British Columbia (Attorney General) v. Canada (Minister of Justice)

In re The Japanese Treaty Act, 1913

[1920] B.C.J. No. 16

56 D.L.R. 69

British Columbia Court of Appeal
Victoria, British Columbia

Macdonald C.J.A., Galliher and McPhillips JJ.A.

Heard: June 22, 23 and 24, 1920.
Judgment: November 16, 1920.

1 **MACDONALD C.J.A.**:-- The first and second questions submitted are as follows:

> "1. Does the said The Japanese Treaty Act, 1913, operate or apply so as to limit the effect of the legislative jurisdiction or powers of the Legislative Assembly of the Province; and, if so, in what particular or respect?
>
> "2. If the said Act does not operate or apply so as to limit or affect the legislative jurisdiction or powers of the Legislative Assembly of the Province, does the said Treaty itself operate or apply so as to limit the legislative jurisdiction or powers of the said Legislative Assembly; and, if so, in what particular or in what respect?"

2 These two questions are general and comprehensive but the argument of counsel was confined to the concrete question of the effect of the Treaty and the Treaty Act upon the powers of the Provincial Legislature in relation to the rights, duties and disabilities, in pursuit of their callings in this Province, of subjects of His Majesty the Emperor of Japan. [29 BCR Page142]

3 In my opinion, the answer to both questions is to be found in the judgment of the Privy Council delivered by Lord Watson in Union Colliery Company of British Columbia v. Bryden (1899), A.C. 580. The Provincial legislation in question in that case prohibited the employment of Chinamen underground in coal mines. The decision makes it clear that in all matters which directly concern aliens and naturalized persons resident in Canada, the Dominion Parliament is invested with exclusive jurisdiction by virtue of section 91, subsection 25, of the British North America Act, 1867.

4 Neither the Treaty nor the Treaty Act can, in view of that decision, in strictness be said to operate or apply so as to limit or affect the legislative powers of the Province in the premises. They cannot limit or affect that which has no existence.

5 My answer, therefore, is that the Legislative Assembly of the Province has no jurisdiction in the premises, not because of the Treaty or the Treaty Act, but because power to legislate was withheld by the British North America Act.

6 The third and fourth questions are as follows:

> "3. Is it competent to the Legislature of British Columbia to authorize the Government of the Province to insert as a term of its contracts for the construction of Provincial public works a provision that no Japanese shall be employed upon, about, or in connection with such works?
>
> "4. Is it competent to the Legislature of British Columbia to authorize the Government of the Province to insert as a term of its contracts and leases conferring rights and concessions in respect of the public lands belonging to the Province, including the timber and water thereon and the minerals therein, a provision that no Japanese shall be employed in or about such premises?"

7 It follows from the answer to the first and second questions that it would not be competent to the Legislature to pass a law prohibiting the employment of Japanese in or about the works and premises referred to in the questions, but it was argued by the Attorney General that the Government might, with propriety, insert in its contracts terms placing the other party under obligation to refrain from employing persons of a particular race, just as the Government itself might, if it were the employer, pick and choose its employees.

8 The answers to the other two questions, I think, apply as well to these, but if not, then as the Treaty Act has made the [29 BCR Page143] Treaty the law of Canada, in so far as the subjects embraced in it are within the legislative powers of Parliament, any Act or resolution of the Provincial Legislature repugnant thereto would be contrary to the Dominion statute and, therefore, beyond the competence of the Provincial Legislature to enact or pass.

9 It is necessary to refer to this difference between the two sets of questions: The first and second questions affect only Japanese subjects; the third and fourth questions refer to "Japanese," a description which may refer not only to nationality but to race, irrespective of nationality.

10 In the case to which reference has already been made, the Privy Council had to determine what was meant by the description "Chinaman" in the statute there in question, and came to the conclusion, in the circumstances of that case, that the statute was aiming at both alien and naturalized Chinese and that, as to both classes, their rights and disabilities were in the hands of the Dominion Parliament. It may, therefore, be accepted that the description "Japanese" in the third and fourth questions embraces both alien and naturalized Japanese. Those of that race who are natural born British subjects, may, and I think do, in relation to their civil rights, in the pursuit of their callings, come within a class by themselves. No argument was presented by counsel upon this aspect of the matter, and the questions themselves do not go the length of requiring the Court to determine the powers of the Provincial Legislature in respect of the civil rights in the Province of any race whose rights lie outside the subject of "naturalization and aliens" assigned to the Dominion.

11 GALLIHER J.A.:-- I agree in answering the questions submitted to the Court in the above matters with the conclusion of the Chief Justice, for the reasons given by him in his judgment just handed down.

12 McPHILLIPS J.A.:-- The questions submitted have been very ably presented at the Bar by the Attorney General for British Columbia and the learned counsel representing interests claimed [29 BCR Page144] to be affected by the inhibitory clauses as contained in contracts and leases of the Crown entered into by His Majesty in the right of the Province of British Columbia. The learned Attorney General contended that The Japanese Treaty Act, 1913 (Can. State. 1913, Cap. 27), was not passed in pursuance of section 132 of the British North America Act, 30 & 31 Vict., c. 3 (Imperial), but that it must be assumed to have been passed in exercise of powers under section 91(2) of the British North America Act relative to "The regulation of trade and commerce" and be confined to such matters. With deference, I do not so view the legislation; it would seem to be in conformity with section 132 of the British North America Act, and the ambit of the legislation is to legalize and implement the provisions of the Japanese Treaty and render it obligatory throughout Canada to the full extent of the powers delegated by the Sovereign Parliament to Canada, and all the Provinces, save as in the Act is provided (see Can. Stats. 1913, Cap. 27, Sec. 2, Subsecs. (a) and (b)). The manner and form of the legislation is not of moment and cannot be the subject of any judicial comment or restriction. The Sovereign Parliament of Canada in the full exercise of its powers, as extensive as the Imperial Parliament in such matters, has by statutory enactment given its adhesion to and imposed upon Canada and all the Provinces the Treaty obligations as contained in the Japanese Treaty. Neither do I consider that it is the province of the Court to observe upon, nor attempt to hold, that the enactment was in its nature anticipatory in respect to any Provincial obligations. None being, as is contended, then existent, the legislation must, according to the true application of the canons of construction of statute law, be given effect to wherever possible, and I see no insuperable or other barriers in the way. The Japanese Treaty, "to have the force of law in Canada," must be held to be destructive of all that has gone before, save as in the Act is provided, i.e., it is legislation affecting all enactments in praesenti as well as in futuro. Nothing can be done in derogation of this statute law to the end that the Treaty obligations may be conformed to by Canada and the Provinces. I cannot see that anything is to be gained by, nor do I, with [29 BCR Page145] the greatest of deference to His Honour the Lieutenant-Governor and His Executive Council, consider that it should be required of the Court of Appeal to answer in detail questions 1 and 2; they are purely academic and it may possibly be that it is not so intended, as at best the views of the Court could not be said to be other than obiter dicta: see Lord Loreburn, L.C. in Dominion of Canada v. Province of Ontario (1910), 80 L.J., P.C. 32 at p. 34. The concrete matters are set forth in questions 3 and 4, which read as follows: [already set out in statement and in the judgment of MACDONALD, C.J.A.].

