REGINA v. SHAVELEAR

(1886), 11 O.R. 727

Ontario Queen's Bench, Wilson C.J., Armour and O'Connor JJ., 29 June 1886

Sale of liquor without license--Canada Temperance Act, 1878 (41 Vic. ch. 16, D.)--Meaning of "County" in Act--Indian Act, 1880 (43 Vic. ch. 28, D.)

The defendant was convicted of having sold intoxicating liquors on 16th December, 1884, at the township of Oakland, in the county of Brant, being the day on which the vote for the passage of the Canada Temperance Act for the county of Brant was taken.

The townships of Oakland and Burford, in the county of Brant, had been for the purposes of Dominion elections separated from the county of Brant and annexed to the adjoining county.

***Held*, that the word "County," as used in the Canada Temperance Act, 1878, means county for municipal and not for electoral purposes.**

Certain portions of the county of Brant consist of Indian lands, and the sale of liquor in these lands is regulated by the Indian Act of 1880 and amendments thereto.

***Held*, that under the eighth objection to the conviction, -- that it did not appear that the votes of the electors on the Indian lands in the county were taken upon the petition for the Act, or that proper means were taken to enable them to exercise their franchise, or that they were permitted to** exercise it,--the present proceedings did not properly bring the matter before the Court.

V. *MacKenzie*, Q. C., obtained from Galt, J., in single Court, an order *nisi* calling upon William Thompson and A. W. Ellis, two of her Majesty's justices of the peace for the county of Brant, and also upon William Thompson, Jr., to shew cause why the conviction against Timothy W. Shavelear, the now defendant, upon the information and complaint of said William Thompson, Jr., for that the said Shavelear did on the 16th of December, 1884, a day on which a vote in accordance with the provisions of the Canada Temperance Act of 1878, was being taken, unlawfully sell liquor between the hours of six o'clock of such a day and six o'clock of the following day, should not be quashed upon the several exceptions taken to the said conviction.

The information was laid on 10th January, 1885, for that Shavelear did at the time before stated, "at the township of Oakland, in the county of Brant, in his premises, being a place where liquors may be sold by retail, unlawfully, sell liquors without any requisition for medical purposes being produced by the vendee or his agent."

The conviction was on the 16th December, 1885, following the terms of the information, but adding that the sale of liquor by Shavelear was made "within the limits of a polling sub-division." The vote was taken under the Temperance Act of 1878. Under 45 Vic. ch. 3 (D.) the townships of Oakland and Burford belong to the South Riding of the county of Oxford, for Dominion electoral purposes.

McKenzie, Q.C., for the defendant, supported the order *nisi*.
Aylesworth, contra.

The facts, with the objections taken to the conviction, appear in the judgment.

June 29, 1886. WILSON, C. J.--The papers filed shew that certain electors of the county of Brant, qualified and competent to vote at the election of a member of the House of Commons in the county of Brant, petitioned the Governor General that an Order in Council might be passed, declaring the second part of the Canada Temperance Act of 1878 to be in force and to take effect in the said county; and that the petitioners desired that the votes of all the electors of the county should be taken for the said Act being also in force and taking effect in the city of Brantford; and that the votes of the electors of the city be taken for or against the adoption of the petition; and the Order of the Governor in Council recites that the signatures of one-fourth or more of all the electors of the city were appended to the notice addressed to the Secretary of State containing the petition, and that an Order of the Governor in Council was passed directing that the votes of all the electors

of the city be taken for or against the adoption of the petition. The Order in Council then directed a poll to be taken in the city on the 11th December, 1884, for taking the votes of the electors for and against the petition.

The like recitals are then made as to the signatures to the notice relating to the county of Brant, being one-fourth or more of all the electors of the county, being genuine; and that an Order of the Governor in Council was passed for taking the votes of the electors of the county for or against the adoption of the petition, and a poll is directed to be taken for the county on the 11th December, 1884.

The elections were accordingly held, and the Temperance Act was duly declared to be in full force and effect.

It is said that the Township of Tuscarora, which is part of the County of Brant for judicial purposes, and that part of the Township of Onondaga which is also for judicial purposes, in the County of Brant, are unsurrendered Indian lands, and that no steps, facilities, or opportunities for recording votes, which are offered and prescribed by the Temperance Act 1878, were taken or provided for having the votes of the electors of the Township of Tuscarora polled at Brantford.

The objections to be considered are the following, as stated in the order *nisi*:

2. That the territory and constituency in and to which the Temperance Act, 1878, should be submitted is an electoral district for the purposes of an election of a member to serve in the House of Commons, or sub-divisions in the whole of a county for such purposes.

3. The Temperance Act does not provide that when a vote is taken for or against the adoption of the Act in or by an electoral division or in sub-divisions of the whole county, which are made for the election of a member to serve in the House of Commons, to include within such electoral division a city which is within the limits of the county, but which is not entitled to elect a member for the House of Commons.

4. The petition is illegal because it prays that the Temperance Act shall be in force in the whole county of Brant, which conflicts with the Indian Act, 1880, and amendments.

8. It does not appear the votes of the electors of the Township of Tuscarora were taken upon the submission of the petition, or that proper means were taken to enable them to exercise their franchise, or that they were permitted to exercise it.

The first and the rest of the nine objections are either covered by those I have stated, or do not require to be considered. The second and third objections above stated I shall consider together, as they raise that same question, whether the voting on the petition for or against the establishment of the Canada Temperance Act, 1878, should be according to the divisions under the Municipal Law, or according to the divisions of the Dominion Electoral Law; in which latter case the voters in the township of Oakland should not have been permitted to vote, as that township is within the county of Brant for municipal but not for Dominion electoral purposes.

