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ANNOTATED

Annotations or briefs, prepared by experts in their respective branches of law, covering the whole law of Canada are included in the D.L.R. to date. For Consolidated Table of Annotations see [1930] 4 D.L.R., pp. XI *et seq.*, or Canadian Annual Digest.

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Supreme Court of Canada, Anglin, C.J.C., Duff, Lamont, Smith and Cannon, JJ. June 15, 1932.

Habeas Corpus I—Improper order—Quashing—Amending quashed order—Judgments and Orders I G—Modification; varying terms of—Not proper after order quashed.

Where a board of inquiry has been held under the Immigration Act, R.S.C. 1927, c. 93, and an order is made by the Board for the deportation of an alien and the order is subsequently quashed by a Court of competent jurisdiction as not in accordance with the Act, it cannot be amended so as to make it comply with the Act, for there is nothing to amend.

APPEAL from the judgment of the British Columbia Court of Appeal, 58 Can. C.C. 250, affirming on equal division the judgment of Murphy, J., 57 Can. C.C. 395, refusing an application for discharge under a writ of *habeas corpus*. Reversed.

C. H. O'Halloran, for appellant.

W. N. Tilley, K.C., and *E. Miall*, for respondent.

ANGLIN, C.J.C.:—I have had the advantage of reading the carefully prepared opinion of my brother Lamont in this case and regret to find myself unable to agree with his conclusion. Unless, to employ a familiar saying, the crossing of every "t" and dotting of every "i" in all the proceedings taken in this matter is essential to the Crown's success, I do not see how this appeal can be maintained.

Two main questions are open for consideration, (a) whether the order of Fisher, J., (44 B.C.R. 317) for the discharge of the appellant will sustain a claim of *res judicata* herein; and (b) whether, if that order does not stand in the way, or can be gone behind, the action of Murphy, J., (57 Can. C.C. 395) in refusing to discharge the appellant on *habeas corpus* was justified. As I read the judgment of Lamont, J., that learned Judge holds (a) that the order of Fisher, J., amounts to *res judicata* in this matter; (b) that that order cannot be gone behind or be ignored; and (c) that the order of Murphy, J., refusing to discharge the appellant on *habeas corpus* after his re-arrest under the amended order of the Board, was nugatory, on the ground that Fisher, J., had definitely set aside the original order of the Board and there was, therefore, nothing left to amend.

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It is true that the Court of Appeal for British Columbia has a jurisdiction conferred on it by statute (Court of Appeal Act, R.S.B.C. 1924, c. 52, s. 6 (*a*)), so far as I am aware, peculiar to that Province, whereby that Court is obliged to entertain an appeal from, *inter alia*, "every judgment, order, or decree made by the Supreme Court or a Judge thereof," no exception being made to the generality of the jurisdiction thus conferred which would exclude a right of appeal by the Crown against the order of a Judge who has under *habeas corpus* discharged a person brought before him. The respondent maintains the right to ignore the order of Fisher, J., treating it as made without jurisdiction, because of the presence in the Immigration Act, R.S.C. 1927, c. 93, of s. 23, and, instead of appealing therefrom, to proceed under the order of the Board, either as originally made or amended.

That it is competent for any Court to amend its own order as issued so as to make it conform to the intention of the Court making it (especially where, as here, the Board, in announcing its decision, had declared in terms, in the presence of the appellant, the order it proposed to make, those terms corresponding with the amendment so made), is a proposition which scarcely requires authority to support it.

But, it is said that the power of the Board to amend ceased with the existence of its order, and that that order ceased to exist when Fisher, J., made his order quashing it. We are thus driven back again to the question of the validity of the order made by Fisher, J., *i.e.*, not whether that order was proper on the merits, but whether the learned Judge had jurisdiction to make it. Ordinarily no doubt, this question of the validity of the order would have been raised on appeal from it, but it does not at all follow that that is the only manner in which the question of jurisdiction can be raised. On the contrary, if a party affected by an order of the Board, or the Board itself, chooses to treat a subsequent order, purporting to set it aside, as a nullity, he or it may do so at his or its peril. Here, the Board adopted the latter course, by ignoring the order of Fisher, J., and proceeding to amend its previous order so as to make it conform to the terms in which it had intended to pronounce

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such order,—terms which were announced at the conclusion of the hearing in the presence of the appellant.

