IN THE MATTER OF THE AUTHORITY OF THE LEGISLATURE OF BRITISH COLUMBIA TO PASS "AN ACT TO VALIDATE AND CONFIRM CERTAIN ORDERS IN COUNCIL AND PROVISIONS RELATING TO THE EMPLOYMENT OF PERSONS ON CROWN PROPERTY"

1921
* Dec. 15, 16.
1922
*Feb. 7.

REFERENCE BY THE GOVERNOR-GENERAL IN COUNCIL.

Constitutional law—Jurisdiction of legislature—Employment on provincial property—Exclusion of Japanese and Chinese—Imperial treaty with Japan—"B.N.A. Act" (1867) s. 91 s.s. 25: s. 92 s.s. 5; ss. 102, 106, 108, 109, 117, 126, 132, 146—"Japanese Treaty Act" (D.) 1913— 3 & 4 Geo. V. c. 27—(B.C.) 1921, 11 Geo. V. c. 49.

The legislature of British Columbia passed an Act in 1921 (11 Geo. V. c. 49) purporting to "validate and confirm (an) order in council" which provided that "in all contracts, leases and concessions "of whatsoever kind entered into, issued or made by the govern- "ment, or on behalf of the government, provision be made that no "Chinese or Japanese shall be employed in connection therewith".

Held, that the legislature of British Columbia had not the authority to enact this legislation. Idington J. *contra* and Brodeur J. *contra* as to the part relating to Chinese.

The Japanese Treaty, made in 1911 between England and Japan, was "sanctioned and declared to have the force of law in Canada" by a Dominion statute enacted under the powers conferred by s. 132 of the B.N.A. Act (3 & 4 Geo. V. c. 27). Paragraph 3 of article 1 of the treaty states that the subjects of the high contracting parties "shall in all that relates to the pursuit of their "industries, callings, professions, and educational studies be placed "in all respects on the same footing as the subjects of citizens "of the most favoured nation."

Per Davies C. J. and Duff and Brodeur JJ.—The provincial statute of 1921, as to its part relating to Japanese, is *ultra vires* of the legislature of the province as being in conflict with the Japanese Treaty. Idington J. *contra* and Anglin and Mignault JJ. expressing no opinion.

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

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REFERENCE by the Governor-General in Council of questions respecting the validity of chapter 49 of the Statutes of British Columbia, 1921, for hearing and consideration pursuant to section 60 of the "Supreme Court Act". The questions so submitted are as follows:—

A REPORT OF THE COMMITTEE OF THE PRIVY COUNCIL APPOINTED BY HIS EXCELLENCY THE GOVERNOR-GENERAL-IN-COUNCIL, ON THE 12TH NOVEMBER, 1921.

The Committee of the Privy Council have had before them a report dated 12th October, 1921, from the Minister of Justice, submitting that the Consul General of Japan, by letter of 4th of May, 1921, addressed to the Minister of Justice, suggested that Your Excellency should exercise the power of disallowance with regard to a statute of British Columbia, assented to April 2nd, 1921, entitled "An Act to "validate and confirm certain Orders-in-Council and "provisions relating to the employment of persons "on Crown Property", being Chapter 49 of the volume of statutes for the current year; the Consul General alleging that the Act is *ultra vires*.

It is enacted by section 2 of this statute that two Orders of the Lieutenant Governor of British Columbia in Council, dated 28th of May, 1902, and 18th, June, 1902, respectively, copies of which are scheduled to the Act, are validated and confirmed, and that they shall for all purposes be deemed to have been valid and effectual from the respective dates of their approval. These Orders in Council were designed to give effect to a resolution of the Legislative Assembly of British Columbia passed on 15th of April, 1902, whereby it was resolved "that in all contracts,

leases and concessions of whatsoever kind entered" "into, issued, or made by the government, or on be- "half of the government, provision be made that no "Chinese or Japanese shall be employed in connection "therewith".

Moreover, it is enacted by section 3 of the statute in question as follows:—

"3. (1) Where in any instrument referred to in the said Orders in Council, or in any instrument of a similar nature to any of those so referred to, issued by any minister or officer of any department of the government of the province, any provision has heretofore been inserted or is hereafter inserted relating to or restricting the employment of Chinese or Japanese, that provision shall be deemed to have been and to be valid and always to have had and to have the force of law according to its tenor.

(2) Every violation of or failure to observe any such provision on the part of any licensee or other person to whom the instrument is issued or delivered or with whom it is entered into, or who is entitled to any rights under it, whether the violation of failure has heretofore occurred or hereafter occurs, shall be sufficient ground for the cancellation of that instrument, and the Lieutenant Governor in Council may cancel that instrument accordingly".

Upon reference to the Attorney General of British Columbia he reports that his government maintains the constitutionality of the Act, and expresses his intention of taking proceedings which would bring the question before the courts.

As the validity of this statute depends upon the interpretation of the legislative powers of the province under the "British North America Act", and as the time for the disallowance will expire on the 18th of April

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1922, one year after the date on which the authenticated copy of the Act was received by the Secretary of State, the Minister states that he considers it desirable that Your Excellency's Government should be advised as to the enacting authority of the province by the Supreme Court of Canada.

The Minister accordingly recommends that pursuant to the authority of Section 60 of the "Supreme Court Act" the following questions be referred to the Supreme Court of Canada for hearing and consideration, viz:

1. Had the legislature of British Columbia authority to enact Chapter 49 of its statutes of 1921, entitled "An Act to validate and confirm certain Orders-in "Council and provisions relating to the employment "of persons on crown property"?

2. If the said Act be in the opinion of the court *ultra vires* in part then in what particulars is it *ultra vires ?*

The Committee concur in the foregoing recommendation and submit the same for Your Excellency's approval.

(Signed) RODOLPHE BOUDREAU.
Clerk of the Privy Council.

E. L. Newcombe K.C. for the Attorney-General for Canada:—The legislation is wholly ineffective: 1° because, by sect. 91 of the B.N.A. Act, it is within the exclusive legislative authority of the Dominion to make laws for the peace, order and good government of Canada with relation to any matter coming within the class of subjects described as "naturalization and aliens"; *Union Colliery Co. of B.C.* v. *Bryden* (1);

(1) [1899] A.C. 580.

Cunningham v. *Tomey Homma* (1); 2° because the legislation conflicts with the "Japanese Treaty Act, 1913", as the province attempts to discriminate and to place Japanese on a footing less favourable than the subjects or citizens of more favoured nations. There is only one Crown and the Crown cannot by its provincial legislation either directly or indirectly break the treaty engagement.

Sir C. H. Tupper, K.C. for the Japanese Association. The Crown is bound by a treaty to which it is a party; *Theodore* v. *Duncan* (2).

The provincial legislation has for its purpose the object of depriving the Chinese and Japanese of any opportunity of earning their living in the industrial development of the province.

Charles Wilson, K.C. for the Shingle Manufacturers' Association of B.C.

J. W. de B. Farris K.C., Attorney-General for British Columbia with *J. A. Ritchie K.C.*—The Crown, while unquestionably one, whether in its executive or legislative capacity, has various aspects; but, within the legislative domain allotted to the provinces by the B.N.A. Act, the right of each province to make laws for its purpose is as full and absolute as the right of either the Imperial or Dominion Parliament to make laws for Imperial or Dominion purposes.

The interest of a province in its Crown lands and other property is as extensive as the interest of a private person in lands held by him in fee to his own

(1) [1903] A.C. 151.

(2) [1919] A.C. 696.

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use or in his own personal property; *St. Catherine's Milling and Lumber Co. v. The Queen* (1); *Smylie* v. *The Queen* (2).

The province has the power to legislate as might be deemed best in its interest in regard to the management of its Crown lands of which the province, upon its entry into the Union in 1871, became seized of the "entire beneficial interest".

An Imperial treaty (except possibly a treaty of peace) or an Act of the Dominion Parliament cannot override an existing law of a self-governing province.

A treaty made in time of peace does not of itself without statutory authority extend so far as to alter the law either as regards individual rights in property, rights of action or as to personal liberty: *The Parlement Belge* (3); Clements, Canadian Constitution, 3rd ed. 136; and if so, such treaty cannot do so in regard to the public rights of a self-governing province.

