thereon, I conceive it might do so even if retroactive legislation of another character than presented for consideration herein.

Or suppose the appellant had chosen to pass this court and go to the court above, is it conceivable that it would, if taking the view I do as to the effect of non-observance of the conditions of bringing into operation this referendum style of legislation, feel bound to hold such an infringement upon property and civil rights as they existed before the enactment of such an Act as binding it?

I am of the opinion that on the stated case the appellant is entitled to succeed and that the appeal should be allowed with costs.

DUFF J.—I concur in the view of the majority of the Appellate Division that the proclamation was not invalid. The evidence furnished by the parent enactment ("The Canada Temperance Act") as well as by the amending statute of 1919 appears to point rather definitely to the conclusion that the order in council to be passed after the vote has been taken is intended to be the operative instrument by which the prohibitions are to be brought into force and the instrument governing the date upon which they are to become law.

Consider first the provisions of the parent Act, the relevant section being section 109. The language is unqualified. Where a petition has been adopted, the section provides

> the Governor in Council may at any time after the expiration of 60 days from the day on which the same was adopted declare that Part II of this Act shall be in force and take effect

on the day on which the licenses then in force shall expire if such day be not less than 90 days from the "date of such order in council" and if less "then on the like day in the following year," and "upon, from and after that day" Part II of the Act shall become and be in force. It is to be observed that the section commits it to the uncontrolled discretion of the Governor in Council to determine the time when the order in council shall pass and it is by reference to this date that the time is fixed when the prohibitions are to come into force.

The second subsection (which applies where there are no unexpired licences) in terms entrusts the Governor in Council with absolute authority to decide when Part II shall come into operation.

This authority of the Governor in Council which arises only after the vote has been taken seems to extend to all cases; and it would extend, I think, to any case in which by the proclamation, a specified day has been named.

The fact, no doubt, that by section 2 the Governor in Council is authorized to state in the proclamation the date upon which, in the case of a favourable vote, Part II is to come into operation gives colour to the suggestion that it is intended to authorize the Governor in Council to decide upon that date in advance. But the tenor of section 109 seems opposed to such an inference. It is the order in council in every case which brings the prohibitions into force and it is the date of the order in council which in every case automatically determines the time when they are to take effect. The section in pointed terms authorizes the Governor in Council to act "at any time" after the expiration of 60 days from the adoption of the petition and it would seem singular indeed, if his discretion

1921

GOLD SEAL LIMITED v. THE ATTORNEY-GENERAL FOR THE PROVINCE OF ALBERTA.

Duff J.

was to be controlled by the naming of a date in the proclamation, that some reference to that contingency does not appear in section 109. It may be suggested, of course, that votes might conceivably be influenced by the circumstance that the prohibitions are to come into force upon this or that date and that to change the date would involve something like a breach of faith. But giving the fullest weight to that suggestion it seems to be quite overborne by the obvious inconveniences entailed by adopting the alternative construction under which all the labour and expense of taking the vote might be wasted by the accident of the proceedings being prolonged (in consequence, for example, of legal controversies) beyond the date named in the proclamation. It is difficult to suppose such a result to have been contemplated.

The language of section 153 of the "Canada Temperance Amending Act" is just as pointed and imposes an imperative duty upon the Governor in council to "declare the prohibition in force" if the vote proves to be favourable to the petition.

The inconvenience, indeed, of the alternative construction is perhaps even more obvious in the case of proceedings under the amending Act. Harvey C.J. has alluded to circumstances indicating the impracticability of fixing in advance the day upon which the Governor in Council is to act after the result of the poll is finally known. Needless to say, there is nothing fanciful in these suggestions; and where the area (as under the amending Act) in which the vote is to be taken is a whole province they are of the gravest practical importance.

For these reasons I think the weight of argument favours the conclusion that the discretion of the

Governor in Council under section 109 and under section 153 is not fettered by anything stated in the proclamation as to the date when the prohibitions are to come into force, in other words, that he was not authorized under the original Act or under the amending Act to limit the exercise of that discretion by an irrevocable decision at the time of the issue of the proclamation.

