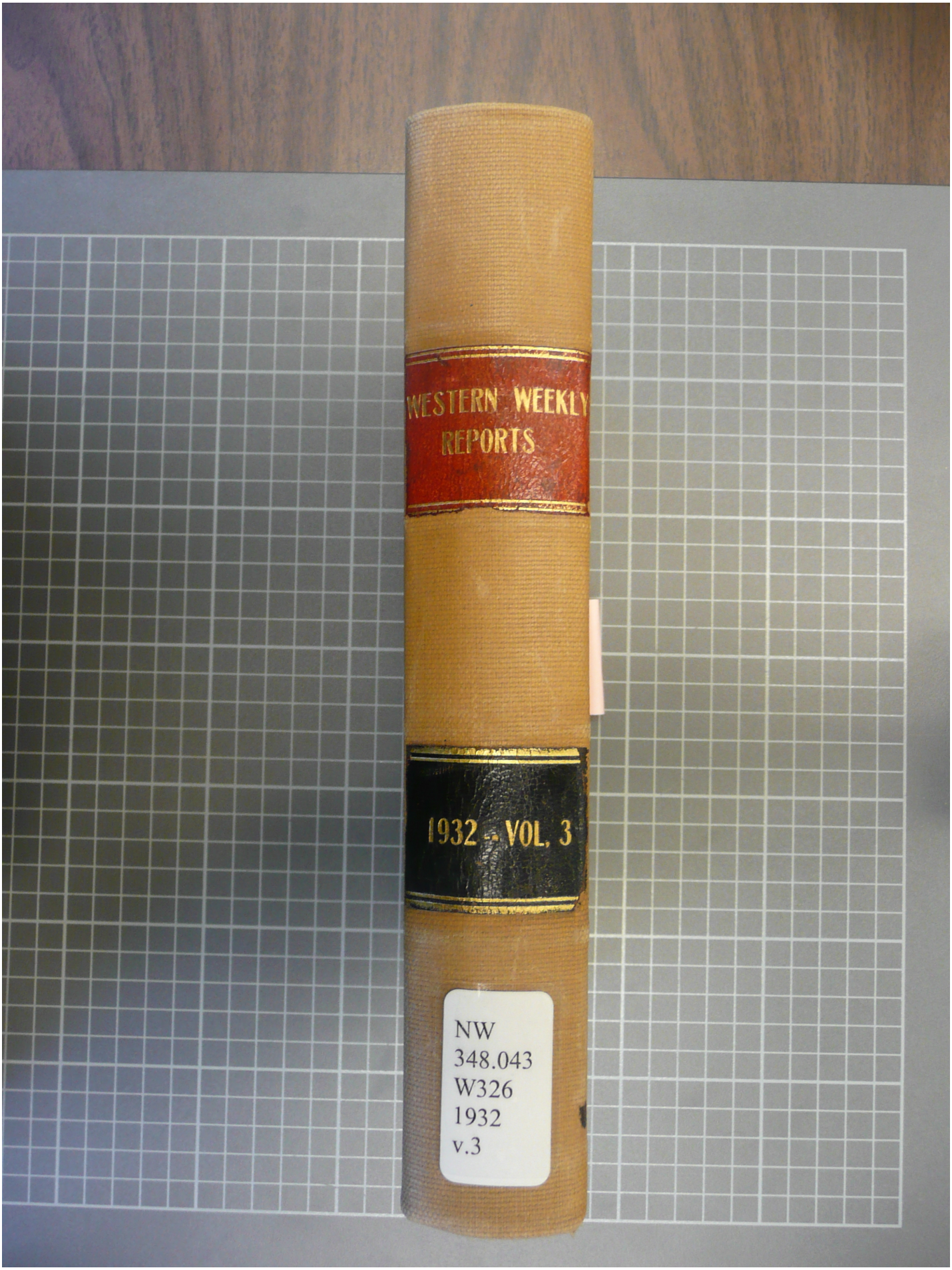



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BRITISH COLUMBIA

COURT OF APPEAL

Before Macdonald, C.J.B.C., Martin, McPhillips and M. A. Macdonald, JJ.A.