The cases of *Union Colliery Co. of B.C.* v. *Bryden* (4), *Tomey Homma Case* (5) and *Quong-Wing* v. *The King* (6) are not applicable; as this provincial legislation does not prohibit any Chinese or Japanese from being employed upon the Crown property, but it establishes only for the province a policy in regard to the management of a provincial property: this legislation being, in effect, a self-denying ordinance, limiting the own freedom of the province in the uses of its own property.

(1) [1888] 14 App. Cas. 46.
(2) [1900] 27 Ont. App. R.172, at p. 180; 31 O. R. 202.
(3) [1879] 48 L.J.P. 18.
(4) [1899] A.C. 580.
(5) [1903] A.C. 151.
(6) [1914] 49 Can. S.C.R. 440.

THE CHIEF JUSTICE.—In the matter submitted by His Excellency The Governor General in Council for our hearing and consideration respecting the validity of chapter 49 of the statutes of British Columbia, 1921, two questions were asked:

1. Had the legislature of British Columbia authority to enact chapter 49 of its statutes of 1921, entitled "An Act to validate and confirm certain orders in council and provisions relating to the employment of persons on crown property?

2. If the said Act be in the opinion of the court *ultra vires* in part only, then in what particulars is it *ultra vires*?

The orders in council which are scheduled to the Act in question and are attempted to be validated thereby provide that "in all contracts, leases and concessions of whatsoever kind entered into, issued or made by the Government, or on behalf of the Government, provision be made that no Chinese or Japanese shall be employed in connection therewith." These general words "contracts, leases and concessions" are expressly defined in the statute referred to us to include the various instruments specified in the long enumeration contained in the order in council dated 28th June, 1902. Moreover, by the earlier order in council dated 28th May, 1902, set out in the schedule to the Act, "all tunnel and drain licenses issued by virtue of the powers conferred by section 58 of the 'Mineral Act' and section 48 of the 'Placer Mining Act'", and "all leases granted under the provisions of part 7 of the 'Placer Mining Act'" are to be read subject to the clause or prohibition in question.

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I am of the opinion that the description "leases, licenses, contracts and concessions", embodied in the orders in council attempted to be validated by the said Act is comprehensive enough to comprise substantially all instruments which may be issued by the provincial government in the administration of its assumed powers, except grants of land in fee, and that the object and intention of these orders in council clearly is to deprive the Chinese and Japanese of the opportunities which would otherwise be open to them of employment upon government works carried out by the holders of provincial leases, licenses, contracts or concessions.

By section 2 of the statute it is enacted that "the said orders in council shall, for all purposes, be deemed to be and to have been valid and efficient according to their tenor from the respective dates of their approval."

Section 3 sub-sec. (1) goes further and enacts: "Where in any instrument referred to in the said orders in council, or in any instrument of a similar nature to any of those referred to, issued by any minister or officer of any department of the government of the province, any provision has heretofore been inserted or is hereafter inserted relating to or restricting the employment of Chinese or Japanese, that provision shall be deemed to have been and to be valid and always to have had and to have the force of law according to its tenor."

In this manner the legislature attempts to legalize any prohibition or restriction of any employment of Chinese or Japanese upon works of or under the government or its lessees, licensees, or contractees which in the discretion of any minister or departmental officer might be embodied in the instrument.

In my opinion this legislation is *ultra vires* the provincial legislature: (1) because, by section 91 of the "British North America Act", 1867, it is within the exclusive legislative authority of the Dominion, notwithstanding anything to the contrary in that Act, to make laws "for the peace, order and good government of Canada" with relation to any matters coming within the classes of subjects described in s.s. 25 of s. 91 as "naturalization and aliens."

This provision of the "British North America Act, 1867", was construed by the Judicial Committee of the Privy Council with relation to British Columbia legislation affecting Chinese and Japanese in two appeals to that Board: *Union Colliery Co.* v *Bryden* (1) and *Cunningham* v. *Tomey Homma* (2).

I confess it seems somewhat difficult to reconcile on all points the observations made by their Lordships who respectively delivered the judgments of the Judicial Committee in these cases. The interpretation of the Bryden decision given by the Lord Chancellor when delivering judgment of the Board in the Tomey Homma case must be accepted by all courts in Canada. He said page 157. "That case (the *Bryden Case* (1)) depended upon totally different grounds. This Board, dealing with the particular facts of that case, came to the conclusion that the regulations there impeached were not really aimed at the regulation of coal mines at all, but were in truth devised to deprive the Chinese, naturalized or not, of the ordinary rights of the inhabitants of British Columbia, and in effect, to prohibit their continued residence in that province, since it prohibited their earning their living in that province." His Lordship then observes "it is obvious

(1) [1899] A. C. 580. (2) [1903] A. C. 151.

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that such a decision can have no relation to the question whether any naturalized person has an inherent right to the suffrage within the province in which he resides" (which was the question then before the Board).

I am of the opinion that the legislation now in question is of the character described by Lord Watson in the Bryden case, as not being within the competency of the Province. His Lordship says, page 587. "Their Lordships see no reason to doubt that by virtue of section 91 s.s. 25, the legislature of the Dominion is invested with exclusive authority in all matters which directly concern the rights, privileges, and disabilities of the class of Chinamen who are resident in the provinces of Canada. They are also of opinion that the whole pith and substance of the enactments of s. 4 of the "Coal Mines Regulation Act", in so far as objected to by the appellant company, consists in establishing a statutory prohibition which affects aliens of naturalized subjects, and therefore trenches upon the exclusive authority of the Parliament of Canada."

(2) I am also of the opinion that the legislation in question conflicts with the Japanese Treaty Act, 1913, of the Dominion of Canada (3 & 4 Geo. V, c. 27). By this Act it is declared that the Japanese Treaty of 3rd April, 1911, set forth in the schedule to the Act "is hereby sanctioned and declared to have the force of law in Canada", with the exception of two provisions neither of which is pertinent in any way to the question now before us.

Paragraph 3 of Article 1 of the scheduled treaty states that the subjects of the high contracting parties "shall in all that relates to the pursuit of their indus-

tries, callings, professions, and educational studies be placed in all respects on the same footing as the subjects or citizens of the most favoured nation."

The Parliament of Canada derived the authority for the enactment of the Japanese Treaty from s. 132 of the "British North America Act, 1867", which provides that "the Parliament and Government of Canada shall have all powers necessary or proper for performing the obligations of Canada or any province thereof, as part of the British Empire towards foreign countries, arising under treaties between the Empire and such foreign countries."

There is no general provincial prohibition or disqualification affecting the citizens of foreign nations other than those of Japan and China in British Columbia, and while the statute now in question is not expressed generally to prohibit or disqualify Japanese and Chinese from all employment, it does provide that "in all contracts, leases, licences and concessions entered into, issued or made" by or on behalf of the Crown as represented by the Government of British Columbia, "no Japanese or Chinese shall be employed in connection therewith".

Thus the province attempts to discriminate and to put the Japanese on a footing less favourable than that of the subjects of the most favoured nation.

This is contrary to the obligations of the treaty and in direct conflict with the Dominion statute which must prevail under the powers conferred by s. 132 of the B.N.A. Act above quoted.

I cannot doubt that the Japanese if employed upon the works which are by the statute in question prohibited to them would be so employed "in the pursuit of their industries, callings, professions". Certainly

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the words "industries, callings", would cover all manual labour, or other labour of a kindred character. Modern dictionaries define industry to include systematized labour or habitual employment, especially human exertion employed for the creation of value, labour.