Without at all questioning the propriety on the merits of the order of Fisher, J., and confining my observations solely to the jurisdiction of that learned Judge, I am of the opinion that the order made by him contravened the prohibition of s. 28 of the Immigration Act and was, therefore, invalid and *ultra vires*, since it amounted to a "reviewing, quashing, reversing, restraining, or otherwise interfering with," an order of the Minister, or of the Board of Inquiry, the appellant being, admittedly, neither a Canadian citizen, nor a person having Canadian domicile. That being so, and the order of Fisher, J., being, accordingly, invalid and *ultra vires*, the order of the Board remained effective. It clearly dealt with matter declared by s. 23 to be outside the authority of any "court or judge or officer thereof" to interfere with.

Moreover, this defect in the jurisdiction of the learned Judge who made the order is obvious on the face of it. It, therefore, could, in my opinion, be taken advantage of by the respondent; and I agree with Murphy, J., in his view that the order of Fisher, J., was a nullity and that the order of the Board, which it purported to set aside, still stands and was validly amended by the Court so as to make it conform to the intention of the Board in making it.

I also agree with Murphy, J., that, having before him such amended order of the Board, he had abundant ground for refusing to interfere with the provision therein contained for detention of the appellant for deportation,—it not being open to that learned Judge, or on appeal from him to the Court of Appeal (58 Can. C.C. 250) or to us, to consider the credibility, or weight, or value of the testimony upon which the Board had proceeded, which was reviewable only by the Minister on appeal to him under ss. 18 and 19,—an appeal which was duly taken by the appellant and which proved unsuccessful.

It is satisfactory to have reached a conclusion which seems to me to be in conformity with the requirements of justice, since the appellant was fully aware of the purpose of the inquiry of the Board and of the substance of the charge against him,

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i.e., that he had procured entrance into Canada by misrepresentation contrary to the provisions of s. 33 (7) of the Immigration Act, which, I have no doubt at all, was stated as a basis of the inquiry into the complaint made to the Minister under s. 42(1). To the absence of any formality in the complaint the presumption *omnia rite esse acta*, affords an answer, 13 Hals., para. 538.

It must be perfectly apparent to everyone reading the proceedings that this was so. For instance, we find the following in the course of the examination of the appellant by the Board:—

"Q. Then you realize that you have entered Canada by misrepresentation, do you? A. No, I don't know that. Because I try to get work but I could not help it. Q. But the fact that you have not taken domestic work shows you entered Canada by misrepresentation? A. I don't know."

And, at the conclusion of the inquiry, we find the following:—

"Chairman: Who told you to say, or to state, that you were coming here as a domestic servant when apparently you have never followed that occupation? A. My uncle in Nanaimo told me to come as a domestic servant for Mr. Uyeno. Q. Is he the same man that came across with you on the boat? A. Yes. Q. And he it was who told you to say you were coming to work as a domestic servant for Uyeno at Nanaimo? A. Yes; I understand I am coming to work as a domestic servant for Mr. Uyeno."

Decision of the Board:—"Mr. Jones: Whereas the said Munetaka Samejima, having been found not to be a Canadian citizen or a person having Canadian domicile, and a complaint having been received under s. 40 of the Immigration Act to the effect that the said Munetaka Samejima is in Canada contrary to the provisions of the Immigration Act, namely s. 33(7), in that he entered Canada by misrepresentation: therefore, pursuant to the provisions of s. 33(7) of the Immigration Act, I move that the said Munetaka Samejima be deported.

"Mr. Speed: I second the motion.

"Chairman: Mr. Samejima, a motion has been duly moved and seconded and I declare it carried unanimously that you be de-

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ported under the provisions of s. 33(7) of the Immigration Act. You have the right to appeal to the Minister of Immigration and Colonization. Do you wish to appeal? A. I am going to appeal."

How a man can, after being so notified, contend before this Court that he had not been informed of the substance of the charge against him, as the appellant does in his affidavit, I do not understand. To say that he had no notice that the substance of the accusation against him was obtaining entry into Canada by misrepresentation, to put it mildly, strikes me as dishonest. No injustice whatever on this score has been done to the appellant and to require that the circumstances of his entry should be again the subject of investigation after his re-arrest would seem to be to impose procedure that is entirely superfluous in view of the fact that the original order of the Board providing for his deportation still stands.