That depends upon the construction of the Temperance Act.

Section 2 of that Act enacts "that the word *county* includes every township, parish and other division or municipality, except a city within the territorial limits of the county, and also a union of counties where united for municipal purposes."

The Act throughout shows a city within the territorial limits of the county is, if the electors of the city desire to have the Temperance Act established within the city, to make an application by itself quite independently of the county for that purpose, and so also the county shall, apart from the city within the county, make a like separate application for the like purpose.

The provisions of the Temperance Act shew the electors to vote under it are to vote according to the subdivisions of the county [except any city within it] according to the municipal organization: and see also 42 Vic. ch. 50, secs. 2, 4, D.

That question arises in this manner. The Temperance Act, sec. 2, excepts cities *generally* from inclusion within the meaning of the word *county*, while sections 5 and 12 of the Act refer to and restrict the Act to such cities only the electors of which "vote at the election of a member of the House of Commons," and all the schedules of the Act restrict the application of the Act in like manner to such cities as return a member to the House of Commons.

No city, whether returning or not returning a member of the House of Commons, is, for municipal purposes, part of the county, and the result is, that if section 2 of the Temperance Act is construed as excepting all cities generally from the meaning of the word *county*, that cities which do not return a member to the House of Commons cannot have the Temperance Act extended to them, because when the Act is applied to a county the Act does not apply to any city within the limits of the county, and it is only such cities which return a member to the House of Commons which can have the Temperance Act applied especially to them; and it was argued that if the voting was held to be according to the Dominion Electoral Division, the election of cities which do not return a member to the house would have the right to vote for or against the Temperance Act as a division of the county.

I do not see how we could declare the electors of cities not returning a member to the House of Commons to have the right to vote as a division of the County Electoral Division when the Act declares that cities shall not be included in the word *county*. The only way of dealing with the Act is to construe section 2 of the Temperance Act as excepting those cities only from inclusion within the word *county* which do return a member to the House of Commons, which will be consistent with sections 5 and 12 of the Act, and with all the schedules of it also, and which construction will give to the electors of cities, which do not return a member to the House of Commons, the right to vote under that amendment as voters of a city as a division of the county for municipal purposes--for there is no doubt, in my opinion, the voting under the Temperance Act is to be according to the municipal organization, and not according to the Dominion electoral organization--and cities not returning a member to the House of Commons, will not then be excluded from having the benefit of voting for or against the Temperance Act, or for or against the removal of the further operation of the act.

It was, I presume, from the doubt whether Brantford, as a city not returning a member to the House of Commons, was, according to section 2 of the Act, upon the one side, and sections 5 and 12 and the schedules of the Act also on the other side, that there was an Order of the Governor in Council for a poll to be held for the city and for the rest of the county separately. In my opinion the just and proper construction of the Act is, to read the exception of cities in the 2nd section as such cities only which return a member to the House of Commons, and there is no difficulty; and thus the words of section 2, that the word *county* shall include "every town, township, parish, and other division or *municipality* except a city, with the added or understood words, "which city does not return a member to the House of Commons," will include cities which do not return a member to the House of Commons under the term *municipality* now in the Act.

The votes of all the electors of the county of Brant were taken by a separate Order in Council for the county without the city of Brantford, and for the city without the rest of the county.

A vote for the whole county was taken, and that was the proper course; and whether it was by one order for the whole county, including the city, or by a separate order for the county and for the city, is, I think, of no consequence.

The voting was properly made, and was properly made in Oakland, as part of the county of Brant for municipal purposes.

The fourth objection is, that the petition for the Act is illegal, because it prayed that the Act should be extended to the whole county; and it conflicted in that respect with the Indian Act of 1880, and the amendments thereto.

I do not see anything in the Indian Acts, 43 Vic ch. 28, sec. 90, and 44 Vic. ch. 17, sec. 10, (D.,) which conflicts with the Temperance Act of 1878.

Intoxicating liquor is prohibited now in the county of Brant by reason of the Temperance Act being carried into operation; and such liquor is prohibited by the Indian Act from being sold on the Indian lands within that county,

The eighth objection of the defendant is, that it does not appear the votes of the electors on the Indian lands in the county were taken upon the said petition, or that proper means were taken to enable them to exercise their franchise, or that they were permitted to exercise it.

In answer to the objection, it does not appear before us that the votes of the electors on these lands were not taken, nor that there were such electors to give their votes.

In any case we should not be willing to give effect to this objection, if it be one, on a motion of this kind.

The defendant is convicted of selling liquor upon a polling day appointed for taking the vote for or against the adoption of the Temperance Act, and after a conviction upon the merits he seeks to avoid the conviction, because, he says, it does not appear that some persons, without any proof of it, who were voters on the Indian lands, voted, or were allowed or enabled to vote. It appears to me such an objection should have been taken before the proclamation was issued by the Governor calling the Act into operation in the county; or, if after the proclamation, that a specific motion should have been made, calling upon the Crown to defend the proclamation--if that course even would have been available to the defendant--probably by moving for a *certiorari* upon the Secretary of State, as in *The Queen v. Sir George Grey*, L. R. 1 Q. B. 469, or it may be, perhaps upon his Excellency the Governor General, if he is amen- able in a case of this kind, to shew cause why the proclamation, and all other proper proceedings, should not be removed by *certiorari* into this Court as a preliminary proceeding to supersede the Order in Council, or to quash the conviction.

The motion must be dismissed, with costs.

ARMOUR and O'CONNOR, JJ., concurred.

Motion dismissed, with costs.