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JAPANESE-CANADIAN
COLLECTION

LIX

PLEASE RETAIN
ORIGINAL ORDER

YOUNG

20-14

FOLDER NO.

-159;

*The Article was written
by H. H. Young at the request
of Mr. Masahiko Yamaguchi,
Director of Pacific Rights
(Continental Black Sea)
Branches and Pacific Rights
in the Pacific Rights
about the year 1926.*

SALMON TROLLING - 1922 - 40%; 1925 - 15%;
Salmon Curing - 1923 - 35 1/3%; 1923-25%
Buyers' License - 1923 - 40%; 1925-15%;
Herring - 1923 - 40%; 1924 - 15%;
Herring Purse-Seine - 1923 - 40%; 1924 - 15%;
Salmon Seine License - 1923 - 100%;

In 1925 the Department of Fisheries attacked the fish salting operations of British Columbia with the object of further elimination of Japanese. To carry out this scheme the Department ordered that a certain percentage of those employed in Salteries be resident White British subjects or Canadian Indian and that this percentage be increased from year to year until resident White British subjects or Canadian Indians only are employed in these establishments. This policy of gradual elimination still stands at the present time as far as SALMON Salteries are concerned but as to Herring Salteries the Japanese were this year completely and suddenly eliminated by an order that all employees of herring Salteries must be resident White British subjects or Canadian Indians. This order does not affect employees of Salmon Canneries who are not of the White race or Canadian Indians

I can find nothing in the Fisheries Act that gives power to the Department to dictate who shall be employed in these establishments. The Act gives the Governor-in-Council power to make regulations in certain matters. The Parliament itself being unable to legislate for all the details of the administration of the Fisheries Act, is forced,

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To the Japanese residents of British Columbia the question which is at present of paramount importance is the Policy of the Department of Fisheries, a policy aiming at the complete elimination of Japanese from the fishing industries of British Columbia. This is a serious matter to the Japanese because if it is legal and is persisted in, it will prevent some thousands of Japanese from earning their livelihood.

The following shows the percentage of reductions in the most important licenses issued to other than white British subjects and Canadian Indians:

Salmon Gill-net	- 1923 - 40%; 1925 - 15%;
Salmon Trolling	- 1922 - 33 1/3%; 1923- 25%; 1924-10%; 1925-15%;
Salmon Curing	- 1923 - 40%; 1923-15%;
Buyers' License	- 1923 - 40%; 1925-15%;
Herring	- 1923 - 40%; 1924 - 15%;
Herring Purse-Seine	- 1923 - 40%; 1924 - 15%;
Salmon Seine License	- 1923 - 100%;

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as a matter of convenience and necessity, to entrust to the Minister acting through Orders-in-Council the power to make rules and regulations necessary for the effective administration of the Act.

Section 45 of the Fisheries Act 1914 gives the Governor-in-Council the power to make regulations on the following matters:

(a) for the better management and regulation of the sea-coast and inland fisheries;

(b) to prevent or remedy the obstruction and pollution of streams;

(c) To regulate and prevent fishing;

(d) to prohibit the destruction of fish;

(e) to forbid fishing except under authority of leases or licenses;

(f) prescribing the time and the manner in which fish may be fished for and caught;

(g) to prohibit the export or sale of any fish or any portion of any fish from Canada or the taking or carrying of fish or any portion of any fish from any one province of Canada to any other province thereof.

Manifestly Section 45 gives no power to any authority to say what class or race of persons may be employed in the fishing industry or to say that licenses shall be restricted to British subjects.

In British Columbia no fishing licence was ever granted to any person unless such person was a British subject but until a year or two ago nothing was mentioned as to the nationality of persons employed in fish curing establishments. Up to that time the majority of those so employed were aliens. If these aliens belong to countries which have treaties with Great Britain, which contain the most favoured nation clause they are placed in all respects on the same footing as the subjects or citizens of the most favoured nation.

Such a Treaty was made between Great Britain and the Japanese Empire in 1911 and became law in Canada by virtue of the Japanese Treaty Act 1913. Therefore, whatever rights and privileges are granted the subjects of any other nation these rights and privileges must also be granted the subjects of Japan.

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Clause 1 of Article 1 of said treaty reads:
The subjects of each of the High Contracting Parties shall have

the right, equally with native subjects, to carry on their commerce and manufacture, and to trade in all kinds of merchandise of lawful commerce, either in person or by agents singly or in partnerships with foreigners or native subjects.

Clause 2 of Article 1 of said treaty reads:

The subjects of each 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 or citizens of the most favoured nation.

The difference between Clause 2 and 3 of said Treaty is this:

in Clause 2 the subjects of Japan have the same right as the British subjects to carry on their commerce and manufacture, etc., and in Clause 3, subjects of Japan are placed in all respects on the same footing as the subjects of the most favoured nation. In other words, if you are a business man and a Japanese subject, you have the same rights as a British subject and if you are a working-man, artisan, etc., you have the same rights as a subject of any other nation.

It follows therefore, that a law which excludes Japanese subjects from employment in Salteries, etc., while subjects of any other nation are employed therein is Ultra Vires. That law also is Ultra Vires which prohibits Japanese subjects from owning and carrying on any business which is open to a British subject.

As to the position of Japanese who have become British subjects by naturalization, I submit that any regulation which discriminates against British subjects of Japanese origin is Ultra Vires.

By the Fisheries Act the Minister is authorized to issue licenses, Section 15a (2) of the Regulations promulgated under the authority of the Act, has been pronounced Ultra Vires in the opinions of eminent counsel. An amendment to the Act, however, would remedy this defect. But if licenses to fish were legally restricted to British

*calling: location trade occupation
trade: occupation location
business: occupation location*

production occupation

subjects then the order of the Minister discriminating against British subjects of Japanese origin would still be Ultra Vires.

The Naturalization Act places no limitations on the citizenship of a naturalized British subject. HE HAS THE STATUS OF A NATURAL-BORN BRITISH SUBJECT. Whatever doubt may exist as to the right of Franchise there is no doubt about the equality of British subjects whether natural-born or naturalized in the pursuit of a means of livelihood either as employers or employees in industry, commerce or manufacture.

"A. H. Young"

STATEMENT OF REDUCTIONS IN LICENSES ISSUED TO OTHER THAN WHITE BRITISH SUBJECTS AND CANADIAN INDIANS - YEARS 1920-1925 Inc.

Reductions shown apply to the numbers of licenses issued for the previous year, respectively.

[illegible]

of granting licenses to applicants, it must consider the

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RE JAPANESE FISHERMEN IN BRITISH COLUMBIA.

JOINT OPINION

This case appears to raise two distinct questions, which call for separate considerations.

One concerns people of Japanese race who are British subjects either by naturalization or because they were born British.

The other concerns persons who are subjects of the Emperor of Japan and therefore are not British subjects at all.

1. As regard persons of Japanese race who are British subjects, we are clear that it makes no difference for the purpose of construing the phrase "British Subject" in sec. 15 (2) 2, of the Fisheries Regulations for British Columbia adopted by Order in Council of March 30th, 1925, whether the British subject by birth. Both are equally British subjects, and persons of Japanese race who are British subjects for either reason are as a matter of construction within Sec. 15 (2) 2 if they are residents in the Province of British Columbia. This however by no means exhausts the matter, for the question next arises whether the Minister of Marine and Fisheries, when the Regulations give him the power to grant a license to a British subject, has an unfettered right so that he can, if he chooses, rule out from possible licensees British subjects who are of Japanese race according to some pre-arranged scheme for their entire exclusion. We assume that it could be established that such a scheme has been deliberately adopted and is being systematically put into force by refusing licenses to persons otherwise qualified and desirable merely in pursuance of a policy of getting rid of all oriental fishermen in a few years time. We do not think as a matter of construction of the present regulations, that the Minister is given any such power and if he can be shown to be acting as above suggested we think he is not really exercising the discretion given him under the Regulation. Generally speaking, when a Public Authority is given the duty of granting licenses to applicants, it must consider the

case of each applicant as it arises without introducing extraneous matter and it may exceed its powers and fail in its duty if owing to the adoption of a fixed rule in advance, it debars itself from the proper exercise of its discretion at the time. This well established principle of law may be usefully illustrated by comparing the case of Rex -v- London County Council exparte Corris (1918) 1 K.B. page 68. (where the County Council was held not to be exercising its discretion according to law when it had passed a general resolution which would cover all future cases and thereafter merely acted on the resolution) with R. -v- Port of London Authority Exparte Kynoch (1919) 1 K.B.176. where the Court was satisfied that there had been a bona fide consideration of a particular application for a license on its merits. The broad principle is expressed in a famous passage of Lord Cairns in Julius -v- Lord Bishop of Oxford 5. A.C. at the bottom of page 224.

Taking the Regulation therefore as it stands and assuming that the matters of fact could be established which we have assumed, we think a Court ought hold that the discretion conferred on the Minister by the Regulation is not being duly exercised .

We must however point out that so far as British subjects of Japanese race are concerned they are covered, if they live in Canada, by any and every valid law made by the appropriate Canadian Legislature and it would therefore appear to be possible for the Dominion Parliament, in the exercising of its power to regulate fisheries, to impose conditions which as between British subjects might in practice tend to exclude British subjects of Japanese race. This part of our opinion must be understood as dealing solely with the regulation as it stands.

2. Secondly, as regards individuals who are subjects of the Emperor of Japan. There can be no question that if Section 15, (2) 2, is valid, any such individual could be refused a fishing licence. The question therefore comes be whether the Regulation is valid, and this in turn amounts to this - whether the Regulation is of a sort which the Fisheries Act of 1914

authorises. We are inclined to think that it is not, for the following reason. The Fisheries Act of 1914 does not purport to be authorising anything which would conflict with the Japanese Treaty Act 1913 and if we confine ourselves to the two statutes there seems no reason to suppose that the latter statute is an attempt impliedly to repeal the earlier one. This being so, it seems to follow that the only regulations which the Act of 1914 authorises are Regulations which are not in conflict with the Anglo-Japanese Treaty. That Treaty is to be found Scheduled to the Japanese Treaty Act 1913 and by Article 1 (2), all subjects of the Emperor of Japan are to have right equally with British subjects "to carry on their commerce and manufacture, and to trade in all kinds of merchandise and lawful commerce." It will be observed that the equality with British Subjects.

In the next sub. paragraph of Article 1, of the Treaty a different standard of equality is set up, for this sub. paragraph stipulates that the subjects of the Emperor of Japan "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, and the "most favoured nation," in this connection means any other foreign nation. It is therefore a nice question whether the claim of a subject of the Emperor of Japan to carry on the business of fishing or to follow the pursuit of canning fish comes within the words "carrying on commerce and manufacture," or only comes within the words "pursuing industries, callings, etc." But we are inclined to think that on a proper construction it ought to be held that a subject of the Emperor of Japan who establishes that his bona fide business is that of fishing or canning is a person who by the terms of the Treaty should have the right to carry this business on equally with British subjects. This is not to say that he would not be subject to Regulation or licence, but it would seem to be a reason for saying that no regulation validly made under the Fisheries Act of 1914 could deny to him the possibility of a licence for this would be to conflict with the Treaty and there is no reason for supposing that upon its

true construction the Fisheries Act 1914 intended to authorize anything of the kind.

Here again we must point out that we are only dealing with the legislation and Regulations as they stand. The fact that the Dominion Parliament in 1913 passed the Japanese Treaty Act seems to be no reason for saying that they could not repeal it in whole or in part, expressly or impliedly, though this would undoubtedly be a very strong measure to take. But the point is that the subsequent legislation does not purport to do so and therefore if it could be shown that a given subject of the Emperor of Japan was a person whose commerce and manufacture was fishing or canning an argument of considerable force might be put forward to say that the Regulation which denies to him the possibility of a license while it contemplates granting a corresponding license to a British Subject who is carrying on the same trade is not a Regulation which the Dominion Parliament has ever authorized.

3. As regards the way to raise this question, the matter is really better dealt with by a lawyer whose principal business is to deal with the conduct and procedure of cases in Canada. In this country the procedure in the first case might be by application for a rule nisi for a mandamus to compel the Minister to consider and deal with the application of a British subject of Japanese birth, while the second case we have discussed would be naturally raised by action for a declaration that the individual who is a subject of Japan is not on that account excluded from the right to have his application considered and that the Regulation in so far as it purports to limit licences to British subjects is ultra vires, not authorized by the Fisheries Act 1914, in conflict with the Japanese Treaty Act 1913, and void.

No doubt those whom we are advising will consider whether the questions could not be conveniently litigated under a reference to the Supreme Court, but care would have to be taken to secure that the facts as to the case which is taken or assumed are quite plainly admitted for the purpose of the argument.

"John Simon" "Geoffery Lawrence"

8 2980R

A. H. YOUNG
BARRISTER & SOLICITOR
1669 Dominion Bank Bldg.
VANCOUVER - B. C.

March 4, 1926.

I think with respect that Sir John Simon and Mr. Geoffrey Lawrence, the authors of the joint opinion, have not directed their minds to the real difficulty in this matter.

It is obvious that section 7 and section 40 of the Fisheries Act are facultative and not obligatory, conferring a power on the Minister in the exercising of which he is entitled to use his discretion. It follows, therefore, that if the Minister has applied himself to the consideration of these sections, and has, no matter how erroneously, determined the question which arises upon them before him, his decision cannot be reviewed by any process. This principle has been applied in many cases, and I will therefore satisfy myself with a quotation from the opinion of Lord Justice Farwell in *Rex. V. The Board of Education* (1910, 2 K.B. at page 179):- "if the tribunal has exercised the discretion entrusted to *bona fide*, not influenced by extraneous or irrelevant considerations, and not arbitrarily or illegally, the Courts cannot interfere; they are not a Court of Appeal from the tribunal but they have power to prevent the intentional usurpation or mistaken assumption of a jurisdiction beyond that given to the tribunal by law and also the refusal of their true jurisdiction by the adoption of extraneous considerations in arriving at their conclusion or deciding the point other than that brought before them, in which cases the Courts have regarded them as declining jurisdiction."

It is quite obvious that the Minister must be held to have a discretion in the grant or refusal of licences, since there is no limitation in the Act upon the class or classes who may apply or the number of the applications which may be made. Clearly the Minister would be entitled to inform himself as to the circumstances which might justify or necessitate a restriction in the number of licences wanted and would, I should think, be entitled and indeed bound to have regard to the character of the applicant.

I will assume for the time being that section 15, sub-section (a), sub-paragraph 2, is *ultra vires* the Governor General in Council, and that the Minister has no right to differentiate between applicants on the ground of their nationality. But even with these assumptions

the difficulty seems to me to be very great for the reason that the Minister is not bound to give any reason for his decision in any particular case, so that he may either remain silent as to his reasons, in which there will be nothing to show that he has wrongly exercised his discretion, or he may even declare that he was in no way influenced by the regulations or by any consideration of the nationality of the applicant.

On the other hand, of course, in an appropriate proceeding it would be open to the applicant whose application had been refused to point to the regulations and possible also to the report of the Fisheries Commission of 1922, and to argue thence that the Minister's discretion could not have been properly exercised, since he must be taken to have acted according to invalid regulations and according to the improper recommendations of the Commission, and, of course, this argument would be immensely strengthened by any admissions which could be extracted from the Minister to the effect that he had really acted in conformity with these improper recommendations.

This brings me to the formidable part of task, namely, how the matter is to be put in train for adjudication. To my mind it is clear that the only available process is by an application for a rule nisi for the prerogative writ of mandamus, and in such a procedure the person to be served is the Minister himself. Now as the Minister is not within the Province it seems to me that the application, failing any consent on the part of the Minister, must be made in Ontario. Upon that application I take it that evidence could be given of the report and recommendations of the Fisheries Commission, and it could be argued from that, coupled with the ultra vires regulation, that the discretion of the Minister could not have been properly exercised. I doubt very much whether in the absence of any affidavit by the Minister, there is any process of discovery available to the applicant. I notice that the authors of the joint opinion suggest an action for a declaration, but I am unable to think at the moment who would be the defendant in such an action unless, which I do not think to be the case, the matter could be brought under the authority of the decision in Dyson v. The Attorney-General. If such an action is competent then again it would have to be brought in Ontario for the purpose of serving the Attorney-General of Canada.

"E. C. Mayers"

HUNTER,
C.J.B.C.

1927

Feb. 18.

REX
v.
McADAM

"WE COMMAND you to attach A. C. McAdam, so that you may have him before us, sitting as a Royal Commission for the investigation of the Customs Department of Canada, at the place where we will be sitting, at the time of such apprehension, to answer to us for certain trespasses and contempts brought against him in our said Commission, and have you then there this writ."

The specific contempt consisted in failing to appear as a witness when called on.

It is to be noted that there is a material difference between a power to issue a bench warrant to bring in an absenting witness for the purpose of securing his evidence and to detain him, if necessary, until he gives it and a power to issue an attachment to punish the contempt involved in wilful refusal to appear, which is a criminal offence if the *subpœna* has been legally issued and properly served together with adequate payment or tender.