In re The Immigration Act
In re Munetaka Samejima

Immigration—Order for Deportation — Power of Court to Interfere—Effect of S. 23, Immigration Act—Form of Order of Deportation—Re-Arrest on Amended Order.

Per Macdonald, C.J.B.C. and McPhillips, J.A.: Because of the prohibition in sec. 23 of the *Immigration Act,* R.S.C., 1927, ch. 93, an order of deportation made by a Board of Inquiry under that Act against a rejected immigrant or passenger cannot be interfered with by any Court on any ground whatsoever, unless he is a Canadian citizen or a person having Canadian domicile. Per McPhillips, J.A.: *In re Munshi Singh* (1914) 6 W.W.R. 1347, 20 B.C.R. 243, is conclusive on the point; *In re Low Hong Hing* [1926] 2 W.W.R. 597, 37 B.C.R. 295, is not applicable.

Per Martin and M. A. Macdonald, JJ.A.: The jurisdiction of the Court to review, quash, or otherwise interfere with the proceedings of the Board of Inquiry still remains in two cases at least, in addition to those expressly conferred where the person detained has Canadian citizenship or domicile, viz., first, where the Board has acted without jurisdiction; and, second, where what has been wrongly done in the exercise of its jurisdiction amounts to a violation of the "essential requirements of justice." (*In re Low Hong Hing, supra,* followed; *In re Munshi Singh, supra,* referred to as supporting the *Low Hong Hing* case.)

[Note up with 4 C.E.D., *Habeas Corpus,* secs. 42, 51; *Immigration,* sec. 16.]

Appeal from the dismissal by Murphy, J. of an application for *habeas corpus.* The Court being equally divided—Macdonald, C.J.B.C. and McPhillips, J.A. for the dismissal of the appeal, Martin and M. A. Macdonald, JJ.A. for its allowance—the appeal was dismissed. The judgment of Fisher, J. discharging the immigrant on a prior application for *habeas corpus* is reported [1931] 3 W.W.R. 56. Following his discharge he was re-arrested and the application to Murphy, J. was then made.

C. H. O'Halloran, for appellant.

J. L. Clay, for Crown, respondent.

January 29, 1932.

Macdonald, C.J.B.C.

MACDONALD, C.J.B.C. (oral)—I would dismiss the appeal.

The first thing to be considered in the case is the jurisdiction of the Board of Inquiry. That jurisdiction is given by

B.C.
1932

IN RE IMMIGRATION ACT

IN RE MUNETAKA SAMEJIMA

Appeal

Macdonald, C.J.B.C.

the *Immigration Act*, R.S.C., 1927, ch. 93. The Board, therefore, entered upon its duties with jurisdiction to decide whether this man was properly in Canada, or whether he was not.

Having made an inquiry and come to the conclusion that he should not remain in Canada, sec. 23 of the *Immigration Act* says that no Court, and no Judge or officer thereof, shall have jurisdiction to interfere with that order, either to quash it or review it, except for two reasons, one by reason of citizenship, and the other of domicile—neither of which are involved in this case, because this man had neither citizenship nor domicile.

But the Court has given another reason. If the Board had no jurisdiction, then the Court had a right to set the judgment aside.

In this case I think the Board had entire jurisdiction in the matter. How they proceeded is not a matter of interest at all. They may have been absolutely wrong in finding that he ought to be deported; they may have gone right in the teeth of the evidence, but nevertheless the Parliament of Canada has said, on no ground whatever is it to be interfered with. So there is no question in my mind that the Board's order was properly made and could not be interfered with by Mr. Justice Fisher, or any other Court, and therefore Mr. Justice Fisher's order ([1931] 3 W.W.R. 56, 44 B.C.R. 317) was a nullity.

There are two courses open to the Crown. The Crown might say: We will treat Mr. Justice Fisher's order as a nullity, keep the person where he is and deport him; or, if we want to get rid of that order, move by way of appeal to set it aside. The Court would have power to review the order of the Judge, but not the order of the Board.