It seems accordingly that if a date be named it must be as a provisional date subject to the possibility, at all events, of any change which the Governor in Council may consider necessary in the exercise of his judgment after the result of the vote has been ascertained; and if that be the manner in which this machinery was intended to operate it would seem to be in furtherance of the intention of Parliament to say simply, as does the proclamation in question, that the prohibitions shall come into force in accordance with the order of the Governor in Council under section 109 of the Act.

The fact that a direction is mandatory in form is not conclusive, of course, as to the result of non-compliance; and the statute in this case does not assist us by any express provision. The duty of the court therefore is to collect the intention of Parliament by examining the whole scope of the enactment. *Liverpool Bank* v. *Turner* (1). As Lord Penzance said in *Howard* v. *Bodington* (2):—

> You must in each case look to the subject matter; consider the importance of the provision (in question) and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory.

(1) [1860] 2 deG. F. & J. 502. (2) 2 P.D. 203 at p. 211.

1921

GOLD SEAL LIMITED v. THE ATTORNEY-GENERAL FOR THE PROVINCE OF ALBERTA.

Duff J.

Considering the matter in this aspect and guided by the considerations indicated above, my conclusion must be that even if the appellants are right in their view that section 152 directs the insertion in the proclamation of the date of coming into force of the prohibitions (specified by the day of the month), then the direction is what is called "directory" only, that is to say, there is no solid ground for implying that nullity shall be the consequence of disobedience.

The prohibitions of the amending Act of 1919 were therefore duly brought into force if the Parliament of Canada had authority to enact them and if the other conditions mentioned in the Act have been fulfilled, namely, that there shall be a "law prohibiting" the sale of intoxicating liquor "in force" in the Province of Alberta and that the result of the vote shall be favourable.

I agree with the reasons given by the Chief Justice in the court below that both these conditions were satisfied.

The capacity of the Parliament of Canada to enact the amendment of 1919 is denied. With this I do not agree. And, first, I am unable to accept the contention founded upon section 121 of the B.N.A. Act; the phraseology adopted, when the context is considered in which this section is found, shews, I think, that the real object of the clause is to prohibit the establishment of customs duties affecting interprovincial trade in the products of any province of the Union.

It is not strictly necessary to express any opinion upon the point whether this statute can be supported as passed in exercise of the power given by the second enumerated head of section 91. It has been held that the literal meaning of the words "trade and commerce" must be restricted in order to give scope

for the exercise of the powers committed to the provinces by section 92. The legislation of 1919, however, deals only with imports into the provinces to which it applies and it is legislation clearly, I think, beyond the authority of a province to enact. The reason mentioned therefore seems to fail of application. It has been held also that the regulation of a particular business in each of the provinces throughout the Dominion by a general system of Dominion licensing is not a "regulation of trade and commerce" within the meaning of the phrase as here employed. That rests, in part at least, upon the ground that such a construction would give to No. 2 a scope including subjects specially dealt with by other heads of section 91, banking, e.g. and shipping. This is an objection which would appear to have little force as applied to legislation dealing only with foreign or interprovincial trade and it seems at least much open to question whether the general elucidation of the language of No. 2 in *Parson's Case* (1), when properly construed, contemplates the exclusion of legislation dealing with exports or imports even of a specified commodity from the ambit of the authority arising under that head; and in the *Insurance Act Reference* (2), it was expressly held that an enactment requiring a foreign company to take out a licence before carrying on the business of insurance in Canada was an enactment within the category of "regulation of trade and commerce."

A much more serious objection, however, arises from the decision of the Lords of the Judicial Committee in *Attorney General for Ontario* v. *Attorney-General for Dominion* (3). It was there held that the

(1) 7 App. Cas. 96. (2) [1916] 1 A.C. 588.
(3) [1896] A.C. 348 at p. 363.

