

M28-1099

GR-0429 BRITISH COLUMBIA. ATTORNEY GENERAL.
Box 07 Correspondence inward, 1901.
File 02



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Ottawa, 31st May 1901.

Warning on Naturalization

S i r;



I have the honour, by direction of the Minister of Justice, to inform you that it has been represented to him that sufficient care is not exercised in your province in the granting of naturalization certificates to Japanese. The Minister bids me call your attention to section 10 of the Naturalization Act which provides that the alien applying for naturalization shall adduce, in support of his application, such evidence of his residence and intention to reside, as the person before whom he takes the oaths requires, and under which it is only on being satisfied with such evidence and that the alien is of good character, that he is to grant a certificate under that section. It is obviously of great importance that certificates of naturalization should not be issued to ineligible persons, and the Minister thinks that, in view of the complaints which have been made to him, it would be well to call the attention of those upon whom the statute imposes the duty of issuing certificates under section 10 to the fact that it is incumbent upon them to thoroughly satisfy themselves that persons applying to take the oaths prescribed by the statutes have put in the necessary residence in Canada and are otherwise qualified, before granting such certificates.

As the persons before whom the oaths are usually taken are for the most part officers appointed by the provincial government

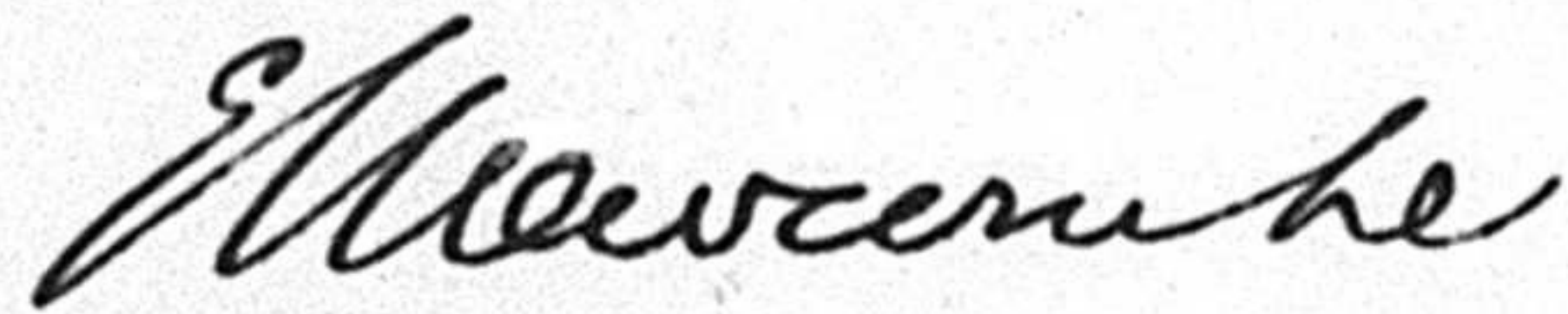
The Honourable,
The Attorney General,
V I C T O R I A,
British Columbia.

government I am to request that you will take such action as may commend itself to you for the purpose of securing the exercise of greater care in the future so that persons seeking naturalization shall in every respect conform to the law.

I have the honour to be,

S i r,

Your obedient servant,

A handwritten signature in cursive script, appearing to read "J. McCreary".

Deputy Minister of Justice.

Wilson & Senkler.
Barristers & Solicitors.

Charles Wilson, L.C. J.H. Senkler
Edgar Bloomfield.

Vancouver, British Columbia.

22nd June 1901.

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Honourable D. M. Eberts, K. C.,

Attorney General,

Victoria, B. C.

Sir:-

Ota v McAllister.

This case had been duly set down for trial on Tuesday, but there being no judge present it stood over until Friday at 2 o'clock when the Chief Justice attended and the case was partly heard on that day. The trial was concluded on Monday and resulted in a verdict for the plaintiff for \$100.00 damages. I enclose you a copy of the Judge's charge for your information. I would have reported it the next day but for the reason that I waited to get a copy of the charge.