In conclusion, therefore, I am of the opinion that Murphy, J., was right in declining to interfere, under s. 23 of the Immigration Act, with the detention of the appellant for deportation, that his order must be sustained and that this appeal, accordingly, should be dismissed with costs.

DUFF, J.:—I concur with my brother Lamont.

The chief question I desire to discuss is the effect of s. 23. The words, "had, made or given under the authority and in accordance with the provisions of this Act relating to the detention or deportation of any rejected immigrant, passenger or other person, upon any ground whatsoever, unless such person is a Canadian citizen or has Canadian domicile," are an essential part of this section; and its disqualifying provisions obviously can only take effect where the conditions expressed in these words are fulfilled. In particular, the phrase "in accordance with the provisions of this Act" cannot be neglected; their meaning is plain. The "order" returned as justifying the detention must be "in accordance with the provisions of this Act." It must not, that is to say, be essentially an order made in disregard of some substantive condition laid down by the Act. This applies to the order of the Minister, as well as to the order of the Board of Inquiry. The order of the Minister must be an

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order directing the investigation of facts alleged in a complaint made to him; and such facts, unless the enactment is to be reduced to the merest parade of words, must be alleged, of course, in such a manner as to make the allegation reasonably intelligible to the person against whom the investigation is directed. The jurisdiction of the Board, as an investigating body, is limited to the investigation of the facts alleged, a condition, again, implying intelligibility of allegation. Indeed, unless the person concerned is to have a reasonable opportunity of knowing the nature of the allegations, what is the purpose of requiring his presence? The deportation order must fully state the reasons for the decision, in respect of the allegations. The spirit, as well as the frame, of the whole statute, evinces the intention that these provisions are mandatory.

I gravely fear that too often the fact that these enactments are, in practice, most frequently brought to bear upon Orientals of a certain class, has led to the generation of an atmosphere which has obscured their true effect. They are, it is needless to say, equally applicable to Scotsmen. I admit I am horrified at the thought that the personal liberty of a British subject should be exposed to the hugger-nugger which, under the name of legal proceedings, is exemplified by some of the records that have incidentally been brought to our attention.

Courts, of course, must often draw the distinction between what is merely irregular and what is of such a character that the law does not permit it in substance. I have no difficulty in giving a construction to s. 23, which does not deprive British subjects, who are not Canadians, of all redress, in respect of arbitrary and unauthorized acts committed under the pretence of exercising the powers of the Act.

I do not find it necessary to decide whether or not the deportation order was one which fell under the protection of s. 23. It is sufficient for me that Fisher, J., had jurisdiction to decide that it did not; and that the learned Judge having done so and set it aside, the chairman of the Board had no authority to issue another.

The appeal should be allowed.

LAMONT, J.:—This is an appeal from the judgment of the

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Court of Appeal of British Columbia dismissing by an equal division of the Court an appeal by the appellant from a judgment of Murphy, J., in which he refused the appellant's application, under a writ of *habeas corpus*, for his discharge from custody.

The appellant (a Japanese subject) entered Canada at the port of Vancouver on September 29, 1928. His passport and the ship's manifest showed that he was entering Canada for the purpose of being employed as a domestic servant by one Uyeno of Nanaimo, B.C. He was permitted to land and, according to his story, he went directly to Nanaimo where he found that Uyeno had failed in business, closed his store and, therefore, did not require a domestic servant. He says that although he tried he could not get work as a domestic servant, and had to take what he could get.

On January 28, 1931, the Deputy Minister of Immigration and Colonization directed an order "To any constable, peace officer or immigration officer in Canada" in which he recited that a complaint had been received to the effect that Munetaka Samejima (the appellant) "was in Canada contrary to the provisions of the Immigration Act, and had effected entrance contrary to the provisions of s. 33(7) of the said Act," and he ordered that the appellant be taken into custody and detained for examination and an investigation into the facts alleged in the said complaint.