They let the man go, and they afterwards amended the order by adding a few words which did not go to the jurisdiction at all, and they re-arrested him on another warrant. That was unnecessary; they could do that at any time under the original order and have held him for deportation. Therefore what they did was futile. There was no right to amend. They should have stood upon that order, and in fact they have done so, since it is in effect. They are right now in standing upon that order. They have the right to detain him for deportation.

With that view of the case, and that seems to be the only possible view to take in view of the sections of the *Immigration Act*, the appeal cannot succeed.

MARTIN, J.A. (oral)—In my opinion this appeal should be allowed, with all deference to contrary views.

This Court has already decided unanimously in the case of *In re Low Hong Hing* [1926] 2 W.W.R. 597, 37 B.C.R. 295, 46 C.C.C. 65, on the corresponding sec. 38 (now 37) of *The Chinese Immigration Act* [now R.S.C., 1927, ch. 95], which is identical in relevant essentials with sec. 23 of the *Immigration Act*, R.S.C., 1927, ch. 93, now under consideration, that in the proper construction of the language of Parliament employed therein, the jurisdiction of the Court to review, quash, or otherwise interfere with the proceedings of the Board of Inquiry still remains in two cases at least, in addition to those expressly conferred, where the person detained has Canadian citizenship or domicile, viz., first, where the Board has acted without jurisdiction; and second, where what has been wrongly done in the exercise of its jurisdiction amounts to a violation of the "essential requirements of justice." I shall not refer further to that case, it speaks for itself and is a judgment of this Court and binding upon us.

In the exercise of that jurisdiction, Mr. Justice Fisher, sitting as the Supreme Court of British Columbia ([1931] 3 W.W.R. 56, 44 B.C.R. 317) set aside the order of deportation complained of, i.e., "reviewed and quashed" it, to use the words of the statute, and so employed in the order of the Court over which he presided and given under its seal as set out on p. 27 of the appeal book, wherein it was declared that the present appellant be discharged from the custody of the immigration authorities, "and the Order for (his) deportation be and the same is hereby quashed."

No appeal was taken from that judgment and it was pronounced under circumstances in which the Court could properly have had jurisdiction and as there is nothing on its face to show any want of jurisdiction it must be presumed that it existed, and so it is improper for this Court to interfere with it or go behind it while it stands as a valid judgment, for we cannot now "assume the functions of a Court of Appeal over it"—cf., even in the case of inferior Courts—*Colonial Bank of Australasia v. Willan* (1874) L.R. 5 P.C. 417, 43 L.J.P.C. 39; *Reg. v. Bolton* (1841) 1 Q.B. 66, 5 Jur. 1154, and *Rex v.*

B.C.
1932

IN RE IMMIGRATION ACT

IN RE MUNETAKA SAMEJIMA

Appeal

Martin, J.A.

Commanding Officer of Morn Hill Camp [1917] 1 K.B. 176, 86 L.J.K.B. 410, wherein it was said, p. 180, that the same principles apply in *habeas corpus* as in *certiorari*.

When the matter came before Mr. Justice Murphy, on the second application for *habeas corpus* after the second arrest, he very properly did not, as his reasons show, essay to base his judgment and his consequent order upon the ground that Mr. Justice Fisher's said order was invalid upon the facts before him, but took another ground which was properly open to him to take, viz., he thought that even though there had been a second arrest of this appellant upon an amended order of deportation, nevertheless that amended order could be justified by the decision of the King's Bench Division in England, in *Rex v. Governor of Brixton Prison; Ex parte Stallman* [1912] 3 K.B. 424, 82 L.J.K.B. 8, 13 Cox C.C. 192.