I do not think that this tribunal has the latter power but, assuming that it has, the applicant was not under the legal compulsion of the *subpœna* as he had admittedly not been tendered any conduct money. The argument, that he had waived his right by being present on several occasions, is futile. He had the right of idle curiosity to be there, if he wished. The right of a witness in a civil proceeding to prepayment of conduct money and expenses to and fro has been well settled since the time of Elizabeth and there are numerous cases in the Courts which shew that the Court does not weigh the amount required to place the party under legal compulsion in too nice a scale when it is sought to use the punitive process and the same principle which applies to a civil proceeding in one of His Majesty's Superior Courts of Record must *a fortiori* apply to a Royal Commission in the absence of express statutory power.

I may add that out of deference to the Commission, if it had been still sitting in Vancouver, I would have insisted on an application being made first to the Commission but I do not think it right that the applicant should be dragged off in custody to a remote part of the country and possibly left stranded on his securing his discharge. The application is allowed.

Motion granted.

Judgment

REX v. SOMERVILLE CANNERY COMPANY
LIMITED.

MACDONALD,
J.
(In Chambers)

1927

Sept. 23.

Constitutional law—British North America Act—Dominion power—
Fisheries and fishing rights—Canning factory—Licensing—Ultra vires
—Can. Stats. 1917, Cap. 16, Sec. 2.

REX
v.
SOMERVILLE
CANNERY CO.

The Dominion in enacting that part of the Fisheries Act, which provides for licensing and taxing canneries has exceeded its powers under the British North America Act. It is not by any reasonable implication necessary to the proper or effectual regulation of "policing" of such fisheries. It is legislation as to civil rights and as such appropriate to the Province.

APPEAL by the Crown by way of case stated from the order of H. O. Alexander, Esquire, stipendiary magistrate, dismissing a charge against the defendant Company for unlawfully operating a clam cannery for commercial purposes contrary to the provisions of The Fisheries Act, 1914, without first obtaining an annual licence therefor from the Minister of Marine and Fisheries. The facts are set out in the reasons for judgment. Argued before MACDONALD, J. in Chambers at Vancouver on the 13th of September, 1927.

Statement

A. B. Macdonald, K.C., for appellant.
W. E. Williams, for respondent.

23rd September, 1927.

MACDONALD, J.: The appellant, hereafter called the "Dominion," appeals, by way of a case stated, from an order of H. O. Alexander, Esquire, stipendiary magistrate, whereby the Somerville Cannery Company Limited, hereafter called "Company," was acquitted, upon a charge, that the said Company, on the 25th of March, 1927, at the City of Prince Rupert,— "unlawfully did operate a fish cannery, to wit, a clam cannery for commercial purposes, contrary to and in violation of the provisions of The Fisheries Act, 1914, and amending Acts, without first obtaining an annual licence therefor from the Minister of Marine and Fisheries."

Judgment

Upon the trial, before the magistrate, certain facts were admitted, which may be shortly stated as follows: The Company was duly incorporated under the laws of British Columbia, with

MACDONALD, J. powers authorizing it to engage in the canning business, including the canning of fish, salmon, clams and other fish products and was the owner of a cannery at Seal Cove in the City of Prince Rupert. It canned clams for commercial purposes on the 25th of March, 1927, without having a licence from the Minister of Marine and Fisheries so to do.

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CANNERY CO.

Further, that the clams, so canned, were purchased by the Company, at its cannery, from diggers and were legally removed from the bed of the foreshore, between high and low-water marks in British Columbia, from land belonging to private individuals or the Crown, in the right of the Province of British Columbia.

It was also admitted that, while the Company had no licence to operate a cannery from the Dominion, it had such a licence from the Province of British Columbia, on the said 25th of March, 1927.

The magistrate held that "section 7A of The Fisheries Act" is *ultra vires* of the Parliament of Canada and, upon application of the "Dominion" he reserved the following question for the opinion of this Court: "Has the Parliament of Canada jurisdiction to enact section 7A of The Fisheries Act?" Such section is as follows:

Judgment

"No one shall operate a fish cannery for commercial purposes without first obtaining an annual licence therefor from the Minister. Where no other fee is in this Act prescribed for a cannery licence, the annual fee for each such licence shall be one dollar."

This provision, as to licensing a fish cannery, which might operate for commercial purposes, was enacted in 1917, by an amendment to The Fisheries Act, 1914, which had already provided for the issuance of fishery leases and licences for fisheries and fishing. It was a re-enactment more broadly worded of section 23A, 1 & 2 Geo. V., Cap. 9, Sec. 2.

While the annual fee for a cannery licence was thus only nominal, still, the revenue derived by the Dominion from its operation was, as far as British Columbia was concerned, supplemented by section 18 of The Fisheries Act. This section provided, in part, that no one should operate a salmon cannery, or salmon-curing establishment, in British Columbia except under a licence from the Minister of Fisheries and that the annual fee

for such a licence should be \$20, and, in addition, the licensee was required to pay the Dominion four cents for each case of sockeye salmon and three cents for each case of any other species of salmon, canned in such cannery.

Sept. 23.

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v.
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CANNERY CO.

When you consider the large amount which is annually received by the Dominion Government for such cannery licences, the importance of the question, to be decided, becomes apparent, because a consideration of said section 7A involves a determination, also as to the validity of said section 18. If the Dominion cannot legally prevent the operation of an unlicensed cannery, then it follows that it cannot restrict the output of such cannery by what amounts to taxation.

It is contended, on behalf of the Dominion, that the legislation in question was properly enacted under item 12 of the class of subjects, enumerated in section 91 of the British North America Act, concerning which, it was declared that the exclusive legislative authority of the Parliament of Canada extended, in all matters, *viz.*, "Sea Coast and Inland Fisheries." Then, by the 5th paragraph of the "Terms of the Union" amongst the services assumed by Canada is that of protection and encouragement of fisheries, British Columbia being thus relieved from responsibility or liability in that behalf, but not debarred of any right, it might possess, to tax or licence a building used and operated in canning salmon or other sea products. Then does the exclusive legislative authority conferred upon the Dominion Parliament, with respect to "Sea Coast and Inland Fisheries," remove a cannery, owned by the Company, from the class of subjects concerning which, the Legislature of a Province may make exclusive laws, and render it amenable to the enactment, which is the subject of attack?

Judgment

It is contended by the "Company," that being the owner of the building, although used as a cannery, it is property on land within the Province and comes under the heading of "Property and Civil Rights of a Province" and exclusively subject to Provincial legislation.

It is contended, on the contrary, on behalf of the "Dominion" that the enactment giving it jurisdiction over "Sea Coast and Inland Fisheries" should receive a liberal interpretation and that it was broad enough, to enable the Dominion even to regu-

MACDONALD, J. late and licence wholesalers or retailers who might deal in fish far from the waters from which they had been obtained. I do not require to consider, however, such contention. If it were accepted, it would, to my mind, be contrary to the spirit and intention of the British North America Act. It would mean Dominion ownership of "fish," as distinguished from control and regulation of "fisheries."

REX v. SOMERVILLE and CANNERY CO. The definition of a "Fishery" is afforded by section 2 of the Act, as follows:

"Fishery" means and includes the area, locality, place or station in or on which a pound, seine, net, weir or other fishing appliance is used, set, placed or located, and the area, tract or stretch of water in or from which fish may be taken by the said pound, seine, net, weir or other fishing appliance, and also the pound, seine, net, weir, or other fishing appliance used in connection therewith."

A "fishery," is the right to take fish in a certain place or in particular waters—Webster's New International Dictionary—*Hart v. Hill* (1836), 1 Whart. 124. It has the right to employ within a particular stretch of water lawful means for the taking of fish which may be found there. *Vide Hume v. Rogue River Packing Co.* (1907), 51 Ore. 237; 92 Pac. 1065. The latter case refers to the incidents attached to the Rogue River, being a navigable stream, as to the common right of user and fishing and, pointedly, as concerns the present case, states that a "fishery"

"is to be distinguished from a fishing place, which is the right to use a particular shore or beach as a basis for carrying on the business, and is always vested in the shore owner."

Lefroy, in his work on "Legislative Power in Canada," lays down two propositions, at pp. 582-3, which may be profitably used as a guide, in considering the power vested in the Dominion Parliament, in dealing with a cannery, utilized for rendering more merchantable, or fit for sale, sea products:

"53. We are not to assume, without express words or unavoidable implication, that it was the intention of the Imperial Legislature to confer upon the Dominion Parliament the power to encroach upon private and local rights of property, which by other sections of the Act have been especially confided to the protection and disposition of another Legislature."

"54. When a question arises as to whether the Dominion Parliament has power in any case over any property or civil rights in a Province, it is always necessary to form an accurate judgment upon what is the particular subject-matter in each case, for the extent of the control of Parliament over the subject-matter may possibly be limited by the nature of the object."

Judgment

He had already considered the effect of the decision of the Privy Council in *Tennant v. Union Bank of Canada* (1894), A.C. 31 which, at p. 45, states:

"Section 91 expressly declares that, 'notwithstanding anything in this Act,' the exclusive legislative authority of the Parliament of Canada shall extend to all matters coming within the enumerated classes; which plainly indicates that the legislation of that Parliament, so long as it strictly relates to these matters, is to be of paramount authority. To refuse effect to the declaration would render nugatory some of the legislative powers specially assigned to the Canadian Parliament. For example, among the enumerated classes of subjects in sect. 91, are 'Patents of Invention and Discovery,' and 'Copyrights.' It would be practically impossible for the Dominion Parliament to legislate upon either of these subjects without affecting the property and civil rights of individuals in the Provinces."

It is on the strength of such decisions that the Dominion contends that the legislation, with respect to canning fish, as distinguished from fishing, comes within its jurisdiction as part of the "fisheries" or, in the language of Lefroy, at p. 583:

"That there may be cases where, in accordance with the principle embodied in Proposition 37, [at p. 425] the Dominion Parliament may have power to interfere with Provincial property in order to the effectual exercise of the enumerated powers conferred upon it by section 91."

As to the right of the Dominion to tax and licence a "cannery," the exercise of such a power extends further than was decided in *Attorney-General for the Dominion of Canada v. Attorneys-General for the Provinces of Ontario, Quebec, and Nova Scotia* (1898), A.C. 700. It decided in that case, at p. 716, that

"the enactment of fishery regulations and restrictions is within the exclusive competence of the Dominion Legislature, and is not within the legislative powers of Provincial Legislatures."

And at p. 713, as to taxation, as follows:

"It is impossible to exclude as not within this power [raising money] the provision imposing a tax by way of licence as a condition of the right to fish. It is true that, by virtue of s. 92, the Provincial Legislature may impose the obligation to obtain a licence in order to raise a revenue for Provincial purposes; but this cannot, in their Lordships' opinion, derogate from the taxing power of the Dominion Parliament to which they have already called attention,"

viz., power to licence, giving the right to fish. In this connection, the Company submits that while the power of the Dominion to tax fishing, by way of licence, may be conceded, it could not be reasonably contended that such right could be extended, so as to include a power of licence or taxation after fish had been legally caught and the control and regulation of fishing had ceased.

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Judgment

MACDONALD, J. The question, as to the right of the Dominion, to grant a lease of a salmon fishery and raising a question as to the scope of the various classes of sections 91 and 92 of the British North America Act, was decided in *The Queen v. Robertson* (1882), 6 S.C.R. 52.

REX v. SOMERVILLE CANNERY CO. Ritchie, C.J., at pp. 120-1, discussed the limitations of Class No. 12 of section 91 as follows:

"I am of opinion that the legislation in regard to 'Inland and Sea Fisheries' [Sea Coast and Inland Fisheries] contemplated by the British North America Act was not in reference to 'property and civil rights'—that is to say, not as to the ownership of the beds of the rivers, or of the fisheries, or the rights of individuals therein, but to subjects affecting the fisheries generally, tending to their regulation, protection and preservation, matters of a national and general concern and important to the public, such as the forbidding fish to be taken at improper seasons in an improper manner, or with destructive instruments, laws with reference to the improvement and increase of the fisheries; in other words, all such general laws as enure as well to the benefit of the owners of the fisheries as to the public at large . . . as a source of national or Provincial wealth."

Judgment Then Strong, J., at pp. 134-5, S.C. after referring to it being "A sound and well-recognized maxim of construction that in the interpretation of statutes we are to assume nothing calculated to impair private rights of ownership, unless compelled to do so by express words or necessary implication . . . and that this principle was well fixed as a canon of construction and not open to the least doubt or question"

said, as to "Inland Fisheries," and his expressions are equally applicable to "Sea Coast Fisheries," as follows:

"We are not to assume, without express words or unavoidable implication, that it was the intention of the Imperial Legislature to confer upon Parliament the power to encroach upon private and local rights of property which by other sections of the Act have been especially confided to the protection and disposition of another Legislature. I am of opinion, therefore, that the thirteenth enumeration of section 91, by the single expression 'Inland Fisheries,' conferred upon Parliament no power of taking away exclusive rights of fishery vested in the private proprietors of non-navigable rivers, and that such exclusive rights, being in every sense of the word 'property,' can only be interfered with by the Provincial Legislatures in exercise of the powers given them by the provision of section 92 before referred to. This does not by any means leave the sub-clause referred to in section 91 without effect, for it may well be considered as authorizing Parliament to pass laws for the regulation and conservation of all fisheries, inland as well as sea coast, by enacting, for instance, that fish shall not be taken during particular seasons, in order that protection may be afforded whilst breeding, prohibiting obstructions in ascending rivers from the sea; preventing the undue destruction of fish by taking them in a particular manner or with forbidden engines, and in many other ways providing for what may be called the police of the fisheries."

This view was substantially affirmed by the Privy Council in *MACDONALD, J. the Fisheries Case* (1898), A.C. 700; 67 L.J., P.C. 90. Lord (In Chambers) Herschell, in delivering the judgment of the Board in that case said (p. 712):

"Their Lordships are of opinion that the 91st section of the British North America Act did not convey to the Dominion of Canada any proprietary rights in relation to fisheries. Their Lordships have already noticed the distinction which must be borne in mind between rights of property and legislative jurisdiction. It was the latter only which was conferred under the heading 'Sea-Coast and Inland Fisheries' in s. 91. Whatever proprietary rights in relation to 'fisheries' were previously vested in private individuals or in the Provinces respectively remained untouched by that enactment."

Consideration then followed in the judgment, as to the proprietary rights being affected by proper enactment under the 91st section, such as prescribing the times of the year, during which fishing might be allowed or the instruments which might be employed for that purpose (p. 713):

"The extent, character, and scope of such legislation is left entirely to the Dominion Legislature. . . . If, however, the Legislature purports to confer upon others proprietary rights where it possesses none itself, that in their Lordships' opinion is not an exercise of the legislative jurisdiction conferred by s. 91. If the contrary were held, it would follow that the Dominion might practically transfer to itself property which has, by the British North America Act, been left to the Provinces and not vested in it."

Lefroy, at p. 585, states that the Proposition 53, *supra*, has been followed and reaffirmed by the Supreme Court in *In re Provincial Fisheries* (1896), 26 S.C.R. 444 and that such decision follows *The Queen v. Robertson, supra*. In his opinion (p. 586),—

"The legislative authority of Parliament under section 91, No. 12, of the Act, is confined to the conservation of the fisheries, by what may be conveniently designated as police regulations."

It may thus be contended that, while the Dominion Parliament has the right to dispose of any property belonging to the Dominion, it has only, as far as fishing is concerned, the right to regulate, and incidentally licence, persons seeking to obtain the right to fish within waters under the control of the Dominion.

As already mentioned, the submission, on behalf of the Company, is that fish, legally caught, become the property of the fishermen and that, in any event, a cannery either through licensing or placing a tax upon its output is not within the jurisdiction of the Dominion Government but comes within that of the Province under the class termed "property and civil rights."

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Judgment

MACDONALD, J. The rights of fishing and the ownership acquired by fishermen (In Chambers) is referred to in *Attorney-General for British Columbia v. Attorney-General for Canada* (1914), A.C. 153 at pp. 168 to 171.

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REX v. SOMERVILLE CANNERY CO. In addition to the authorities already referred to, the Company cited what may be termed the "Grain" cases and "Insurance" cases as lending support to its position.

In *The King v. Eastern Terminal Elevator Co.* (1925), 3 D.L.R. 1, it was held, according to the head-note, that:

"The Dominion cannot by legislation ultimately intended to regulate external trade in a particular commodity, assume control over particular occupations and local works and undertakings in the Provinces, notwithstanding that the intended effect of the legislation could not be attained by the Provinces individually or in concert."

Anglin, C.J.C., in a dissenting judgment, at p. 8, dealing with *The Canada Grain Act*, Can. Stats. 1912, Cap. 27, states that, in his view

"not only is the grain trade of Canada a matter of national concern and of such dimensions as to affect the body politic of the Dominion, but the provisions of the *Canada Grain Act*, with some possible exceptions, deal with matters which, as envisaged by that legislation, do not 'come within the Class of Matters of a local or private Nature . . . assigned exclusively to the Legislatures of the Provinces.' (s. 91 (29), B.N.A. Act.)"