The examination was to be made by the Board of Inquiry or an officer acting as such. Neither the complaint itself nor a copy thereof was forwarded to the Board or served upon the appellant who was taken into custody and brought before the Board on April 29, 1931. On being questioned he admitted that he had not worked as a domestic servant since he landed in Canada, giving as a reason his inability to obtain that kind of work. The Board found that he had entered Canada by misrepresentation, and a resolution for his deportation was passed. On the same day a deportation order was drawn up and served upon the appellant. The order read as follows:—

"This Is To Certify that the rejected person above named, a person who entered Canada at B. C. ex 'Empress of Asia' from Yokohama, Japan, which arrived at the said Port on September 29th, 1928, at — o'clock —M., has this day been examined by the Board of Inquiry at this Port, and has been rejected for the following reasons: In that he is in Canada contrary to the provisions of the Immigration Act and effected entry contrary to the provisions of s. 33 (7) of the said Act.

"And the said rejected person is hereby ordered to be deported to the place from whence he came to Canada. . . .

"Dated at Victoria, B.C., this 29th day of April, 1931.

"J. A. Anderson,

"Chairman of the Board of Inquiry."

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The appellant appealed to the Minister but his appeal was dismissed. He then obtained a writ of *habeas corpus*, and an application for his discharge thereunder was made to Fisher, J., who, on July 8, 1931, discharged him from custody and quashed the deportation order, on the ground that the order was not in accordance with the provisions of the Act, in that it did not specify with sufficient particularity the reason for his deportation. On September 23, 1931, the appellant was re-arrested on what purported to be an order for his deportation signed by the chairman of the Board of Inquiry, and bearing date April 29, 1931, the date of the original order. This new order will hereafter be referred to as the "amended order." This amended order was in form sufficient to satisfy the requirements of the statute. After his re-arrest the appellant was not again brought before the Board, or examined by it, or given an opportunity to offer a defence to this arrest. He, however, again sued out a writ of *habeas corpus* and applied to Murphy, J., to quash the amended order under which alone, according to the return made to the writ, the appellant was held in custody. Murphy, J., refused to set aside the order holding that although the first order was deficient the deficiency could be remedied by issuing a new order, and he held the new order valid. Whether or not he was right in so holding we have now to determine.

Sections 40 and 41 of the Immigration Act, R.S.C. 1927, c. 93, provides that where a person belonging to the prohibited or undesirable class, as specified therein, other than a Canadian citizen or person having a Canadian domicile, is found in

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Canada, "it shall be the duty of any officer becoming cognizant thereof, and the duty of the clerk, secretary or other official of any municipality in Canada wherein such person may be, to forthwith send a written complaint thereof to the Minister giving full particulars." [now 1928 (Can.), c. 29, s. 1.]

Included in the prohibited class is a person who enters or remains in Canada contrary to any provision of the Act.

Then s. 42 reads:—"Upon receiving a complaint from any officer, or from any clerk or secretary or other official of a municipality against any person alleged to belong to any prohibited or undesirable class, the Minister or the Deputy Minister may order such person to be taken into custody and detained at an immigrant station for examination and an investigation of the facts alleged in the said complaint to be made by a Board of Inquiry or by an officer acting as such. . . .

"3. If upon investigation of the facts such Board of Inquiry or examining officer is satisfied that such person belongs to any of the prohibited or undesirable classes mentioned in the two last preceding sections of this Act, such person shall be deported forthwith, subject, however, to such right of appeal as he may have to the Minister."

Counsel for the appellant contended that jurisdiction to order the arrest of the appellant under this section depended upon the existence of the conditions precedent required by the statute, that is to say upon the receipt of a complaint from an officer under the Act or from a municipal official, and that in either case the complainant must give particulars of the act or omission which placed the immigrant in the prohibited or undesirable class; that there was no evidence that the complaint in this case had been received from any person specified in the section; that the order of the Deputy Minister would indicate that no particulars other than those contained in his order had been given, and, therefore, no jurisdiction on the part of the Deputy Minister to order the appellant's arrest had been shown, and jurisdiction would not be presumed. He further contended that as there was no jurisdiction to issue the order which set these proceedings in motion, every step taken subsequent to the order was invalid.