In my opinion the constitutionality was at no time called in question in this action. Irrespective of the points mentioned in the Judge's charge the Statute itself does not justify any detention. Consequently it is almost impossible to resist a verdict for the plaintiff. I had thought that one of the primary objects of the action was to obtain an expression of the opinion as to the constitutionality of the Act, and that it had been promoted by the Japanese for that express purpose. I thought it as a matter of tactics highly inexpedient, to raise the question of constitutionality or unconstitutionality in a case where the point was not clearly defined, and feeling as I did that the Act itself was no defence, I



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carefully refrained from raising any question which would enable the Court to pass upon the Statute itself.

I think the Learned Chief Justice erred in directing the jury that the Statute had no application to a British subject. To my mind it applies as clearly to a British subject who is unable to comply with its provisions, as it does to any one. Having regard however, to his lordship's ~~construction, his lordship's~~ definition of the word "immigrant" it may be that British subjects would be divided into two classes, namely, those who come here in the first instance intending to make it their permanent home, and those who have already been here and acquired a domicile. As to the first class, the Act would apply. As to the second class, possibly it would not.

I should very much like to appeal from the Chief Justice's ruling, but in view of the fact that it is almost impossible to avoid a verdict for the plaintiff, I hesitate to advise it. I may add that his lordship overstated in his summing up that which I pointed out to the jury, namely, that if they should be of opinion or be instructed by the Court that the Statute was no justification for the defendant's act in detaining the plaintiff, then that he would be entitled to a verdict, but that having regard to the manner in which he

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acted, that verdict should be accompanied by ^{a farthing} damages.

I have the honour to be

Sir,

Your obedient servant,

Charles Weller

Dict.C.W.

1 Enclosure.

Juarez's.
P.S. The Charge will duly follow on Monday's boat.

Clo.

IN THE SUPREME COURT OF BRITISH COLUMBIA.
(BEFORE McCOLL, C.J. & SPECIAL JURY)

VANCOUVER JUNE 17/01.

OTA VS McALLISTER.

JUDGE'S CHARGE.



Mr. Foreman and Gentlemen -

The question in issue in this case is one of considerable importance, and as part of a larger question, that is Japanese immigration into this Province, is of course one of very much greater importance.

It is well said by one of the counsel that the political view of the question was one with which you had nothing to do. I may add, you have equally nothing to do with any question of sympathy for or against either of the persons in this case. I will only add that if you are to regard any outside considerations you cannot very well ~~ignore~~ discard from your minds the effect of any partiality in the administration of justice as between a Japanese and another person, and the effect of any such partiality must have as regards the treatment which Canadians are entitled to expect when they visit Japan, as very often happens now.

I take a somewhat different view of the law in this matter from that of either counsel. The question of law is whether this Act which is relied upon is applicable to this plaintiff or not, and the question of the interpretation of the Act is of course one of law, which is for me to decide,

in the first place, and it is one that does not concern you. You, as a matter of course, have to be guided by it in coming to the conclusion which you arrive at, and then if I prove to be wrong - which very often happens with any judge - I can be very easily set right afterwards. And the view I take is this - This Act has been passed by the Legislature of this Province for the regulation of Immigration, and the question upon which I have to direct you in the first place is, what is the meaning of the term "immigration?" The term is not defined in the Act itself, and therefore it must be construed in the ordinary sense; and immigration as we all know, means the act of going into a foreign country to reside there. That being so, if this plaintiff was, at the time when he returned into this Province after his visit to Japan, a naturalised subject of the Crown, having been naturalised in British Columbia, it seems to me to be plain as an argument - in fact, I do not see how possibly an argument to the contrary could be advanced - that a man returning to his own country cannot be returning to a foreign country - that is, British Columbia, in these circumstances would not be a foreign country as regards this plaintiff. I am bound to admit it seems to me too clear to admit of argument, though I may be wrong, and if so, there is always a remedy by way of appeal. But as a point of law, my first duty is to direct you that if you find this man was naturalised at the time - this is the meaning of the application of the Act - it cannot apply. As regards evidence of naturalisation, Mr. Wilson very properly admitted that the certificate itself was conclusive of the naturalisation of some person, the doubt he suggested being only as to whether the person named in that document was, in truth, the plaintiff. I do not think a suggestion of that kind ought to be made. I do not mean any reflection upon counsel, of course,

