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DOMINION LAW REPORTS

THE "ALL-CANADA" SERIES

ANNOTATED

CONTAINING ALL REPORTABLE CANADIAN CASES FROM ALL THE COURTS OF CANADA INCLUDING THE DECISIONS OF THE SUPREME COURT OF CANADA AND CANADIAN APPEALS TO THE PRIVY COUNCIL

[1946] 3 D.L.R.

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CANADA
CANADA LAW BOOK CO., LTD.
417 Terminal Bldg., 207 Queen's Quay,
TORONTO
1946.

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witness, Edward Wallace, who was called by the plaintiff himself, and who was, in my opinion, a very reliable witness, described very clearly how, after burning the pile of grass, the fire was extinguished. His evidence satisfied me that all reasonable precautions were taken to extinguish the fire and that it was, in fact, completely extinguished after the school grounds had been prepared on the afternoon preceding the social. He was also present at the social and there until 1.30 in the morning and definitely says that there was no fire on the school grounds at that time.

It should be noted that over 600 persons attended the social and I cannot believe that with that number on the comparatively small school grounds any fire was smouldering all the time. The other evidence, in my opinion, confirms the fact that there was no such fire. The witnesses for the defence on the other hand say that on the following evening the fire was burning first on the property of the plaintiff and spread from his property to the school property. Witness Wallace, called by the plaintiff, gives evidence to this same effect.

A word should be said about the evidence of Robert Elmer Hartin, who is a tenant of the plaintiff. He states that on the afternoon of the day following the social, attracted by smoke, he walked over to the vicinity of the school grounds, and that there was fire smouldering then close to the plaintiff's property. He says he did not see anyone in attendance and he did not do anything about the fire. I find it difficult to accept this evidence. He may be mistaken in the time that he was there but in any event, if his evidence is true, it would have been a very simple matter for him to have extinguished this unattended fire and saved the plaintiff's property.

The property of the plaintiff was grown high with weeds; the season was unusually dry, and it would only be conjecture to say how or when the fire started which destroyed his trees, but I do not believe that the evidence discloses that it started on the school premises.

The action will, therefore, be dismissed with costs.

Action dismissed.

Can.
S.C.

REFERENCE RE DEPORTATION OF JAPANESE.

Supreme Court of Canada, Rinfret C.J.C., Kerwin, Hudson, Taschereau, Rand, Kellock and Estey JJ. February 20, 1946.

Aliens I—War II F—Constitutional Law I—Orders providing for deportation of Japanese and for denaturalization—Classes of Japanese affected — Validity of Orders under War Measures Act (Can.)—

Orders in Council P.C. 7355, 7356 and 7357, dated December 15, 1945, passed under the *War Measures Act*, R.S.C. 1927, c. 206 (and continued in effect under the authority of s. 4 of the *National Emergency Transitional Powers Act*, 1945 (Can.), c. 25), provide respectively for:

(1) The deportation to Japan of (a) Japanese nationals resident in Canada who have since December 8, 1941, made requests for repatriation or who were detained, under specified authority, as at midnight of September 1, 1945; (b) naturalized British subjects of the Japanese race resident in Canada who have made requests for repatriation not revoked in writing prior to midnight September 1, 1945; (c) natural born British subjects of the Japanese race resident in Canada who have made requests for repatriation not revoked in writing prior to the making of a deportation order; and (d) the wives and children under 16 years of age of persons in any of the above classes (by their inclusion in any order of deportation of such persons); (2) the loss of status of a British subject or of a Canadian national, as of the date on which he leaves Canada, by any deported person who was naturalized under the *Naturalization Act*, R.S.C. 1927, c. 138; and (3) the inquiry by a commission into the activities of Japanese nationals and naturalized persons of the Japanese race in Canada with a view to recommending whether they should be deported.