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The objection here taken is, to my mind, a very serious one, for the jurisdiction of a Minister or his Deputy, under s. 42, to take an immigrant into custody is conditioned upon a complaint being received from one of the persons specified therein. Parliament has not authorized the exercise of this jurisdiction on the complaint of an unknown person who might be an enemy or competitor or business rival of the immigrant, desirous of harassing him. It is given only on the complaint of an officer or official, whose official position it may have been thought would warrant the inference that the complaint would not be made without knowledge, nor inspired by any but proper motives. It is established law that jurisdiction on the part of an official will not be presumed. Where jurisdiction is conditioned upon the existence of certain things, their existence must be clearly established before jurisdiction can be exercised. Failure to establish the right to arrest would ordinarily vitiate all subsequent proceedings following directly as a result of the arrest. Whether this principle would apply to a second arrest I do not find it necessary to determine, for, assuming that it would not, the order in question must, in my opinion, be set aside on another ground, namely, that the amended order itself was wholly invalid.

Section 33 (5) provides that the order of deportation may be made in Form C in the schedule to the Act, which form requires the reasons for the rejection to be "stated in full," and a copy of the order to be forthwith delivered to the rejected person. The statute, therefore, contemplates that the order will show the reason for the deportation. The only reason for the deportation of the appellant, as found by the Board of Inquiry, was that he had entered Canada by misrepresentation. That reason was not stated in the deportation order which formed the return made to the writ of *habeas corpus* before Fisher, J. Because of the Board's failure to state in the order the particular offence found against the appellant Fisher, J., quashed the order and set the appellant at liberty. Had he jurisdiction to do so?

It was contended that s. 23 deprived him of any jurisdiction to interfere. That section reads:—

"No court, and no judge or officer thereof, shall have juris-

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diction to review, quash, reverse, restrain or otherwise interfere with any proceeding, decision or order of the Minister or of any Board of Inquiry, or officer in charge, had, made or given under the authority and in accordance with the provisions of this Act relating to the detention or deportation of any rejected immigrant, passenger or other person, upon any ground whatsoever, unless such person is a Canadian citizen or has Canadian domicile."

It will be observed that the prohibition against interference by a Court or Judge applies only to "any proceeding, decision or order had, made or given under the authority and in accordance with the provisions of this Act." It follows, therefore, that if the proceeding, decision or order has not been had, made or given in accordance with the provisions of the Act, no restriction is placed upon interference therewith by the Court, and the immigrant is at liberty to appeal to a Court or Judge for any remedy to which he may be found entitled.

In this case the original deportation order was not in accordance with the provisions of the Act. Fisher, J., had, therefore, jurisdiction to quash it, which he did, on July 8, 1931. His order, having been made with jurisdiction, was a valid order and could only be reversed on appeal, if an appeal lay therefrom.

The Crown does not contend that the original order was valid, but it does contend that where a slip has been made in the drawing up of an order, a new order in proper form may be substituted. Up to a certain point I entirely agree with this contention. If the Board of Inquiry made a deportation order defective on its face, it could, in my opinion, recall it and substitute therefor an order in proper form, so long as the defective order had not been acted upon. Even after it has been served on the person in custody and constitutes the return made to a writ of *habeas corpus*, it may still, in my opinion, by leave of the Court or Judge, be amended, or another order substituted for it, so as to make it conform to the finding of the Board. *Leonard Watson's Case*, 9 Ad. & El. 731, at p. 804, 112 E.R. 1389; *Re Clarke*, 2 Q.B. 619, 114 E.R. 243. But after a deportation order which is not in accordance with the Act has been quashed by a Court having jurisdiction, it cannot be amended for there is nothing to amend. The order of the Board no longer exists—it is a thing of naught.

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What was attempted to be done in this case was to amend the order of April 29, after it had been quashed, by adding to it the reasons for the appellant's deportation so as to make it conform to the requirements of the statute. There is no evidence that the amended order ever was before the Board. The only order made by the Board of Inquiry of which we have any record is the one that was quashed by Fisher, J.

In the statute ample provision is made for rectifying the situation which arose through the quashing of the original order, and all the Board of Inquiry had to do was to follow the statute. In s. 33(7) which sets out the various offences constituting a cause for deportation, it is provided that, "any person suspected of an offence under this section may be arrested and detained, without a warrant by any officer for examination as provided under this section; and if found not to be a Canadian citizen, or not to have Canadian domicile, may be ordered to be deported. Every member of the Board of Inquiry is an officer under the Act.