who follows the instructions given him by his client, but I do not think any suggestion of that kind ought to be made, unless there is any reasonable ground for it, and if so, then I think the government ought to have, instead of setting up a defence of this nature, charged the plaintiff with fraudulently using the certificate of another person. You have been told that a great deal of this sort of thing has been going on, persons getting naturalisation papers that they are not entitled to. If that be so, and it was said that it was a matter of common knowledge, it seems to me this would be a good opportunity for the government to take advantage of this plaintiff being well known by so many white persons to sheet home that charge to him, and not content themselves with simply setting up a suggestion of this kind.

I do not really think there was any question - any serious dispute upon the naturalisation papers during the evidence; it was only when counsel came to argue the matter that counsel did suggest to you you might not be satisfied with those papers. I leave that question bare.

Now, as to the passport, that is the next point that occurs ~~me~~ to me as to which I ought to make some observations. It does not appear why it was necessary - if it was necessary - for this plaintiff to have the passport he has had issued to him upon leaving Japan; but of course you will understand it is a question of common sense if that certificate got here is conclusive and was admitted, then the mere fact that the plttff. that the plaintiff may have been masquerading in another country as not being a British subject cannot change the truth of the certificate of naturalisation here. Being admitted to be conclusive, then however wrongfully he may have acted in using a passport, if he was using one, cannot change the fact. The reason he got it does not appear. Counsel

suggested that if he had got naturalised, on going there he would most likely have talked of his naturalisation and have been as you all are, proud of being a British subject, and that he would have taken advantage of parading that certificate. It did not occur to me in that way, and I do not think it does to you. A Japanese going back to his own country, if it did not appear that he had forsworn his allegiance, would be likely to conceal the fact, so it does not seem to me you should attach very much weight to the remark made as to that. But you will see it is only to this limited extent that that question can have any bearing on the present case; the fact that this man had a Japanese passport of that kind is something which I suggest to you might fairly awaken suspicion in the mind of this deft. as an officer of the government that the man was not the British subject that he claimed to be, because otherwise, why should he have a passport? Therefore, that it was a justification to him in regarding this man with suspicion. I agree with that, though it is for you to say whether that has any bearing at all.

The next question of law which I find ~~myself~~ it necessary to address myself to is this: Assuming you are not satisfied that this man was naturalised, what is the position? Of course, if you believe he is the man represented in that certificate, then there is an end to that part of the case, the act does not apply. You must consider it does not, because that is my ruling at present on a point of law, but supposing you are not satisfied, then the other question upon which I charge you is, if the plaintiff was domiciled, that is to say, if he had his fixed residence in British Columbia at the time the law was passed, it does not apply to him. Take the case of a wealthy American citizen who comes ^{over} to Vancouver, beguiled by the climate, scenery, and that sort of thing, and who brings

his family and lives here for ten years without wishing to come under the British flag. Then, if that wealthy citizen with the evident intention of continuing his residence here, happened to go to Seattle to take in the 4th of July, it would involve this - that upon his return he could be separated from his family here, and not allowed under this Act to land. It does not seem to me that the legislature intended anything of this kind. It seems to me clear as a matter of law that at the time this plaintiff returned to Japan he had his domicile here, that he had his fixed residence in the Province and that the Act does not apply to him; and the question you have to consider is whether he had the intention of coming home and making this his home, before he left on his return to Japan. There is nothing I have to say to you on the evidence on that point. It is short and you will remember it. If you are satisfied he had his place of residence here at that time, then the Act as a matter of law, does not apply.