Judgment The majority of the Supreme Court, however, held the Grain Act *ultra vires*.

Duff, J., at p. 11, says:

"The Act is an attempt to regulate, directly and through the instrumentality of Grain Commissioners, the occupations mentioned. It is also an attempt to regulate generally elevators as warehouses for grain, and the business of operating them; and it seems, *ex facie*, to come within the decision of the Judicial Committee. *Att'y-Gen'l for Canada v. Att'y-Gen'l of Alberta and Att'y-Gen'l of British Columbia* [(1916)], 26 D.L.R. 288, condemning the Insurance Act of 1910 (Can.), c. 32, as *ultra vires*."

Mignault, J., at p. 21, after referring to numerous authorities, culminating in the then recent decision in *Toronto Electric Commissioners v. Snider* (1925), A.C. 396 states, that all arguments in support of the validity of the Grain Act had been addressed to the Court but were all finally answered by these decisions. He considered that the statute then under consideration could not be sustained on the ground that it was a regulation of trade and commerce or for the general advantage of Canada nor could it be contended that it was designed to cope with a national emergency. He then added:

"I have not overlooked the appellant's contention that the statute can be supported under s. 95 of the B.N.A. Act as being legislation concerning agriculture. It suffices to answer that the subject-matter of the Act is not agriculture but a product of agriculture considered as an article of trade. The regulation of a particular trade, and that is what this statute is in substance, cannot be attempted by the Dominion on the ground that it is a trade in natural products."

Here, the Company contends that the purchase of salmon and clams at its cannery, though natural products of the Coast waters, should not require a licence nor should there be a tax imposed for trading and dealing with such natural products and that they should only be subject to the rights of the Province under its powers of legislating as to property and civil rights.

In *Attorney-General for the Dominion of Canada v. Attorneys-General for the Provinces of Ontario, Quebec, and Nova Scotia* (1898), A.C. 700 various questions relating to the property rights and legislative jurisdiction of Canada and the Provinces respectively in relation to rivers, lakes, harbours, fisheries and other cognate subjects were considered by the Privy Council. Lord Herschell, at pp. 709-10, says:

"It must also be borne in mind that there is a broad distinction between proprietary rights and legislative jurisdiction. The fact that such jurisdiction in respect of a particular subject-matter is conferred on the Dominion Legislature, for example, affords no evidence that any proprietary rights with respect to it were transferred to the Dominion. There is no presumption that because legislative jurisdiction was vested in the Dominion Parliament proprietary rights were transferred to it. The Dominion of Canada was called into existence by the British North America Act, 1867. Whatever proprietary rights were at the time of the passing of that Act possessed by the Provinces remain vested in them except such as are by any of its express enactments transferred to the Dominion of Canada."

While other authorities were cited bearing upon the subject under consideration, I think it will suffice to simply refer in conclusion to the *Toronto Electric Commissioners v. Snider* (1925), A.C. 396. In that case, it was held that the *Industrial Disputes Investigations Act, 1907* (6 & 7 Edw. 7, c. 20, Can.) was not within the competence of the Parliament of Canada under the British North America Act. That it was clearly in relation to property and civil rights within the Provinces. It lends support to the argument of the Company in this respect and the first portion of the judgment of their Lordships delivered by Viscount Haldane covers the contention of the "Dominion" as to the portion of *The Fisheries Act* in question not being

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MACDONALD, declared *ultra vires*, after it had been in force for a number of years as follows (pp. 400-1):

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"It is always with reluctance that their Lordships come to a conclusion adverse to the constitutional validity of any Canadian statute that has been before the public for years as having been validly enacted, but the duty incumbent on the Judicial Committee, now as always, is simply to interpret the British North America Act and to decide whether the statute in question has been within the competence of the Dominion Parliament under the terms of s. 91 of that Act. In this case the Judicial Committee have come to the conclusion that it was not. To that conclusion they find themselves compelled, alike by the structure of s. 91 and by the interpretation of the terms that has now been established by a series of authorities."

It was argued, or rather drawn to my attention, that the Province though interested, beyond question, in the outcome of this contest, was not assisting nor supporting the attack upon the Dominion legislation. I do not think this is material, as taxation was sought to be imposed upon the Company and its business was affected. It thus had the right to take advantage of any legal means of defence.

Judgment

In my opinion, the "Dominion," in enacting that part of The Fisheries Act, which provides for licensing and taxing canneries, has exceeded its powers under the British North America Act. The portion of the Act in question is not "truly ancillary" to legislation with respect to the fisheries which are within the jurisdiction of the Dominion. It is not by any reasonable implication necessary to the proper or effectual regulation or "policing" of such fisheries. It is legislation as to civil rights and as such appropriate to the Province.

The question, as to the validity of section 7A, is answered in the negative. In view of this answer, the other, less important question submitted does not require consideration.

Appeal dismissed.

GOODWIN ET AL. v. THE ROYAL TRUST COMPANY.

COURT OF
APPEAL

Settlement—Voluntary deed—Rectification—Evidence—Intention.

1927

Mere alteration of intention or change of mind is not sufficient to induce the Court to interfere with or vary a voluntary trust settlement which was fully understood and deliberately executed by the grantor.

Oct. 4.

GOODWIN
v.
THE ROYAL
TRUST CO.

APPEAL by plaintiffs from the decision of MURPHY, J. of the 25th of May, 1927, in an action to rectify a voluntary trust deed of the 25th of May, 1926. The plaintiff had received a legacy from his mother amounting to about \$60,000. He was a man who was threatened with tuberculosis and was subject to going on severe drinking bouts. Owing to his drinking he had previously dissipated large sums of money and in fear of continuing this he decided to leave one-third of his mother's legacy to his wife and one-third to his only child, a boy of nine years of age. He then entered into a voluntary trust deed whereby he assigned to The Royal Trust Company a one-third interest of the legacy with directions to pay the income to his son for life and after his son's death the *corpus* to be paid to his children and failing children to his son's wife and failing wife to whom he may will the estate and failing will to his next of kin.

Statement

The plaintiff claimed he intended to give his son \$10,000 of the capital when he reached the age of 25 years and thereafter the income on the balance of the *corpus* until he attained the age of 30 years when he should receive the entire balance of the *corpus*. He claimed that he was not in proper condition at the time he signed the deed having been on a drinking bout and owing to this he did not notice the error in the deed. The solicitor who drew the deed testified that it was drawn in accordance with the instructions he received and the trial judge relying on his evidence dismissed the action concluding that after the deed had been executed the plaintiff merely changed his mind.

The appeal was argued at Victoria on the 4th of July, 1927, before MACDONALD, C.J.A., GALLIHER and McPHILLIPS, J.J.A.

Whittaker, for appellants: The amount involved is about Argument

1917
Oct. 23.

THE KING v. LONDON COUNTY COUNCIL.
Ex parte Corrie

London - Management-Parks-By-Law-Discretion-Sale of Literature
-Consent of Public Authority-Resolution to refuse Consent-
Mandamus.

The London County Council, in exercise of statutory Powers, made a by-law relating to parks, gardens, and open spaces whereby the selling of any article without the consent in writing of the Council was constituted an offence. After granting permission to sell literature at meetings in certain parks, they passed a resolution that the existing permissions should be determined and that no new permission should be granted thenceforth. Acting on this resolution they refused an application made by a certain society for permission to sell pamphlets at its meetings in one of the parks:-

Held, that there was vested in the London County Council by virtue of the by-law a discretion similar to that of justices at licensing sessions, and that they did not properly exercise that discretion by passing a general resolution to Grant no permission and acting on that resolution.

Rule made absolute for a mandamus to hear the application.
Reg. v. Sylvester (1862) 31 L.J. (M.C.) 93 applied.

Rule Nisi for a mandamus to the London County Council commanding them to hear and determine, pursuant to the statutes in that behalf, an application by one Linda Corrie, the prosecutrix for their consent under No. 27 of No. 1 of their by-laws relating to parks, gardens, and open spaces made pursuant to the London Council (General Powers) Act, 1890 (53 & 54 Vic. s. Coxliff.) (1), to the sale of pamphlets entitled "The British Blind" in the parks belonging to the County Council in connection with public meeting in such parks held by the National League of the Blind of Great Britain and Ireland.

The Ground for the rule nisi was that the Council could not, by general resolution to refuse consent to all cases, fetter their discretion to give or refuse consent on a particular application for consent.

The Prosecutrix was the wife of Frederick David Corrie, of Junction Road, Holloway. From her affidavit on the motion for the rule nisi the following facts appeared:-

1. The prosecutrix was the secretary of the West London branch of the National League of the Blind, which has its office

1. London Council (General Powers) Act, 1890, (53 & 54 Vict. c. cexliii.), s. 14, "It shall be lawful for the Council from time to time to make, alter and repeal in relation to the parks, gardens and open spaces vested in or under the control of the Council by-laws for all or any of the purposes for which under ss. 3 & e of the Metropolitan Board of Works Act, 1877, they are authorized to make by-laws whether as regards the parks or the heaths and commons as referred to and defined in that Act which purposes shall (without restricting the generality of this enactment) be deemed to extend to and include the various matters set out in schedule B. to this Act.

"For the purpose of this part of this Act and of the Schedule B. to this Act the expression 'park garden or open space' includes every park heath common recreation ground garden ornamental enclosure or open space now or hereafter

vested in or under the control of the Council

Schedule B.

"Subjects of General By-laws for parks, gardens and open spaces.

"29. Selling any article or distributing any bill or like thing without the consent of the Council in writing under the hand of their clerk.

Metropolitan Board of Works Act, 1877 (40 Vict. c. viii.), s. 3; "The Board may, subject to the provisions of this Act, from time to time make by-laws as regards the parks for all or any of the following purposes; (that is to say.)

"1. Their Government, control and management and the preservation of order and good conduct among persons frequenting them.
....."

at the White Hart Hotel, Windmill Street, Tottenham Court Road, in the County of London, On June 19, 1917, she made an application in writing for permission to sell pamphlets of the society at meetings held by the society in Finsbury Park and on Parliament.

2. In reply she received a letter dated June 19, which concluded as follows; "The sale of literature at the Council's parks and open spaces is not now allowed."

3. On or about July 6, 1917, she again wrote to the chief officer of the Parks Department of the London County Council explaining that the society of which she was the secretary did not wish to sell literature in the ordinary way, but to sell a pamphlet, of which she enclosed a copy, solely for the benefit of the society's funds; and again asking for permission.

4. She received the following reply. July 9, 1917, Madam:-
In reply to your letter (undated) I have to state that the Council has decided that no permits for the sale of literature at the Council's parks and open spaces are to be issued. I regret that it is not possible to make exception to this rule even in a most deserving case. (Signed) F.W. Parker, Second Officer."

5. The by-laws relating to parks and open spaces contain the following; "1. The acts and things specified in the following clauses, numbered 1 to 41 respectively, are hereby prohibited and declared to be offences;"; 27. Selling or letting for hire any article or distributing any bill or like thing, or placing any chair or seat for hire without the consent of the Council in writing under the hand of its clerk." The affidavit proceeded as follows:-

"6. It appears that the refusal of the officer of the Parks Department to grant the permit for the sale of the said pamphlet is in accordance with the resolution passed by the London County Council on May 30th, 1916, in the words and figures following:-
"That the existing permits to sell literature at meetings at certain parks and open spaces under the control of the Council be determined as from September 30, 1916, and that no new permits be issued after that date." For 25 years and upwards prior to the passing of the resolution set out in paragraph 6 herein it was, I am informed and believe, the practice of the London County Council to issue permits for the sale of literature at meetings held in parks and open spaces.

"7. I hereby submit that the London County Council or its proper officer must take into consideration the nature of the pamphlet which I submitted and determine judicially whether it is a fit and proper pamphlet to be sold in the parks in connection with the meeting of the National League of the Blind and must issue the said permit for the sale thereof unless they should determine judicially that the said pamphlet is an improper one to be sold in connection with said meeting Sworn," &c

The affidavit of the clerk to the County Council showing cause against the rule contained the following paragraphs:-

"5. At a meeting of the Council held on May 20, 1916, the Parks and Small Holdings and Allotments Committee of the Council, hereinafter called the Parks Committee, presented a report of

which the part material to the present application was as follows:-
No. 27 of the by-laws governing the management of parks and open spaces under the control of the Council prohibits the sale of any article at those places without the consent of the Council. Under this by-law permits to sell literature have been issued from time to time, but such sale is confined to the sites on which public meetings are held.

"For some time past, however, we have entertained doubts as to the necessity for allowing the sale of literature, even to this limited extent, as there are such ample facilities for obtaining books and other forms of literature elsewhere and we cannot eliminate the possibility of the parks being utilized for the purpose of private gain or profit. After giving the matter full consideration we have come to the conclusion that, in the public interest, it is desirable that the issue of the permits should be discontinued, this bringing the Council's policy in this matter into line with permits to sell literature should be annulled as from the end of September, 1916, It is not proposed to vary the practice of issuing, under another provision of the same by-law, permits to distribute literature at meetings free of charge. We recommend that the existing permits to sell literature at meetings at certain parks and open spaces under the control of the Council be determined as from September 30, 1916, and that no new permits be issued after that date."

"6. That said report was received and approved by the Council at the said meeting and the recommendation therein contained became a resolution of the Council.

"7. In pursuance of the said resolution all permits then existing for the sale of literature at meetings in the Council's parks were determined as from September 30, 1916, and no new permit has been issued since that date."

The Affidavit went on to state that representations had been

made to the Council by various societies and that the Council referred the matter to the Parks Committee, who on May 11, 1917 reported as follows:-

"Apart from the merits of the question, we understand that, owing to the depletion of staff, it would be impracticable, during the period of the war, to modify the resolution to the Council of May 30, 1916, to issue no further permits for the sale of literature and we have therefore decided to postpone the further consideration of the matter until after the declaration of peace."

This report was received and approved by the Council. It was in consequence and in pursuance of the resolution of May 30, 1916 that the application of the prosecutrix was refused.

A rule nisi having been obtained as aforesaid.

SIR ERNEST POLLOCK, K.C. (Craig Henderson with him,) showed cause. The granting of leave to sell literature in the public parks is a matter within the discretion of the County Council. A mandamus will not lie to command them to exercise their discretion in any particular way; Reg.V. Lewisham Union (1); Julius V. Bishop of Oxford.(2)

MACMORRAN, K.C., and W.H. Eldridge, in support of the rule. This discretion of the County Council in giving or withholding their consent is like that of justices of licensing sessioned in granting or refusing a certificate for a licence to sell intoxicating liquors. It has been held that justices cannot pass a general resolution to refuse a certificate to every applicant for an ale and beer house licence who refuses to take out also a licence for the sale of spirits; Reg. V.Sylvester (3), Sharp v. Wakefield (4) They must consider each application on its merits. So in this case the County Council do not properly exercise their discretion by passing a resolution that they will not consent to the sale of literature in parks under their control. They must hear the application of the prosecutrix and decide it on its merits.

SIR ERNEST POLLOCK, K.C. in reply. The analogy of justices at licensing sessions is not a *tru* one. A licence to sell intoxicating liquors is a kind of property. The licensing district is not vested in the justices as the parks are in the County Council. There is no *prima facie* right at common law to sell goods on the property of another; there is *prima facie* a right at common law to sell goods, including intoxicating liquors in the vendor's house.

DARLING J. This rule must be made absolute. The Court can come to no other decision without infringing the principles governing the hearing of applications for licenses to sell intoxicating liquors. It has been laid down that the body on whom is conferred the jurisdiction of granting such licences must bear such application on its merits and cannot come to a general resolution to refuse a licence to everybody who does not conform to some particular requirement. It is not true to say that these parks are the property of the County Council in the sense that a man's house is his property. They are only the property of the Council for the public benefit and for purposes of control and management. By s. 14 and Sched. b.s. 39, of their General Purposes Act of 1890, the Council may make by-laws relating to the selling of any article without their written consent and they have made a by-law, No. 27, by force of which it is an offence, except perhaps a trespass, to sell a book without committing an offence. She has a right to ask the Council for their consent. The Council refuse to hear her application. They have passed a general rule to the effect that no one shall sell books in the parks. So the prosecutrix comes to this Court for a *mandamus* to command them to hear her application to be allowed to do that which without their consent would be unlawful. In my view this case is not like *Reg. V.*

LWEISHAM UNION (1), but is within the principle of the licensing cases, and the applicant has a right to move the Court in this form. The rule must be made absolute.

AVORY J. I have come to the same conclusion, though somewhat reluctantly, because I doubt whether the rule will be of any effective service to the prosecutrix, inasmuch as, when the application for permission is considered, the Council will probably refuse to give it. We have to decide whether the prosecutrix has any legal right which is being withheld. I think she has a legal right to have her application considered. From the affidavit filed on behalf of the Council it appears that the application was refused in consequence and pursuance of the resolution of May 30, 1916, that no new permits were to be granted after September, 1916. Sir Ernest Pollock was invited to point out any distinction in principle between that refusal and the refusal to grant the license in Reg.V. Sylvester.