13 That the inhibitory provisions are not contained in any statutory enactment of the Province, in my opinion, is not an effective answer, as admittedly they have been inserted following the passage of a resolution of the Legislative Assembly of the Province of British Columbia, of date the 15th of April, 1902, which resolution was in the following terms:

> "That in all contracts, leases and concessions of whatsoever kind entered into, issued or made by the Government, or on behalf of the Government, provision be made that no Chinese or Japanese shall be employed in connection therewith."

14 Following this resolution an order in council was passed, of date the 16th of June, 1902, which provided:

> "That a clause embodying the provisions of the resolution be inserted in all instruments issued by officers of the Government for the various purposes above quoted."

15 The application of the resolution, by order in council, referred to was to be held to extend to all instruments issuing under the Land Act, Coal Mines Act, Water Clauses Consolidation Act, Public Works contracts, the terms of which are not prescribed by statute, and the Placer Mining Act. In practice the resolution was given general application and imposed in all contracts, leases and other instruments executed by and on behalf of His Majesty in the right of the Province of British Columbia. Turning to the Interpretation Act (R.S.B.C. 1911, Cap. 1, Sec. 26, Subsec. 4) we see that the "'Lieutenant-Governor-in-Council' means the Lieutenant-Governor of British Columbia, or person administering the Government of British Columbia for the time being, acting by and with the advice of the Executive Council of British Columbia." It follows that [29 BCR Page146] the order in council, in its terms, cannot any longer "have the force of law" (Can. Stats. 1913, Cap. 27) in the Province if it, at any time, had the force of law. In view of the provisions of The Japanese Treaty Act, 1913, and section 132 of the British North America Act, i.e., the "Lieutenant-Governor-in-Council" must perform the obligations of the Province as contained in the Japanese Treaty given the force of law throughout Canada and the respective Provinces as set forth in The Japanese Treaty Act, 1913.

16 I do not find it necessary to enter into the detail as to what powers relative to say "Property and Civil rights in the Province" (B.N.A. Act, Sec. 92(13)) may not still be exercised without thereby infringing upon the obligations imposed by the Japanese Treaty when the legislation is general in its application to all residents of the Province.

17 We have seen that "political rights" are not beyond the powers of the Provinces and, in passing, it might be said that the Japanese Treaty does not impose any obligations of this nature. The Lord Chancellor (Earl of Halsbury) in Vancouver City Collector of Voters v. Tomey Homma (1902), 72 L.J., P.C. 23 said:

> "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 ...."

18 At p. 24:

> "Could it be suggested that the Province of British Columbia could not exclude an alien from the franchise in that Province? ... 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 .... It is obvious that such a decision [Union Colliery Co. of British Columbia v. Bryden (1809), A.C. 580; 68 L.J., P.C. 118] 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."

19 It follows that wherever there is legislation, be it legislation of the Parliament of Canada or legislation of any of the Parliaments of the Provinces of Canada, in conflict, repugnant and inconsistent with any of the terms of the Japanese Treaty (save such as is preserved by The Japanese Treaty Act, 1913), all such legislation is displaced, as The Japanese Treaty Act, 1913, declares that the Japanese Treaty is "to have the force of law [29 BCR Page147] in Canada." Lex posterior derogat priori. A fortiori this same effect is applicable to all orders in council, which presumptively are only passed and have the effect of law if founded upon constitutional authority and statute law admitting of their passage. Lord Parker of Waddington in The Zamora (1916), 2 A.C. 77 at p. 90, said:

> "The idea that the King in Council, or indeed any branch of the Executive, has power to prescribe or alter the law to be administered by Courts of law in this country is out of harmony with the principles of our Constitution. It is true that, under a number of modern statutes, various branches of the Executive have power to make rules having the force of statutes, but all such rules derive their validity from the statutes which creates the power, and not from the executive body by which they are made ...."

20 At p. 93:

> "It cannot, of course, be disputed that a Prize Court, like any other Court, is bound by the legislative enactments of its own Sovereign State .... The fact, however, that the Prize Courts in this country would be bound by Acts of the Imperial Legislature affords no ground for arguing that they are bound by the Executive orders of the King in Council."

21 Now the order in council here in question and which has to be considered, in answering questions 3 and 4, is in plain conflict with the Japanese Treaty, and it must be held to be displaced following the passage of The Japanese Treaty Act, 1913, and any existent legislation in conflict is displaced, and during the continuance of the Japanese Treaty, no legislation would have validity which, by its terms, or in effect, derogated from the statutorily validated Japanese Treaty, a Treaty now effective throughout the whole British Empire (Hall's International Law, 7th Ed., 356, and Clement's Canadian Constitution, 3rd Ed., 135-44). The analogy of the reasoning in The Zamora case is apparent if applied to the questions here to be considered. Lord Parker, continuing at p. 97, said:

> "There are two further points requiring notice in this part of the case. The first arises on the argument addressed to the Board by the Solicitor-General. It may be, he said, that the Court would not be bound by an order in council which is manifestly contrary to the established rules of international law, but there are regions in which such law is imperfectly ascertained and defined; and, when this is so, it would not be unreasonable to hold that the Court should subordinate its own opinion to the directions of the Executive. This argument is open to the same objection as the argument of the Attorney General. If the Court is to decide judicially in accordance with what it conceives to be the law of nations, it cannot, even [29 BCR Page148] in doubtful cease, take its directions from the Crown,

> which is a party to the proceedings. It must itself determine what the law is according to the best of its ability, and its view, with whatever hesitation it be arrived at, must prevail over any executive order. Only in this way can it fulfil its function as a Prize Court and justify the confidence which other nations have hitherto placed in its decisions .... Further, the Prize Court will take judicial notice of every order in council material to the consideration of matters with which it has to deal, and will give the utmost weight and importance to every such order short of treating it as an authoritative and binding declaration of law."