After the Board's deportation order had been quashed, any member thereof could have caused the appellant to be re-arrested and held for examination, for, having on April 29, 1931, found that he entered Canada by misrepresentation, his presence at large thereafter would justify the suspicion that he was in Canada in violation of the Act. If, on re-examination the Board still found that his entry into Canada had been secured by misrepresentation, a new deportation order could have been made based upon the re-examination and, if it was in proper form, no Court or Judge would have jurisdiction to quash or reverse it. This re-examination, however, would have entitled the appellant to meet the charge with such evidence as he might be able to put before the Board. How important that right would have been for the appellant is disclosed in his evidence.

He says that when the Immigration Officer came to Chemainus where he was working on April 28, 1931, and took him to

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Victoria, that the officer told him that he might return to Chemainus next day, so, when he was taken before the Board of Inquiry for examination and was asked if he wanted a lawyer he answered "No," because he says he did not anticipate getting into any trouble. The record of his examination before the Board shows that the proceedings were opened by the chairman stating to him that he was to be examined as to his right to remain in Canada, and did he wish to have counsel. The chairman then referred to the complaint set out in the warrant of the Deputy Minister, in the language of the complaint. Up to that time the appellant had not been informed that he was to be charged with entering Canada by misrepresentation. Then he was questioned as to his age, place of birth, religion, relatives in Japan and in Canada, statements appearing in his passport, his object in coming to Canada, his movements after he landed and where and for whom he expected to work when he came here. To all of these questions the appellant answered apparently in a straightforward manner, informing the Board that his destination was Nanaimo and that he expected to work for Mr. J. Uyeno as a domestic servant but, that when he got to Nanaimo he found that Mr. Uyeno had failed in business, his store was closed and he himself was working in the mill; that after trying in vain for two weeks to get work as a domestic servant in Nanaimo, he went to Vancouver and tried there, but was equally unsuccessful, and he had to take whatever kind of work he could get. Then he was asked:—

"Q. When you got back to Vancouver, did you report to the Canadian Immigration Office and report to them that your employer was closed up and could not employ you as a domestic? A. No. I didn't. Q. You know that you were permitted to land in Canada for the purpose of being employed as a domestic servant and that you were going to work for Mr. Uyeno; why did you not report that this man was not in a position to employ you when you found he was closed up? A. I didn't know that I should report to the Immigration what to do."

He was then questioned as to his subsequent employment; the names and addresses of his employers; the rate of wages he received, etc.

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Then, practically at the close of his examination, we have the following:—"Q. And when you were questioned by the Immigration Officer, did you not state that you were going to be a domestic servant? A. I told the officer at Vancouver I was going to be a domestic servant. Q. After you arrived you made no attempt to be a domestic servant? A. I tried several times to have domestic work in Vancouver but could not find any. Q. You have never been in domestic servant work in Canada? A. No, I have not. Q. Then you realize that you have entered Canada by misrepresentation, do you? A. No. I don't know that. Because I try to get work but I could not help it. Q. But the fact that you have not taken domestic work shows you entered Canada by misrepresentation? A. I don't know."

This was the first time so far as the material before us discloses that he was made aware that the charge against him was entering Canada by misrepresentation. Had he known that he had to face that charge he could have had the evidence before the Board of Inquiry which he subsequently placed before Murphy, J., on the *habeas corpus* proceedings, namely, that of Mr. Uyeno, who had carried on business in Nanaimo for 25 years and who, in his affidavit, stated not only that the appellant was to be employed by him as a domestic servant, but that more than a year before the landing of the appellant he (Uyeno) had applied to the Japanese Consul at Vancouver for a permit for the appellant's entry into Canada as his domestic servant. This was corroborated by the affidavit of K. Ishii, the appellant's uncle, who for 40 years had been a merchant in Victoria, B.C., and, for many years, held office as head of the Victoria Japanese Ass'n, and who swore that he knew of his own personal knowledge that Mr. Uyeno had, in the latter part of 1928, applied to the Japanese Consul for a permit for the entry of the appellant as Uyeno's domestic servant. This evidence although tendered before Murphy, J., could not be considered by that learned Judge because he had no jurisdiction to revise the findings of fact made by the Board of Inquiry. If the evidence of these witnesses had been placed before the Board of Inquiry when the appellant was examined by them, it is possible that the Board might not have found as a fact that the appellant entered