(2) He failed to satisfy me that there is any valid distinction. It is unlawful to sell intoxicating liquor without a justices' certificate and a licence; it is unlawful to sell any article in a park without the consent in writing of the Council. In exercising their functions justices cannot pass a general resolution to refuse certificates; that is not a judicial exercise of their discretion. Somilarly in the present case there has not been judicial exercise of the discretion which is vested in the County Council. The analogy seems to be complete. The by-law, whether it be made under s. 3. of the Metropolitan Board of Works Act, 1875, or under the General Powers Act of 1890, does not empower the Council to forbid the sale of articles altogether, but only a sale without the consent of the Council.

I desire to add that I do not assent to the submission of the prosecutrix that the County Council must give their consent unless they determine that the pamphlet is an improper one to be sold in parks in connection with meetings of the National League of the Blind. No such duty is cast upon them by the By-laws. They may refuse their

consent although, as an article, no exception can be taken to the pamphlet which it is proposed to sell.

SANKEY J. I agree. Before we deny a person his prima facie right to be heard we ought to be satisfied that the Legislature intended to take away the right of the prosecutrix by enabling the County Council to pass a general resolution depriving her of that right. The right to be heard is one of those public safeguards which we should always struggle to preserve.

Rule absolute.

Solicitor for prosecutrix; CHALTON HUBBARD.

Solicitor for London County Council; EDWARD TANNER.

.....

(IN THE COURT OF APPEAL)
THE KING V. PORT OF LONDON AUTHORITY
Ex Parte Kynick, Limited.

C.A.
1918
Nov. 4, 11.

London-Port Authority-Construction of Wharf-Application for
Licence Refusal Without Hearing-Mandamus-General Policy in
Granting Licences - Alternative Remedy-Limitation of Time-
Thames Conservancy Act,
1894 (57 & 58 Vict. c. clxxxvii.) s. 109-Port of London Act, 1908
8 Edw. 7. c. 68L. ss. 2, 7-Public Authorities Protection Act, 1893
(56 & 57 Vict. c. 61), s. 1.

The Port of London Authority are, by s. 2, sub-s. 1 of the Port of London Act, 1908, charged with the duty of considering the state of the river and the accommodation afforded in the Port of London, and of taking such steps as they may consider necessary for the improvement thereof; and for those purposes they are enabled to construct, equip, maintain, or manage any docks, quays, wharves, jetties, &c. By s. 109 of the Thames Conservancy Act, 1894, and s. 7 of the Port of London Act, 1908, the Port authority may grant to any owner of land adjoining the Thames a licence or make any dock basin, pier, jetty, wharf, &c. By s. 7, Sub-s. 2, of the later Act, if the Port Authority refuses to grant a licence for such a purpose on reasonable terms the applicant may appeal to the Board of Trade.

Owners of land adjoining the Thames having applied for permission to construct a deep water wharf and other extensive works, the Port authority in November, 1917, decided to refuse the application on the ground that the accommodation applied for, was of the character of that which Parliament had charged the authority with the duty of providing. In September, 1918, the applicants applied for, and later obtained, a rule nisi for a mandamus commanding the authority to consider and exercise their discretion according to law upon the application, insisting that they had not done so:-

Held (1) on the facts that there had been no refusal by the Port authority to consider and exercise their discretion according to law.

(2) that the Port authority, in view of their position, powers and duties, were warranted in adopting a general policy in granting licences under s. 109 of the Thames Conservancy Act, 1894

Reg. v. Sylvester (1862) 31 L.J. (M.C.) 93 and Rex v. London County Council (1918) 1 K.B. 68 considered and distinguished.

(3) That if the decision of the Port authority amounted to a refusal to exercise their discretion according to law, an appeal to the Board of Trade, under s. 7, sub-s. 2, of the Port of London Act, 1908 (assuming it to lie), was as convenient, beneficial, and effectual a remedy as that by way of mandamus.

Rex v. Stepney Corporation (1902) 1 K.B. 317 distinguished. The Court, without deciding, inclined to the view that the six months limitation to actions, prosecutions, and proceedings prescribed by s. 1 of the Public Authorities Protection Act, 1898, does not apply to the prerogative writ of mandamus.

Rule nisi for a writ of mandamus directed to the Port of London Authority commanding them to consider and exercise their discretion according to law upon the application hereinafter

mentioned of Kynoch, Limited, the Prosecutors.

The prosecutors were the owners of contiguous freehold lands on the northern bank of the Thames in the Parish of Canvey Island, in the County of Essex, and the owners of lands adjoining the Thames within the meaning of s. 109 of the Thames Conservancy Act, 1894, (1) One June, 8, 1917.

(1) Thames Conservancy Act, 1894
(57 & 58 Vic, C. clxxxvii,) S. 109

"The Conservators may from time to time for a fair and reasonable considerationgrant to any owner or occupier of any land adjoining the Thames a licence under the hand of the Chairman of the Conservators or the secretary for all or any of the following purposes, namely:-

"1. For the making of any dock basin, pier, jetty, wharf, bank, quay or embankment wall or other work immediately in front of his land and into the body of the said river,"
Port of London Act, 1908 (8 Edw. 7, c. 68), s. 2; "(1) It shall be the duty of the Port Authority..... to take into consideration the state of the river and the accommodation and

facilities afforded in the Port of London, and, subject to the provisions of this Act to take such steps as they may consider necessary for the improvement thereof

"2. For the purposes aforesaid the Port Authority may, subject to the provisions of this Act, do all or any of the following things,

"A. Carry on the undertaking of any dock company transferred to the Port Authority by this Act;

"B. Acquire and carry on any undertaking affording or intended to afford accommodation or facilities for the

They made an application under that section and s. 7, sub.s 1 and 2 of the Port of London Act, 1908, to the Port Authority for permission to carry out the following works to the river- namely, a deep water wharf, barge canal, and barge quays, with the necessary approaches thereto, to the executed according to plans accompanying the application. The works were required for the loading and unloading of vessels and dealing with passengers and general merchandise.

On November 2, 1917, the Port of London Authority replied to the application in the following terms; "The authority have considered the application of June 8, last.....The decision of the Authority was that the application be declined on the ground that the accommodation applied for

.....

loading unloading, or warehousing of goods in the Port of London;

"C Construct, equip, maintain, or manage any docks, quays, wharves, jetties, locks, or

piers, and buildings, railways, and other works in connections, therewith

Sec. 7, "(1) Subject to the provisions of this Act.... there shall be transferred to the Port Authority all rights, powers and duties of the Conservators of the Thames..... in respect of the River Thames below the Landward limit of the Port of London....."

(2) All enactments relating to the Conservators (except those regulating the funds.....) shall as far as not repealed by this Act and as far as they relate to the rights, powers, duties, property, and liabilities transferred, have effect as if references to the Port Authority were substituted for references to the Conservators; Provided that..... (1) if the Port Authority revoke any licence for any of the purposes mentioned in ss. 109 and 110 of the Thames Conservancy Act, 1894..... or refuse to grant a licence for any such purpose on reasonable terms, the licencee or applicant may appeal against the revocation or refusal to the Board of Trade is of the character of that which Parliament has charges the Authority with the duty of providing in the Port."

and the decision of the Board of Trade shall be final and binding on both parties.....
Public Authorities
Protection Act, 1893 (56 & 57 Vict. c. 61) s. 1, Where any action prosecution, or other proceeding is commenced..... against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, of of any Public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the following provisions shall have effect;
"(a) The action, prosecution or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof....."

The prosecutors being dissatisfied with this reply gave notice of appeal to the Board of Trade on April 14, 1918. Meanwhile in November, 1917, a Bill was introduced into Parliament to incorporate a Company with power to construct a deep water wharf and railway at canvey Island. The prosecutors and others opposed this Bill and in June 1918, it was dismissed. In September, 1918, the prosecutors acting on legal advice withdrew their appeal to the Board of Trade and applied to the King's Bench Division for a rule nisi for a writ of mandamus directed to the Port Authority commanding them to consider the exercise their discretion according to law upon the application of the prosecutors on the ground that the Port Authority declined the application without having considered or exercised their discretion upon it. On October 18 the divisional Court (Darling and Avery JJ., Salter J. dissenting) refused the rule. From this refusal the prosecutors appealed to the

Court of Appeal, and that Court on October 21 granted a rule.

Thereupon the secretary of the Port Authority, on their behalf, filed an affidavit contained the following paragraphs:-

"2. The application of June 8, 1917 ...was on receipt thereof duly referred to and considered by the River Committee of the Port of London Authority in the first instance, and later by the General Purposes Committee of the said Authority, and finally by the Board of the said authority.

"3 The decisionwas.....arrived at after full consideration of the facts of the particular application and the accompanying documents and of the reports of the officials of the said authority and of the said committees thereof.

"5. The Port of London Authority in this case in accordance with their general practice in connection with applications under s. 109 of the Thames Conservancy Act, 1894, considered the particular case on its own merits, but in so doing no doubt, acting as the Port Authority, considered those merits in relation to the public interests of the Port of London and to their duties as such authority under s. 2 of the Port of London Act, 1908, and after such full consideration of the whole matter in the exercise of their discretion came to their conclusion as reported in my letter of November 2, 1917.

SIR JOHN SIMON K.C. and Wotten showed cause. A writ of mandamus is a "prosecution or other proceeding against the Port Authority in respect of an alleged "neglect or default in the execution of "a public duty - namely, the duty to hear and determine the application of the prosecutors. By s. 1 of the Public Authorities Protection Act. 1893, that prosecution or proceeding shall not be instituted unless it is commenced within six months next after the neglect or default complained of. The alleged neglect or default in this case took place on November 2.

1917, when the Port Authority is supposed to have refused jurisdiction; The writ of mandamus was not applied for until September, 1918. It follows that this rule should be discharged. No doubt Avery. J. in Rex. v. Hartford Union (1) said obiter that he was inclined to think the Act and no application to the prerogative writ of Mandamus, but there seems to be no authority for that view; and, as is pointed out in Short and Meller's Crown Practice, 2nd Ed., -. 219, the words of the Act are wide enough to include the writ.

Secondly, the Port Authority has heard and determined the application according to law,. This is clear from the affidavit of the secretary; but, if necessary, the authority might rely on the letter of November 2, alone. It is said that in accordance with a policy adopted beforehand the authority refused the application. But when the constitution and duties of the authority are considered it is plain that it was incorporated for the purpose of giving effect to a policy. It is their duty to take such steps as they may consider necessary for the improvement of the Port of London, and for that purpose to construct wharves. They may permit others to construct wharves if they consider that a suitable method of providing accommodation; but if they think it inadvisable to set up imperium in imperio, of if they think the Port is sufficiently provided with wharves already, they are not bound to go through the form of hearing an application for permission. They may adopt a policy is a mistaken one the applicant's remedy is not by way of mandamus, but by appeal to the Board of Trade, of finally to Parliament. Rex v. London County Council (1), on which this rule was granted, was a very different case. There the London County Council had passed a resolution precluding themselves from exercising their discretion. The Port Authority have in no way tied their hands. Further, that case was based on Reg.v. Sylvester (2), which, being a proceeding to question the exercise of a discretion which, it is said, has not been exercised.

Thirdly, an appeal to the Board of Trade is an equally "convenient, beneficial, and effectual" remedy; Reg. v. Registrar of Joint Stock Companies (3), per Field J.

Fourthly, the application for a mandamus is made too late. TALBOT K.C. and Scholfield in support of the rule. The Port

authority have not brought an open mind to bear on this application. They have determined without hearing it. Rex v. London County Council

(1). The affidavit of the secretary to the Port authority carried the case no further than his letter does, and that shows that this application for a licence has not been considered in its merits.

The Port authority have taken into account "something extraneous

and extra-judicial which ought not to have affected their decision."

- namely, the possibility of competition with their own undertakings.

That is, the same as declining jurisdiction. Rex. v. Adamamson (4),

Reg. v. De. Putzon. (5) An improper rejection of evidence may amount

to a refusal to hear and determine; Reg. v. Marsham, (6)

No doubt a mandamus will not be granted where there is another

remedy equally convenient, beneficial, and effectual. In re Barlow, (1) if there had been a hearing an appeal might be such

a remedy, but where there has been no hearing to have the decision

of the inferior tribunal before it enters upon the appeal. Rex v.

Stepney Corporation. (2)

There was no undue delay in applying for the writ of mandamus.

BANKERS L.J. This rule must be discharged, in showing cause

four points were taken; first, that the application for the writ was

cut of time by reason of the Public Authorities Protection Act, 1893

secondly, that the Port authority had in fact heard and determined

the application for a licence; thirdly, that there was besides the

writ of mandamus an equally convenient and effective remedy by way

of appeal; and fourthly, that there was undue delay in applying for

the mandamus, I take the last ground first, There seems to me to

have been undur delay, but I do not decide the case upon that point, because other important matters were discussed upon which the parties are entitled to the decision of the Court.

The main ground was that the Port authority had not heard and determined the application of June 8, 1917, for permission to carry out wroks of a very important character with a very extensive frontage on the river. The application was made under s. 109 of the Thames Conservancy Act, 1894. Sect. 111 of that Act forbids the making of any such works without a licence. The origin of this jurisdiction to grant licences was a dispute between the Grosn, the City of London, and the Thames Conservancy concerning the ownership of the bed and soil of the tidal river. Application having been made under s. 101 after some interval a reply was sent indicating, as the prosecutors contend, that the Port authority refused to entertain the application or to hear and determine it. Because of that reply this application for a mandamus was made.

Every case must depend on its own particular circumstances; but decided cases furnish some rule which ought to govern the Court in the exercise of its discretion to grant or refuse the prerogative writ of mandamus. There must be something in the nature of a refusal to exercise jurisdiction by the tribunal or authority to whom the writ is to be directed. A refusal may be conveyed in one of two ways; there may be an absolute refusal in terms, or there may be conduct amounting to a refusal. In the latter case it is often difficult to draw the line between those cases where the tribunal or authority has heard and determined erroneously upon grounds which it was entitled to take into consideration and those cases where it has heard and determined grounds outside and beyond its jurisdiction. but this conclusion may be drawn from decided cases, that there is no refusal to hear and determine unless the tribunal or authority has in substance shut its ears to the application which was made to it, and has determined upon an application which was not made to it. On this point I would

refer to the words of Farwell L.J. in *Rex v. Board of Education* (1).

"If the tribunal has exercised the discretion entrusted to it *bona fide*, no influenced by extraneous or irrelevant considerations, and not arbitrarily or illegally, the Courts cannot interfere; they are not a Court of Appeal from the tribunal, but they have power to prevent the intentional usurpation or mistaken assumption of a jurisdiction beyond that given to the tribunal by law, and also the refusal of their true jurisdiction by the adoption of extraneous considerations in arriving at their conclusion or deciding a point other than that brought before them, in which cases the Courts have regarded them as declining jurisdiction." Again, in *reg. v. Bowman* (2), where licensing justices had allowed their decision to be influenced by extraneous considerations, Wills J. said; "there has been no real hearing, and the mandamus must therefore go." Those two cases furnish a rough test for deciding when a tribunal, in considering matters outside its jurisdiction, has refused to exercise its true and proper jurisdiction.

In the present case there is another matter to be borne in mind. There are on the one hand cases where a tribunal in the honest exercise of its discretion has adopted a policy, and, without refusing to hear an applicant, intimated to him what its policy is, and that after hearing him it will in accordance with its policy decide against him, unless there is something exceptional in his case. I think counsel for the applicants would admit that, if the policy has been adopted for reasons which the tribunal may legitimately entertain, no objection could be taken to such a course. On the other hand there are cases where a tribunal has passed a rule or come to a determination, not to hear any application of a particular character by whomsoever made. There is a wide distinction to be drawn between these two classes. Of the cases cited on this branch of the argument I would refer to two. The first is *Reg. V. Sylvester*, (1) An undue significance has been given to certain words of *Wightman J.* in that case. Justices had come to an annual

licensing meeting resolved to refuse any application for a beer-house licence unless the applicant was prepared to take out an excise licence for the sale of spirits in addition to the licence for the sale of beer. Now a decision of a tribunal may be wrong in point of law, but it does not follow that it involves a refusal to hear and determine. Reg. v. Sylvester (1) was a special case stated by the justices upon the question whether they had acted illegally in refusing to renew certain beerhouse licences because the applicants declined to take out licences for the sale of spirits also. On such a case it was not only open to the Court, but necessary for the Court, to consider whether the decision of the justices was or was not correct in point of law. The question whether the justices had or had not refused jurisdiction was not before the Court. Wightman L. in his decision uses these words; "They came to the meeting with a general resolution already prepared; and I answer the question put to us by saying that they were wrong in the way in which they exercised the discretion which is given to them." Those words have been cited as applicable to a proceeding based upon a refusal by a tribunal to exercise its discretion. The second case to which I would refer is Rex v. London County Council, (1) It is very material to see the rule which the County Council had adopted, and which was the foundation of the application for the mandamus in that case. An applicant having asked for permission to sell pamphlets in one of the public parks received this reply, "In reply to your letter I have to state that the Council has decided that no permits for the sale of literature at the Council's parks and open spaces are to be issued. I regret that it is not possible to make exception to this rule even in a most deserving case." The Divisional Court regarded that not as the adoption of a policy in the exercise of a discretion but as a refusal to exercise any discretion.