There is only one Crown, although it may act "by and with the advice and consent of" the several parliaments or legislatures of the whole of the British Empire. The Crown which "by and with the consent and advice of the Lords and Commons of the United Kingdom" enacted the "British North America Act, 1867", conferring upon itself acting "by and with the advice and consent of the Senate and the House of Commons of Canada" the power to sanction treaty obligations affecting the Dominion of Canada or a province thereof, is the same Crown which became in 1911, a party to the Japanese Treaty, the provisions of which declared that, "they (the Japanese) shall in all that relates to the pursuit of their industries, callings, professions, educational studies be placed in all respects on the same footing as the subjects or citizens of the most favoured nation." It is the same Crown which in 1913, "by and with the advice and consent of the Senate and the House of Commons of the Dominion of Canada" in execution of the powers conferred by s. 132 of the B.N.A. Act, 1867, sanctioned the Japanese Treaty and enacted that it should have "the force of law in Canada"; and it is the same Crown which in 1921, "by and with the advice and consent of the legislature of British Columbia" enacted the statute in question here. If this Act is *intra vires* it is in absolute conflict with the Treaty and the Dominion statute because it prohibits the employment of Japanese in the pursuit

of their "industries and callings" in British Columbia on all provincial government works, or on works on land held by leases, licences or concessions authorized by the legislature of British Columbia. Thus the Japanese are placed on a footing less favourable than that of the subjects or citizens of more favoured nations.

The Crown was undoubtedly bound by the force of the "Japanese Treaty Act" of 1913 to perform within Canada its treaty obligations, and, if so, I cannot understand how it can successfully be contended that the Crown can by force of enactments of a provincial legislature directly or indirectly break its treaty obligations.

For these reasons I am of the opinion that the legislature of British Columbia had not the authority necessary to enact chapter 49 of the 1921 statutes of British Columbia.

As my answer to the first question is in the negative, any answer to the second question submitted is unnecessary.

IDINGTON J.—Under section 60 of the "Supreme Court Act" we are asked the following questions:—

1. Had the legislature of British Columbia authority to enact chapter 49 of its statutes of 1921, entitled "An Act to validate and confirm certain orders in council and provisions relating to the employment of persons on crown property?

2. If the said Act be in the opinion of the court *ultra vires* in part only then in what particulars is it *ultra vires?*

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Idington J.

The second section of the said Act declares certain orders in council set forth in a schedule to the Act to have been and to be valid and effectual.

Then section 3 of said Act in question herein reads as follows:—

"(1) Where in any instrument referred to in the said orders in council, or any instrument of a similar nature to any of those so referred to, issued by any minister or officer of any department of the government of the province, and provision has heretofore been inserted or is hereafter inserted relating to or restricting the employment of Chinese or Japanese that provision shall be deemed to have been and to be valid and always to have had and to have the force of law according to its tenor.

(2) Every violation of or failure to observe any such provision on the part of any licensee or other person to whom the instrument is issued or delivered or with whom it is entered into, or who is entitled to any rights under it, whether the violation or failure has heretofore occurred or hereafter occurs, shall be sufficient ground for the cancellation of that instrument, and the Lieutenant Governor in Council may cancel that instrument accordingly."

The schedule seems to me (save as to one item) to deal entirely with the crown lands, timber, coal and other minerals and mines and water the property of the Crown on behalf of the province of British Columbia.

That province was brought into the Canadian confederation by virtue of the 146th section of the B.N.A. Act, 1867, and pursuant to the several addresses therein provided for and by the order in council of the late Queen resting thereon also so provided for.

The agreement evidenced thereby appears on pages LXXXV to CVII prefixed to the statutes of Canada for 1872.

The terms thereof render operative and effective as to the legislature of British Columbia the like powers enjoyed by the legislatures of the other provinces of Canada under section 92 of the said B.N.A. Act of 1867, and each of them contained in items 5, 10, 13, and 16, are of vital importance herein as are also other provisions of said Act such as section 109, which reads as follows:—

"109. All lands, mines, minerals, and royalties belonging to the several provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all sums then due or payable for such lands, mines, minerals, or royalties, shall belong to the several provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the province in the same."

Section 10 of the respective addresses which formed the basis of Union and of the order in council bringing the Union into effect, reads as follows:—

"10. The provisions of the "British North America Act, 1867", shall (except those parts thereof which are in terms made, or by reasonable intendment may be held to be, specially applicable to and only affect one and not the whole of the provinces now comprising the Dominion, and except so far as the same may be varied by this minute) be applicable to British Columbia in the same way and to the like extent as they apply to the other provinces of the Dominion, and as if the colony of British Columbia had been one of the provinces originally united by the said Act."

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Idington J.

That renders operative section 109 of the B.N.A. Act, 1867, and I submit, rendered all therein specified subject to the jurisdiction of the responsible government of British Columbia which thereby had power to enact such orders in council relative to the administration of all the said properties as the legislature of said province should see fit to support and so long as it so saw fit to support same.

The Act now in question of the legislature of British Columbia seems therefore well within the powers so assigned to it.

There being numerous acts of the legislature of British Columbia, such as "The Land Act"; "The Forest Act"; "The Mines Act"; and amendments thereto, each and all seeming to be expressly enacted relative to the administration of such crown properties by ministers respectively specified therein, it would not seem to require anything further than the orders in council made in course of such administration to give validity to any licences or contracts relative to the regulations of such properties of the crown.

Mr. Ritchie's argument on behalf of the Attorney General of British Columbia in taking this point seemed to me to suggest quite properly that the Acts now called in question are of minor consequence and that even the veto power if exercised would fall short of reaching the alleged evil complained of herein.

The mode of the administration of any of the properties in question seems as much subject to the will of the legislature as that of any private owner to the will of the owner thereof.

The conditions of the licences for operating upon same binding the licensees not to employ in doing so Chinese, Japanese or other orientals may be offensive

to some minds and may economically speaking be very questionable, but how can it be contended that any private owner might not so stipulate in such a licence or other contract in relation to his own property?

Counsel for the Minister of Justice and for the company which challenged the right of the government of British Columbia to so stipulate, respectively admitted on argument that the private owner could so stipulate in relation to his own property despite the treaty hereinafter referred to but counsel for the Japanese Association relied upon an American decision laying down the doctrine that it would be against public policy to so contract.

The obvious answer is that the legislature in control of the subject matter is the power to create or dictate any such provincial public policy and that must be predominant unless and until the Dominion Parliament acting *intra vires* declares otherwise.

The decision in the case of *Union Colliery* v. *Bryden* (1) was presented in argument but not as decisive of the questions raised herein.

I may point out that it was a general regulation as applicable to a private mine which was in question therein and that the judgment seems to be rested upon item 25 of the 91st section of the B.N.A. Act of 1867—"Naturalization and Aliens"—and was followed by the decision in the case of *Cunningham* v. *Tomey Homma* (2) where the Lord Chancellor, in giving the judgment of the court above does not, at foot of page 56 and following page, seem to maintain the doctrine in the judgment in the former case to the full extent declared therein and as understood by the courts in British Columbia attempting to abide by it. Hence the judgments of these courts were reversed.

(1) [1899] A. C. 580.

(2) [1903] A. C. 151.

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Idington J.

I submit that the powers I have referred to above as given the legislature of British Columbia in relation to its control of the properties in question herein are quite as explicit as anything given it in relation to the franchise.

The disposition of the question raised in the *Colliery Case*, (1) however, does not end there, for in the case *Quong-Wing* v. *The King* (2) the question of discrimination against a Chinaman, in this instance a naturalized British subject, within the ambit of our Canadian "Naturalization Act", was again raised.

The majority of this court held that, despite what was held in the *Colliery Case* (1) the legislature of Saskatchewan had the power to discriminate against him, in the same spirit as evident in relation to what is in question herein, and in the way that appears in that case.

An application on his behalf to the court above, for leave to appeal from such decision here, was refused.

And that although, as our "Naturalization Act" then stood by section 24 thereof, it provided as follows:—

"24. An alien to whom a certificate of naturalization is granted shall, within Canada, be entitled to all political and other rights, powers and privileges, and be subject to all obligations to which a natural born British subject is entitled or subject within Canada, with this qualification, that he shall not when within the limits of the foreign state of which he was a subject previously to obtaining his certificate of naturalization, be deemed to be a British subject unless he has ceased to be a subject of that state in pursuance of the laws thereof, or in pursuance of a treaty or convention to that effect."

(1) [1899] A. C. 580. (2) 49 Can. S.C.R. 440.

The question most urgently pressed in the present case by way of challenging the validity of the Act now in question herein, was the Act of our Dominion Parliament, assented to on the 10th April, 1913, and known as the "Japanese Treaty Act, 1913", declaring the treaty to have the force of law in Canada.