1921

GOLD SEAL LIMITED v. THE ATTORNEY-GENERAL FOR THE PROVINCE OF ALBERTA.

Duff J.

authority touching the regulation of "trade and commerce" given by section 91 contemplates the passing of laws with the view to the preservation of the thing to be regulated and not with a view to its destruction and consequently that a law abolishing all retail transactions in liquor within a specified area could not be supported as a law passed in the exercise of this power.

It is undoubted that the Act of 1919 was passed in aid of provincial liquor enactments and in substance aims at the abolition of transactions in liquor within the provinces to which it applies, and that being the case there is of course much force in the suggestion that the Act of 1919 could not be sustained as a valid enactment in "regulation of trade and commerce" consistently with their Lordships' decision.

In a wider view it might be well suggested that a law prohibiting the export or the importation of a specified commodity or class of commodities from or into a particular province is, when considered in its bearing upon the trade and commerce of the Dominion as a whole, a law passed in "regulation of trade and commerce;" and it may be open to doubt whether their Lordships' decision on the reference of 1896 ought to be regarded as applying to an enactment solely directed to the prohibition of such exports or imports.

On the other hand the enactments of the amending Act are not enactments dealing with a matter falling within any of the classes of matters exclusively assigned to the provinces by section 92 and they are within Dominion competence if they are enactments touching "the peace, order and good government of Canada" which seems too clear for argument. It is argued that such an enactment must be one whose operation extends to the whole of Canada—which this enactment

does, conditionally at all events. But I am not prepared without further examination of the point to agree that an enactment in the terms of the Act of 1919 confined in its operation to one province could not be sustained as relating to "the peace, order and good government of Canada." I pass no opinion upon that point.

In this view it is not necessary to pass upon the question of the validity of the statute of 1921 but as it has been the subject of discussion by other members of the court I will give my opinion upon it.

Clearly, I think, if the Dominion had power to pass the Act of 1919 it had power by a subsequent enactment to construe it with the consequence that all courts would be bound to observe the construction so placed upon it. That is so because the power of legislation is plenary and it could not be seriously disputed that given legislation being valid as dealing with a subject within the jurisdiction of the Dominion Parliament a subsequent interpreting statute would equally be valid provided of course that the interpreting statute did not so entirely change the character of the legislation as to cause it to operate within a field withdrawn from Dominion authority. If the enactment as construed could validly have been passed then the construing statute is *intra vires*. Could the provisions of 1921 have been enacted as part of the statute of 1919 without impairing the validity of this last mentioned statute? The answer to this question must be in the affirmative except at all events as to the third section. And it is no objection that pending litigation is affected since that is only one of the consequences necessarily involved in the full exercise of the authority to pass legislation of the type in question.

1921

GOLD SEAL LIMITED v. THE ATTORNEY-GENERAL FOR THE PROVINCE OF ALBERTA.

Duff J.

The fallacy lies in failing to distinguish between legislation affecting civil rights and legislation "in relation to" civil rights. Most legislation of a repressive character does incidentally or consequentially affect civil rights. But if in its true character it is not legislation "in relation to" the subject matter of "property and civil rights" within the provinces, within the meaning of section 92 of the British North America Act, then that is no objection although it be passed in exercise of the residuary authority conferred by the introductory clause. Ancillary legislation permissible as in exercise of the powers given by the enumerated heads of 91 may be legislation of a different order, that is to say, it may be legislation which, if enacted by a province, would be legislation "in relation to" some at least of the matters (civil rights, for example) falling within the classes of subjects specified in section 92. *Tennant* v. *Union Bank of Canada* (1). The parent Act as well as the amending Act affect property and civil rights although they are not enactments in relation to that subject. The amending Act makes the importation of liquors into Alberta unlawful and accordingly a common carrier could not either under the provisions of the Dominion "Railway Act" or by the common law be required to accept liquor for shipment into Alberta. The right which otherwise the owner of the liquor would have possessed has therefore ceased to exist because the Dominion Parliament has validly declared the act he could before have required to be done an unlawful act. The legislation does not deal with the duties of common carriers as such but the law as declared by it necessarily has a very important effect upon the duties of common carriers.