Upon a reference to the Supreme Court of Canada to determine the validity in whole or in part of the foregoing Orders in Council, *held*, unanimously, P.C. 7355 is valid in so far as it involves the deportation of Japanese nationals resident in Canada and in so far as it involves the deportation of naturalized British subjects of the Japanese race; *held*, further, Rand and Kellock JJ. dissenting, P.C. 7355 is valid in so far as it involves the deportation of natural born British subjects of the Japanese race, having regard to the arrangement for their reception in Japan, and notwithstanding that they are not deprived under any of the Orders in Council of their status as British subjects; *held*, further, *per* Rinfret C.J.C., Kerwin and Taschereau JJ., P.C. 7355 is valid in so far as it involves the deportation of wives and children of persons to be deported; *per* Hudson, Kellock and Estey JJ., it is invalid in that respect since the condition for the validity of such exercise of delegated legislative power under the *War Measures Act*, (*viz.*, that such deportation was necessary or advisable for the security, defence, peace, order and welfare of Canada, etc.) was in no way apparent; *per* Rand J., it is invalid (for the same reason) only in relation to the compulsory deportation of wives and children who do not come within the classes of Japanese nationals or naturalized British subjects of the Japanese race. *Held*, further, Rand and Kellock JJ. dissenting, P.C. 7356 is valid. *Per* Rand and Kellock JJ.: It is invalid in so far as it purports to revoke the naturalization of persons of the Japanese race merely because of their deportation under P.C. 7355 and in disregard of the conditions of revocation stipulated under the *Naturalization*

Can.
S.C.
REFERENCE RE DEPORTATION OF JAPANESE.

Act in accordance with the terms of the *British Nationality and Status of Aliens Act*, 1914, as amended.

Held, further, P.C. 7357 is valid; *per* Rand J., subject to compliance with the *Naturalization Act* as to grounds for revocation of naturalization; *per* Kellock J., save in so far as it may purport to authorize a departure from the *British Nationality and Status of Aliens Act*, 1914.

Cases Judicially Noted: *A.-G. Can.* v. *Cain*, [1906] A.C. 542, folld; *Fort Frances P. & P. Co.* v. *Man. Free Press*, [1923], 3 D.L.R. 629, A.C. 695, 25 O.W.N. 60; *Re Gray*, 42 D.L.R. 1, 57 S.C.R. 150, [1918] 3 W.W.R. 111; *Reference re Regulations (Chemicals) under War Measures Act*, [1943], 1 D.L.R. 248, S.C.R. 1, 79 Can. C.C. 1; *R.* v. *Halliday*, [1917] A.C. 260, refd to.

Constitutional Law I—Administrative Law—War I—Order under War Measures Act — Condition as to necessity or advisability for security, etc. of Canada—Inquiry by Court whether condition fulfilled—

In determining the validity of an Order in Council passed under the *War Measures Act*, R.S.C. 1927, c. 206 which requires, as a condition of its passing, that the Governor in Council deem it necessary or advisable, by reason of the existence of real or apprehended war, for the security, defence, peace, order and welfare of Canada, the Court is not entitled to substitute its view of such necessity or advisability for that of the Government, so long as it appears from the order or can be presumed that the decision as to necessity or advisability has been made.

Cases Judicially Noted: *Re Gray*, 42 D.L.R. 1, 57 S.C.R. 150, [1918] 3 W.W.R. 111; *Reference re Regulations (Chemicals) under War Measures Act*, [1943], 1 D.L.R. 248, S.C.R. 1, 79 Can. C.C. 1; *R.* v. *Comptroller Gen'l of Patents*, [1941] 2 K.B. 306, apld.

Habeas Corpus I—War I—Order declaring persons to be in "legal custody"—Whether right to habeas corpus ousted—Whether Order in conflict with authorizing statute—

Section 9 of Order in Council P.C. 7355 of December 15, 1945, which provides that any Japanese person detained for deportation under an order to that effect shall be deemed to be in legal custody is not invalid as being in conflict with s. 5 of the *War Measures Act*, R.S.C. 1927, c. 206. A provision that a person shall be deemed in legal custody does not abolish the right to *habeas corpus* since it does not preclude an inquiry whether the legal custody has been effected pursuant to the terms of the authorizing statute or order.

Cases Judicially Noted: *Greene* v. *Secretary of State for Home Affairs*, [1942] A.C. 284, apld.