Section 3 of Art. 1 of the said treaty seems to contain all that can be even plausibly relied upon in such a connection. It reads as follows:—

"3. They shall in all that relates to the pursuit of their industries, callings, professions and educational studies be placed in all respects on the same footing as the subjects or citizens of the most favoured nation."

Compare the forceful effect of the language used in the "Naturalization Act" above quoted and that just quoted from the treaty.

The former was turned down in this court and, in the court above, held not worthy of a hearing as against a provincial legislative enactment of the same tenor and purpose as that challenged herein.

I do not pretend that the aggregate consequences flowing from the Saskatchewan Act would be at all equal to those flowing from the policy of the legislature of British Columbia in doing as it pleased with its own, and complained of herein.

But I do pretend that the principle involved in the Saskatchewan Act, relative to a naturalized Chinaman, assured by our "Naturalization Act" of his right as such, in the terms above quoted, is of more serious import than anything contained in said section 3 of article 1 of the treaty above mentioned.

When we are asked to strain and positively wreck our constitution as outlined in the B.N.A. Act assuring provinces of such powers as challenged herein, I have no doubt what my answer should be to the questions submitted.

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Idington J.

I, before doing so, should observe that at one time in the course of the argument and consideration of the matters involved in item "N" of the schedule to the Act, which reads as follows:—"(n) Public works' contracts the terms of which are not prescribed by statute;" I was inclined to doubt if that article was maintainable.

On mature consideration I am, however, unable to discriminate between the rights of a property owner with which I have been dealing and the rights of a government executing a non-statutory contract such as covered by the last quotation.

Having considered all the supplemental factums presented in support of the argument at the hearing, I am tempted, with great respect, to suggest that the argument based upon the prerogative of the Crown, and obligations of the Crown, as if one and indivisible throughout the Empire, seems to overlook the many and varying limitations thereof brought in with the recognition of responsible government in Canada, over three-quarters of a century ago.

Even some forms of treaty must be read as being subject thereto.

I would, therefore, answer the first question in the affirmative which renders it unnecessary to answer the second.

I cannot, however, forbear asking what possible difference it can make so long as in these days of public ownership the government of British Columbia could, I submit, act directly and select its own workmen to clear its forests and exclude the Chinese and Japanese so long as public opinion would support them in doing so.

DUFF J.—The attack upon the provincial statute rests upon two principal grounds, 1st, that it is repugnant to the Dominion Act of 1913 declaring the accession of Canada to the Japanese Treaty and giving to the provisions of that treaty the force of law throughout the Dominion and 2nd, that the provincial legislation considered in itself, abstraction made from the operation of the Dominion Statute of 1913, is without legal force for the reason that it is an enactment "in pith and substance" relating to the subject of aliens and naturalized subjects, and on the principle of *Bryden's Case* (1) is *ultra vires*.

To consider, first, the second of these grounds of attack. The provincial statute professes to attach to the leases, licences, contracts and concessions which are the subject of the scheduled orders in council a condition which contains a stipulation that no Chinese or Japanese shall be employed by any of these classes of licensees, lessees and concessionaires in the exercise of the rights granted and in the case of contracts by any contractor in connection with the public work to which his contract relates; and the condition also contains a provision authorizing the cancellation of the rights of any grantee or contractor who disregards the stipulation. The instruments to which this condition applies are of two classes, 1st, contracts under which the contractor's remuneration would, in the ordinary course, be a payment of money out of the public funds of the province, and 2nd, grants of rights in and in relation to the public property of the province but grants of limited and particular rights only of which a mining lease so called may be taken as typical.

(1) [1899] A. C. 580.

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A single word of explanation may be convenient at the outset in relation to the water power certificates under the "Water Clauses Consolidation Act". These water power certificates were certificates granted to incorporated companies by the Lieutenant Governor in Council on certain specified terms and subject to such further terms as he in his discretion might see fit to exact, conferring a right upon the company receiving the certificate to apply for power purposes water power made available by authority of water records granted under the same Act and giving to the company in addition extensive compulsory powers for the construction, maintenance and operation of its works The precise point to be noted is that in the year 1892 the legislature of British Columbia, following legislation of a similar but much more elaborate character passed in the year 1890 by the Dominion Parliament relating to what was then known as the North West Territories, now the provinces of Alberta and Saskatchewan, declared that all unappropriated waters, that is to say, all water in the province not appropriated under statutory authority should be the property of the Crown in the right of the province; so that water power certificates authorizing the diversion and the application of unappropriated water for the purposes of the companies possessing such certificates are in effect conditional grants of special rights over and in relation to a subject which by the statute law of British Columbia is the property of the Crown.

The conclusion to which I have come is that the decision of the Lords of the Judicial Committee in *Bryden's Case* (1) does not in principle extend to pro-

(1) [1899] A. C. 580.

vincial legislation attaching to contracts of the kind and to grants of public property of the character to which the statute relates a condition in the terms of that now under consideration.

It is most material, I think, first of all to notice the nature and extent of the control exercisable by the legislature of a province over its public assets. The B. N. A. Act provided for the distribution not only of power, legislative and other, between the Dominion and the provinces but for the distribution of responsibilities and assets as well. The responsibilities assumed by the provinces were onerous and extensive; administration of justice, including police, public health, charitable institutions, colonization, including highways, municipal institutions, local works, including intraprovincial transport and above all, education. The responsibility in respect of agriculture and immigration was assumed jointly. In the sequel immigration has gradually become almost exclusively a Dominion matter while agriculture has been left very largely to the care of the provinces. The scheme of confederation necessarily involved a division of assets and an allotment of powers of taxation. The division of assets is the subject matter which concerns the sections of the Act numbered, 102 to 126 inclusive. By these sections the whole mass of the duties and revenues over which the provinces possessed the power of appropriation at the time of confederation is divided between the Dominion and the provinces. The sections in which their respective rights are defined being sections 102, 108, 109, 117 and 126.

Two characteristics of these provisions have often been judicially noted, 1st, they do not displace the title of the Crown in the public property. What is

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dealt with is the power of appropriation possessed by the provincial legislature at the time of Confederation (sec. 102); and 2nd, this power of appropriation is treated (secs. 108, 109, 117, 92 (5)) as equivalent to property. The interest of the Dominion as well as that of the provinces in the public property both in that assigned by the sections mentioned and that afterwards acquired as the result of taxation or from other sources of revenue is, as Lord Watson said in *Maritime Bank* v. *Receiver General*, (1) this right of appropriation; and as was said again by Lord Watson in the *St. Catherines Milling Case*, (2) this right of appropriation is equivalent to the entire beneficial interest of the Crown in such property. Ultimately in each case this power of appropriation rests with the Dominion or the provincial legislature as the case may be and that not by virtue alone of any special enactments of secs. 91 and 92 relating to property but in the case of the provinces by force of the provision giving the provinces control over the provincial constitution; and the legal effect of these provisions as Lord Watson said in the *St. Catherines Milling Case* (2) is to exclude from Dominion control any power of appropriation over the subjects assigned to the provinces which are placed under the control of the provincial legislatures. As regards the provinces this control by the legislatures over the proceeds of taxation and over the property assigned to them by the enactments of the B.N.A. Act is essential to the system set up by the B.N.A. Act. Provincial autonomy would be reduced to a simulacrum if the proceeds of provincial taxation were subject to the control of some extra-provincial authority and such proceeds are placed

(1) [1892] A.C. 437, at pp. 441 and 444. (2) 14 App. Cas. 46, at p. 57.

by the provisions referred to on precisely the same footing in respect of the legislative power of appropriation as the existing assets distributed by the Act. The title to all such property is vested in His Majesty but in His Majesty as sovereign head of the province (*Maritime Bank's Case* (1)); as regards the appropriation and disposal of such property His Majesty acts upon the advice of the provincial legislature and executive. No extra provincial authority is constitutionally competent to give such advice.

I do not mean to imply that the provinces in exercising their powers of ownership over provincial property may not be subject to restrictions arising out of the provisions of competently enacted Dominion legislation. *In re Provincial Fisheries* (2) Lord Herschell delivering the judgment of the Judicial Committee pointed out that Dominion legislation might in certain cases, in theory at least, so restrict the exercise of the provincial proprietary rights as virtually to effect confiscation of them.