22 Therefore, it is for the Court to say what the state of the law is in respect to the questions propounded, and the Court may reject as invalid and ultra vires an order in council which, even if valid, at the time of its passage, is now invalid by reason of subsequent legislation. In my opinion, the order in council never had validity wherein it was provided:

> "That in all contracts, leases and concessions of whatsoever kind entered into, issued or made by the Government, or on behalf of the Government, provision be made that no Chinese or Japanese shall be employed in connection therewith,"

quite apart from the Japanese Treaty and the effect of The Japanese Treaty Act, 1913. This conclusion, it seems to me, must be the only conclusion one can arrive at after careful study of Union Colliery Company of British Columbia v. Bryden (1899), 68 L.J., P.C. 118. There it was held that

> "An enactment by a Provincial Legislature that no Chinaman shall be employed in mines is beyond its competence, inasmuch as by the British North America. Act, 1867, s. 91, sub-s. 26, legislation with respect to 'naturalization and aliens' is reserved exclusively to the Parliament of the Dominion."

23 The order in council, authorizing and directing the inhibition in all contracts, leases and concessions reads "no Chinese or Japanese," and turning to questions 3 and 4 submitted to the Court for answer the words are "no Japanese shall be employed." It is impossible to have a decision which would be more complete than the Bryden case, and it being the judgment of the Privy Council, it is absolutely binding upon this Court. The Bryden case was considered in Quong-Wing v. Regem (1914), 49 S.C.R. 440.

24 Referring to the Bryden case and subsequent cases, Mr. Justice CLEMENT, in his admirable work, before referred to, at pp. 486-7, said: [29 BCR Page149]

> "In a provincial Act (British Columbia) dealing with the working of coal mines a clause prohibiting the employment of Chinaman in such mines underground was considered by the Privy Council not to be aimed at the regulation of coal mines at all but to be in its pith and substance a law to prevent a certain class of aliens or naturalized persona from earning their living in the Province. In other words the enactment was not really in relation to local works or undertakings (Sec. 92, No. 10) or to property and civil rights in the Province (Sec. 92, No. 13) or to a matter of a local or private nature in the Province (Sec. 92, No. 16); but it was in fact an enactment in relation to aliens and naturalization (Sec. 91, No. 25),

> and therefore ultra vires of a Provincial Legislature. Union Colliery Company of British Columbia v. Bryden (1899), A.C. 580; 68 L.J., P.C. 118. In a later case, on the other hand, an enactment of the same Legislature denying the franchise to Japanese was held to be legislation in relation to the Provincial Constitution (See. 92, No. 1), and as having no necessary relation to alienage; and discrimination, in other words, being based upon racial not national grounds. Tomey Homma's case (1903), A.C. 151; 72 L.J., P.C. 23. As will appear later, it is difficult to reconcile these two decisions; and in a recent case in the Supreme Court of Canada a provision in a Provincial Act (Saskatchewan) forbidding the employment of any white woman or girl in any restaurant, laundry, or other place of business or amusement owned, kept, or managed by any Chinaman, was upheld as within Provincial competence as a law for the suppression or prevention of a local evil (Sec. 92, No., 16), or as touching civil rights in the Province (Sec. 92, No. 13). It did not in the opinion of the majority of the Court present any aspect particularly affecting Chinaman as aliens; for a natural born British subject of the Chinese race (and there are many such in Canada) would be under the ban of the Act. (Quong-Wing v. R. [(1914)], 49 S.C.R. 440. The Privy Council refused leave to appeal. See post, p. 671. In Re Insurance Act, 1910 [(1913)], 48 S.C.R. 260, the question of legislative aspect and purpose also appears; see particularly per Brodeur, J., at p. 313)."

25 It is to be observed that their Lordships of the Privy Council refused leave to appeal in the Quong-Wing case, but it cannot be assumed that there has been any change of view of the law when, as here, we have exactly similar verbiage, i.e., "no Chinese or Japanese shall be employed" - "No Japanese shall be employed." In the Quong-Wing case, Davies, J. (now Chief Justice of Canada); said at pp. 448-9:

> "The regulations impeached in the Union Colliery case (1899), A.C. 580, were, as stated by the Judicial Committee, in the later case of Tomey Homma (1903), A.C. 151 at p. 157, '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.'
>
> "I think the pith and substance of the legislation now before us is [29 BCR Page150] entirely different. Its object and purpose is the protection of white women and girls; and the prohibition of their employment or residence, or lodging, or working, etc., in any place of business or amusement owned, kept or managed by any Chinaman is for the purpose of ensuring that protection. Such legislation does not, in my judgment, come within the class of legislation or regulation which the Judicial Committee held ultra vires of the Provincial Legislatures in the case of The Union Collieries v. Bryden (1899), A.C. 580."

26 The order in council is clearly ultra vires and it would be ultra vires of the Legislative Assembly to enact or authorize the passage of any order in council providing for the insertion in any con-

tracts, leases, or concessions any inhibitory provision that no Japanese shall be employed. Plainly, the provision would be exactly similar in effect to that declared to be ultra vires in the Bryden case, and as interpreted in the later Tomey Homma case by the Lord Chancellor (Earl of Halsbury), the language of the Lord Chancellor being quoted above by the Chief Justice of Canada in the Quong-Wing case (49 S.C.R. 448). Mr. Justice Duff, at pp. 466-8, in the Quong-Wing case deals with the Bryden and Tomey Homma cases.

27 It will, therefore, be seen that, according to the interpretation put upon the Bryden case by the Supreme Court of Canada, there can be only negative answers to questions 3 and 4. It would not be competent for the Legislature of British Columbia to authorize the Government of the Province to insert as a term of its contracts for the construction of Provincial public works, a provision that no Japanese should be employed upon, about or in connection with the works, nor would it be competent to the Legislature to authorize the Government to insert, as a term of its contracts and leases, conferring rights and concessions in respect of the public lands belonging to the Province, including the timber and water thereon and the minerals therein, a provision that no Japanese should be employed in and about such premises. It would be ultra vires legislation, quite apart from being in conflict with the Japanese Treaty and unquestionably now in view of The Japanese Treaty Act, 1913, any such legislation would be invalid.