Constitutional Law I—Validity of Order in Council — Whether affected by use therein of vague words—

The validity of an Order in Council (and, *semble*, of a statute) is not affected by the fact that some of the terms used therein, *e.g.*, the word "race", are vague or uncertain in meaning.

Statutes Considered: *Orders in Council* P.C. 7355 ([1945] 4 S.O.R. 365); 7356 ([1945] 4 S.O.R. 368); 7357 ([1945] 4 S.O.R. 369); *War Measures Act*, R.S.C. 1927, c. 206; *National Emergency Transitional Powers Act*, 1945 (Can.), c. 25; *Naturalization Act*, R.S.C. 1927, c. 138; *British Nationality and Status of Aliens Act*, 1914 (Imp.), c. 17.

Can.
S.C.
REFERENCE RE DEPORTATION OF JAPANESE.
Rinfret C.J.C.

REFERENCE to the Supreme Court of Canada for the determination of the validity, in whole or in part, of Orders in Council P.C. 7355, 7356 and 7357 passed under the *War Measures Act*.

Aime Geoffrion, K.C. and *D. W. Mundell*, for A.-G. Can.; *K. L. Maitland*, K.C., for A.-G. B.C.; *F. A. Brewin*, for A.-G. Sask; *J. R. Cartwright*, K.C., *F. A. Brewin* and *J. A. MacLennan*, for Cooperative Committee on Japanese Canadians.

The judgment of RINFRET C.J.C., KERWIN and TASCHEREAU JJ. was delivered by

RINFRET C.J.C.:—On December 15, 1945, His Excellency, the Governor-General in Council, ordered as follows:

"2(1) Every person of sixteen years of age or over, other than a Canadian national, who is a national of Japan resident in Canada and who,

"(a) has, since the date of declaration of war by the Government of Canada against Japan, on December 8, 1941, made a request for repatriation; or

"(b) has been in detention at any place in virtue of an order made pursuant to the provisions of the Defence of Canada Regulations or of Order in Council P.C. 946, of the 5th day of February, 1943, as amended by P.C. 5637, of the 16th day of August, 1945, and was so detained as at midnight of September 1, 1945; may be deported to Japan.

"(2) Every naturalized British subject of the Japanese race of sixteen years of age or over resident in Canada who has made a request for repatriation may be deported to Japan: Provided that such person has not revoked in writing such request prior to midnight the first day of September, 1945.

"(3) Every natural born British subject of the Japanese race of sixteen years of age or over resident in Canada who has made a request for repatriation may be deported to Japan: Provided that such person has not revoked in writing such request prior to the making by the Minister of an order for deportation.

"(4) The wife and children under sixteen years of age of any person for whom the Minister makes an order for deportation to Japan may be included in such order and deported with such person."

The Order further provided that a request for repatriation, made under the above provisions, would be deemed final and irrevocable for the purpose of the Order or any action taken thereunder after a fixed delay.

The Minister of Labour was thereby authorized to "make orders for the deportation of any persons subject to deportation";

Can.
S.C.
REFERENCE RE DEPORTATION OF JAPANESE.
Rinfret C.J.C.

to take such measures as he deemed advisable to arrange for the deportation and for the detention, transportation, etc., of the persons subject thereto, and generally to make such rules or regulations and employ such officers or adopt such measures as he would from time to time deem necessary for the purpose of carrying out the Order.

Certain ancillary provisions are added to the Order with regard to property and belongings of the person being deported, or subject to deportation, or for the purpose of enabling the Minister to carry out the provisions of the Order. Of these ancillary provisions, s. (9) alone need be reproduced *verbatim*:

"(9) Any person for whom an order for deportation is made and who is detained pending deportation or who is placed under restraint in the course of deportation by virtue of any order or measure made or taken under Section 4 of the Order shall, while so detained or restrained, be deemed to be in legal custody."