Now if that case had been on a par with the present one, I would, even though it is not binding on us, have little to say under its particular circumstances, but, as was pointed out by Mr. O'Halloran, for the appellant, it contains in fact and law fundamental distinctions, and when it is thoroughly understood it is not an authority in support of the decision now appealed from, but is against it. We find, for example, Mr. Justice Phillimore saying, at p. 449, that though there may be a re-arrest (in proper circumstances) on an extradition warrant, yet if one is made even on a valid warrant, then the case of the arrestee must also be "fully investigated before his committal" thereupon. And, again, the charge in the original British warrant upon which the applicant was re-arrested was the same as that upon which he was arrested and liberated in India and because there had not been in law a real decision in India of the charge upon the merits, it was held that the original charge could be proceeded with in England.

Now the primary complaint in the present case is that the original order of the Board has been accepted and acted upon by itself as unsound and insufficient to support a re-arrest, and so it improperly assumed jurisdiction to amend its proceedings by setting out, for the first time, a definite charge against the appellant and arresting him thereunder; that was the whole and sole reason for the amended order, because the first order for release was defective, as Mr. Justice Murphy says, owing to the fact that the particular breach of the *Immigration Act* was not set out as is required. But the Board having illegally amended its proceedings and reframed the charge so as to

formulate it particularly and properly for the first time against this person, and arrested him thereunder, proceeded to deport him without giving him an opportunity to show cause against that very grave punitive proceeding.

My mind is shocked by such a miscarriage of justice, and I am sure that if anything of the kind had been before the King's Bench Division in the *Brixton Prison* case, *supra*, they would have given it no sanction whatever, and I feel it is our duty to do likewise herein.

I therefore put my decision on two grounds: First, that under the circumstances the order of Mr. Justice Fisher was a proper order to make, and we are not justified in interfering with it; and, second, that even if the proceedings upon the Board's amended order could be invoked at all they contain the incurable defect that after the re-arrest there was no re-investigation of the accused on the definite charge that was for the first time then laid against him but, on the contrary, he was in effect condemned upon that amended charge without being given any opportunity to meet it and sentenced to deportation in his absence. It is a coincidence, but it was upon that very ground (violation of natural justice) that the applicant in the *Brixton* case had been liberated from his arrest on the first warrant in India, by the High Court of Justice there, in that he had not been given an opportunity to present evidence to meet the charge against him: in other words, no real trial of the charge had been held.

With respect to the suggestion that the Board can now, at the eleventh hour, abandon its amending proceedings and the arrest thereunder by amended order and fall back upon the first order and justify the second arrest thereunder, there are two complete answers to it, viz., first, the original order is defective as aforesaid; and, second, even if it were not, the return of the immigration agent, Roff, dated October 23, 1931, to the writ of *habeas corpus* upon which the deportee is now detained by him shows, as it states specifically, that this detention is solely

> under and by virtue of an order of deportation a true copy of which is hereto annexed * * * and that the said Munetaka Samejima is detained by me by virtue of the said order of deportation and for no other cause whatsoever.

Now the "order annexed" is the amended and not the original order, and therefore the immigration agent has elected to justify and bring up the body in accordance with his return

B.C.
1932

IN RE IMMIGRATION ACT

IN RE MUNETAKA SAMEJIMA

Appeal

Martin, J.A.

and no other return is before us or can be relied upon by the said agent or even considered by us—cf. C.O. Rule Civil, 241.

As the case in this Court of *In re Munshi Singh* (1914) 6 W.W.R. 1347, 20 B.C.R. 243, has been cited and misconceived I refer to it only to say that it clearly supports, if support were needed, our later consistent decision in *Low Hong's* case, *supra*, as appears by the judgments of four members of the Court at pp. 258, 263, 269 and 277. For example, at p. 258 the learned Chief Justice gave some illustrations of cases wherein this same sec. 23 does not take away the remedial jurisdiction of the Court, viz.:

> Had the Board of Inquiry acted without jurisdiction, or upon orders in council made without authority, or upon a statute which was unconstitutional, no doubt the Court could and would interfere to prevent what in that case would be an illegal detention.

In my opinion it is apparent *ex facie* that the "essential requirements of justice" have been violated in this case by the proceedings of the Board and an unfounded jurisdiction exercised, and therefore the appeal should be allowed and the deportee set at liberty forthwith.

McPhillips, J.A.