28 With respect to questions 1 and 2, no concrete cases have been put, and, with the greatest deference and respect, as previously pointed out, there is no necessity for any specific answers to be [29 BCR Page151] made thereto, but without venturing to limit the horizon or define the ambit of the Japanese Treaty, as validated by The Japanese Treaty Act, 1913, it may be said that it has the force of law in Canada and throughout the Provinces of Canada, and any legislation, which, in its terms, is in conflict with, or repugnant to the Japanese Treaty, as validated by The Japanese Treaty Act, 1913, must be held to be repealed by necessary implication, and any future legislation limiting the privileges guaranteed by the Japanese Treaty, during the life of the Japanese Treaty, would be ultra vires legislation, in that the Treaty, as long as it is existent, has the effect of inhibiting legislation, Federal or Provincial, which would be in conflict with the terms of the Treaty, i.e., to that extent the powers of the Parliament of Canada and the Parliaments of the Provinces of Canada, as conferred by the British North America Act, 1867, are curtailed.

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ANNOTATED

For Alphabetically Arranged Table of Annotations to be found in Vols. I-LVI. D.L.R., See Pages vii-xix.

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EDITED BY

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Audette, J.

public talk, especially among promoters, in the locality, built upon the comparative prices which were obtained from subdivisions in other localities. That is not of much assistance when it is sought to find the market price of this property at the date of the expropriation, especially when the demand for lots there must be admitted to be very small.

As expressed by Anglin, J., in the *Trudel* case, 19 D.L.R. at p. 279:—

> Of anything which a far-seeing purchaser would take into account in estimating what he should pay for the property . . . the owners are entitled to the benefit in fixing the value of the land for purposes of expropriation.

And indeed, when we consider the amount tendered and offered by the Crown, we must come to the conclusion that such consideration and basis have been weighed and accepted before arriving at the sum of $16,360, because that amount is far beyond the value of the property as a farm.

Viewed as a farm, with the advantage of the potentiality of being turned into subdivisions within a fairly reasonable time, the buildings, with very few exceptions, can only have a demolition value and not the value established by some of the witnesses on the basis, as to what it would cost in our days to build them anew. The dwelling house appears to have been built over 60 years ago.

At the date of the expropriation, it could not fairly be expected that this property could be all sold within a reasonable time as building lots. Sales would be very slow, and spread over a very long period, if ever they were all sold. There was no market for such a large subdivision in such locality at the date of the expropriation.

The tender and offer made by the Crown, which appears to be very reasonable under the circumstances, is based, as appears from the evidence, upon the valuation of Crown witness Morrison —but as this witness has, apparently, left out some items for which the owners should receive compensation, and upon which the witness when at trial placed additional value, I have come to the conclusion that if $2,000 be added to the tender, as representing compensation for severance, the water-lot, fence, second well, etc., etc., in fact covering all other legal elements of compensation—that a very fair and just award will be arrived at.

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Eliza Murray, one of the defendants, is vested with only a life interest in the property, and it is admitted by both parties, that she was born on October 11, 1864—she being of the age of 54 at the date of the expropriation—her life-interest is assessed, according to the tables found in Cameron on Dower, at 55.89% of the award, and Agatha Hatt at 44.11% for the reversion.

Therefore, there will be judgment as follows: 1st, the lands expropriated herein, are declared vested in the Crown as of the date of the expropriation; 2nd, the compensation for the lands taken and for all damages resulting from the expropriation is hereby fixed at the total sum of $18,360, with interest on the sum of $15,660, from August 19, 1918, to the date hereof, and on $2,700 from November 6, 1918, to the same date; 3rd, the defendants are entitled to recover from the plaintiff the said sum of $18,350 in the following proportion, viz.: Eliza Murray—for her life-interest, 55.89%, equal to $10,261.40, and Agatha Hatt, the reversion representing 44.11%, equal to $8,098.60—with interest as above mentioned—upon their giving to the Crown a good and sufficient title free from all mortgages or incumbrances whatsoever upon the said expropriated property. 4th, the defendants are also entitled to the costs of the action. *Judgment accordingly.*

Re THE JAPANESE TREATY ACT.

B. C.
C. A.

British Columbia Court of Appeal, Macdonald, C.J.A., Galliher and McPhillips JJ.A. November 16, 1920.

CONSTITUTIONAL LAW (§ I A—3)—ALIENS—EXCLUSIVE JURISDICTION OF DOMINION PARLIAMENT—JAPANESE TREATY ACT, 3-4 GEO. V. 1913 ch. 27—RIGHT OF PROVINCE TO INHIBIT EMPLOYMENT OF.

In all matters which directly concern aliens and naturalised persons resident in Canada, the Dominion Parliament is invested with exclusive jurisdiction by virtue of sec. 91, sub-sec. 25, of the B.N.A. Act, 1867, and a provincial Order in Council providing "that in all contracts, leases and concessions of whatsoever kind entered into . . . by the Government . . . provision be made that no Chinese or Japanese shall be employed in connection therewith" is invalid and *ultra vires*, not because of the Japanese Treaty or the Japanese Treaty Act, 3-4 Geo. V. 1913 (Can.), ch. 27, but because power to legislate was withheld by the B.N.A. Act.

[*Union Colliery Co.* v. *Bryden*, [1899] A.C. 580; *Quong Wing* v. *The King* (1914), 18 D.L.R. 121, 49 Can. S.C.R. 440, 23 Can. Cr. Cas. 113, followed.]

Statement.

REFERENCE by the Governor-in-Council to the Court of Appeal, under R.S.B.C. 1911, ch. 45, as to the Japanese Treaty Act.

B. C.
C. A.
RE THE JAPANESE TREATY ACT.
Macdonald, C.J.A.

J. W. DeB. Farris, K.C., for Provincial Government.
C. Wilson, K.C., for Shingle Agency.
A. P. Luxton, K.C., for Attorney-General of Canada.
Sir C. H. Tupper, K.C., for Japanese Government.

MACDONALD, C.J.A.:—The first and second questions submitted are as follows:—

1. Does the said Japanese Treaty Act, 3-4 Geo. V. 1913 (Can.), ch. 27, operate or apply so as to limit the effect of the legislative jurisdiction or powers of the Legislative Assembly of the Province, and, if so, in what particular or respect?