Now to apply those principles to the facts of this case. There is the letter of November 2, written on behalf of the Port authority by their secretary, and much relied on by the prosecutors, and there is

his affidavit. It negatives the suggestion that the only matter considered by the Port authority was that specified in the letter. We must decide this case upon the affidavit. Read carefully and fairly it amounts to a statement that the Port authority did nothing which could be properly described as a refusal to hear and determine. But I go a step further. Even assuming that the letter contains the only ground on which the application was refused, I think, considering the position of the Port authority, that the matters involved in that decision were rightly and properly considered by them, and warrant the adoption of a general policy in granting licences for works of this particular class. Therefore on the main point the rule must be discharged.

It is not necessary to go at any length into the other matters raised. The exact meaning of s. 7, Sub-s 2 (1) of the Act of 1908, giving a right of appeal, may some day have to be considered. In this case it is not in dispute. Mr. Talbot did however contend that admitting the right of appeal, the remedy by appeal was not equally convenient and beneficial. He referred to Rex.v. Stepney Corporation (1), a case so dissimilar from this that the decision is of no practical help. There an appeal lay to the Treasury from a public authority, who, instead of deciding the case on their own view, conceived themselves bound by some rule of the Treasury, with which they might or might not have agreed. In these circumstances the Court might well think and appeal to the Treasury from its own decision was not so convenient and beneficial as an appeal from the decision of another tribunal, especially where the question was of the amount due to a particular officer. In the present case the question is one of policy to be decided ultimately by the Board of Trade. It can hardly be said that an appeal to that department is not as convenient and beneficial a remedy as a mandamus to the Port authority with an appeal from them to the department. I think the rule should be discharged on that ground also.

As to the effect of the Public Authorities Protective Act, 1893, I express no confident opinion without further considering the dicta cited, but my present impression is that the language of that Act does not extend to proceedings of this class. The essence of the prerogative writ of mandamus is a command to a tribunal to do something which it has omitted or refused to do, and an application for the writ is not an action, prosecution, or other proceeding for any act done in pursuance or execution or intended execution, nor, as I think, for any neglect or default in the execution of any Act of Parliament or public duty or authority. But apart from that, the Act seems to contemplate something which results, if successful, in the payment of damages or in the enforcing of some penalty, and the words "action, prosecution, or other proceeding" were not intended to include a prerogative writ calling upon a public authority to perform a public duty. The rule must be discharged.

WARRINGTON L.J. I thoroughly agree, and having to add.

SCRUTTON L.J. As the grounds on which a mandamus will be granted are difficult to state accurately, I prefer to adopt the words of Willis J. in Reg.V. Cotham (1) "I take the governing principle to be that if the justices have applied themselves to the consideration of a section of an act of Parliament, and have no matter how erroneously, determined the question which arises upon it before them, their decision cannot be reviewed by process of mandamus. That is so whether there is an appeal from their decision or not. If there is an appeal, mandamus will not lie; if there is not, their decision is final. But when it appears that they have taken into consideration matters which are absolutely outside the ambit of their jurisdiction, and absolutely apart from the matters which by law ought to be taken into consideration, then they have not heard and determined according to law." I may add that if, before they sit to hear a matter

they have absolutely come to a determination their sitting may not be a hearing and determining because they have determined before hearing. Mr. Talbot, says that the Port Authority determined, before hearing this application, that they would grant no licence for a wharf likely to compete with the accommodation with which, by the Act constituting them they themselves are bound to provide, and that it was not open to them to take into account the question of competition.

Now I state it as my view, because it is the substantial question in this case and that which the parties want decided, that the Port authority representing the various interests in the Port are by virtue of the Act entitled in this matter of granting licences to regard the effect of the proposed accommodation upon the accommodation which they themselves have provided, or may have to provide, in discharge of their statutory duty. An applicant who cannot obtain a licence from the Port authority has his remedy by appeal to the Board of Trade, or he may promote a Bill in Parliament authorising his undertaking. On this point, which goes to the merits, Mr. Talbot fails to show that the Port authority has taken into consideration, in the words of Wills (1) "matters which are absolutely outside the ambit of their jurisdiction."

Another reason against granting a mandamus is the existence of another and an equally convenient remedy. On a matter of trade policy an appeal to a Government charged with the trade of England is a very convenient remedy.

As to the Public Authorities Protection Act, 1893, the writ of mandamus, like that of certiorari and prohibition, is a high prerogative writ, and a very valuable right to the Crown for keeping subordinate tribunals within their jurisdiction. Clear words are necessary to impair such a right, and the words of this Act, "action, prosecution, or other proceeding against any person," are no such clear words as to have that effect. There is less inconvenience in coming to this decision because the Court has always a discretion to refuse the writ of mandamus after an undue

lapse of time. In this case I should have been prepared to hold that the prosecutors had, by delay, precluded themselves from relief, but as I have said, I prefer to decide the case upon the merits I agree that the rule must be discharged.

Rule discharged.

Solicitors for Prosecutors; Kerly, Sons & Karath.
Solicitor for defendants; Ernest Glenshaw.

(HOUSE OF LORDS)

H.L. (F)
1880

FREDERIC GUILDER JULIUSAppellant.

and

March 4,
8,9,11,15,
16,23.

THE RIGHT REV. THE LORD BISHOP OF
OXFORD: THE REV. THOMAS THELLUSSON }
CARTER.....)

RESPONDENTS.

R.,R.V.Locke
(1910) 2
K.B.201,79
L.J.K.B.
659

Church Discipline Act - Discretionary Power of Bishop - "It shall be lawful."

R., Golden
V.Reg.(1911)
A.C.480

The words in a statute "It shall be lawful" of themselves merely make that legal and possible which there would otherwise, be no right or authority to do. Their natural meaning is permissive and enabling only.

R.R. v.
Metropolitan
(1911) 2
K.B. 1131

But there may be circumstances which may couple the power with a duty to exercise it. It lies upon these who call for the exercise of the power to show that there is an obligation to exercise it.

R.R.V.,
Mitchell
(1913)1
K.B.561;
K.B. 153
82 L.j.

The 3rd section of the Church Discipline Act (3 & 4 Vict. c. 86.) provides that in every case of any clerk in holy orders who may be charged with any offence against the laws Ecclesiastical, or concerning who there may exist scandal or evil report as having offended against the said laws, it shall be lawful for the bishop of the diocese within which the offence is alleged or reported to have been committed, on the application of any party complaining thereof, or, if he shall think fit, of his own more motion, to issue a commission under his hand and seal to certain persons for the purpose of making inquiry as to the grounds of such charge or report:-

Held, that this section gave the bishop complete discretion to issue or decline to issue such commission,
The Act recites that the manner of proceeding in cases for the correction of clerks requires amendment. Its provisions therefore may be construed independently of the practice under the previously existing law.

Per LORD BLACKBURN:- There is no duty cast on the bishop by the statute, unless perhaps a duty to hear and consider the application, which in this case he has performed.

Enabling words are always compulsory where they are words to effecuate a legal right.
Reg. v. the Tithe Commissioners (1) and Ditcher v. Denison (2) commented on, and explained.

THE LORD CHANCELLOR (EARLY CAIRNS):-

My lords, in this case Dr. Frederick Guilder Julius, of Clower, in the County of Borks, preferred a complaint to the Bishop of Oxford against the Rev. Thomas Thellusson Carter, rector of the parish, in respect of unauthorized deviations from the ritual of the Church in the Communion Service, and the use of unauthorized vestments, and required the Bishop to issue a commission under the Church Discipline Act (3 & 4

Vict. c. 86) to inquire into this charge. This commission the Bishop, in the exercise of his discretion, declined to issue. The Court of Queen's Bench, on the application of Dr. Julius, Directed a writ of mandamus to issue commanding the bishop wither to issue the commission which Dr. Julius has applied for, or to send the case by letters of request to the Court of Appeal of the province under the statute.

The question is, was the Court of Queen's Bench right in awarding this mandamus? The Court of Appeal has reversed the decision of the Court of Queen's Bench. The Court of Queen's Bench in awarding the mandamus, and the Court of Appeal in reversing this decision, were both unanimous, and it is for your Lordships now to decide between them.

The case appears to me to turn upon the use of the words "it shall be lawful" in the 3rd section of the Church Discipline Act. I cannot think that the practice of the Ecclesiastical Courts, before the Act, need be the subject of much examination. The Act, states in the preamble that "the manner of proceeding in cases for the correction of clerks requires amendment." Whether, therefore, the office of the judge could, before the Act be promoted by any person as of right, or whether a discretion could be exercised by the Judge as to allowing himself to be put in motion, or as to the terms on which he could be put in motion, is not, as it seems to me, of much importance, inasmuch as the practice in this respect may have been just one of the matters which the Act was intended to amend.

The 3rd section of the Act enacts;- omitting words which for the present purposes are immaterial, - that in every case of any clerk who may be charged with any offence against the Laws Ecclesiastical it shall be lawful for the bishop of the diocese within which the offence is alleged to have been committed, on the application of any party complaining thereof, to ussue a

a commission for the purpose of making inquiry as to the grounds of such charge. And the question is, under the words "it shall be lawful" if the bishop bound, on the application of any party, to issue a commission, or has he a discretion as to whether he will issue it or not?

The question has been argued and has been spoken of by some of the learned Judges in the Courts below as if the words "it shall be lawful" might have a different meaning, and might be differently interpreted in different statutes, or in different parts of the same statute. I cannot think that this is correct. The words "it shall be lawful" are not equivocal. They are plain and unambiguous. They are words merely making that legal and possible which there would otherwise be no right or authority to do. They confer a faculty or power, and they do not of themselves do more than confer a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so. Whether the power is one coupled with a duty such as I have described is a question which, according to our system of law, speaking generally, it falls to the Court of Queen's Bench to decide on an application for a mandamus. And the words "it shall be lawful" being according their natural meaning permissive or enabling words only, it lies upon those, as it seems to me, who contend that an obligation exists to exercise this power, to show in the circumstances of the case something which according to the principles I have mentioned, creates this obligation.

I think that is these principles are kept in kind it will be found that all the cases on this subject are easily understood and reconciled, and I will refer shortly to the most important of those which were mentioned to your Lordships before examining further the circumstances connected with the present case.

The earliest case which is generally referred to is that of Alderman Backwell (1) before Lord Keeper North. The creditors of Alderman Backwell petitioned for a commission of bankruptcy against him, and they would have been obviously exposed to prejudice and hasard, if it has not been granted. The words of the statute were that the Chancellor "may grant a commission," and the Lord Keeper held that he was bound to exercise the power which was in effect reposed in him for the benefit of those who asked for its exercise.

The next case is the King v. Barlow (2). That was not a mandamus but an indictment on the 14 Car. 2. c. 12, against the churchwardens for not making a rate to reimburse the constables. The statute appears to have used the words "may make a rate." but it was naturally held that the constables were entitled to be reimbursed; and that the churchwardens, being made the depositaries of a power for that purpose, could not refuse to exercise it.

The Kind v. Havering-atte-Bower (1) was the case of a mandamus in reference to a power granted by royal charter to the steward and suitors of the manor giving them authority to hear and determine civil suits. It was held that this was in effect the establishment of a Court for the Public benefit, and that the stewards and suitors of the manor were bound to hold the Court

In Macdougall v. Paterons (2) the question was whether the Plaintiff in a County Court action who had recovered his debt should not have his costs taxed and allowed in a particular way. The statute had provided there, that under the circumstances in which the Plaintiff stood, the Court might by rule or order

direct that he might recover his debts; and Chief Justice Jarvis, delivering the opinion of the Court, stated that the conclusion to be drawn from the cases was that when a statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorized to exercise the authority, when the case arises, and its exercise is duly applied for by a party interested, and having the right (that is having by statute the right) to make the application.

The case of *Mrisse v. Royal British Bank* (3) was a case of the same kind, and decided that under the words "it shall be lawful for the Court", a creditor who had obtained judgment against a joint stock banking company, and had failed to recover his debt against the company, was entitled as of right to execution against a shareholder, on complying with the conditions imposed by the statute.

My Lords, the only other case that I will refer to is one which was decided in the Court of Queen's Bench in 1840, *Reg. v. Tithe Commissioners* (4). A power was there given to the Tithe Commissioners in dealing with certain landowners, to confirm agreements for commutation of tithe under certain special circumstances and conditions, which I need not refer to at length. The Court held, upon the construction of the whole statute, that if a case occurred, coming within the terms of the statute, the Commissioners were bound to confirm the agreements there mentioned.

In delivering the opinion of the Court, Mr. Justice Coleridge uses these words; "The words undoubtedly are only empowering, but it has been so often decided as to have become an axiom, that in public statutes words only directory, permissive, or enabling may have a compulsory force where the thing to be done is for the public benefit or in advancement of public justice." To the rule thus guardedly expressed there is not, perhaps, much

to object, and I only refer to the words for the purposes of pointing out that I am unable to see that they justify the expressions of the Lord Chief Justice of the Queen's Bench in the present case. Who speaks of them as (1) "Now finding nothing in the enactments or language of the 3rd section or other parts of the Church Discipline Act, which should have the effect of controlling or qualifying the words "It shall be lawful", but, on the contrary, finding the language of the section pointing, as it seems to us, the contrary way, we can see no ground which would justify us in giving to these words any other than the meaning which the established canon of construction has assigned to them, a canon of construction so thoroughly settled, that Mr. Justice Coleridge speaks of it as an axiom, - and by which in construing this statute, we deem ourselves absolutely bound." The only axiom Mr. Justice Coleridge spoke of was, that, under certain circumstances, enabling words might have a compulsory force.

My lords, the cases to which I have referred appear to decide nothing more than this; That where a power is deposited with a public officer for the purpose of being used for the benefit of persons who are specifically pointed out, and with regard to whom a definition is supplied by the Legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised, and the Court will require it to be exercised.

I now turn to the Church Discipline Act, for the purpose of considering whether it is possible to suppose that an absolute and unconditional right was given by it to put in motion the bishop of the diocese, independently of any judgment or discretion of his own.

The 3rd section provides (His Lordship read it, see ante.

p.215.) The first observation which occurs upon this section is that the words "any party" are words of the most general kind, and must as was admitted in the argument of the most general kind, in the case before your Lordships, invoked the action of the Bishop, is a parishioner of the parish of Clower, and a member of the statute, the aid of the bishop might be invoked equally by one who never had entered the parish, who never had been in England, who was ignorant, perhaps, of the language, who was not a member of the Church of England, who was not possibly, a believer in Christianity. If, under the statute, any person has an absolute right to put the bishop in motion, a person may do so who is a pauper, or wholly unable to answer the costs of the suit. No authority is given to the bishop to require security for costs, and the clerk may be ruined by a litigation from which he emerges as the victor.

Again, the offence charged may be an offence against the Laws Ecclesiastical, but it may be of so trifling and insignificant a nature that no one, having any discretion in the matter, ought to allow it to be the subject of litigation. Or the charge or the report may be one which, within the knowledge of the bishop, is unfounded. Or, again, the clerk may have been chargeable with a departure from authorized ritual, and on the remonstrance of the bishop may have admitted his fault and have promised to discontinue the wrong practice, and may have faithfully kept such promise, and yet, an offence having once been actually committed, the bishop, if the argument of the Appellant be right, may be called upon to proceed against the clerk, with whose conduct in the matter he has every reason to be satisfied.

The illustrations of the effect of the Appellant's argument which I have suggested (and may more might be added) appear to

have been field by the Queen's Bench to press against the argument. In some of the cases which I have summarised the difficulty is met by the Court of Queen's Bench, by saying that if the bishop refused to act the Court might, in its discretion, refuse to grant a mandamus to make him act. But this is only saying that the Court will take upon itself to exercise a discretion which it refused to allow to the bishop.

It is farther to be observed on this part of the case that the bishop of the diocese cannot, in my opinion, be looked upon merely as a ministerial officer through whose hands process is to pass as a matter of form. He is charged with the oversight of his diocese. and with a vigilant attention to its discipline. and if discretion as to proceedings, in respect of the discipline of clerks, is to be reposed anywhere, it is in the bishop that you would expect to find it. But, in truth, a most conspicuous instance of the reposing of this discretion in the bishop is found in another part of this statute. The 3rd section allows the bishop of a diocese in which an act of immorality has been committed by a clerk, having preferment in another diocese, to issue a commission to inquire into the grounds for a formal charge. I will suppose that the bishop of diocese A. issues such a commission of his own authority against X., a beneficed clergyman of diocese B. The Commissioners report that there are *prima facie* grounds for proceeding against the party accused. The Bishop of diocese A. is thereupon, under sect. 5, to transmit a copy of this report and of the depositions to the bishop of diocese B.; thereupon, under sect. 7, the bishop of diocese B. may proceed in due form of ecclesiastical law against X. up to punishment, but it is quite clear, under the 7th section that it is discretionary with the bishop of diocese B. whether he will do this or whether we will allow the whole proceedings, even after the commissioners have found that there is a *prima*

facie case, to drop.