McPHILLIPS, J.A. (oral)—I would dismiss the appeal, and I am in agreement with my learned brother the Chief Justice, upon the facts and the law.

There could be no misconception from the start of the question to be inquired into. The evidence is complete, that the authorities had the suspicion that Munetaka Samejima came into Canada by misrepresentation. That is the threshold of the matter. I cannot agree that there was any failure of the statutory tribunal to proceed in due course, and nothing was done which was against natural justice. Munetaka Samejima was held, the claim being that he came here making the misrepresentation that he was going to be a domestic servant, with a named person, and that was false; there was nothing to support the truthfulness of that statement.

The case of *In re Munshi Singh* (1914) 6 W.W.R. 1347, 20 B.C.R. 243, is a decision of this Court which determined that no Court had jurisdiction to review or reverse any decision of any Board of Inquiry, unless the case was one who possessed Canadian citizenship or Canadian domicile—sec. 23 inhibiting it where the case was not one of Canadian citizenship or Canadian domicile.

I go to p. 1354 (in *In re Munshi Singh, supra*) where Mr. Justice Irving made use of this language:

> Sec. 23 [that is the section we are considering] to which our attention is particularly invited, deals with two classes of persons, namely, Canadian citizen or person having a Canadian domicile—that is one class; the other class is "any rejected immigrant, passenger or other person, not being a Canadian citizen or having a Canadian domicile."
>
> With respect to the first class, in my opinion the right of the civil courts to intervene has not been taken away. In such cases the courts have a right to interfere by *certiorari*. With reference to the second class, the jurisdiction of the court to review, quash, reverse, restrain or otherwise interfere, I shall not say has been taken away, *but does not exist*. The right to *certiorari* in the second class is limited to want of jurisdiction or excess of jurisdiction or fraud. In cases where the right to *certiorari* is taken away by statute, the courts can nevertheless inquire as to the facts which go to the jurisdiction—that is, facts collateral to the matters they are to determine; but as to the merits of the case, the tribunal appointed is the sole judge. A person may apply to a civil court to determine whether he falls within one class or the other, but once it is established that he is a rejected immigrant or passenger, under the authority and in accordance with the Act, and is not a Canadian citizen or has not Canadian domicile, then the civil court has no jurisdiction to investigate the correctness of the decision.

Now that is this case; and I am surprised that the learned Judge gave the judgment he did; there must have been some oversight. There was no authority, with great respect, for the learned Judge upon a *habeas corpus* proceeding to set aside anything—which he presumed to do, i.e., set aside the Board's order for deportation. His whole duty was to apprise himself as to whether or not a person is illegally detained. Now when the matter came before the learned Judge, how impossible it was for him to say that he was not rightfully held when, in the face of sec. 23, he could not enter into the subject-matter at all, or, in the language of my late brother Irving:

> With reference to the second class, the jurisdiction of the court to review, quash, reverse, restrain or otherwise interfere, I shall not say has been taken away, but *does not exist*.

Notwithstanding, the learned Judge made the order quashing the Board of Inquiry's decision. That can only be an order made without jurisdiction, a nullity, and one that this Court has no power, even no right, to consider—Parliament is the highest Court in the land.

Now with respect to *In re Low Hong Hing* [1926] 2 W.W.R. 597, 37 B.C.R. 295, 46 C.C.C. 65, referred to by my learned brother Martin, with great respect I do not think it can have any bearing upon the matter we have now before us. In the first place, it is upon a different statute, and I am reminded of what Lord Parmoor once said in the Privy Council, that

B.C.
1932

IN RE IMMIGRATION ACT

IN RE MUNETAKA SAMEJIMA

Appeal

McPhillips, J.A.

the decisions upon other statutes are not very helpful, and I do not think that any decision based upon the *Chinese Immigration Act*, R.S.C., 1927, ch. 95, can be at all helpful to us in this matter. We have here a section which is so clear and precise that there can be no question of a doubt about its meaning. It reads: "No Court, and no judge or officer thereof, shall have jurisdiction" to interfere with that order unless such person is a Canadian citizen or has Canadian domicile. Can there be any question of doubt as to the meaning of this? The appellant in this case had ample notice of his rights given to him, and when we turn to the proceedings, at pp. 28-29 of the appeal book, we find this—this is the Board's finding, and this notice is appended:

> If you claim to be a Canadian citizen or to have acquired Canadian domicile you have the right to consult counsel and appeal to the courts against deportation.