2. If the said Act does not operate or apply so as to limit or affect the legislative jurisdiction or powers of the Legislative Assembly of the Province, does the said treaty itself operate or apply so as to limit the legislative jurisdiction or powers of the said Legislative Assembly, and, if so, in what particular or in what respect?

These two questions are general and comprehensive, but the argument of counsel was confined to the concrete question of the effect of the treaty and the Treaty Act upon the powers of the Provincial Legislature in relation to the rights, duties and disabilities, in pursuit of their callings in this Province, of subjects of His Majesty the Emperor of Japan.

In my opinion, the answer to both questions is to be found in the judgment of the Privy Council delivered by Lord Watson in *Union Colliery Co. of British Columbia* v. *Bryden and The Att'y-Gen'l of British Columbia*, [1899] A.C. 580. The provincial legislation in question in that case prohibited the employment of Chinamen underground in coal mines. The decision makes it clear that in all matters, which directly concern aliens and naturalised persons resident in Canada, the Dominion Parliament is invested with exclusive jurisdiction by virtue of sec. 91, sub-sec. 25, of the B.N.A. Act, 1867.

Neither the treaty nor the Treaty Act can, in view of that decision, in strictness be said to operate or apply so as to limit or affect the legislative powers of the Province in the premises. They cannot limit or affect that which has no existence.

My answer, therefore, is that the Legislative Assembly of the Province has no jurisdiction in the premises, not because of the treaty or the Treaty Act, but because power to legislate was withheld by the B.N.A. Act.

B. C.
C. A.
RE THE JAPANESE TREATY ACT.
Macdonald, C.J.A.

The 3rd and 4th questions are as follows:—

3. Is it competent to the Legislature of British Columbia to authorise the Government of the Province to insert as a term of its contracts for the construction of provincial public works a provision that no Japanese shall be employed upon, about, or in connection with such works?

4. Is it competent to the Legislature of British Columbia to authorise the Government of the Province to insert as a term of its contracts and leases conferring rights and concessions in respect of the public lands belonging to the Province, including the timber and water thereon and the mineral therein, a provision that no Japanese shall be employed in or about such premises?

It follows from the answer to the 1st and 2nd questions, that it would not be competent to the Legislature to pass a law prohibiting the employment of Japanese in or about the works and premises referred to in the questions, but it was argued by the Attorney-General that the Government might, with propriety, insert in its contracts terms placing the other party under obligation to refrain from employing persons of a particular race just as the Government itself might, if it were the employer, pick and choose its employees.

The answers to the other two questions, I think, apply as well to these but, if not, then as the Treaty Act has made the treaty the law of Canada, insofar as the subjects embraced in it are within the legislative powers of Parliament, any Act or resolution of the Provincial Legislature repugnant thereto would be contrary to the Dominion statute and, therefore, beyond the competence of the Provincial Legislature to enact or pass.

It is necessary to refer to this difference between the two sets of questions: The 1st and 2nd questions affect only *Japanese subjects*. The 3rd and 4th questions refer to "*Japanese*," a description which may refer not only to a nationality but to race irrespective of nationality.

In the case to which reference has already been made, the Privy Council had to determine what was meant by the description "Chinaman" in the statute there in question and came to the conclusion, in the circumstances of that case, that the statute was aiming at both alien and naturalised Chinese and that, as to both classes, their rights and disabilities were in the hands of the Dominion Parliament. It may, therefore, be accepted that the description "Japanese," in the 3rd and 4th questions, embrace both alien and naturalised Japanese. Those of that race, who are

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natural born British subjects, may, and I think, do, in relation to their civil rights, in the pursuit of their callings, come within a class by themselves. No argument was presented by counsel upon this aspect of the matter and the questions themselves do not go the length of requiring the Court to determine the powers of the Provincial Legislature in respect of the civil rights in the Province of any race whose rights lie outside the subject of "naturalisation and aliens" assigned to the Dominion.

Galliher, J.

GALLIHER, J.A.:—I agree in answering the questions submitted to the Court in above matters with the conclusion of Macdonald, C.J.A., for the reasons given by him in his judgment just handed down.

McPhillips, J.A.

MCPHILLIPS, J.A.:—The questions submitted have been very ably presented at the Bar by the Attorney-General for British Columbia and the counsel representing interests claimed to be affected by the inhibitory clauses as contained in contracts and leases of the Crown entered into by His Majesty in the right of the Province of British Columbia. The Attorney-General contended that the Japanese Treaty Act, 1913, 3-4 Geo. V (Can.), ch. 27, was not passed in pursuance of sec. 132 of the B.N.A. Act, 1867, 30-31 Vict., ch. 3 (Imp.), but that it must be assumed to have been passed in exercise of powers under sec. 91 (2) of the B.N.A. Act, relative to "The Regulation of Trade and Commerce" and be confined to such matters. With deference, I do not so view the legislation. It would seem to be in conformity with sec. 132 of the B.N.A. Act and the ambit of the legislation is to legalise and implement the provisions of the Japanese Treaty and render it obligatory throughout Canada to the full extent of the powers delegated by the Sovereign Parliament to Canada and all the Provinces, save as in the Act is provided (see sec. 2, sub-secs. (a) and (b) of 3-4 Geo. V. 1913, ch. 27). The manner and form of the legislation is not of moment and cannot be the subject of any judicial comment or restriction. The Sovereign Parliament of Canada in the full exercise of its powers—as extensive as the Imperial Parliament in such matters—has by statutory enactment given its adhesion to and imposed upon Canada and all the Provinces the treaty obligations as contained in the Japanese Treaty. Neither do I consider that it is the province of the Court to observe upon, or attempt to hold, that the enactment was in

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its nature anticipatory in respect to any provincial obligations, none being, as is contended, then existent. The legislation must, according to the true application of the canons of construction of statute law, be given effect to, wherever possible, and I see no insuperable or other barriers in the way. The Japanese Treaty, 3-4 Geo. V. 1913, ch. 27, sec. 2, "to have the force of law in Canada," must be held to be destructive of all that has gone before save as in the Act is provided, *i.e.*, it is legislation affecting all enactments *in presenti* as well as *in futuro*. Nothing may be done in derogation of this statute law to the end that the Treaty obligations may be conformed to by Canada and the Provinces. I cannot see that anything is to be gained by, nor do I—with the greatest of deference to His Honour the Lieutenant-Governor and his Executive Council—consider that it should be required of the Court of Appeal to answer in detail questions 1 and 2, wherein they are purely academic and it may possibly be that it is not so intended, as at best the views of the Court could not be said to be other than *obiter dicta*. (See Lord Loreburn, L.C., in *Dominion of Canada* v. *Province of Ontario*, [1910] A.C. 637, 80 L.J. (P.C.), 32 at 34, 2nd so last paragraph, 2nd column.) The concrete matters are set forth in questions 3 and 4, which read as follows: [See judgment of Macdonald, C.J.A., ante p. 71].