(1) [1894] A.C. 31.

So the Act of 1921 declares that certain acts shall be deemed to have been unlawful and it follows that a court holding that the importation would have been unlawful must, as a consequence, hold that the right set up by the shipper did not exist.

It is not quite clear indeed whether or not the right set up in this case is not really a right derived from Dominion legislation, but that is of little importance. Neither by the law of British Columbia nor by that of Alberta could a common carrier be required to do an act which by competent legislative authority had been declared to be illegal.

Section 3 presents a different question. It may well be argued that it is legislation relating to civil rights or to the administration of justice and not within the competence of Parliament to enact in exercise of the residuary power. I express no opinion upon this as there has been no argument upon it.

For these reasons the appeal should, in my opinion, be dismissed with costs.

ANGLIN J.—The plaintiff company is incorporated under the Dominion "Companies' Act" and empowered to engage throughout Canada, in buying, selling, importing and exporting intoxicating liquors. The defendant company is a common carrier and operates between the points to and from which the liquors, of which the carriage is in question in this action, were consigned. The plaintiff sues to recover damages for alleged wrongful refusal by the defendant to accept for transport four consignments of intoxicating liquors, within the meaning of that term in the "Canada Temperance Act," which were duly tendered to it. One of these shipments, tendered at Vancouver, British

1921

GOLD SEAL LIMITED v. THE ATTORNEY-GENERAL FOR THE PROVINCE OF ALBERTA.

Anglin J.

Columbia, was, to the knowledge of the defendant, intended for export by the plaintiff from its warehouse at the City of Calgary in the Province of Alberta to which it was consigned. Each of the other three shipments was, to the defendant's knowledge, *bona fide* consigned to an individual at his private dwelling house where the provincial law in each instance permitted such liquors to be received and used.

The material facts are stated in a special case submitted, pursuant to an order of a judge of the Supreme Court of Alberta, for the opinion of the Appellate Division as to the legality of the defendant's refusal to carry. If the plaintiff should be entitled to recover in respect of the rejection of the four shipments the parties have agreed that the damages sustained by it amounted to $7,260 and that judgment should be entered for that sum.

It is stated in the special case that the defendant justified its refusal to accept the tendered shipments solely on the ground that, having regard to the "Canada Temperance Act" (R.S.C. [1906], c. 152), as amended in 1919, and the Dominion "Elections Act" (10 & 11 Geo. V, c. 46) and certain orders in council, proclamations and proceedings purporting to have been made, issued and taken by virtue of those statutes, it could not lawfully carry intoxicating liquors into the several provinces for which the shipments were respectively destined, viz.: Alberta, Saskatchewan and Manitoba.

The Appellate Division of the Supreme Court of Alberta by a majority judgment determined the issue so presented in favour of the defendant and dismissed the action. From that judgment the present appeal is brought.

In the provincial court counsel were heard representing the parties to the litigation and the Attorney General of Alberta, who, upon being notified of the hearing by direction of the court, intervened to oppose the plaintiff's contention. The Minister of Justice, although likewise notified, was not represented. In this court counsel appeared for the plaintiff as appellant and for the Attorney General of Alberta as intervenent. Neither the defendant nor the Minister of Justice was represented.

The appellant urged the following grounds of appeal:

(The learned judge here sets out the grounds of appeal as the same are stated at pages 430 *et seq. supra*).

