HOMMA, MISS HASUE

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JAPANESE-CANADIAN
COLLECTION

PLEASE RETAIN
ORIGINAL ORDER

VIII

[PRIVY COUNCIL.]

CUNNINGHAM AND ATTORNEY-GENERAL FOR BRITISH COLUMBIA . . } APPELLANTS;

AND

TOMEY HOMMA AND ATTORNEY-GENERAL FOR THE DOMINION OF CANADA . . . . . } RESPONDENTS.

J. C.* 1902 July 4; Dec. 17.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

British North America Act, s. 91, sub-s. 25; s. 92, sub-s. 1—Naturalization and Aliens—British Columbia Provincial Elections Act, s. 8—Powers of Provincial Legislature—Privileges conferred or withheld after Naturalization.

Sect. 91, sub-s. 25, of the British North America Act, 1867, reserves to the exclusive jurisdiction of the Dominion Parliament the subject of naturalization—that is, the right to determine how it shall be constituted.

The provincial legislature has the right to determine, under s. 92, sub-s. 1, what privileges, as distinguished from necessary consequences, shall be attached to it.

Accordingly, the British Columbia Provincial Elections Act (1897, c. 67), s. 8, which provides that no Japanese, whether naturalized or not, shall be entitled to vote, is not ultra vires.

APPEAL from an order of the above Supreme Court (March 9, 1901) affirming an order of the Chief Justice, sitting as county court judge (Nov. 30, 1900), which reversed the decision of the collector of voters, and ordered that the name of Tomey Homma be placed on the register of voters for the Vancouver electoral district.

In October, 1900, the said T. Homma, a native of the Japanese empire, not born of British parents, but a naturalized British subject, by notice given in the prescribed manner to the appellant, made the application now in question.

By the Provincial Elections Act of British Columbia (Revised Statutes of British Columbia, 1897, c. 67) it is enacted (amongst other things) as follows:—

"3. The following terms shall in this Act have the

* *Present:* THE LORD CHANCELLOR, LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, and LORD LINDLEY.

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meanings hereinafter assigned to them unless there is something in the context repugnant to such construction, that is to say—"

* * * * *

"The expression 'Chinaman' shall mean any native of the Chinese empire or its dependencies not born of British parents, and shall include any person of the Chinese race naturalized or not.

"The expression 'Japanese' shall mean any native of the Japanese empire or its dependencies not born of British parents, and shall include any person of the Japanese race naturalized or not.

"The expression 'Indian' shall mean any person of pure Indian blood."

* * * * *

"7. Every male of the full age of twenty-one years, not being disqualified by this Act or by any other law in force in this province, being entitled within this province to the privileges of a natural-born British subject, having resided in this province for twelve months, and in the electoral district in which he claims to vote for two months of that period immediately previous to sending in his claim to vote, as hereinafter mentioned, and being duly registered as an elector under the provisions of this Act, shall be entitled to vote at any election: provided that no person shall be entitled to be registered or to vote as aforesaid who shall have been convicted of any treason, felony, or other infamous offence, unless he shall have received a free or conditional pardon for such offence, or have undergone the sentence passed upon him for such offence.

"8. No Chinaman, Japanese, or Indian shall have his name placed on the register of voters for any electoral district, or be entitled to vote at any election. Any collector of voters who shall insert the name of any Chinaman, Japanese, or Indian in any such register shall, upon summary conviction thereof before any justice of the peace, be liable to a penalty not exceeding $50."

By the Provincial Elections Act Amendment Act, 1899

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the franchise is not a topic which their Lordships are entitled to consider.

The first observation which arises is that the enactment, supposed to be ultra vires and to be impeached upon the ground of its dealing with alienage and naturalization, has not necessarily anything to do with either. A child of Japanese parentage born in Vancouver City is a natural-born subject of the King, and would be equally excluded from the possession of the franchise. The extent to which naturalization will confer privileges has varied both in this country and elsewhere. From the time of William III. down to Queen Victoria no naturalization was permitted which did not exclude the alien naturalized from sitting in Parliament or in the Privy Council.

In Lawrence's Wheaton, p. 903 (2nd annotated ed. 1863), it is said that "though (in the United States) the power of naturalization be nominally exclusive in the Federal Government, its operation in the most important particulars, especially as to the right of suffrage, is made to depend on the local constitution and laws." The term "political rights" used in the Canadian Naturalization Act is, as Walkem J. very justly says, a very wide phrase, and their Lordships concur in his observation that, whatever it means, it cannot be held to give necessarily a right to the suffrage in all or any of the provinces. In the history of this country the right to the franchise has been granted and withheld on a great number of grounds, conspicuously upon grounds of religious faith, yet no one has ever suggested that a person excluded from the franchise was not under allegiance to the Sovereign.

Could it be suggested that the province of British Columbia could not exclude an alien from the franchise in that province? Yet, if the mere mention of alienage in the enactment could make the law ultra vires, such a construction of s. 91, sub-s. 25, would involve that absurdity. The truth is that the language of that section does not purport to deal with the consequences of either alienage or naturalization. It undoubtedly reserves these subjects for the exclusive jurisdiction of the Dominion—that is to say, it is for the Dominion to determine what shall constitute either the one or the other, but the question as to

what consequences shall follow from either is not touched. The right of protection and the obligations of allegiance are necessarily involved in the nationality conferred by naturalization; but the privileges attached to it, where these depend upon residence, are quite independent of nationality.