That the inhibitory provisions are not contained in any statutory enactment of the Province, in my opinion, is not an effective answer, as admittedly they have been inserted following the passage of a resolution of the Legislative Assembly of the Province of British Columbia, of date April 15, 1902, which resolution was in the following terms:—

> That in all contracts, leases and concessions of whatsoever kind entered into, issued or made by the Government, or in behalf of the Government, provision be made that no Chinese or Japanese shall be employed in connection therewith.

Following this resolution an Order in Council was passed, of date June 16, 1902, which provided "that a clause embodying the provisions of the resolution be inserted in all instruments issued by officers of the Government for the various purposes above quoted."

The application of the resolution by the Order in Council referred to, was to be held to extend to all instruments issuing under the Land Act, Coal Mines Act, Water Clauses Consolidation

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Act, Public Works contracts, the terms of which are not prescribed by statute and the Placer Mining Act. In practice the resolution was given general application and imposed in all contracts, leases and other instruments executed by and in behalf of His Majesty in the right of the Province of British Columbia. Turning to the Interpretation Act, R.S.B.C. 1911, ch. 1, sec. 26, sub-sec. 4, we see that the "Lieutenant-Governor-in-Council" means the "Lieutenant-Governor of British Columbia or person administering the Government of British Columbia for the time being, acting by and with the advice of the Executive Council of British Columbia." It follows that the Order in Council, in its terms, cannot any longer "have the force of law" (3-4 Geo. V. 1913, ch. 27), in the Province—if it at any time had the force of law—in view of the provisions of the Japanese Treaty Act, 1913, and sec. 132 of the B.N.A. Act, *i.e.*, the Lieutenant-Governor-in-Council must perform the obligations of the Province as contained in the Japanese Treaty given the force of law throughout Canada and the respective Provinces as set forth in the Japanese Treaty Act, 1913.

I do not find it necessary to enter into the detail as to what power relative to, say, "Property and Civil Rights in the Province." (sec. 92, sub-sec. 13, B.N.A. Act), may not still be exercised without thereby infringing upon the obligations imposed by the Japanese Treaty *when the legislation is general in its application to all residents of the Province.*

We have seen that "political rights" are not beyond the powers of the Provinces and, in passing, it might be said that the Japanese Treaty does not impose any obligations of this nature. The Lord Chancellor (Earl of Halsbury) in *Cunningham and Att'y-Gen'l for British Columbia* v. *Tomey Homma and Att'y-Gen'l for Canada.*

[1903] A.C. 151, at pp. 156-157:—

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 . . . Could it be suggested that the Province of British Columbia could not exclude an alien from the franchise in that Province? . . . 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 . . . It is obvious that such a decision (*Union Colliery Co.* v. *Bryden*, [1899] A.C. 580) can have no relation to the question whether any naturalised person has an inherent right to the suffrage within the Province in which he resides.

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It follows that wherever there is legislation, be it legislation of the Parliament of Canada or legislation of any of the Parliaments of the Provinces of Canada, in conflict, repugnant and inconsistent with any of the terms of the Japanese Treaty (save such as is preserved by the Japanese Treaty Act, 1913), all such legislation is displaced, as the Japanese Treaty Act, 1913, declares that the Japanese Treaty is "to have the force of law in Canada," 3-4 Geo. V. 1913, ch. 27, sec. 2, *lex posterior derogat priori*. *A fortiori* this same effect is applicable to all Orders in Council, which presumptively are only passed and have the effect of law if founded upon constitutional authority and statute law admitting of their passage. Lord Parker of Waddington, in *The "Zamora,"* [1916] 2 A.C. 77, at 90, said:—

The idea that the King in Council, or indeed any branch of the Executive has power to prescribe or alter the law to be administered by Courts of law in this country is out of harmony with the principles of our constitution. It is true that under a number of modern statutes various branches of the Executive have power to make rules having the force of statutes but all such rules derive their validity from the statute which creates the power and not from the Executive body by which they are made . . .

And at p. 93:—

It cannot of course be disputed that a Prize Court like any other Court is bound by the legislative enactments of its own sovereign state . . . The fact, however, that the Prize Courts in this country would be bound by Acts of the Imperial Legislature affords no ground for arguing that they are bound by the Executive orders of the King in Council.

Now the Order in Council here in question and which has to be considered, in answering questions 3 and 4, is in plain conflict with the Japanese Treaty, and it must be held to be displaced following the passage of the Japanese Treaty Act, 1913, and any existent legislation in conflict is displaced, and during the continuance of the Japanese Treaty no legislation would have validity, which, by its terms, or in effect, derogated from the statutorily validated Japanese Treaty, a treaty now effective throughout the whole British Empire (Hall's International Law, 7th ed., p. 356 and Clement's Canadian Constitution, 3rd ed., pp. 135 to 144). The analogy of the reasoning in the "*Zamora*" case, *supra*, is apparent if applied to the questions here to be considered. Lord Parker, continuing, [1916] 2 A.C., at 97, said:—

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There are two further points requiring notice in this part of the case. The first arises on the argument addressed to the Board by the Solicitor-General. It may be, he said, that the Court would not be bound by an Order in Council which is manifestly contrary to the established rules of international law, but there are regions in which such law is imperfectly ascertained and defined; and when this is so, it would not be unreasonable to hold that the Court should subordinate its own opinion to the directions of the Executive. This argument is open to the same objection as the argument of the Attorney-General. If the Court is to decide judicially in accordance with what it conceives to be the law of nations, it cannot, even in doubtful cases, take its directions from the Crown, which is a party to the proceedings. It must itself determine what the law is according to the best of its ability, and its view, with whatever hesitation it be arrived at, must prevail over any executive order. Only in this way can it fulfil its function as a Prize Court and justify the confidence which other nations have hitherto placed in its decisions . . .

Further, the Prize Court will take judicial notice of every Order in Council material to the consideration of matters with which it has to deal and will give the utmost weight and importance to every such Order short of treating it as an authoritative and binding declaration of law.