But for legislation (11 & 12 Geo. V, c. 20), passed since the argument I should have been prepared to give effect to the appellants' contention that non-compliance with the imperative requirement of clause (g) of s. 152 of the "Canada Temperance Act"—that the proclamation of the Governor in Council for taking the poll should state

> the day on which, in the event of the vote being in favour of the prohibition such prohibition will go into force—

was fatal to the validity of all the subsequent proceedings, including the orders in council bringing prohibition into force. This would have meant that they would recover judgment for $7,260 and costs. Parliament has, however, by an Act, so framed as to admit no doubt as to its construction in this particular ordained (s. 2) that, notwithstanding any such defects, those orders in council shall be and shall be deemed to have been valid, effective and sufficient from their respective dates.

Although at first disposed to doubt the power of Parliament thus to take away the civil rights of litigants, further consideration has satisfied me that,

1921

GOLD SEAL LIMITED v. THE ATTORNEY-GENERAL FOR THE PROVINCE OF ALBERTA.

Anglin J.

since such interference with civil rights, though no doubt intended (vide s. 3), is merely an incidental consequence of the legislation, its validity cannot be successfully impugned on that ground. The legislative jurisdiction which authorized the Act of 1919 will likewise support the auxiliary statute of 1921—at all events sections 1 and 2 thereof.

This recent Act also overcomes any objection to the orders in council bringing prohibition into force based on prolongation of the hours of polling beyond those prescribed by clause (b) of sec. 152. There is nothing in the record to shew that the result of the vote was materially affected either by that irregularity or by the omission from the proclamation of the date on which prohibition should go into force.

Interference by *ex post facto* legislation with rights involved in pending legislation, even when deemed necessary in the public interest, is to be deprecated. Where such interference is not necessary to the attainment of the object of the legislation it is difficult to conceive of any defence for it. Here, if my view of the fatal effect of the omission from the proclamation of the Governor in Council of the date on which prohibition should come into force be correct, the plaintiffs' right to recover $7,260 has been taken away. The purpose of the act of June last—to prevent the loss of the thousands of dollars expended in taking polls in several provinces—would have been fully attained had a proviso saving the rights of the plaintiffs and others in like plight been inserted in it.

The legislation of 1919 when brought into force prohibits the importation of intoxicating liquor into those provinces where its sale for beverage purposes is forbidden by provincial law. It was enacted as Part IV (secs. 152 to 156) of the Canada "Temperance

Act" (R.S.C. [1906], c. 152) and was passed in order to supplement and make more effective such provincial prohibitory laws. Its true character therefore is temperance legislation rather than legislation regulating the importation of liquor as a matter of trade and commerce. It prohibits; it does not regulate. Moreover, it deals with trade in only one class of commodities. In view of these facts Part IV itself should be regarded, as the Canada "Temperance Act" has been (*Attorney General for Ontario* v. *Attorney General for Dominion* (1); *Attorney-General for Canada* v. *Attorney General for Alberta* (2), rather as an exercise of the general power of Parliament to pass laws for the "peace, order and good government of Canada," than ascribable to its powers to legislate for "the regulation of trade and commerce" (the only enumerated head invoked to support it) or authorized by any other of the enumerated powers conferred by s. 91 of the B.N.A. Act.

It is common ground that the prohibition of importation is beyond the legislative jurisdiction of the province. It is not covered by any of the enumerated heads of s. 92. It lies outside of the subject matters enumeratively entrusted to the provinces under that section and upon it, therefore, the Dominion Parliament can legislate effectively as regards a Province under its general power "to make laws for the peace, order and good government of Canada". *Attorney General for Canada* v. *Attorney General for Alberta* (2). The "Canada Temperance Act" itself, the validity of which was upheld in *Russell* v. *The Queen* (3), Lord Haldane assures us is an instance of such a case.

(1) [1896] A.C. 348, at pp. 362-3. (2) [1916] 1 A.C. 588, at p. 597.
(3) 7 App. Cas. 829.

1921

GOLD SEAL LIMITED v. THE ATTORNEY-GENERAL FOR THE PROVINCE OF ALBERTA.

Anglin J.