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This, indeed, seems to have been the opinion of the learned judges below; but they were under the impression that they were precluded from acting on their own judgment by the decision of this Board in the case of *Union Colliery Co.* v. *Bryden*. (1) That case depended upon totally different grounds. This Board, dealing with the particular facts of that case, came to the conclusion that the regulations there impeached were not really aimed at the regulation of coal mines at all, but were in truth devised to deprive the Chinese, naturalized or not, of the ordinary rights of the inhabitants of British Columbia and, in effect, to prohibit their continued residence in that province, since it prohibited their earning their living in that province. It is obvious that such a decision can have no relation to the question whether any naturalized person has an inherent right to the suffrage within the province in which he resides.

For these reasons their Lordships will humbly advise His Majesty that the order of the Chief Justice in the county court and the order of the Supreme Court ought to be reversed, except so far as the respondent, Tomey Homma, is entitled to his costs under those orders. Having regard to the terms of the Order in Council giving special leave to appeal, their Lordships direct the appellants to pay the costs of Tomey Homma in this appeal, but that otherwise the parties shall pay their own costs.

Solicitors for appellants: *Gard, Rook & Winterbotham.*

Solicitor for respondent Homma: *S. V. Blake.*

Solicitors for Attorney-General for the Dominion: *Charles Russell & Co.*

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

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(Statutes of British Columbia, 1899, c. 25), it is enacted (amongst other things) as follows:— J. C. 1902

"3. Section 7 of said chapter 67 is hereby amended by striking out the word 'twelve' in the fourth line thereof and substituting therefor the word 'six,' and by striking out the words 'two months' in the fifth line thereof and substituting therefor the words 'one month,' and by adding thereto as sub-s. 2 thereof the words following:— CUNNINGHAM v. TOMEY HOMMA.

"2. No judge of the Supreme or County Court, no sheriff or deputy sheriff, no employee of the provincial government who is in receipt of salary of at least $300 per annum, no sailor, marine, or soldier on full pay in the Imperial service, and no officer in the Imperial service on full pay, shall be entitled to have his name placed upon the register of voters for any electoral riding. This sub-section shall not apply to Ministers of the Crown, Mr. Speaker, members of the Legislative Assembly, or school teachers."

On October 19, 1900, the appellant, in obedience to s. 8 of the said Provincial Elections Act, disallowed the claim of Tomey Homma.

The County Court and the Supreme Court held that s. 8 of the Provincial Elections Act of British Columbia related to a matter, namely, "naturalization," which, by virtue of the British North America Act, 1867, s. 91, was within the exclusive legislative authority of the Parliament of Canada, and not within the jurisdiction of the legislature of British Columbia.

Robinson, K.C., and *C. A. Russell*, K.C., for the appellants, the Attorney-General for the province having been joined as an intervenor with the collector, contended that the orders of the County and Supreme Courts were wrong, and should be reversed. They contended that it should be declared that Homma was not entitled to be placed on the register of voters. Sect. 8 referred to was not within the exclusive legislative authority of the Dominion. It does not relate to any matter declared by s. 91 of the British North America Act, 1867, to belong to the Dominion jurisdiction. See particularly sub-s. 25,

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affecting Imperial relations, and to retain them within the exclusive power of the Dominion.

Robinson, K.C., replied.

Dec. 17. The judgment of their Lordships was delivered by

THE LORD CHANCELLOR. In this case a naturalized Japanese claims to be placed upon the register of voters for the electoral district of Vancouver City, and the objection which is made to his claim is that by the electoral law of the province it is enacted that no Japanese, whether naturalized or not, shall have his name placed on the register of voters or shall be entitled to vote. Application was made to the proper officer to enter the applicant's name on the register, but he refused to do so upon the ground that the enactment in question prohibited its being done. This refusal was overruled by the Chief Justice sitting in the county court, and the appeal from his decision to the Supreme Court of British Columbia was disallowed. The present appeal is from the decision of the Supreme Court.

There is no doubt that, if it is within the capacity of the province to enact the electoral law, the claimant is qualified by the express language of the statute; but it is contended that the 91st and 92nd sections of the British North America Act have deprived the province of the power of making any such provision as to disqualify a naturalized Japanese from electoral privileges. It is maintained that s. 91, sub-s. 25, enacts that the whole subject of naturalization is reserved to the exclusive jurisdiction of the Dominion, while the Naturalization Act of Canada enacts that a naturalized alien shall within Canada be entitled to all political and other rights, powers, and privileges to which a natural-born British subject is entitled in Canada. To this it is replied that, by s. 92, sub-s. 1, the constitution of the province and any amendment of it are placed under the exclusive control of the provincial legislature. The question which their Lordships have to determine is which of these two views is the right one, and, in determining that question, the policy or impolicy of such an enactment as that which excludes a particular race from