Therefore, it is for the Court to say what the state of the law is in respect to the questions propounded and the Court may reject as invalid and *ultra vires* an Order in Council which, even if valid, at the time of its passage, is now invalid by reason of subsequent legislation. In my opinion, the Order in Council never had validity wherein it was provided:—

> That in all contracts, leases and concessions of whatsoever kind entered into, issued or made by the Government, or on behalf of the Government, provision be made that no Chinese or Japanese shall be employed in connection therewith,

quite apart from the Japanese Treaty and the effect of the Japanese Treaty Act, 1913. This conclusion, it seems to me, must be the only conclusion one can arrive at after careful study of *Union Colliery Co.* v. *Bryden*, [1899] A.C. 580. There it was held that:—

> An enactment by a Provincial Legislature that no Chinaman shall be employed in mines is beyond its competence inasmuch as by the B.N.A. Act, 1867, sec. 91, sub-sec. 25, legislation with respect to "naturalisation" and "aliens" is reserved exclusively to the Parliament of the Dominion.

The Order in Council authorising and directing the inhibition in all contracts, leases and concessions reads: "no Chinese or Japanese"; and turning to questions 3 and 4 submitted to the Court for answer the words are "no Japanese shall be employed." It is impossible to have a decision which would be more complete than the *Bryden* case, and it being the judgment of the Privy

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Council, it is absolutely binding upon this Court. The *Bryden* case was considered in *Quong Wing* v. *The King* (1914), 18 D.L.R. 121, 49 Can. S.C.R. 440, 23 Can. Cr. Cas. 113.

Referring to the *Bryden* case and subsequent cases, Clement, J., in his admirable work, Clement's Canadian Constitution, 3rd ed., at pp. 486, 487, said:—

> In a Provincial Act (British Columbia) dealing with the working of coal mines a clause prohibiting the employment of Chinamen in such mines underground was considered by the Privy Council not to be aimed at the regulation of coal mines at all but to be in its pith and substance a law to prevent a certain class of aliens or naturalised persons from earning their living in the province. In other words, the enactment was not really in relation to local works or undertakings (sec. 92, No. 10) or to property and civil rights in the province (sec. 92, No. 13) or to a matter of a local or private nature in the province (sec. 92, No. 16); but was in fact an enactment in relation to aliens and naturalisation (sec. 91, No. 25), and therefore *ultra vires* of a Provincial Legislature. *Union Colliery Co.* v. *Bryden*. In a later case, on the other hand, an enactment of the same Legislature denying the franchise to Japanese was held to be legislation in relation to the provincial constitution (sec. 92, No. 1), and as having no necessary relation to alienage; and discrimination, in other words, being based upon racial, not national grounds. *Tomey Homma's* case, [1903] A.C. 151. As will appear later, it is difficult to reconcile these two decisions; and in a recent case in the Supreme Court of Canada a provision in a provincial Act (Saskatchewan) forbidding the employment of any white woman or girl in any restaurant, laundry, or other place of business or amusement owned, kept, or managed by any Chinaman, was upheld as within provincial competence as a law for the suppression or prevention of a local evil (sec. 92, No. 16), or as touching civil rights in the province (sec. 92, No. 13). It did not in the opinion of the majority of the Court present any aspect particularly affecting Chinamen as aliens; for a natural born British subject of the Chinese race (and there are many such in Canada) would be under the ban of the Act. *Quong Wing* v. *The King*, 18 D.L.R. 121, 49 Can. S.C.R. 440, 23 Can. Cr. Cas. 113. The Privy Council refused leave to appeal. In *Re Insurance Act*, 1910 (1913), 15 D.L.R. 251, 48 Can. S.C.R. 260, the question of legislative aspect and purpose also appears; see particularly *per* Brodeur, J.

It is to be observed that their Lordships of the Privy Council refused leave to appeal in the *Quong Wing* case, but it cannot be assumed that there has been any change of view of the law when, as here, we have exactly similar verbiage, *i.e.*, "no Chinese or Japanese shall be employed," "no Japanese shall be employed." In the *Quong Wing* case (18 D.L.R. at pp. 127-128), Davies, J., (now Chief Justice of Canada), said:—

> The regulations impeached in the *Union Colliery* case, [1899] A.C. 580, were, as stated by the Judicial Committee, in the later case of *Tomey Homma*, [1903] A.C. 151, at p. 157, "*not really aimed at the regulation of coal mines at*

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all, but were in truth devised to deprive the Chinese, naturalised 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." I think the pith and substance of the legislation now before us is entirely different. Its object and purpose is the protection of white women and girls; and the prohibition of their employment or residence, or lodging, or working, etc., in any place of business or amusement owned, kept or managed by any Chinaman is for the purpose of ensuring that protection. Such legislation does not, in my judgment, come within the class of legislation or regulation which the Judicial Committee held *ultra vires* of the Provincial Legislature in the case of *The Union Collieries* v. *Bryden*.

The Order in Council is clearly *ultra vires* and it would be *ultra vires* of the Legislative Assembly to enact or authorise the passage of any Order in Council providing for the insertion in any contracts, leases, or concessions any inhibitory provision that no Japanese shall be employed, plainly the provision would be exactly similar in effect to that declared to be *ultra vires* in the *Bryden* case, and as interpreted in the later *Tomey Homma* case by the Lord Chancellor (Earl of Halsbury), the language of the Lord Chancellor being quoted above by the Chief Justice of Canada, then Davies, J., in the *Quong Wing* case (18 D.L.R. at pp. 127, 128). Duff, J., 18 D.L.R. at 141-142, in the *Quong Wing* case, deals with the *Bryden* and *Tomey Homma* cases:—

I think, however, that in applying *Bryden's* case, we are not entitled to pass over the authoritative interpretation of that decision which was pronounced some years later by the Judicial Committee itself in *Cunningham* v. *Tomey Homma*, [1903] A.C. 151. The legislation their Lordships had to examine in the last mentioned case, it is true, related to a different subject-matter. Their Lordships, however, put their decision upon grounds that appear to be strictly appropriate to the question raised on this appeal. Starting from the point that the enactment then in controversy was *primâ facie* within the scope of the powers conferred by sec. 92, they proceeded to examine the question whether, according to the true construction of sec. 91 (25), the subject-matter of it really fell within the subject of "aliens and naturalization;" and, in order to pass upon that point, their Lordships considered and expounded the meaning of that article. At pp. 156 and 157, Lord Halsbury, delivering their Lordships' judgment, says:—"If the mere mention of alienage in the enactment could make the law *ultra vires*, such a construction of sec. 91, sub-sec. 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

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independent of nationality." It was hardly disputed that if this passage stood alone the argument of the appellant must fail. But it is said that this passage is *obiter* and is inconsistent with, and indeed, contradictory to certain passages in Lord Watson's judgment in *Bryden's* case, which passages, it is contended, give the true ground of the decision in that case, and consequently, are binding upon us. I have already said what I have to say as to the effect of Lord Watson's judgment; but I think this last mentioned argument is completely answered by reference to a subsequent passage of Lord Halsbury's judgment in *Cunningham's* case, [1903] A.C. 151, at 157. It is as follows: "That case depended upon totally different grounds. This Board, dealing with the particular facts of the 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."