The facts that the legislation of 1919 was designed to aid provincial prohibition legislation, that it applies only to certain provinces,—those in which a local prohibition law is from time to time in force,—that it deals with the liquor evil as a matter of local importance in each province affected, and that it interferes with civil rights of the individual citizen safeguarded by the provincial law therefore do not afford arguments against its validity. The propriety of concurrent or supplementary legislation to cover a field which lies partly within the jurisdiction of the provincial legislatures and partly within that of the Dominion Parliament was indicated by Lord Atkinson in delivering the judgment of the Judicial Committee in *City of Montreal* v. *Montreal Street Railway* (1).

Nor do I see any force in the objection that the initial step towards bringing the prohibitive section 154 into force is a resolution of the provincial legislature. I see no reason why a provincial legislature may not thus intimate its opinion that concurrent action by the Dominion authorities is desirable. Under the "Canada Temperance Act" the initial step is a petition of one-fourth of the electors of the county or city in which it is sought to bring that Act into force.

Neither is the legislation under consideration in my opinion obnoxious to s. 121 of the B.N.A. Act. The purpose of that section is to ensure that articles of the growth, produce or manufacture of any province shall not be subjected to any customs duty when carried into any other province. Prohibition of import in aid of temperance legislation is not within the purview of the section.

(1) [1912] A.C. 333 at p. 346.

The prohibition of import and of inward transportation by sec. 154 is absolute. No exception is made in favour of liquor intended for export from the province into which it is sought to take it. I find nothing to justify the reading of such an exception into the statute.

The two remaining grounds taken by the appellants were that sec. 154 was not in force in the province of Alberta (a) because the law of that province prohibiting the sale of intoxicating liquor as a beverage is *ultra vires* in that it prohibits the holding within the province of liquor for export therefrom, and (b) because a majority in favour of prohibition was not obtained in each of the electoral districts of the province.

(a) The stated case submits no question as to the Alberta "Liquor Act." That statute is not set up as a justification of the defendants' refusal to accept the tendered shipments. In fact it is not mentioned in the stated case at all. Its invalidity was raised in argument by counsel for the plaintiff solely to support his contention that because there was not a valid prohibition law in force in Alberta a condition precedent to the Dominion prohibition of import being brought into effect in the province did not exist. If the Alberta "Liquor Act" should be construed as prohibiting the holding within that province of intoxicating liquor for export (having regard to the provisions of the "Liquor Export Act" I do not think that is its effect) it might be *pro tanto*, but *pro tanto* only, *ultra vires*. The question is discussed at length in the judgments rendered by the Supreme Court of Alberta in *Gold Seal Ltd.* v. *Dominion Express Co.* (1). Speaking generally, I am disposed to accept the dissenting opinions of the Chief Justice and Mr. Justice Stuart in that case.

(1) 16 Alta. L. R. 113.

1921

GOLD SEAL LIMITED v. THE ATTORNEY-GENERAL FOR THE PROVINCE OF ALBERTA.

Anglin J.

(b) Section 153 of the amended "Canada Temperance Act" provides that

> the Governor in Council shall by order in council declare the prohibition in force (in the province) if more than one-half of the total number of votes cast in all the electoral districts are in favour of such prohibition.

Counsel for the appellant contends that the word "all" is here used in the sense of "each and every of." No doubt "all" is often susceptible of that meaning. But the context, particularly the words immediately preceding, viz., "one-half of the total number of votes cast,"—and the general tenor of the statute makes it plain that the phrase "in all the electoral districts" is here used as the equivalent of "in the whole province." Any other interpretation of it would shock common sense. Although the majority in some of the electoral districts in each of the three provinces was against prohibition, a majority of the total number of votes cast in each province, taken as a whole, was distinctly in favour of it. This contention of the appellant fails.

On the whole case therefore, although with some reluctance because I think the plaintiffs were quite unnecessarily and, if I may say so with respect, arbitrarily deprived of what I regard as a good cause of action by the *ex post facto* legislation of last June, I concur in the dismissal of this appeal.