Now, assuming the law to be as I have laid down, and if it is not, of course I will be set right by a different court, the only question remaining is the question of damages. It is very frankly, and if I may say so, very properly admitted by counsel - because I think counsel ought to admit what they agree is the fact according to their own view - it is too much to expect that they will agree with the jury and judge but I say it was admitted by counsel that this plaintiff was entitled to some damages, that even if this Act does not apply to him, his detention - I will not use the word "arrest" because that to my mind is associated with arrest by a constable and incarcerated in a cell; but if he was detained, as undoubtedly he was, his detention was not authorised by the Act, and so he is entitled to some damages,

but the extent of the damages is worthy of your consideration, one point being whether the course pursued by this deft. was a reasonable one, or not.

The next point for your consideration on this branch of the case, is whether this deft. did more than was reasonably necessary to be done in carrying out his duty, assuming that he was acting in good faith under the Act? Now, a good deal was said for the deft. about the plaintiff not having put somebody in the box, I suppose calling somebody as a witness for him to prove on oath that he was naturalised and was rightfully here. You see, gentlemen, the course followed by the deft. prevented that. If the course prescribed by the Act of going before a Magistrate at once and making complaint had been adopted, then there would have been something before a court in that case - upon which the plaintiff could give evidence; but until some such thing was done he could not give evidence. He could not go before a Magistrate and be sworn, because the law makes it a criminal offence to take an oath unless in some proceeding.

Then as to the detention being longer than you think was reasonably necessary for the purpose ~~of~~ the deft. had in view, it seems to me that the ~~man's~~ naturalisation papers were not obtained until about 5 o'clock. I do not remember any evidence - it is for you to say - that anything further was got in favour of the plaintiff's right to release after that time, excepting that a book-keeper in a cannary office telephoned that this man was what he said he was. Well, if the book-keeper simply telephoned - he does not seem to have come to see the man - I do not see what weight that would add to the evidence one way or the other, because he could not say anything more over the ~~line~~ telephone than that there was some man, but whether this is the man would not appear. But that,

as I understand, was the only evidence available until the next morning when he was allowed to go. Assuming that he was not doing anything very much out of the way from 5 o'clock to the time when the papers were got, why was he detained afterwards? And if the view of the government mentioned obtains now, why is he at large? The deft. instructs his counsel to tell you the ~~praxxx~~ position he takes as to this plaintiff. If that is so, why was the case dropped the next morning.

I do not know gentlemen, that I can call your attention to anything more. You are a special jury of the City of Vancouver, and it is not necessary for me to do what I would do with a common jury - go into the evidence at greater length. You are quite as capable of course as I am, very likely much more than I am, of forming a correct conclusion on the facts.

As to damages that is entirely within your discretion. If you find, as it is admitted you must find something, even nominal damages, but the amount is entirely in your discretion. Find what you think is just and right. You may retire and consider your verdict.

(Jury retired 3.17 p.m.)

Mr. Wilson: My first objection, my lord, is that your lordship told the jury that the Act cannot apply to a man that has been naturalised?

Court: Yes?

Mr. Wilson: I submit there is nothing in the Act ~~xx xx~~ which shows, except inferentially, whether it is intended to apply to a British subject or an alien. I submit it is obvious it cannot be intended exclusively to apply to aliens.

Court: If you will pardon me, objections are made only upon two grounds - either that the court ought not to have told the jury so-and-so, or that it omitted to tell them so-and-so.

Mr. Wilson: My objection is that your lordship ought not to have told the jury that the Act did not apply to a British subject.

Court: Yes, I decline to change that.

Mr. Wilson: I object to your lordship's illustration with respect to American citizens, because I submit it has no application. Then I further object to your lordship telling the jury that the Act does not apply if he is domiciled here.

Court: Yes, I decline to change it. I may be wrong, but I have not the slightest doubt about it.

Jury returned at 3.45 p.m. with a verdict for the plaintiff; damages \$100.00.

Judgment accordingly, and certificate for special jury. Special counsel fee \$150.00. Jury discharged.

I hereby certify the foregoing to be a true and accurate report of the said proceedings.

"F. Evans".

Official Stenographer.

(Copy).

SUPREME COURT.

O T A

V

McALLISTER.

JUDGE'S CHARGE.

WILSON AND SENKLER.