That is an interpretation of *Bryden's* case, [1899] A.C. 580, which it appears to me to be our duty to accept.

It will, therefore, be seen that, according to the interpretation put upon the *Bryden* case by the Supreme Court of Canada, there can be only negative answers to questions 3 and 4. It would not be competent for the Legislature of British Columbia to authorise the Government of the Province to insert as a term of its contracts for the construction of provincial public works, a provision that no Japanese should be employed upon, about or in connection with the works, nor would it be competent to the Legislature to authorise the Government to insert, as a term of its contracts and leases, conferring rights and concessions in respect of the public lands belonging to the Province, including the timber and water thereon and the minerals therein, a provision that no Japanese should be employed in and about such premises. It would be *ultra vires* legislation—quite apart from being in conflict with the Japanese Treaty—and unquestionably now in view of the Japanese Treaty Act, 1913, any such legislation would be invalid.

With respect to questions 1 and 2, no concrete cases have been put, and, with the greatest deference and respect, as previously pointed out, there is no necessity for any specific answers to be made thereto, but without venturing to limit the horizon, or define the ambit of the Japanese Treaty, as validated by the Japanese Treaty Act, 1913, it may be said that it has the force of law in Canada and throughout the Provinces of Canada and any legislation, which, in its terms, is in conflict with, or repugnant to the Japanese Treaty, as validated by the Japanese Treaty Act, 1913,

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must be held to be repealed by necessary implication, and any future legislation limiting the privileges guaranteed by the Japanese Treaty, during the life of the Japanese Treaty, would be *ultra vires* legislation, in that the treaty, as long as it is existent, has the effect of inhibiting legislation, federal or provincial, which would be in conflict with the terms of the treaty, *i.e.*, to that extent the powers of the Parliament of Canada and the Parliaments of the Provinces of Canada, as conferred by the B.N.A. Act, 1867, are curtailed.

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CLARKE v. GREAT WEST LIFE ASSURANCE Co.

Saskatchewan Court of Appeal, Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A. November 29, 1920.

INSURANCE (§ III G—150)—LIFE—TERMS OF CONTRACT—LAPSE OF POLICY —REINSTATEMENT.

A life insurance policy contained the following provisions: (1) If default be made in the payment of the first or any subsequent premiums or any part thereof, or of any note, cheque or other obligation given on account thereof this policy shall be void; (2) Should this policy lapse it will be reinstated at any time upon the production of evidence of insurability satisfactory to the company and the payment of all overdue premiums and any other indebtedness to the company upon the policy with interest at the rate of 6 per cent. per annum compounded annually from the date of lapse.

The Court held that the jury were justified on the evidence that the company, through its agent, was satisfied as to the health of the insured at the time of payment of overdue premiums and that it was not necessary to inform insured as to his reinstatement before it took effect.

Statement.

APPEAL by defendant from the trial judgment in an action to enforce payment of two life insurance policies. Affirmed.

P. H. Gordon, for appellant; *W. F. A. Turgeon*, K.C., and *P. M. Anderson*, K.C., for respondent.

The judgment of the Court was delivered by

Newlands, J.A.

NEWLANDS, J.A.:—This is an action to enforce payment of two life insurance policies on the life of Dr. Clarke, the husband of the plaintiff, who died on December 8, 1918. The defence is that the policies lapsed before the death of the assured, for the non-payment of a quarterly payment on one of the policies and the non-payment of instalments due under promissory notes given for past due premiums, and that no evidence of the insurability of the deceased satisfactory to the defendant was furnished by assured after the lapse of the policies and prior to his death.

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The quarterly premium was due on September 21, 1918, and was for the sum of $36.85. On September 18, the company wrote the assured calling his attention to the fact that the premium would be due on the 24th of that month, and again on October 10, they wrote him that the days of grace would end on October 24, and on October 23 he sent them a cheque for that amount. The company appropriated the cheque on past due indebtedness, but the jury have found, and I am of the opinion that the evidence justified them in so finding, that the assured appropriated this payment to the premium due September 24.

The other payments, for non-payment of which it is claimed the policy lapsed, were the monthly payments on the notes for past due premiums due on the 16th days of September, October and November. The payment which fell due September 16, not having been paid, the policy lapsed. An application for re-instatement, dated October 9, was sent in, but, for some reason, was not accepted, and a new application for re-instatement was sent in on October 28, and the instalments due on the notes on September 16 and October 16 were paid. On November 22 the company accepted evidence of insurability of the assured up to October 28, and forwarded the same to Wright, their agent in Regina. The evidence of McGlynn, the head of the re-instatement department, upon this point is as follows:—

Well, on the 22nd November, 1918, I approved of the evidence of insurability then in the company's possession, which was up to the 28th October, 1918, and caused this advice to be sent to Mr. Wright for delivery to Dr. Clarke in exchange for payment of the monthly instalments which were then past due, on demand note, and while Dr. Clarke was still in good health.

The instalments due at that date was the November instalment on each note due the 16th of that month amounting together to $25.

Wright then telephoned Dr. Clarke's office, and informed Miss Williams, his book-keeper, that the amount was overdue, and on December 2, 1918, she paid it to him and took his receipt for the same. Her evidence as to what took place is as follows:—

A. I gave him $25. And he asked me if Dr. Clarke was in a perfect state of health when he left the city, and I said, yes, he was. And in casual conversation I told him the reason that he had gone to Rochester with Mrs. Clarke. I think I told Mr. Wright at the time that the doctor had gone to Rochester with Mrs. Clarke because she was undergoing an operation,