But while that is so Lord Watson pointed out as already mentioned, in *St. Catherines Milling Company's Case* (3) that the legal effect of the provisions of the Act dealing with the distribution of assets was to exclude the assets assigned to the province from the Dominion power of appropriation save for the purpose mentioned in sec. 117. There is therefore this limit to the effect of Dominion legislation in this connection. The Dominion has no power to deal with provincial public assets as owner. This is illustrated by the decision in the *Fisheries Case*, (2) in which it was held that notwithstanding the Dominion power of

(1) [1892] A.C. 437, at pp. 443, 444. (2) [1898] A.C. 700.
(3) 14 App. Cas. 46, at p. 57.

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regulation of fisheries the authority remains with the province to settle the conditions upon which rights shall be granted in respect of fisheries vested in the province as owner; and at p. 713 Lord Herschell explicitly says on behalf of the Judicial Committee that an attempt on the part of the Dominion to deal with provincial public property as owner cannot be supported as an exercise of legislative authority under sec. 91.

This authority of the province in relation to its public property seems necessarily to involve the exclusive right to fix the conditions upon which public money shall be disbursed and rights in or in respect of provincial public property granted. That seems to be involved in the conception of such authority as equivalent to ownership. True it is that by section 106 and by section 126 it is provided that the duties and revenues over which the Dominion and the provinces are respectively given the power of appropriation shall be appropriated to the public service of the Dominion or of the province as the case may be. What is an appropriation to the public service of the Dominion or to the public service of a province? Is that a question reviewable by a court? Without deciding finally that point it is quite plain that the question whether a given appropriation by the Dominion Parliament or by a provincial legislature is an appropriation for the public service within the meaning of these enactments is a point upon which any court would be slow to pass. I doubt very much if such a question is reviewable judicially.

The present reference presents the question (as it was argued by counsel on behalf of the Dominion as well as on behalf of the private interests opposed to the validity of the legislation) as a question depending

upon the application of *Bryden's Case* (1). *Bryden's Case* was considered in the later case of *Cunningham* v. *Tomey Homma* (2). There are expressions in the later judgment which appear to throw some doubt upon the earlier decision but I do not think the Judicial Committee in 1903 intended to overrule the central point of the decision of 1899. In the earlier case Lord Watson laid down that the rights and disabilities of aliens constituted a matter exclusively within the legislative jurisdiction of the Parliament of Canada and having come to the conclusion that the legislation in question there did "in pith and substance" deal solely with this subject, he held that the legislation was beyond the jurisdiction of the province. According to the interpretation of *Bryden's Case* (1) laid down in 1903 the Coal Mines Legislation had been obnoxious to constitutional restrictions in the sense that in principle it involved an assertion of authority on the part of the province to exclude Chinese aliens and naturalized subjects from all employments and thus by preventing them earning their living to deny them the right of residence within the province. That I think is the pith of the earlier legislation according to the interpretation placed by the later decision upon the judgment in *Bryden's Case* (1)—an assertion of authority on the part of the province to exclude Chinese aliens or naturalized subjects from residence in the province. I shall come presently to consider the Act of 1921 from this point of view, but before doing so it is important I think, to observe that the minor premise of the judgments in *Bryden's Case* (1) and *Tomey Homma's Case* (2) was that the legislation impeached in *Bryden's Case* (1) was legislation which in substance and effect if not in its very

(1) [1899] A. C. 580. (2) [1903] A. C. 151.

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terms it would have been competent to the Dominion to enact in exercise of its power to make laws in relation to aliens and naturalization; but while I do not think an affirmative answer to the question would by any means be necessarily decisive upon the point upon which we have to pass at present it is I think pertinent and worth while to examine the question whether or not the enactment now in question is an enactment which in whole or in part would have been competent to the Dominion under section 91.

I have already in a general way pointed out the characteristics of the scheduled orders-in-council. They enact that there shall be engrafted upon each instrument of the class mentioned a stipulation against the employment of Chinese and Japanese and the statute provides that a breach of this stipulation will confer upon the government of the province a right of cancellation. Is this an enactment competent to the Dominion under its legislative authority in relation to the subject of aliens? The Judicial Committee in *Citizens Ins. Co.* v. *Parsons* (1) and very lately in the judgment delivered by Lord Haldane in the *Great West Saddlery Company* v. *The King* (2) has pointed out that the scope of the enactments of ss. 91 and 92 must be determined, and in many cases the question is one of more than a little nicety, by reference to the context furnished by the two sections as a whole. Their Lordships in *Tomey Homma's Case* (3) had to consider the scope of the legislative authority conferred in respect of the subject of naturalization in its relation to the provincial authority upon the subject of the provincial constitution and they reached the conclusion that if this limitation

(1) [1881] 7 App. Cas. 96. (2) [1921] 2 A. C. 91.
(3) [1903] A.C. 151.

at all events was imposed upon the Dominion authority that it was not of such scope as to place any restriction upon the provincial power to prescribe the conditions of such privileges as that of the right to exercise the provincial legislative suffrage. It would appear to admit of little doubt that similar considerations apply with perhaps much greater force to the Dominion authority in respect of aliens. An authority to legislate on the subject of aliens (the subjects of the provincial constitution and municipal institutions being assigned to the province) would not seem *prima facie* to embrace the authority to provide that all aliens should possess the same right to the provincial legislative suffrage as British subjects or the same right to sit in the legislature and to hold seats in the provincial executive or the same right to exercise the municipal franchises or to be members of municipal councils or to be municipal officials or (the exclusive authority to legislate on the subject of provincial officials being allotted to the province) to provide that aliens should possess equal rights with British subjects in respect of employment in the civil service of the provinces. Similar considerations again would appear to me sufficient to establish the exclusion from that authority of the power to require that aliens shall be on the same footing as British subjects in respect of the beneficial enjoyment of appropriations by provincial legislatures from public provincial funds or in respect of grants of interests in provincial property.

An attempt on part of the Dominion to enact the Act of 1921 would pass beyond the scope of the authority given by section 91. The restrictions imposed by the scheduled orders-in-council affect, it must be observed, naturalized British subjects and native

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born British subjects. Clearly the Dominion could not an any ground capable of plausible statement pass a law restricting the right of grantees of interests in provincial property in relation to the employment of native born British subjects; the *Tomey Homma Case* (1) seems to negative the existence of such an authority in relation to naturalized subjects. The proportion of naturalized and native born British subjects of Japanese and Chinese race to the whole of the population within that category in the province of British Columbia must be considerable. These considerations alone seem to present a formidable difficulty in the way of supporting such legislation as Dominion legislation under its authority in relation to aliens and naturalization.

But the Dominion authority must fail, I think, upon a broader ground. For the purpose of explaining that ground more clearly I shall assume that the condition in question affected all aliens and aliens alone. The Dominion authority in respect of aliens it must be taken I think in consequence of the decision in *Bryden's Case* (2), comprehends the right to define the rights and disabilities of aliens in a general way. But whether it comprehends the right even by general enactment to attach to grantees of rights in provincial property a special disability in relation to the employment of aliens, is, I think, at least gravely questionable; and the difficulty is not diminished when one considers the question in relation to grants of public monies. Assuming aliens to be under no applicable general disability is it truly legislation on the subject of aliens to prohibit the employment of them in circumstances in which they are to be paid out of public funds? To prohibit the provincial government from employing an alien in

(1) [1903] A.C. 151. (2) [1899 A.C. 580.

any circumstances? To place a like prohibition upon municipalities? I am not convinced that an affirmative answer can be given to these questions.

But the legislation in question goes a step—and a very long step—beyond this. It professes to attach to contracts entered into with the provincial government, to grants made by the provincial government, a stipulation and a condition the character of which has already been described, making the rights of the contractor or grantee defeasible upon nonperformance of the stipulation. It does not appear to me to admit of doubt that to impose by law such a stipulation and such a condition as part of such instruments would be an attempt on the part of Parliament to intervene in the disposition of the public funds of the province and the control and disposition of the public property of the province as owner; and therefore to transcend the restriction which as already mentioned is plainly laid down upon the activities of the Dominion parliament in exercise of the authority given by sect. 91 of the B.N.A. Act and plainly required by the decisions above mentioned. On this ground alone for the reason above given the irrelevancy of *Bryden's Case* (1) seems established.