My Lords if the statute had singled out particular individuals who might naturally be supposed to have a personal interest-the churchwardens, for example, or even certain communicants or parishioners, and had laid down conditions as to costs, or otherwise, which they were to comply with before calling on the bishop to take proceedings, there might have been a ground for contending, on the authorities I have referred to, that the power of the bishop was one which under those circumstances he could not refuse to exercise. This, however, is not the frame or character of the enactment; and, indeed having regard to the various matters to which the Act applies and the various dioceses in which it might have to be put in force, it is difficult to see how the enactments could have taken that shape.

I ought to mention an argument which was much dwelt upon before your Lordships and in the Courts below, viz., the argument that the words "if he shall think fit," in the 3rd section, in the alternative power to the bishop to proceed of his own mere motion, rather imply that on the application of a third party, he is to proceed whether he thinks fit or not. My Lords, I do not think that the words "if he shall think fit" have any such effect. They appear to me to be, where they occur, mere surplusage, as, indeed, is proved by the circumstance that if they were altogether omitted that clause of the section would mean just exactly what it means with those words inserted. But the words in fact appear to me to be introduced merely to mark more clearly that an alternative power is conferred upon the bishop, and that he is left free to proceed without any one to put him in motion if he chooses to do so.

My Lords, I am satisfied upon these short grounds, and without going into many of the topics which were so elaborately considered in the Courts below, that the judgment under appeal

is correct and ought to be affirmed. I will only add that if I am right in holding that the bishop has, under the statute, a discretion as to proceeding or not proceeding, in the way in which the Appellant calls upon him to do, your Lordships have not, as it seems to me, any occasion or indeed any right to examine into the manner in which, or the principles upon which, that discretion has been exercised. For the exercise of that discretion is an answer to the application for a mandamus, and at the same time, on that application, to criticise the grounds upon which that discretion has been exercised.

I have only to move, that the appeal should be dismissed in the usual way.

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RESUMPTION OF PRIVATE TRADE WITH JAPAN

It was announced today that applications of businessmen for permits to visit Japan will now be accepted. Because of the lack of suitable accommodation, only 400 private businessmen will be initially permitted entry. These will be selected by the various member nations of the Far Eastern Commission on a quota basis set for each member nation by the Inter-Allied Trade Board, according to their pre-war trade with Japan. Entry into Japan will begin August 15th 1947, and visits will be allowed for a period of 21 days. However, extension privileges may be granted overseas by the Supreme Commander Allied Powers (SCAP).

Hotel accommodations, transportation and communication facilities within Japan will be handled by the Japanese under supervision of SCAP. These facilities will be arranged for only in Tokyo, Osaka, Nagoya, Kyoto, but it will be possible to arrange side trips to other nearby cities. Visitors will be required to pay for all services rendered.

At the outset, applications to visit Japan will be considered only for the following purposes:

- (a) To purchase goods available for export, or to make arrangements for future purchases of potential exports, or to sell raw materials which Japan requires.
- (b) To provide commercial services to expedite the movement of exports and imports between Japan and Canada. These services include bank representation, insurance and shipping.
- (c) To inspect commercial investment interests. Applications for this purpose will be given consideration only after other needs are filled.

Selection of trade representatives to be admitted to Japan will be made on the basis of information submitted to the Department of Trade and Commerce. Such information should include a detailed statement of the purpose of the visit, explaining whether it is to purchase goods, develop future markets, to make arrangements for furnishing raw materials, or to inspect property.

Applications will be reviewed in accordance with the terms of the Far Eastern Commission's Policy Directive and in the light of information submitted by SCAP as to goods available in Japan, raw materials required, and potential lines of business which may be developed.

Names of all applicants approved by the Department of Trade and Commerce will be transmitted to SCAP. Applicants receiving final approval by SCAP will also require a valid passport, applied for in the usual manner, to the Passport Division of the Department of External Affairs, Ottawa. If no accommodations are available, the Department of Trade and Commerce will inform the applicant. Applications, however, will be held and processed in the order of their receipt and will be transmitted to SCAP for consideration as soon as accommodations become available.

Applicants will also be required to furnish information indicating financial responsibility, a record of the past experience in handling the type of commodities available for export from Japan, or in the absence of such experience, the applicant should be prepared to provide reasonable proof that his visit will contribute to the restoration of Japanese trade.

Initially, prices will be arranged by negotiation between private purchasers and SCAP. SCAP will provide the Department of Trade and Commerce with a list of commodities available for export, together with such pertinent data as it may have as to quantity, etc. A second list will indicate commodities reserved for government-to-government trade. A third list will indicate those raw materials needed in Japan to further its production programmes, with respect to which prospective suppliers will be considered for admission to Japan. SCAP will provide this information on a monthly basis, supplemented by interim reports. All this information will be disseminated by the Department of Trade and Commerce as soon as available.

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COMPLIMENTS OF
The Hon. Secy, C.A.C.

Preliminary advice from SCAP indicates availability of the following general classes of Japanese products:

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|---|--|-------------------------------------|
| Bamboo products. | Bicycles. | Ceramics and Chinaware |
| Industrial bolting and hoses. | Blankets. | Light Bulbs |
| Chemicals and pharmaceuticals. | Hardware. | Cosmetics |
| Linen goods. | Health supplies | Notions and Novelties |
| Electric supplies and materials. | Office supplies | Mensuring and Testing equipment. |
| Paper and Paper products. | Waters and fanges | Teatls and furs |
| Fish and fish products. | Rayon fabrics and rayon finished goods | Food and beverages. |
| Rubber and rubber products. | Aquatic products | Vegetable and flower seeds. |
| Household goods. | Stiff fabrics. | Surgical and dental instruments. |
| Sporting goods and musical instruments. | Laboratory instruments. | Wool yard goods and finished goods. |
| Leather goods. | British Colonial Seals. | |

Due to prior arrangements between the United States Commercial Company (USCC), a government corporation, and SCAP, the former will continue to dispose of the 1947 tea crop, but the sale of the 1948 tea crop will be made through private trade channels.

Banks now licensed to do limited business in Japan will render visiting traders the same facilities now authorized for Allied personnel. Insurance and shipping companies should file applications with the Department of Trade and Commerce, for though these company representatives will be admitted separately from the quota for private businessmen, the Department will have to obtain the necessary permits for entry from SCAP. Transnational communications, such as entering into actual purchase and sales contracts, are not yet authorized but will be permitted at the earliest possible date. As soon as possible also, exchange of samples will be permitted between Japanese and Canadian traders. Insurance on export shipments may be obtained either through insurance companies operating in Japan or by coverage obtained in Canada by the consignee.

The Japanese Government will be given full responsibility for fulfillment of contracts. SCAP will undertake no warranty or guarantee of merchandise. SCAP will render all possible assistance to the Japanese Government in carrying out its responsibilities under consummated transactions.

Subject to the approval of SCAP, acceptance by the Japanese Government of the terms of transactions will be final, and binding except that any agreement entered into may be cancelled or modified by SCAP when, in its opinion, unanticipated circumstances adversely affecting or prejudicial to economic occupation arise, make such action necessary.

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COMPLIMENTS OF
Tom Reid, M.P.

B R I E F
Opposing Oriental Franchise in the
Province of British Columbia

Reasons why it would not be in the best in-
terests of Canada for the Dominion Government
to make any amendments to the Elections and
Franchise Acts which would permit Canadian
citizens of Oriental birth or parentage in
British Columbia to vote in Dominion elec-
tions, contrary to the views of the majority
of British Columbia citizens as expressed by
Provincial Statute.

Submitted by Tom Reid, M. P.,
Representative for the Constituency of
New Westminster, B. C.
Dated March 4th, 1937.

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B R I E F

Opposing Oriental Franchise in the
Province of British Columbia

Reasons why it would not be in the best interests of Canada for the Dominion Government to make any amendments to the Elections and Franchise Acts which would permit Canadian citizens of Oriental birth or parentage in British Columbia to vote in Dominion elections, contrary to the views of the majority of British Columbia citizens as expressed by Provincial Statute.

In 1936 there appeared before the Special Committee on Elections and Franchise, appointed by the House of Commons, a delegation of four Japanese who presented a Brief asking that the Dominion Election and Franchise Acts be amended by deleting certain sections of the present Acts which by their provisions allows citizens of Oriental or Asiatic birth or origin to vote only in those provinces which by Provincial Statute do not preclude them from voting in Provincial elections. As the Province of British Columbia is one province which deems it advisable to preclude all citizens of Oriental or Asiatic birth or origin from voting, this Brief is presented with the view of placing before the Committee certain important facts in regard to this question which have not so far been presented. In view of the very strenuous efforts being put forth on behalf of the Japanese resident in British Columbia it is also felt some statement should be made by way of rebuttal.

HISTORY OF ORIENTAL IMMIGRATION INTO CANADA

So that a proper and better understanding of the Oriental problem may be obtained, it is deemed advisable first of all to present a brief resume of Oriental immigration into Canada from Confederation days up to the present time. It should be noted,

however, that the Oriental or Asiatic question is primarily a British Columbia question and does not to any extent if at all effect any of the other provinces of the Dominion. According to a Provincial survey over a period of twenty years, eighty per cent of all Chinese immigration to Canada is resident in British Columbia, ninety-eight per cent of all the Japanese, and ninety per cent of the Hindus, resident within that Province. This is perhaps understandable when one considers that British Columbia faces the Pacific Ocean and is Canada's western gateway.

Practically all Oriental and Asiatic immigration is confined to British Columbia and those living east of the Rocky Mountains are wholly unaware of the seriousness of this Oriental penetration within the Province of British Columbia. It is safe to say that had the other provinces the same number of Orientals in proportion to their total population as has British Columbia, not only would this problem have been brought home to them, but something would have been done about it ere this time. For example, if the Provinces of Ontario and Quebec had the same number of Orientals in proportion to the balance of their population, there would be over 500,000 in those two provinces alone. Later on in the Brief I shall deal with the actual figures.

It should be noted by the Committee, that leaving out of the discussion the Hindus, there are two distinct classes of Orientals in B. C., namely: Chinese and Japanese, both being mostly Mongolian in their origin. In regard to those from India, who are mostly of the Aryan race, these are not at the moment, nor are they likely to become any great problem, the estimated total number being not over 1400, and of this number only about two per cent are females, so that no great increase is feared.

CHINESE

The Chinese were the first of the Oriental peoples to settle in British Columbia, some having landed on the Pacific

Coast before Confederation. There was some fear even as far back as 1889 that Canada might be over-run by Orientals, for legislation governing the entry of persons of Chinese origin was first enacted in that year, at which time a head tax of \$50 was placed as a barrier to their entry. This was later increased in 1901 to \$100 and again in 1904 was raised to \$500 for every Chinaman coming in, but so great was the number of Chinese immigrants entering, that in 1923 the legislation governing the entry of Chinese was repealed and a new Act passed. This enactment abolished the head tax entirely and provided only for the entry of three classes, designated in Section 5 of the Chinese Immigration Act as follows:

"The entry to or landing in Canada of persons of Chinese origin or descent irrespective of allegiance or citizenship, is confined to the following classes, that is to say:-

- (a) The members of the diplomatic corps, or other government representatives, their suites and their servants, and consuls and consular agents;
- (b) The children born in Canada of parents of Chinese race or descent, who have left Canada for educational or other purposes, on substantiating their identity to the satisfaction of the controller at the port or place where they seek to enter on their return;

- (c) (i) Merchants as defined by such regulations as the Minister may prescribe,

- (ii) Students coming to Canada for the purpose of attendance, and while in actual attendance, at any Canadian university or college authorized by statute or charter to confer degrees."

This practically closed the door insofar as the Chinese were concerned, as since that enactment in 1923 only some seven Chinese have entered as immigrants.

The total number of Chinese immigrants entering Canada, according to the Department of Immigration records, since 1886 amounts to 90,326, and of this number 82,370 entered on payment of head tax. The total amount of head tax money paid by the Chinese for admission to this country between 1885 and 1923, when the doors were closed to immigration, amounted to the large sum of \$21,223,150.

This fact should not be entirely lost sight of when considering the plea of the Japanese in this country, and there is

little doubt that the Chinese have been discriminated against as compared with the Japanese, who have been allowed to enter Canada without any such handicap and free of any head tax. Further there is a special Act on our Statute Books called the Chinese Immigration Act, which prohibits any Chinese entering Canada except, of course, certain prescribed classes such as members of the diplomatic corps, etc. Here again the Japanese have been given more favourable treatment in that there is no such Act or barrier in force against those of Japanese origin or birth.

It is difficult indeed to state accurately the precise number of Chinese in Canada and particularly in British Columbia, owing to certain well-known factors such as: the number of Chinese leaving Canada and returning, the number of deaths, the number who have entered surreptitiously, the difficulty of taking a census of the Chinese population, and the reluctance of the Chinese to register births. These and other reasons make it extremely difficult to enumerate the exact number, and here it might be said the same difficulties apply with equal force when dealing with figures of the Japanese population, and which will be dealt with later.

It would only be fair to state, however, that the number of Chinese is now somewhat less than a few years ago owing to the return of many Chinese to their native land. This coupled with the fact that the number of Chinese females is only ten per cent of the Chinese males, is quite an important factor in preventing the natural increase which would ensue were there more Chinese women.

The latest official figures given are those issued by the Economic Council of British Columbia and issued in September, 1935, the total Chinese in British Columbia at the end of 1931 being given as 27,139, of which 24,900 were males and only 2,239 females. This ratio of ten per cent is in distinct contrast to the Japanese where the Japanese females almost equal the number of Japanese males in the Province.

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Before leaving the Chinese question it should be noted that no agitation to be given the franchise has come from the Chinese in British Columbia, nor has anything been said of the fact that in the Province of Saskatchewan it is the Chinese only who are not allowed to vote at Provincial Elections, and are the only Oriental race specifically mentioned. The present agitation for the franchise has been fostered entirely by the Japanese and by Japanese societies, and it is believed no momentous action such as this is ever undertaken without the full cognizance of the Japanese Imperial Government through its accredited mouthpiece in this country - The Japanese Consul. Such being the case it will perhaps be necessary to deal more particularly with the question in relation to the Japanese rather than the Chinese who, it would seem, are content to accept our laws without protest, and here again they differ from the Japanese who are much more assertive in Canada than are the Chinese.

JAPANESE

Immigration to Canada from Japan did not begin to be extensive until the years following 1900. Previous to that year the number of Japanese was estimated to be 1400. Due, however, to the great numbers entering in 1905, 1906, and 1907, in which latter year some 7,601 Japanese immigrants entered, the Government of that day negotiated with Japan what has been called a Gentlemen's Agreement, whereby Japanese immigrants were to be limited to only 400 per year. Unfortunately, it was later discovered that Japan was not observing the Agreement entered into, as far greater numbers of Japanese were coming to Canada than the 400 per year agreed upon, the number entering for one year alone, according to the Department's records, being given as 1,178. It was during those years that the so-called picture brides came to Canada in such large numbers. At this time Japanese resident in British Columbia could and did pick out wives for themselves from photographs, and those so chosen entered Canada as the wife of some Japanese.

After much negotiation between Canada and Japan a new Gentlemen's Agreement was finally concluded in 1928, when it was arranged that the number should be definitely fixed at not more than 150 yearly - 75 males and 75 females.

This number has more or less maintained since that time. According to the latest official figures issued by the Research Department of British Columbia, who made a complete and careful survey of the Oriental question on behalf of the Provincial Government in 1935, there was a total of 22,205 persons of Japanese birth or origin resident in British Columbia up to the end of the year 1931. Of this number 13,035 were male and 9,170 female, making the proportion of females to males forty per cent of the total Japanese population. To this number would have to be added the number who have come into the country since 1931, which according to Immigration statistics would amount to approximately 600, and to this must also be added the natural increase which in the years from 1928 to 1931 amounted to an average of 1400 per year. These, however, are only the births actually registered by the Japanese, for it is well known that great numbers of births take place amongst the Japanese which are not registered. This then brings the total up to approximately 30,000. It is here that strong exception must be taken to the figures presented by the Japanese delegates appearing before the Committee, who on page 4 of their Brief give a total of only 19,960 which number is far and away below even that of the immigration figures given in the report of the Department of Immigration and Colonization issued by the Dominion Government, and considerably below that issued in 1935 by the Research Department of British Columbia, who made a most careful study and survey of the matter.

Evidently the Japanese in presenting their case to the Committee wanted it to appear that there were fewer Japanese in the Province of British Columbia than careful analysis actually shows, for the statistical number of 30,000 now given was available for them to present to the Committee had they been willing to do so

and to give anything like the actual number of Japanese resident within that Province.