With some hesitation, because of the presence in section 3 in the recent Act of the concluding words "having regard to the provisions of this Act," I concur in the exercise of discretion by this court in awarding to the plaintiffs their costs of this litigation throughout.

MIGNAULT J.—As this case stood after the argument, and before Parliament enacted the recent statute, 11-12 Geo. V, ch. 20, which received Royal sanction

on the 4th June 1921, my opinion was that the proclamation ordering the vote should have mentioned the day on which prohibition would go into force in the event of the vote being in its favour (section 152 "Canada Temperance Act"), and that the omission of this statement rendered the subsequent proceedings void. This would have entitled the appellant to judgment for $7,260, the agreed amount of its damages by reason of the respondent's refusal to carry its goods.

The new statute materially modified this situation, and notwithstanding Mr. McGillivray's ingenious argument I must hold that it is clearly retrospective. The omission made in the proclamation therefore can no longer justify a judgment in favour of the appellant.

On all other features of the case my opinion was against the contentions of Mr. McGillivray. I take it that the validity of the "Canada Temperance Act" having been affirmed by the Judicial Committee in *Russell* v. *The Queen* (1), the amendment of 1919, 10 Geo. V., ch. 8, being legislation of the same character, cannot be assailed as transcending the powers of Parliament.

Nor do I think that any argument can be based on sec. 121 of the British North America Act which states that

> all articles of the growth, produce or manufacture of any of the provinces shall, from and after the Union, be admitted free in each of the other provinces.

This section, which so far as I know has never been judicially construed, is in Part VIII of the Act, bearing the heading "Revenues, Debts, Assets, Taxation," and is followed by two sections which deal with customs and excise laws and custom duties.

(1) 7 App. Cas. 829.

1921

GOLD SEAL LIMITED v. THE ATTORNEY-GENERAL FOR THE PROVINCE OF ALBERTA.

Mignault J.

In the United States constitution, to which reference may be made for purposes of comparison, there is a somewhat similar provision (art. 1, sec. 9 par. 5 and 6) the language of which, however, is much clearer than that of sec. 121. It says:—

> No tax or duty shall be laid on articles exported from any state. No preference shall be given, by any regulation of commerce or revenue, to the ports of one state over those of another; nor shall vessels bound to or from one state be obliged to enter, clear or pay duties to another.

I think that, like the enactment I have just quoted, the object of section 121 was not to decree that all articles of the growth, produce or manufacture of any of the provinces should be admitted into the others, but merely to secure that they should be admitted "free," that is to say without any tax or duty imposed as a condition of their admission. The essential word here is "free" and what is prohibited is the levying of custom duties or other charges of a like nature in matters of interprovincial trade.

My conclusion therefore is that in view of the provisions of the statute of 1921 judgment can no longer be rendered in favour of the appellant on the only point where, in my opinion, under the then state of the law, it was justified in attacking the proclamation and the order in council. The appeal must consequently be dismissed.

On the question of costs, however, other considerations arise. Here the statute of 1921 gives the court full discretion to make such order as it may see fit, and it is natural that it should have done so. Retrospective legislation of this nature, affecting pending litigation, can only be justified under very extraordinary circumstances. It takes away from the appellant its right to obtain damages for the

refusal of the respondent to carry its goods, refusal which was not, when made, justified by the proceedings had under the "Canada Temperance Act." But as it leaves to the court full discretion to adjudicate upon the costs, I think that the appellant should have its costs throughout. As I have said, before the statute of 1921, the appellant was right in attacking the proclamation as being insufficient in an essential particular, and I would not further penalize it by making it bear the costs it has incurred. And although, as a rule, costs should follow the event, here, carrying out what I take to be the intention of section 3 of the new statute, I would grant them to the appellant.

My opinion is to dismiss the appeal but to give to the appellant its costs here and below.

Appeal dismissed with costs against respondent.

Solicitors for the appellant: *Tweedie & McGillivray.*

Solicitor for the defendant: *George A. Walker.*

Solicitor for the respondent: *H. H. Parlee.*