But to come to a more particular consideration of *Bryden's Case* (1) and *Tomey Homma's Case* (2) and the application of the principle of these decisions to the statute of 1921 and the scheduled orders-in-council. The view taken in *Bryden's Case* (1) as explained by *Tomey Homma's Case* (2) of the "Coal Mines Regulation Act" was, as I have said, that it involves an assumption on the part of the province to deal with the funda-

(1) [1899] A.C. 580. (2) [1903] A.C. 151.

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mental rights of aliens and naturalized subjects in a manner and degree not consistent with a recognition of their right of residence in the province. In *Bryden's Case* (1) it was held that the necessary and indeed the only effect of the prohibition contained in the statute there under consideration was to prevent the class of Chinamen inhabiting British Columbia (aliens and naturalized subjects) from pursuing the occupation of underground coal mining. The statute and orders-in-council now under review have no such effect in fact or in principle. There is no prohibition directly levelled against Chinese and Japanese. There is a stipulation imposed, it is true, *ab extra* by the law upon instruments of the classes affected enforceable against grantees and concessionaires by the penal sanction of forfeiture which in effect excludes the employment of Chinese and Japanese, whether aliens, naturalized subjects or native born subjects in connection with the exercise of rights or the performance of duties under such instruments, but the stipulation and the condition are strictly limited to the employment of such persons in such circumstances. There is no prohibition affecting a lessee under the "Placer Mining Act", for example, or the holder of a certificate under the "Water Clauses Consolidation Act" in activities having no connection with the rights given by such instruments, and there is no general prohibition generally affecting any single occupation.

The last mentioned point requires perhaps a little elaboration. The orders in council as affecting the lumbering and logging industries, for example, are without operation in all cases in which the right to cut timber is incidental to the ownership of the land

(1) [1899] A.C. 580.

and in cases where the right to cut timber is derived through any grant of any character other than licenses and leases of the specific kinds mentioned in the orders-in-council. Without proceeding to further detail it is sufficient to point out that the vast areas of land in different parts of the province granted as subsidies for aid in the construction of railways and the timber on those areas are quite unaffected by anything in these orders-in-council. There is, for example, the great land grant in Vancouver Island embracing about one fifth of the whole area of the island given in aid of the construction of the E. & N. Ry. There is the railway belt stretching from the coast to the eastern boundary line of the province granted to the Dominion under the terms of union, and besides there are the large areas in southern British Columbia given by the legislature in aid of railway construction some thirty years ago. So as to coal mining. The effect of these orders-in-council on the industry of coal mining must be trivial because it has no application except to coal mining in lands in which the title does not remain in the Crown. So again with regard to metalliferous mining. The statute does not affect mining on Crown granted mineral claims except in a very limited degree or in mineral claims worked under the provisions of the "Mineral Act" before the issue of a Crown grant; and as regards placer mining it applies only to placer mining leases under the specified provisions and does not affect such mining pursued on placer mining claims. So again with regard to the grants of water rights. The right to divert water for agricultural purposes, for ordinary domestic purposes, for community supply, is not affected by the condition laid down, which affects only power certificates under Part IV of the Act. As regards contracts

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for public works, the incidence of the order-in-council is no doubt intended to be limited and I think that it is the proper construction of it to contracts with the government where the remuneration of the contractor is derived from the legislative appropriation of public monies. Obviously the legislature has not by the Act of 1921 attempted to deny the Chinese and Japanese the right to dispose of their labour in the province nor has it attempted to prohibit generally the employment of Chinese and Japanese by grantees of rights in the public lands of the province.

It should be noted that the provisions of the B.N.A. Act 102 to 126, in so far as they affect the public lands, contemplate not only the raising of revenue but an object at least as important, the distribution of these lands for the purpose of colonization and settlement. As Lord Selborne said in the *Attorney General* v. *Mercer Case* (1), the provisions are of a high political nature they are the attribution of Royal territorial rights for the purposes of not only revenue but for the "purposes of government" as well.

In some of the provinces perhaps the most important responsibility resting upon the legislature was the responsibility of making provision for settlement by a suitable population. This is recognized by the provision of the Act which gives to the provinces (subject to an overriding Dominion authority) the power to make laws in relation to the subject of immigration.

I find it difficult to affirm that a province in framing its measures for and determining the conditions under which private individuals should be entitled to exploit the territorial resources of the province is passing beyond its sphere in taking steps to encourage

(1) [1883] 8 App. Cas. 767.

settlement by settlers of a class who are likely to become permanently (themselves and their families) residents of the province. I see no reason for thinking that the province of British Columbia in providing, for example, that persons entitled to take advantage of the privileges given by the "Crown Lands Act" in relation to pre-emption of the public lands is entering a sphere which does not properly belong to it in enacting that such persons shall be either British subjects or those who have declared their intention to become British subjects.

These considerations are not irrelevant because they point to the conclusion that it cannot be affirmed (a condition of the applicability of *Bryden's Case* (1)) in respect of such legislation as that before us that it has no other effect than its effect upon the unrestricted opportunity which Chinese and Japanese might otherwise enjoy in disposing of their labour. That cannot be affirmed because it is impossible to say that the legislature in imposing such conditions had not in view some object falling within the scope of its political duties in relation to the interests and responsibilities committed to it.

The next point which naturally arises for consideration is whether effect should be given to the contention made on behalf of the Dominion that the Dominion statute of 1913 can be sustained as enacted in exercise of the power of the Dominion in relation to aliens. There are grave objections to this contention. One of the provisions of the treaty which is declared to have the force of law is a provision which puts Japanese subjects on the same footing as regards education

(1) [1899] A.C. 580.

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as British subjects. The subject of education, as already mentioned, is committed to the provincial jurisdiction by s. 93. One of the provisions which, as I have already said, must be regarded as fundamental. I am unable to agree that the authority of the Dominion with regard to the subject of aliens is comprehensive enough to support an enactment in the terms of the treaty clause on this subject and it is impossible, I think, to suppose that parliament in declaring this clause to have force of law was professing to exercise any authority under s. 91. But there is an objection based upon a broader ground. I am unable for the present at all events to agree with the view that the Dominion authority in relation to aliens comprehends the power to give to aliens rights having primacy over the rights of the provinces in relation to grants of public money or grants of interests in public lands. I will not elaborate this point, my reasons will sufficiently appear from what I have already said.

I now come to section 132, which is in these terms:—

"132. The parliament and government of Canada shall have all powers necessary or proper for performing the obligations of Canada or of any province thereof, as part of the British Empire, towards foreign countries arising under treaties between the Empire and such foreign countries."

It is a condition of the jurisdiction created by this section that there shall be some obligation of Canada or of some province thereof as part of the British Empire towards some foreign country arising under a treaty between the Empire and such foreign country. A treaty is an agreement beween states. It is desirable, I think, in order to clear away a certain amount of confusion which appeared to beset the argument to emphasize this point that a treaty is a compact between

states and internationally or diplomatically binding upon states. The treaty making power, to use an American phrase, is one of the prerogatives of the Crown under the British constitution That is to say, the Crown, under the British constitution, possesses authority to enter into obligations towards foreign states diplomatically binding and, indirectly, such treaties may obviously very greatly affect the rights of individuals. But it is no part of the prerogative of the Crown by treaty in time of peace to effect directly a change in the law governing the rights of private individuals, nor is it any part of the prerogative of the Crown to grant away, without the consent of parliament, the public monies or to impose a tax or to alter the laws of trade and navigation and it is at least open to the gravest doubt whether the prerogative includes power to control the exercise by a colonial government or legislature of the right of appropriation over public property given by such a statute as the B.N.A. Act. All these require legislation. As regards these matters the supreme legislative authority in the British Empire is, of course, the Parliament of the United Kingdom. Three views are perhaps conceivable as to the scope of the authority arising under s. 132. It might be supposed that it was intended to give jurisdiction only in relation to those matters which are committed to the authority of parliament by section 91 and other provisions of the B.N.A. Act. It might be supposed, on the other hand, to constitute a delegation of the entire authority of the parliament of the United Kingdom, in so far as the execution of such authority might be required for the purpose of giving effect to the treaty obligations of the Empire within Canada or in relation to Canada. On the other hand it may be supposed that a less sweeping