Mention should be made of the number of Japanese who have entered Canada surreptitiously and also of the great number of Japanese who are holders of naturalization certificates presumably issued in British Columbia, but who obtained these fake naturalization certificates before leaving Japan. A highly organized racket was exposed in 1931 before the Courts of British Columbia when one by the name of Yoshi, a Japanese, who held the position of Japanese interpreter for the Department of Immigration, was convicted as the leader of a group who had been practicing this nefarious game for upwards of ten years, and during which time it was estimated hundreds of Japanese had entered Canada with false naturalization papers.

It is also well known that many Japanese in British Columbia to-day are holders of birth certificates which show them as having been born at some place in British Columbia, but who were actually born in Japan.

It would be difficult to correctly estimate the number of Japanese who are thus claiming naturalization in this country or to having been born here, but who obtained the papers they have under the circumstances just described.

ANSWERS TO JAPANESE SUBMISSIONS

It was submitted on behalf of the Japanese that the reason for the Provincial legislation denying the franchise to Orientals was due to the fact that at the time this was enacted there were large numbers of Chinese in British Columbia, most of whom were labourers, etc., and that these Chinese were uneducated and of low social order, and totally unfitted to discharge the duties of citizens. Such a statement is neither a fair one nor is it a correct one to make, and one wonders just what the Chinese themselves would have to say were they made fully aware of this

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statement, and which to say the least, belittles those of the Chinese race, and pictures those of Japanese origin as being of a far superior race or class of people than the Chinese.

It can at least be said for British Columbia that in its legislation saying who shall be given the franchise and who shall not, no favoritism or discrimination has been shown, for the Act prohibiting the franchise to certain classes and races of Orientals, includes Chinese as well as Japanese, and including likewise British Subjects from India and also the native Indians of British Columbia.

On Page 9 of their Brief, the argument is used that the classification of Japanese along with Chinese, Hindus, and Indians, and in which all are included in the disqualification clause of the Provincial Franchise Act is, so they claim, a weapon of industrial expediency and an instrument of race suppression. Surely they are not serious in this contention, and they should be the very last in this country to make any complaint about weapons of industrial expediency, that is when one considers the almost strangle-hold the Orientals have obtained in British Columbia on many of the leading industries in that Province.

Note the effrontery of the statement made on Page 11 that the Japanese who have come to Canada for the past number of years have been of a higher class than usually is the vanguard of immigration to any country. This statement, I claim is an insult to the early pioneers who came to Canada in the early days and hewed out homes for themselves, and who suffered many and real hardships in the early years of the building up of this country. As a matter of fact the Japanese is not a pioneer at all, he usually waits until someone else does that and then follows along afterwards, and so reaping any benefits accruing from such pioneering. This, at least, has been the history of the Japanese in the Province of British Columbia.

On Page 11 mention is made as to why the Dominion Parliament passed the legislation it did in the matter of disqualification. The legislation passed by the Dominion Parliament was passed in fairness to the wishes of the people of British Columbia, who in their wisdom deemed it advisable not to grant the franchise to the four classes, namely: Chinese, Japanese, Hindus, and Indians. The statement that the legislation passed was instituted largely by the trades labour unions should be seriously challenged, likewise the one made that at that time there was no true race question before the country. It should be emphasized that there has always been a race question in British Columbia ever since the advent of Orientals into that Province and as far back as 1886.

If any argument is required to show that this matter should have been taken up by the Japanese first of all in the Province of British Columbia and to the Provincial Government, it can I believe be found on Page 12 of their own Brief, wherein they quote the resolution passed by the Vancouver and Vicinity Camp and Mill Workers Federal Union No. 31, which resolution asks that full provincial franchise rights be granted to all, this being sent to the Provincial Government and where the question in the first place rightfully belongs.

To argue as they do on Page 13 that this state of affairs is a blow to the principles of Confederation is simply a begging of the whole question. If such a line of argument were pursued it could well be shown that at the time of Confederation, British Columbia being a Crown Colony retained certain rights and privileges of its very own, and at that time there were practically no Orientals in the Province except a handful of Chinese. How could the Fathers of Confederation have successfully dealt with something which had not then arisen and which was never even contemplated?

The argument advanced on behalf of the Japanese on Page 14 cannot be taken very seriously when they quote from a speech by the

late Hon. Thomas D'Arcy McGee, wherein he states, "God hath made of one blood all the nations that dwell on the face of the earth". They may be of one blood insofar as blood itself is concerned, but is it not a fact that the different races which exist on the earth to-day - white, yellow, black, and red - are, biologically speaking, distinct one from the other? We have a long way to go yet before the different races can be made into one homogenous race if indeed they ever can be, and the granting of the franchise to the Orientals will not overcome the evident physical difference and distinctive characteristics of race.

We entirely agree with them on Page 14 that the race disqualification in British Columbia is a purely provincial matter; with this we are in hearty accord. There is no gainsaying the fact that were the Dominion Government to act contrary to the wishes of the people of British Columbia as expressed by Provincial Statute, thereby removing the present sections in the Dominion Act, it would certainly be the thin end of the wedge in the drive by the Japanese to overcome the views held and expressed by the people of British Columbia. In that event it could very well be argued, and it certainly would be in British Columbia by the Japanese resident therein, "We are allowed to vote at Dominion elections in your Province, so why should we be debarred from voting in Provincial elections?" When that day comes, if it ever comes, we might as well pull up our stakes and seek pastures new, for they will then, by reason of numbers to a great extent be able to control affairs in the Province of British Columbia, political as well as economic. This point cannot be too strongly emphasized. The appeal now being made by the Japanese to Ottawa is to say the least of it, rather an astute move on their part. Knowing the strong sentiment which exists in the Province of British Columbia against the granting of the franchise to Orientals, they have ignored that Province and come some three thousand miles to the Capital city of Ottawa in the hope that by appealing to a Committee

comprising a majority of members from other provinces, who by reason of distance etc. from the Province are not quite aware of the serious influx into British Columbia of Orientals and the actual serious conditions existing there, they might possibly be influenced by sentimental appeal into giving some attention to the request now made on behalf of the Japanese.

The Japanese are ever prone, in this country at least, to speak frequently about British justice but they, it would seem, in regard to similar matters affecting nationals other than Japanese, in Japan act in accordance with Japanese standards of justice which according to the British or Canadian standpoint might be something entirely different.

The statement is made on Page 16 of the Brief that as the result of their being denied the right to be elected to public office, such as the Provincial legislature, Municipal Council, School Board, etc., the Japanese in British Columbia find it difficult to obtain employment with Canadian people. This is not only a gross exaggeration but is entirely misleading and untrue. One has only to visit British Columbia to see for himself the inroads made by Orientals in industry to realize just how untrue such a statement really is. Wherever one goes Japanese of all ages and both sexes will be seen at work either in pulp mills, logging operations, fish canneries, etc. and on the coastal steamers Japanese have been employed for many years past. A complete survey of the Oriental labour situation in British Columbia was instituted by the Provincial Government and according to the figures issued, in 1931 there was a total in the Province of 31,760 Orientals gainfully employed, and of which 23,192 were Chinese and 8,568 were Japanese. These Orientals are employed in practically all pursuits from labouring and farming to the professional and commercial occupations.

A very interesting statement is also shown in the Provincial official report mentioned. One of the tables submitted

shows that British Columbia may expect in the years 1938 to 1940 inclusive a slight decrease of some 452 Chinese on the labour market, but an increase of some 3,504 males and 370 females of Japanese birth on the labour market, or a total increase of Japanese in the labour market of 3,874 in these years.

Further, with regard to the inroads which have been made by the Japanese in the economic life of British Columbia, consider for a moment the encroachments made by them and the hold they now have on our Canadian fishing grounds. Out of a total of some 12,325 licenses issued by the Department of Fisheries in 1935, 2,023 of these were issued to those of Japanese birth or origin as against 2,971 to Indians and 7,331 to Whites. In other words the Japanese are getting 18% or more of all fishing licenses issued and which, according to numbers, is equal to a total of 7% of the number of Japanese resident in that Province. The percentage of Whites and Indians combined is only approximately 1 $\frac{1}{2}$ % of the total population, and yet never an opportunity is lost by the Japanese to plead for more and yet more commercial fishing licenses for those of their own race.

Strong exception must be taken to the statements on Page 18 when in dealing with scholastic attainments it is asserted that the Japanese born in British Columbia do not speak the Japanese language neither, so it is stated, do they learn it in their own homes. This statement is far from the truth. Not only do they speak Japanese when conversing with those of Japanese origin and birth, but they see to it that the children, whose parents are unable to send them to Japan, learn not only the Japanese language but Japanese culture, etc. as well, and Japanese day schools are held almost everywhere throughout British Columbia where Japanese are to any extent congregated. The Japanese children have to attend school under Japanese instructors after regular school hours and on Saturdays, and also during the usual annual summer and winter recesses, at which times other children are free from school duties. It is

openly stated on fairly reliable authority that financial assistance is provided for the Japanese teachers and instructors from sources in Japan itself, through the medium of the resident Japanese Consul. This point is mentioned not as an argument that the Japanese have no actual right to do this if they so desire, but rather to refute the statement made, namely: that the Japanese children in British Columbia do not speak the Japanese language. The statement made is at complete variance with the actual facts of the situation as they exist to-day in British Columbia.

ASSIMILABILITY OF THE ORIENTAL

We now come to the question of assimilability of race and here it should be noted that very little is stated in their Brief about this matter, although it is one of the most important if not the most important, especially from the standpoint of our national life, economic and otherwise. Without dealing too exhaustively with the question of what is meant by non-assimilability, it perhaps can be stated to be when one race of people cannot, biologically speaking, be absorbed into another race of people by the union of the two races in marriage, and this is the case in regard to the Chinese and Japanese, whose blood stream is principally Mongolian or Polynesian, marrying into our own race. As a matter of fact the danger is that the Chinese or Japanese by inter-marriage would absorb our own race, and this is amply born out by the fact that in the few instances where a Chinese or a Japanese has married a Canadian woman or vice versa, the offspring born from the union of these two races have distinct physical characteristics and are unmistakably Oriental in features and appearance. It is not generally known, however, that the Japanese themselves do not encourage marriages with other races such as ours. Even the Japanese recognize in their Brief that Canadian-born Japanese retain Japanese characteristics, as on page 19 they state that children born of Japanese parents in Canada (and I quote the words used) "except for physical characteristics are indistinguishable from Canadian children". Is that not a sufficient difference, for

What is the standard of white men's physical characteristics?

well could the same be said also of children born of coloured parents. This statement is repeated on Page 20 where it is stated of the Japanese children born in Canada that all the other racial characteristics with the exception of the different racial physical characteristics, in a short time will be gone, and in which statement we concur, for the children now born in British Columbia are as distinctly Japanese as their parents or grandparents.

The granting of the franchise will not, and indeed could not break down the peculiar racial characteristics which the Oriental has, and which it is admitted still exists. It would, however, as they themselves readily suggest, further economic assimilation, but are we in Canada prepared to allow an unassimilable race of people to control the economic and political life, if not of Canada, then that of British Columbia, the dangers of which have become more apparent in that Province during the past number of years.

The Brief speaks of the Japanese race as being a proud one, etc., a fact with which we find no fault, although it is not generally known just to what extent this pride of theirs really goes and which is now becoming more apparent in British Columbia. We take no great exception to this, but it should be pointed out that national pride does not pertain to any one race or nation. When the question of good feeling is introduced by them as one being related to that of trade, the fact should not be lost sight of that Australia has gone a great deal farther in restrictive legislation against the Oriental than has Canada, in closing her gates entirely to them, yet Australia has been doing more trade with both China and Japan over the past number of years than has Canada.

One wonders at many of the arguments advanced on Page 22. For example, they state that the Japanese system of Government is like ours and one can only wonder just why such an argument would be made or if they really expect such a statement to be believed. And again, what the fact of their navy being modelled along lines

similar to that of Great Britain has to do with the granting of the franchise to the Japanese in British Columbia is somewhat difficult to understand, unless it is being used as some kind of threat or bogey.

On Page 21 they speak of a time to come when by force of numbers the franchise will have to be granted to them, and it is stated it will be then too late. Further they ask the question, "Does Canada want a blood purge similar to that of Hitler with regard to the Jews in Germany?" Statements such as these just quoted and as put forward on behalf of the Japanese ought not to be given much credence and should not be recognized as having any bearing whatsoever in any appeal for enfranchisement of Orientals at Dominion elections in any province in Canada.

RIGHTS OF DOMINION TO LEGISLATE

A considerable number of pages of the Japanese Brief, notably Pages 25 to 42, are devoted to somewhat lengthy arguments, legal and otherwise, which are advanced disputing the rights of the Dominion Parliament under the B.N.A. Act to legislate in regard to who shall or who shall not vote at elections. Surely no importance can be attached to those arguments. The fact that this matter was taken before our Courts by the Japanese themselves, even going as far as appealing to the Privy Council in 1905, at which time the decision was against them, is proof enough of our legal rights to legislate and settles the question without any shadow of doubt. It is the right of every country, including Canada, to say, if they deem desirable so to do, who shall and who shall not vote, and to argue as is done on Page 39 that our refusal to grant the franchise to the Japanese cannot be supported by law is, to say the least of it, ridiculous.

LAWS IN JAPAN

The conclusion of the Brief deals particularly with Japanese Acts and ordinances in effect in Japan, touching on nationality laws, land laws, and ordinances as affecting foreigners in that

country. No proper interpretation of the various Japanese statutes quoted can be obtained by a mere cursory examination or reading of sections extracted or quoted from these Statutes, and which have been translated into English for the purpose of the arguments submitted. Just for what purposes these extracts from Japanese Statutes have been submitted is difficult to understand, unless it be for the purpose of making some kind of comparison between Japanese and Canadian laws. In answer it should be pointed out that it is hardly possible to make anything like a fair comparison between two countries such as Japan and Canada as conditions are so vastly different and dissimilar in Japan to those in Canada. However, what we in Canada do is strictly speaking our very own business. Likewise what Japan does is strictly Japan's own business, but strong exception must be taken to any suggestion that Canada is less generous in her dealings or treatment of Oriental races within its borders, than is Japan itself towards those of foreign or alien birth living in Japan.

In Mr. W. J. Sebald's translation of "The Civil Code of Japan" he enumerates "private rights" as follows:

"Among other disabilities, aliens cannot hold shares in the Bank of Japan (B.J.R. Art.5), Yokohama Specie Bank (Y.S.B. Art.5), Bank of Korea (B.K.L. Art. 5, par.2), Korean Industrial Bank (K.I.B. Art. 4, par.2), Oriental Development Co. (O.D.C. Art.3), Japan Wireless Telegraph Co. (J.W.L. Art. 5), South Manchuria Railway Co. (S.M.R. Art. 2), They are not allowed to hold mining rights (Mining Law Art.5), or placer mining rights (Placer Mining Law, Art. 23), to own Japanese ships (Shipping Law, Art. 1), to become pilots (pilots' Law, Art. 2, par. 1). They cannot obtain navigation subsidies or ocean fishing subsidies (Ocean Navigation Subsidy Law, Art. 1, and Ocean Fishing Encouragement Law, Art. 2). They cannot be members or heads of Japanese houses (Civil Code, Art. 964 and Art. 990, par. 2). But aliens are debarred from owning land only in strategical areas specially designated by

"Imperial Ordinance (Alien Land Law, Art. 4). As for public rights, they are excluded from all suffrage, national, prefectural and municipal. Nor can they enlist in the army or navy or be appointed officials (if aliens are taken into Government employment, it is merely as "employees" and not as regular officials.) They cannot even join political parties or be promoters of public political meetings (Peace Police Law, Art.6)".

As already pointed out, it is not possible in any Brief such as has been submitted to deal in any competent manner whatsoever with the laws and ordinances of a country like Japan, unless one is fully conversant not only with all the Statutes and ordinances of the country itself, but also with its customs and people. It should be pointed out, however, that while many of the Japanese Statutes read as being one thing, very often the effect of them is entirely changed or nullified by provisions contained in other laws or ordinances. It is difficult to understand just what significance such presentations in their Brief have in regard to the question, but some note should be taken of them and to refute any suggestion that Japan gives the same equal rights or privileges to those in Japan other than her own race and equal or similar to those enjoyed by the Japanese themselves in Canada. One has only to carefully read over the various sections quoted in the Japanese Brief to realize the truth of this.

DUAL CITIZENSHIP

Mention should be made of the question of Japanese dual citizenship, which matter was discussed in 1936 during the time the four Japanese delegates appeared before the Elections and Franchise Committee and considerable attention should be given to this matter when considering any appeal for the granting of the franchise to those of Japanese birth or origin.

Up until 1924 all Japanese born in Canada were Japanese citizens and reckoned as such by the Japanese Government, and

according to the Japanese National Law all Japanese children, no matter where born, were Japanese subjects, unless at the time of their birth the parents renounced allegiance to Japan. It is extremely doubtful if many Japanese ever took steps to renounce allegiance to Japan. Under the new Law Japanese can and still do retain Japanese citizenship of their children born in Canada by simply having the births registered with the Japanese Consul.