But the appellant did not come within either class. Now that was a plain intimation to the appellant of the situation of things. It is not advanced at this Bar—I asked Mr. O'Halloran precisely whether or not his client, the appellant, was a Canadian citizen or had achieved Canadian domicile. The learned counsel was not able to say that his client came within either class, i.e., Canadian citizen or Canadian domicile. Well then, the appellant also was apprised and had notice of this:

> In all other cases [and here was one of these cases not having Canadian citizenship or domicile] you may appeal to the Minister of Immigration and Colonization against any decision of the Board of Inquiry, or Officer in Charge, whereby you are ordered to be deported, unless such decision is based upon a certificate of the Examining Medical Officer that you are affected with a loathsome disease, or a disease which may become dangerous to the public health. The formal notice of appeal will be supplied to you by the Immigration Officer in charge upon request.

Where was there any failure to give the appellant every opportunity, as in a Court of justice, to make out his case and to take his proceedings? The utmost care has been taken, as I see it, by the National Government in all the proceedings that took place.

I could go on in detail and go through this material to show that there was not a thing left undone to rightly proceed and rightly inquire into the whole matter.

Then, a question comes up as to compliance with form C. of the Act, i.e., that the order was not properly filled up. I have as to this this observation to make: The Board it is true did not state in their first order the reasons in full, but there

is no question about what their reasons were; they were orally stated to the appellant, as the proceedings show, and all that was done later on was to fill in a blank space that which had been omitted, i.e., any Court may at any time, so could this statutory tribunal, set forth the order actually pronounced. Now if it were necessary—and my learned brother the Chief Justice has indicated the non-necessity for it—but if it were necessary that there should be any amendment, I am of opinion that the amendment could rightfully be made, and made with legal warrant, because, after all, the filling in of the reasons for rejection can very well in a case of this character be said to be merely directory, and their absence not fatal.

In sec. 33, subsec. 5, of the Act:

> An order for deportation by a Board of Inquiry or officer in charge *may be made* in the form C in schedule to this Act, and a copy of the said order shall forthwith be delivered to such passenger or other person, and a copy of the said order shall at the same time be served upon the master or owner of the ship or upon the local agent or other official of the transportation company by which such person was brought to Canada; and such person shall thereupon be deported by such company subject to any appeal which may have been entered on his behalf under this Act.

Now can it be said with any truth or with any force that the appellant did not know why he was to be deported? Why the whole inquiry was on this question of misrepresentation throughout, and it was pointed out how he said that he came in for his stated purpose, and he intimated that he was going into service in that certain capacity, which he never carried out. We have the word *misrepresentation*, it has no magical meaning. Misrepresentation is an English word not surrounded by the perplexities that arise in some specific legal terms. He made a statement to the government officer at the time of his entry that was false and has been proved to have been false; that was the gravamen of the charge, and that was what was inquired into. And the evidence is clear to demonstration that the appellant made no sufficient answer to the charge.

The only appeal was to the Minister, and, when you look at the proceedings, the appellant was so advised by the Chairman of the Board, i.e., that he had a right of appeal to the Minister; and he could as well have said, as it would have been truthful: You *not* being a Canadian citizen and *not* having a Canadian domicile are not now even without any opportunity for relief. But in effect the Chairman had said this: This order may be reversed by the Minister; you have the right

B.C.
1932

IN RE IMMIGRATION ACT

IN RE MUNETAKA SAMEJIMA

Appeal

McPhillips, J.A.

of an appeal to the Minister. And the appellant then and there said: I intend to appeal. Can there be any question about his knowing what he was going to appeal about—all exhibited to him, stated to him, and he did appeal to the Minister, one of the Cabinet of the Government of Canada, and his appeal was denied.