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Canada by misrepresentation. Had the appellant known that he had to meet the charge of misrepresentation before he announced that he did not want a lawyer, I think it highly probable that he would have had counsel and that the evidence of Uyeno and Ishii would have been placed before the Board. I, therefore, find myself entirely in accord with the language used by Martin, J.A., in the Court below, where his Lordship said (58 Can. C.C. 250, at p. 254) :—

"Even if the proceedings upon the Board's amended order could be invoked at all they contain the incurable defect that after the re-arrest there was no re-investigation of the accused on the definite charge that was for the first time then laid against him."

The amended order, being simply an amendment of an order which had been quashed instead of a new order based upon a re-examination, had no validity whatever, and should also have been quashed.

For the Crown it was contended that, even if the order was invalid, Murphy, J., was right in refusing to set the appellant at liberty, and cited, among others, the case of *Rex* v. *Governor of Brixton Prison, Ex p. Stallman*, [1912] 3 K.B. 424. That was an entirely different case and, in my opinion, goes no further than to hold that it does not necessarily follow in every case where some irregularity is shown to have taken place in the procedure under which a person has been placed in custody that he should be set at liberty. But it is only in cases where the Court is satisfied that a *prima facie* case has been made against such person, and that it is in the interests of justice that he should be tried for the offence charged, that he will be detained under an irregular commitment. In the present case the commitment under which the appellant was held was not simply tainted with an irregularity in procedure, but was wholly bad.

The appeal should be allowed with costs; the order of the Board of Inquiry quashed, and the appellant discharged.

SMITH, J., concurs with ANGLIN, C.J.C.

CANNON, J., concurs with LAMONT, J.

Appeal allowed.

PHILLIPS v. JOSEPH.

Ont.
C.A.
1932.

Ontario Court of Appeal, Mulock, C.J.O., Masten and Grant, JJ.A. October 3, 1932.

Wills III C—Bequest of "personal effects in my room including desk complete with contents"—Bank books and promissory notes in desk—Removal by executor before death of testator.

A testator bequeathed to his niece, "my personal effects in my room, including pictures, roll top desk and chiffonier complete with their contents." The desk, the customary repository of the testator for his valuables, contained three savings bank pass books and some promissory notes, which the executors removed before the testator's death while he was unconscious.

Held, that the removal of the valuables by the executors was unauthorized and illegal and that the intention of the testator was that the contents of the desk were to pass in addition to what was given by the preceding words. The bequest was therefore effective to pass to the niece the promissory notes and the money in the bank represented by the savings bank pass books.

[*Re Robson, Robson* v. *Hamilton*, [1891] 2 Ch. 559; *Kendrick* v. *Dominion Bk. & Bownas*, 58 D.L.R. 309, 48 O.L.R. 539; *Re Dillon, Duffin* v. *Duffin*, 44 Ch. D. 76; *Brown* v. *Toronto Gen'l Trusts Corp.*, 32 O.R. 319, apld.]

APPEAL by the plaintiff from the judgment of Orde, J.A., [1932], 1 D.L.R. 568, O.R. 71, dismissing the plaintiff's action. Reversed.

D. L. McCarthy, K.C., for the appellants.

C. F. H. Carson, for the respondents.

MULOCK, C.J.O.:—This is an appeal from the judgment of Orde, J.A.

The question is: What passed to the plaintiff under the 4th paragraph of the last will of Abe Lyons, deceased?

The will is as follows:—"I hereby revoke all former wills and other testamentary dispositions at any time heretofore made by me and declare this to be and contain my last will and testament.

"1. I direct that all my just debts, funeral and testamentary expenses be paid by my executor hereinafter named as soon as conveniently may be after my decease.

"2. I bequeath my gold watch and chain to my nephew Sigmund Lyons.

"3. I bequeath my jewels, including my diamond bar pin and extra stone in safety deposit vault at Toronto General Trusts Corporation to my niece Leah Singer, wife of Israel Singer.