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authority is conferred by this section; that it is subject to some limitations arising out of co-ordinate provisions of the B.N.A. Act itself. As to the first of these views, it may, I think, be at once rejected upon the ground that otherwise the section would be quite unnecessary. As to the other two; there are certain fundamental terms of the arrangement upon which the B.N.A. Act was founded, and these it is difficult to think it was intended that parliament should have power to disregard in any circumstances. But it is unnecessary to pass upon these points. The authority given by section 132 is an authority to deal with subjects of imperial and national concern as distinguished from matters of strictly Dominion concern only; and I am satisfied it is broad enough to support the legislation in question. The treaty validated by statute of 1913 deals with subjects which are ordinary subject matters of international convention: with precisely the kind of thing which must have been in the contemplation of those who framed this section. The effect of the Act of 1913 is, in my opinion, at least this: that with respect to the right to dispose of their labour, the Japanese are to be in the same position before the law as the subjects of the most favoured nation. Equality in the eye of the law in respect of these matters is what I think the legislation establishes. Does the Act of 1921 in its true construction infringe these rights of Japanese subjects? In my opinion it does. It excludes them from employment in certain definite cases. It is not, I think, material that the province in passing the Act is engaged in administering its own corporate economic affairs. If it goes into effect, it goes into effect (as a law of the province) abrogating rights guaranteed by the treaty. It is thus not only a law passed against the good faith of the

treaty but it is, in my opinion, a law repugnant to the treaty and as such I think it cannot prevail. I think, moreover, that the Act of 1921 views Japanese and Chinese as constituting a single group and since it cannot take effect according to its terms that it must be treated as inoperative *in toto*.

ANGLIN J.—The competency of the legislature of British Columbia to pass chapter 49 of its statutes of 1921 is the subject of a reference to this court by His Excellency the Governor General in Council, made under s. 60 of the "Supreme Court Act". The statute in question purports to validate certain orders of the provincial executive council providing for the insertion, in leases of Crown lands, Crown licences and other documents, of clauses precluding the employment by Crown lessees and licensees of Chinese and Japanese labour. Its validity is challenged on two distinct grounds: (a) that it impinges on the exclusive jurisdiction of the Dominion Parliament over "Naturalization and Aliens" (B.N.A. Act, s. 91 (25); (b) that it derogates from rights assured to the Japanese in Canada by a treaty between H.M. the King and H.M. the Emperor of Japan, "sanctioned and declared to have the force of law in Canada" by 3 & 4 Geo. V., (D), c. 27.

It seems obvious that, inasmuch as the latter ground of attack concerns only the Japanese, it will, in any event, be necessary to consider the former ground in order to answer the question propounded in so far as it relates to the Chinese, who are also affected by the impugned legislation and the orders in council it purports to confirm. Their Lordships of the Privy Council have frequently intimated that in dealing with matters akin to that now before us, those upon whom the duty

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of determining them is thrown will be well advised so far as possible to restrict their expressions of opinion to what is essential for the determination of the particular question in hand. *Citizens Ins. Co. v. Parsons* (1); *Hodge v. The Queen* (2); *Attorney General of Manitoba v. Manitoba Licence Holders' Association* (3). It would therefore seem to be desirable that the question as to the effect of the Japanese Treaty and of its sanction by the Canadian parliament should be entered upon only if the impugned legislation should be held not to invade the jurisdiction of the Dominion parliament under s. 91 (25) of the B.N.A. Act. I accordingly take up this latter question.

If the British Columbia legislation, when properly appreciated, falls within the legislative jurisdiction conferred on the Dominion Parliament by s. 91 (25), in view of the concluding proviso of s. 91—"Any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local and private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the legislatures of the provinces"—it should not be upheld merely because it may in some aspects be regarded as an exercise of legislative power conferred by one of the subsections of s. 92.

In determining the validity of legislation which it is sought to uphold under, and which may *ex facie* purport to have been passed in the exercise of certain legislative powers conferred by the B.N.A. Act, their Lordships have intimated that the courts should have regard to "the pith and substance of the enactment" rather than to its form or to any gloss put upon it

(1) 7 App. Cas. 96, 109. (2) [1883] 9 App. Cas. 117, at p. 128.
(3) [1902] A. C. 73, at p. 77.

(*Union Colliery Co. v. Bryden*) (1)—that they should ascertain at what the legislation is really aimed and should accordingly determine where legislative jurisdiction to enact it is to be found. *Great West Saddlery Co. v. The King* (2), *Attorney General for Canada v. Attorney General for Alberta* (3) and *The Board of Commerce Case* (4) are recent instances in which their Lordships have so dealt with Canadian statutes.

To paraphrase Lord Watson's language in the *Bryden Case* (1) the leading feature of the orders in council dealt with by the legislation in question consists in this—that they have, and can have, no application except to Japanese and Chinamen who are aliens or naturalized subjects, and that they establish no rule or regulation except that these aliens or naturalized subjects shall not work, or be allowed to work, upon, or in the development of, any property leased from the government of British Columbia or in private enterprises which are operated in whole or in part under licences from that government; "the pith and substance of the enactments" objected to consists in establishing a prohibition which affects aliens or naturalized subjects in matters that directly concern their rights, privileges and disabilities as such; they therefore trench upon the exclusive authority of the parliament of Canada.

While the judgment in the *Bryden Case* (1) is undoubtedly explained and somewhat restricted in its application by what Lord Chancellor Halsbury said in pronouncing the judgment of the Board in the *Tomey Homma Case* (5), the authority of the former decision remains unchallenged. The legislation now before us

(1) [1899] A.C. 580, at p. 587.
(2) [1921] 2 A.C. 91.
(3) [1921] 38 Times L. R. 90.
(4) [1922] 1 A.C. 191.
(5) [1905] A.C. 151 at p. 157.

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in my opinion much more closely resembles that condemned in the *Bryden Case* (1) than that upheld in the *Tomey Homma Case* (2), where a matter of provincial electoral franchise, and therefore of the constitution of the province, was the subject of the legislation, or in the subsequent *Quong-Wong Case* (3) in this court, where a law for the suppression of a local evil was upheld. Properly appreciated, the orders in council which the British Columbia legislation of 1921 purports to validate are devised to deprive Chinese and Japanese, whether naturalized or not, of the ordinary rights of the inhabitants of British Columbia in regard to employment by lessees and licensees of the Crown and are not really aimed at the regulation and management of Crown properties or Crown rights. I am unable to distinguish the case at bar in principle from the *Bryden Case* (1). If the authority of that decision is to be destroyed, it must be by the Judicial Committee itself and not by this court.

I would therefore answer the first question on the reference in the negative, which renders an answer to the second unnecessary.

BRODEUR J.—The question we have to consider on this reference is whether the British Columbia legislature has the right to prohibit the employment of Chinese or Japanese on Crown lands or on public works.

On the 2nd April 1902 the Legislative Assembly of that province passed a resolution declaring that in all contracts, leases and concessions made by the government, provision should be made that no Chinese or Japanese should be employed in connection with these contracts, leases or concessions.

(1) [1899] A.C. 580. (2) [1903] A.C. 151.
(3) 49 Can. S.C.R. 440.

Such a resolution was never embodied before 1921 in any statute of the legislature and was not then part of the law of the land. Further it could not be disallowed by the federal authorities under the powers conferred by sections 55 and 90 of the B.N.A. Act because it was not a statute.

In conformity with the said resolution, however, the government of the province passed on the 28th of May 1902 and on the 16th day of June 1902 orders in council carrying into effect the resolution of the Legislative Assembly and since the passing of these orders in council the Government has inserted in its contracts for the construction of provincial public works a provision that no Chinese or Japanese should be employed in connection with such works and has caused it to be inserted as a term of its contracts and leases conferring rights or concessions in respect to the public lands belonging to the province, a provision that no Chinese or Japanese shall be employed about such premises.