According to Professor Hayakawa, a British Columbia born Japanese and one of the chief witnesses, no figures could be given as to the number of Japanese born in Canada who would be thus registered at one and the same time as citizens of both countries and which he later declared gave them protection in Canada by the Japanese Government. It was admitted, however, that Japanese children born in Canada were still being registered with the Japanese Consul, and it is very doubtful if there are any appreciable numbers of Japanese children born in this country whose births are not registered with the Japanese Consul in this country. While the disinclination of the Japanese to relinquish Japanese citizenship is their own affair, why pretend they are out and out Canadians? It is doubted if in effect there is actually much difference in the new Japanese Law of 1924 from that of the Act previously in operation.

The disinclination of the Japanese to relinquish their citizenship is perhaps looked upon by them as being a virtue rather than a fault, and possibly furnishes one of the outstanding reasons for the great national solidarity of Japan, unique among the nations of the earth today. It does, however, furnish an equally good reason why the average Japanese cannot, in the strict sense of the word, make a good Canadian citizen. The further fact should be noted that China also makes claim to all Chinese living abroad, and even Chinese born in alien lands are not allowed by China to change their nationality.

What is particularly feared in British Columbia is the danger of Japan maintaining a separate state within Canada. What

has taken place in other countries; particularly Hawaii and California, should be a lesson to Canada. As late as the early 1920's Japan maintained in California a state within a state, in which every Japanese, whether alien or native-born American citizen, was under orders from Japan in peace or in war, and was forced to belong to a local association under the control of the Consul General of Japan at San Francisco.

In 1924 when the new Law regarding registry of births abroad was put into effect by Japan, the argument was advanced by the Japanese abroad, just as it is being advanced today by the Japanese in British Columbia, that dual citizenship would largely disappear. Such, however, has not been the case. Various factors, including the insistence of the first generation, the pull of heredity, the Japanese law of family, the teachings of Buddhist instructors in the Japanese language schools, and the encouraged study of Japanese culture, tend to nullify the purpose of the law. It was estimated by Governor Joseph Poindexter in February, 1936 that in Hawaii over two-thirds of the Hawaiian-born Japanese retain their Japanese citizenship with all obligations thereof. It has been estimated on fairly reliable authority that nearly fifty per cent of the voters in Hawaii are now of Japanese origin or birth.

That the same situation exists in regard to the registry of Japanese births with the Japanese Consul in Canada will not be either seriously or successfully refuted. The statement made to the Committee by Professor Hayakawa that he did not know the number of Japanese children born in British Columbia who would be registered by the Japanese Consul, on the face of it seems strange. The four Japanese delegates who appeared before the Committee were apparently fully conversant with all complete figures and data, and it hardly seems probable that they would have no knowledge or information as to the number of Japanese children registered with their own Consul since 1924, which registration makes them citizens of Japan, amenable to directions and instructions from the Japanese

Government and as was admitted by Professor Hayakawa before the Committee last year, in the event of serious trouble in Canada they would be given some kind of protection or other.

Once the Japanese secure the franchise in British Columbia the next objective contemplated is to obtain legislative positions, such as municipal, Provincial or Dominion, and this was readily admitted by one of the Japanese delegates. When that time comes, the Japanese Government will then have an active voice in Canada and so help to shape the policies of this country.

Practically all the arguments presented to the Committee on May 22nd, 1936, by the four Japanese delegates in person, were contained in the brief submitted by Mr. T. G. Norris, K. C. on behalf of the Japanese Canadian Citizens League, and their submissions were in most instances merely repetitions or extracts from the Brief itself. However, there were some statements made by them which it is perhaps just as well to take note of and not allow to remain unchallenged, lest it perhaps be said later that they either were not or could not be.

Dr. Banno in his evidence made the statement that out of possibly 2,000 Canadian-born Japanese over the age of eighteen, 500 are members of the Japanese League in the Lower Fraser Valley, New Westminster, and Vancouver districts, and then Professor Hayakawa in his evidence stated that the group of young Japanese who made the survey mentioned found only 1,210. Quite a disparity in numbers. This same group in their survey, according to Miss Hyodo, discovered only 19,960 Japanese in the entire Province, of which she stated 10,965 are Canadian born, which would leave only some 8,995 who are not Canadian-born and therefore must have entered Canada. According to official Japanese figures issued in the Japan-Manchoukuo Year Book of 1937 issued in Tokyo, at Page 46 of that report a total of 21,062 is given as the number of Japanese resident in Canada in 1934. How does this compare with Miss Hyodo's statement that there are only some 8,995 not Canadian-born, unless it be that

all Japanese, whether born in Canada or Japan, are looked upon as such by Japan itself, and which we contend is actually the case!

financial assistance does not apply to Canada

An important fact and one not generally known but which must not be overlooked, is that Japan grants financial assistance to Japanese emigrants to enable them to settle abroad. The official figures published in Tokyo for a period of ten years, 1925 to 1934, show a total of 197,325 Japanese, both male and female, as being given financial help to enable them to make a start abroad. The same table shows a total sum of 222,611,000 yen, approximately fifty million dollars, as money having been remitted by the 197,325 Japanese who left Japan to settle in other countries, (see Page 45, Japan-Manchoukuo Year Book, 1937).

The official records issued by the Department of Immigration of Canada show the number of Japanese coming into Canada from 1900 to 1936 as being a total of 25,014. This does not take into account the Japanese immigration for any of the years previous to 1900 and which amounted to some 1,500. One wonders if any figures presented by the Japanese in Canada can be relied upon and the question naturally arises as to the real reason for the Japanese not presenting the officially recorded figures issued and obtainable from the Department of Immigration and which figures cannot very well be disputed. They could even have presented the figures obtainable from Japan itself. It would appear to be a studied policy on their part to minimize the actual or potential numbers of their race not only in Canada, but also as was done in regard to Hawaii and the Pacific Coast States as well. It is fair to make the statement that the official figures as issued by the authority of the Provincial Government of British Columbia in 1935, are fairly conservative and if anything, rather under estimate the actual number of Japanese living in British Columbia, the total number being given as approximately 30,000 and not 19,960 as quoted by Miss Hyodo.

Dr. Hayakawa mentioned before the Committee that there

was danger of the situation in British Columbia ultimately becoming similar to the caste system of India. Surely this is a far-fetched argument to use, as there is no comparison between the matter of the caste system of India, which is maintained chiefly through different religious beliefs or doctrines, and the question of the Japanese enfranchisement in British Columbia, where the problem is chiefly a biological one. ?

Instances of the Japanese marrying outside of their own race are rare. Now then, it should be asked, is it possible to absorb a race such as the Japanese without intermarriage? Canada, like the United States, must be built up of a homogenous race, although there are some who believe that admixture of blood of all races is beneficial to mankind, but usually those who advocate or believe this want it tried out by other people's sons or daughters rather than their own. Apart from all this, however, we should face the question that even if assimilation were possible, which of the two races would predominate? while

Professor Hayakawa's statement in answer to a question that no restrictions are placed on foreigners voting in Japan, cannot be accepted as it is at complete variance with "The Civil Code of Japan" which has already been quoted. Professor Hayakawa failed to make mention of the numerous and varied prohibitions in effect in Japan which mitigate against aliens or foreigners, so-called, in matters such as ownership of land, restrictions in regard to private rights, etc. and as to "public rights", why they just haven't any in Japan? (See "The Civil Code of Japan" W. J. Sebald's translation).

In answer to a question Professor Hayakawa stated he did not know just how many Canadian-born Japanese went back each year to Japan to comply with Japanese military regulations. It is not denied that numbers do go back each year to Japan for this purpose and to quote again from Japanese authorities, in

U.S. has majority
two languages
assimilate without intermarriage?
assimilation & intermarriage
have place

No Japanese go from
here to do military duty

speaking about expatriation of Japanese, they have this to say:

"It may be noted that those American or Canadian-born Japanese boys not yet expatriated are still technically liable to the Japanese conscription law, so that the crux of "double nationality" question remains unsolved, as is also the case with the Prussian or French boys born in America." (Japan-Manchoukuo Year Book, 1937).

In answer to statements made by Dr. Hayakawa in connection with economic difficulties which it is claimed are experienced by the Japanese resident in British Columbia, it is only fair to say that any such statement would not be taken seriously by the people of British Columbia, and it is extremely doubtful if any mention would have been made of this matter if the appeal were to the Province of British Columbia instead of to a Committee of the House of Commons, located at Ottawa. That they have prospered and done exceedingly well in this country cannot be denied. Their natural industry and aptitude in adapting themselves to new conditions (which qualities we all admire) coupled with the fact that owing to their lower standards of living, etc. they are able to more successfully compete against our own Canadian people, has enabled them to in large measure not only prosper, but also to supercede Canadians and gradually obtain control in many lines of economic endeavor.

The splendid opportunities and economic advantages which the Japanese have received and obtained in Canada are in striking contrast to the policy of Japan itself, which by Imperial ordinances precludes the entry to Japan of cheaper labour, such as the Chinese and Koreans. It is true perhaps that the exclusion of these two races of people was necessary to protect Japanese labour, as it is well known that they could not successfully compete against Chinese or Korean labour on account of the lower standard of living of the Chinese or Koreans. It is little use now, however, for Canada to regret that at the outset some such like action was not taken to protect own own people from the competition of the cheaper labour from Oriental countries, but the fact that Canada did not do so, is no reason now why we should repeat

what is now generally recognized was a grave mistake of economic policy on our part.

Provincial governments of all shades of political opinion have at various times endeavored to grapple with the problem of Oriental economic activities in that Province. One aspect of the Oriental problem in British Columbia has been recently brought to the attention of the public in that Province. At a largely attended representative gathering of farmers held on February 23rd in the town of Cloverdale, close to the city of New Westminster, a demand was made to the Provincial Government, asking that a Royal Commission be appointed to investigate the actions and activities of Chinese vegetable growers, wholesale, and commission houses who, it is authoritatively stated, are in complete control of the sale of all vegetables, and who seem to act at variance with control laws as to marketing, etc. and in open defiance of Provincial Statutes in effect in that Province.

A complete Provincial survey was made in British Columbia in 1927 and in that year disclosed to what extent economic Oriental penetration had then been reached in the Province. In view of the seriousness of the problem at that time, which has become more serious since then, the Provincial Government of that day caused a humble address to be presented to His Honour the Lieutenant Governor, praying that copies of the report be sent to the Governor General and to the Dominion Parliament at Ottawa. The following extracts are given from that report:

Page 4. The facts assembled by the Bureau of Provincial Information from official sources bring out the following, among other, phases of the situation.

- (1) That at the beginning of 1927 the Oriental population of the Province is at least 46,500 or, in other words, 1 in every 12 persons.
- (2) That the Japanese birth-rate is 40 per 1,000, as compared with a general birth-rate of all races, except native Indians, of 18 per 1,000.
- (3) That the increase in the Japanese population through the excess of births over deaths is greater by more than 2 to 1 than the immigration of that race.
- (4) That the arrivals of Japanese women have greatly outnumbered the arrivals of men for several years past, and that at the present time two women come in for every man that enters.

- (5) That of the Oriental arrivals in Canada for the past twenty years British Columbia got 80 per cent of the Chinese, over 98 per cent of the Japanese, and nearly 99 per cent of the Hindus.
- (6) That Orientals own land and improved property in British Columbia to an aggregate value of \$10,491,250 and lease property valued at \$1,099,500.
- (7) That over 11,300 Orientals are employed in industries of the Province, and that, for instance, while the proportion employed in the lumbering industry generally has been reduced to 20 per cent, there are between 30 and 40 per cent employed in saw and planing mills and close on 50 per cent in shingle mills.
- (8) That in 1925 there were 3,231 Asiatics carrying on in licensed trades and callings, and that in the cities they constitute an incredibly large percentage of the total number of licensees in some callings.
- (9) That in three years the number of Japanese children in the public schools has increased by 74 per cent, while in the same time the number of white children has increased by 6 per cent.
- (10) That in the fishing industry, upon which the Orientals appeared to have a strangle-hold a few years ago, the policy of a gradual reduction in the number of licences allowed to them is bringing the industry back into the hands of white and native Indian fishermen.

The statistical branch of the Department of Agriculture brings out the following facts regarding the Oriental in agriculture:

- (1) That in the four years from 1921 to 1925 the acreage of land owned by Orientals increased by approximately 5,000 acres and the land leased by approximately 1,500 acres.
- (2) That of the acreage in small fruits at the present time the portion held by Oriental growers is 30.6 per cent, while in number they constitute but one-seventh of the growers, the holdings average $1\frac{1}{2}$ acres to each white grower and 4 acres to each Oriental grower.
- (3) That with the development of production under glass, which has been quite marked of late years, the Oriental is more and more increasing his hold on this branch of the industry; that where in 1923 he constituted 9 per cent of growers with 28 per cent of glass area, in 1925 he constituted 13 per cent of growers with 37 per cent of glass area.
- (4) That while the total increase in glass area between the 1923 and 1925 greenhouse surveys was 22 per cent, the increase in white operation was but 8 per cent and the increase in Oriental operation 58 per cent.
- (5) That the handling of produce and garden-truck by peddlers or hucksters is almost entirely in the hands of Chinese, and that the same applies to the sale of vegetables in stores, to the extent of 91 per cent in one city.

The following is also taken from the report:

"There has always been a certain amount of difficulty in securing registrations of Oriental births, and there is some ground for the suspicion that even yet, with the greatest vigilance on the part of officials of the Provincial Board of Health, there are births which are not reported. Comparison of a series of the reports by the Registrar of Vital Statistics will show that a number of births, chiefly of Orientals, are not registered until years after. The figures of actual births for the years given in the statement are subject to addition every year hereafter as further births in the several years are registered."

The following table is from the report of the Economic Council of British Columbia on the total number of Orientals employed in the labour market in 1931 and issued September, 1935 under authority of the Provincial Government of British Columbia:

ORIENTALS, 10 YEARS OF AGE AND OVER, GAINFULLY EMPLOYED
IN BRITISH COLUMBIA, 1931.

OCCUPATION	CHINESE	JAPANESE
: Agriculture	4,193	1,513
: Fishermen	18	1,464
: Logging	653	599
: Coal Mining	307	62
: Other Mining	84	39
: Vegetable Products	25	14
: Animal Products	400	76
: Textile Goods & Apparel	203	128
: Wood Products	150	230
: Pulp & Paper, Paper Prod.	1	131
: Printing, Publishing and Bookbinding	32	21
: Metals (not electroplate or Precious Metals)	42	82
: Precious Metals & Electroplate	7	1
: Non-metallic Mineral Prod.	18	6
: Chemical Processes and Paint Makers	11	20
: Miscellaneous Products	2	2
: Electric Light & Power Production	45	49
: Building & Construction	37	181
: Transportation & Commun'n.	470	238
: Warehousing and Storage	81	17
: Commercial	1,841	419
: Finance, Insurance	16	15
: Public Admin. & Defence	4	3
: Professional	78	88
: Entertainment and Sport	22	19
: Personal	5,182	839
: Laundry Workers, Cleaners, Dyers, Pressers	749	50
: Clerical	124	103
: Unspecified	:	2
: Labourers & Unskilled workers (not agricultural, Min., or Log.)	8,203	1,441
: Hunting	1	:
GRAND TOTAL - 30,851	22,999	7,852

It is interesting to compare the totals of Orientals employed in industry in British Columbia in the year 1927 with the greatly increased numbers employed, and as given, in 1935. This answers completely and effectively any statements made by the Japanese either personally or in their Brief regarding any economic disadvantage which they say exists to those of their race in British

Columbia and disproves entirely such contention that any discrimination exists. Orientals in the Province of British Columbia have to quite a remarkable extent displaced Canadian labour in many fields and have been able to do so largely on account of the fact that their lower standards of living enable them to work for less and which fact has given them considerable preference.

In conclusion it should be pointed out that the submissions contained are presented in rebuttal to the submission to the Special Committee on Elections and Franchise in 1936 on behalf of the Japanese Canadian League, and are not in any way actuated by any personal animus to either those of Chinese or Japanese origin or birth.

It should again be reiterated that the granting of the franchise in Dominion elections to Japanese in British Columbia would be but the thin end of the wedge which would be used to compel the granting of the franchise in British Columbia to all unassimilable races at Provincial elections, and if the Japanese in British Columbia were granted this privilege, what about the Chinese and likewise the Hindus who are British subjects before coming to Canada. In that event could the franchise very well be denied the other Asiatic races in the Province and what particular reason is there to suppose that the Japanese alone should be specially favoured? When the time ever comes that the people of British Columbia themselves decide to grant the franchise to all those of Oriental birth or origin at Provincial elections it will be time enough for the Dominion Parliament to seriously consider the question of allowing the franchise to those of Oriental birth or origin at Dominion elections in British Columbia, and we trust that day is quite a long way off yet.

The Oriental question in Canada, being primarily a British Columbia question, it is respectfully requested that the Dominion Parliament would be well advised to continue to co-operate with the people of British Columbia, who by the statutes of that Province, preclude from voting all those of Oriental birth or origin.