So that under the statute law of this country this appellant has been treated fairly, in conformity with the law, and in accordance with natural justice throughout. He had a fair hearing, a proper inquiry, every opportunity was afforded to him to make out his case, and he exhausted his right of appeal. It would certainly be an anomaly if this Court, the highest Court of the province, should solemnly give the judgment that they did in the case I have referred to (*In re Munshi Singh, supra*) that it would be possible for a Judge in the Court below to absolutely disregard it and give a judgment not in conformity with it, when the decision of the Court of Appeal was based upon a statutory inhibition contained in the Dominion *Immigration Act* (sec. 23). That is what occurred here. I feel confident, though, that some misunderstanding has taken place as to this Court's decision. It is true that since the amending provisions in the *Court of Appeal Act*, R.S.B.C., 1924, ch. 52, allowing appeals in *habeas corpus* proceedings, it has been decided that, in accordance with a view I always maintained, the decision is one of the Privy Council,* that an application may be made to any Judge, and even if the applicant has appealed and failed, and the learned Judge below would have had the right to hear the application and grant the applicant his liberty, as Mr. Justice Fisher did ([1931] 3 W.W.R. 56, 44 B.C.R. 317) were it not in a case where there was express statutory inhibition, and therefore a nullity. Here the appeal is from Mr. Justice Murphy, the appellant being again apprehended, under the Board's order for deportation, and that learned Judge refused him his liberty. And we have been hearing a case on appeal from a learned Judge who did not proceed in the same manner as Mr. Justice Fisher. This appeal is from an order made by Mr. Justice Murphy, and Mr. Justice Murphy had these authorities that I have referred to placed before him, and Mr. Justice Murphy refused to release the appellant. It is not difficult to know upon what ground he came to that conclusion, but I should think he could well come to it on the ground of the merits themselves; and secondly he could also come to the conclusion naturally in

Eshugbayi Eleko v. Nigeria Government [1928] 3 W.W.R. 437, [1928] A.C. 459, 97 L.J.P.C. 97.—Ed.

view of our decision (*In re Munshi Singh, supra*) that I have referred to that he had no authority whatever to intervene in the matter, there being in this case the statutory inhibition.

So that I would conclude by saying that the appellant was, in accordance with British and Canadian justice, apprised of his misrepresentation complained of by the Crown, made upon his entry into Canada, and the Board of Inquiry held that he was wrongfully in Canada, he having every opportunity to meet the case that was outlined to him, and he attempted, I suppose as well as he could, to meet it. The Board, exercising its jurisdiction, found against him and made an order for deportation. If he had been a Canadian citizen or had Canadian domicile, he would have had recourse to the ordinary Courts of the land, but not being that, he was apprised that he would have an appeal to the Minister, and that appeal he took, as referred to above. That appeal was a further examination of all the proceedings and all the evidence adduced, and the Minister determined that the order of the Board was right in the premises.

Now that is the history of this case, and it would be indeed deplorable if all the machinery that has been provided in Canada could be treated as provisions of naught, after fair, open and complete investigation, with not one supportable contention that there was any miscarriage of justice in one particular.

M. A. MACDONALD, J.A. (oral)—I have little to add to the views outlined by my brother Martin, beyond expressing concurrence. I think there is no doubt that under certain circumstances, outlined in the cases, and indicated by the section of the Act under review, it was open to Mr. Justice Fisher to review the decision of the Board of Inquiry. Whether or not he reached the proper conclusion ([1931] 3 W.W.R. 56, 44 B.C.R. 317) is not material. If error crept in it could only be corrected by an appeal to this Court, and the time for doing so has expired. His order quashing the first order of deportation must therefore be regarded as final.

Having reached that conclusion further difficulties, if any, disappear. The so-called amended order was made without the observance of statutory prerequisites and without any further inquiry taking place. The first inquiry cannot be resorted to as a basis for the amended order. That being so, an essential principle of justice, viz., an inquiry before sentence, was not observed. I would allow the appeal.