In 1920 the provincial government of British Columbia referred to the Court of Appeal of that province the question whether the Japanese Treaty of the 3rd of April, 1911, operated as to limit the legislative jurisdiction of the Legislative Assembly.

The Court of Appeal unanimously decided that it was not competent to the provincial legislature to insert in these public contracts or leases in respect of public lands a provision that no Japanese shall be employed upon such works or lands.

In 1921 the legislature of British Columbia passed the statute ch. 49 by which the two orders in council of the 28th May 1902 and the 18th June 1902 are declared to have been valid and effectual for all purposes.

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The Consul General of Japan having suggested to the Federal government that this statute of 1921 was *ultra vires* and that it should be disallowed by His Excellency the Governor General, the Federal Government has referred to the Supreme Court the two following questions:—

"1. Had the legislature of British Columbia authority to enact cap. 49 of its statutes of 1921 "An Act to validate and confirm certain orders in council and provisions relating to the employment of persons on Crown property?

"2. If the said Act be in the opinion of the court *ultra vires* in part then in what particulars is it *ultra vires?*"

The question of restricting the employment of Chinese and Japanese labour has been for years a subject of discussion in the legislature of British Columbia and of litigation before the Canadian courts and the Privy Council. It has been also the subject of diplomatic relations between the countries interested.

We see that as far back as 1890, the legislature of that province passed the "Coal Mines Regulation Act" by which it prohibited the Chinamen from employment in underground coal workings. The Privy Council, being called upon to pass judgment on the validity of the Act, declared that the statutory prohibition in question was within the exclusive authority of the Dominion Parliament conferred by section 91, subsection 25 in regard to "naturalization and aliens": *Union Colliery v. Bryden* (1).

In 1897, the "British Columbia Electoral Act" was passed and provided that no Japanese, whether naturalized or not, should be entitled to vote. The

(1) [1899] A. C. 580.

validity of this Act was also brought before the courts, and the Privy Council upheld the validity of the Act and decided that the Dominion parliament, under sec. 91 s.s. 25 B.N.A. Act, had exclusive jurisdiction to determine how the naturalization should be constituted, but that the provincial legislature had the right to determine under sec. 92, s.s. 1 what privileges, as distinguished from necessary consequences, shall be attached to naturalization. *Cunningham v. Tomey Homma* (1).

It was said that in the *Tomey Homma Case* (1) the Judicial Committee "modified the views of the construction of subsection 25 of section 29 in the Union Collieries decision". *Quong-Wing v. The King* (2).

This *Quong Wing Case* (2) gives another instance of a legislative enactment against Orientals. It has reference to a prohibition by the legislature of Saskatchewan against the employment of white female labour in places of business kept by Chinamen, and it was decided by this court that such a provision was intra vires of the provincial legislature.

The Privy Council refused leave to appeal in this *Quong Wing Case* (2).

I can, with some difficulty, reconcile these three above decisions. (Clement's Canadian Constitution, 2nd ed. p. 673)

It appears to me however that where a province deals with a subject which evidently is within its jurisdiction, as the constitution of its legislative assembly or the making of the civil contract of hire, then it can provide against the Chinese and the Japanese becoming duly qualified electors and employing white girls. But where, under the pretence of dealing with local

(1) [1903] A. C. 151.

(2) 49 Can. S.C.R. 440 at p. 446.

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undertakings, the legislature undertakes to legislate with regard to naturalization or aliens, then it is a legislation which is not within its competence. A provincial legislature cannot discriminate against an alien upon the ground of his lack of British nationality, but a person may nevertheless be under disability, civil or political by reason of racial descent, a disability which he would share with natural born or naturalized British subjects of like extraction. *Quong-Wing v. The King* (1).

By the orders in council which the British Columbia government passed in 1902 and which were confirmed by the Act whose validity is referred to us, the legislature deals with its own crown lands and enacts that a certain class of persons will not be permitted to work on those lands. It is a question of internal management which, according to section 92 s.s. 5 of the B.N.A. Act, is within the competence of the local authority.

I therefore come to the conclusion that the Legislation at issue, if it were not for the Japanese Treaty to which I will presently refer, would be *intra vires*. It is certainly *intra vires* as far as the Chinese are concerned.

In 1911, a treaty was made between His Majesty the King and the Emperor of Japan in which it was stipulated that the subjects of the contracting parties "shall in all that relates to the pursuit of their industries, callings, professions and educational studies be placed in all respects on the same footing as the subjects or citizens of the most favoured nation."

This treaty was sanctioned and declared to have the force of law in Canada by the Canadian parliament in 1913.

(1) 49 Can. S.C.R. 440.

Now by the B.N.A. Act sec. 132, it is provided that the parliament of Canada shall have all powers necessary for performing the obligations of Canada or of any province towards foreign countries arising under treaties between the British Empire and such foreign countries.

If the treaty had not been adhered to by the Dominion parliament, it could be contended with force that a Canadian province was not bound to obey the provisions of this treaty and could discriminate against the Japanese in favour of their foreign subjects. *Walker v. Baird* (1).

The King has the power to make a treaty, but if such a treaty imposes a charge upon the people or changes the law of the land it is somewhat doubtful if private rights can be sacrificed without the sanction of Parliament. The bill of rights having declared illegal the suspending or dispensing with laws without the consent of parliament, the Crown could not in time of peace make a treaty which would restrict the freedom of parliament.

In the United States a different rule prevails. Under the United States constitution the making of a treaty becomes at once the law of the whole country and of every state. In our country such a treaty affecting private rights should surely become effective only after proper legislation would have been passed by the Dominion parliament under section 132 B.N.A. Act.

We have in the "Japanese Treaty Act" of 1913 the legislation which is required to give force of law to that agreement, and it becomes binding for all Canadians and for all the provinces.

(1) [1892] A.C. 491.

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British Columbia could not under that treaty give to the Japanese a treatment different from the one given to other foreigners.

I consider the legislation of British Columbia illegal as far as the Japanese are concerned.

I would then answer the first and second questions referred to us: That the legislature of British Columbia had authority to enact cap. 49 of its statutes of 1921 as far as the Chinese were concerned but that in so far as the Japanese are concerned such statute is *ultra vires*.

MIGNAULT J.—In answering the questions submitted by this reference, two decisions of the Judicial Committee must be considered: *Union Colliery Co. of British Columbia v. Bryden* (1), and *Cunningham v. Tomey Homma* (2).

The latter decision somewhat qualified the former, and indicated its scope in the following language:—

"This Board, dealing with the particular facts of that case, came to the conclusion that the regulations there impeached were not really aimed at the regulation of coal mines at all, but were in truth devised to deprive the Chinese, naturalized or not, of the ordinary rights of the inhabitants of British Columbia and, in effect, to prohibit their continued residence in that province, since it prohibited their earning their living in that province."

In my opinion, the purport of the legislation and orders in council referred to in the reference is well described by the above language. So far as it could do so, the government of British Columbia, with the sanction of the legislature, has excluded the Chinese and

(1) [1899] A.C. 580. (2) [1903] A.C. 151.

Japanese, naturalized or not, from the field of industry and the labour market in that province, and has, in effect, prohibited their continued residence and their earning their living in British Columbia. The case comes well within the rule of the *Bryden Case* (1) as explained in the *Tomey Homma Case* (2), and therefore the statute and the orders in council are *ultra vires*.

During the argument, counsel referred us to the Anglo-Japanese Treaty of April 3rd, 1911, sanctioned and declared to be law by the Dominion statute, 3-4 Geo. V. ch. 27, as rendering the impeached provisions void in so far as the Japanese are concerned.

This treaty is not mentioned in the reference, and inasmuch as I have come to the conclusion that this legislation is *ultra vires* under the "British North America Act" as construed by the above mentioned decisions, it is unnecessary to consider whether the treaty furnishes a further ground of nullity.

I would answer "No" to the first question of the reference. The second question requires no reply.

At the sittings on the 7th February, 1922, the Chief Justice, speaking for the court, said:—

"The answer by the court to the first question "submitted by His Excellency the Governor General "is in the negative. It is therefore unnecessary to "answer the second question. Idington J. dissenting; "Brodeur J. dissenting in part."

(1) [1899] A.C. 580.

(2) [1903] A.C. 151.