This Order in Council was given P.C. 7355 [[1945] 4 S.O.R. 365] and the reasons for its adoption are stated in the preamble as follows:

"Whereas during the course of the war with Japan certain Japanese nationals manifested their sympathy with or support of Japan by making requests for repatriation and otherwise;

"And whereas other persons of the Japanese race have requested or may request that they be sent to Japan;

"And whereas it is deemed desirable that provisions be made to deport the classes of persons referred to above;

"And whereas it is considered necessary by reason of the war, for the security, defence, peace, order and welfare of Canada, that provision be made accordingly."

On the same day two other Orders in Council were adopted under numbers P.C. 7356 [[1945] 4 S.O.R. 368] and P.C. 7357 [[1945] 4 S.O.R. 369]. The first of these (7356) refers to Order in Council 7355 whereby provision is made for the deportation of persons who, during the course of the war, have requested to be removed or sent to an enemy country "or otherwise manifested their sympathy with or support of the enemy powers and have by such actions shown themselves to be unfit for permanent residence in Canada". It orders that any person who, being a British subject by naturalization under the *Naturalization Act*, R.S.C. 1927, c. 138, is deported from Canada under the provisions of Order in Council P.C. 7355 of December 15, 1945, "shall, as and from the date upon which he leaves Canada in the course of such deportation, cease to be either a British subject or a Canadian national."

Can.
S.C.
REFERENCE RE DEPORTATION OF JAPANESE.
Rinfret C.J.C.

Order in Council P.C. 7357 begins by stating that during the war particular measures with regard to persons of the Japanese race were made necessary by reason of their concentration along the Pacific Coast of Canada; that experience during the war in the administration of Order in Council P.C. 946 [[1943] 1 C.W.O.R. 359] of February 5, 1943, providing for the control of persons of the Japanese race has indicated the desirability of determining whether the conduct of such Japanese persons in time of war was such as to make the deportation of any of them desirable in the national interest, and that it is deemed advisable to make provision for the appointment of a Commission to institute the investigation concerned. It is then ordered that a Commission consisting of three persons shall be appointed to make inquiry concerning the activities, loyalty and the extent of cooperation with the Government of Canada during the war of Japanese nationals and naturalized persons of the Japanese race in Canada in cases where their names are referred to the Commission by the Minister of Labour for investigation with a view to recommending whether in the circumstances of any such case such person should be deported. The Commission is given power, at the request of the Minister of Labour, to inquire into the case of any naturalized British subject of the Japanese race who has made a request for repatriation and which request is final, and to make such recommendations with respect to such case as it deems advisable. The Commission is to report to the Governor in Council. Any person of the Japanese race who is recommended by the Commission for deportation shall be deemed to be a person subject to deportation under the provisions of Order in Council P.C. 7355, which Order shall then apply, *mutatis mutandis*, to such person. As a result of the deportation, the person in question shall cease to be either a British subject or a Canadian national. And, further, the Commission is given, for the purpose of all inquiries and investigations made pursuant to this Order, all the powers and authority of Commissioners appointed under Part I of the *Inquiries Act*, R.S.C. 1927, c. 99.

As will be seen, the latter two Orders in Council (7356-7357) have no operation except by reason of the first Order in Council (7355); the three Orders constitute one scheme, the validity of which depends upon the first Order in Council.

I have outlined above the preamble of the first Order in Council. The Order contains certain definitions. "Deporta-

Can. S.C. REFERENCE RE DEPORTATION OF JAPANESE. Rinfret C.J.C.

tion" is stated to mean the removal pursuant to the authority of this Order (7355), of any person from any place in Canada to a place outside Canada. "Deported" is stated to mean removed or sent from Canada pursuant to the authority of this Order. "Minister" means the Minister of Labour. "Request for repatriation" means a written request or statement of desire to be repatriated or sent to Japan.

The Order established three categories of persons who may be deported to Japan. The first category includes every national of Japan, who is not also a Canadian national, of 16 years of age or over, resident in Canada who was detained pursuant to the provisions of the *Defence of Canada Regulations* or of Order in Council P.C. 946 of February 5, 1943, as amended by Order in Council P.C. 5637 [[1945] 3 C.W.O.R. 263] of August 16, 1945, at midnight of September 1, 1945, the day before the formal unconditional surrender of the military forces of Japan.

The second category includes certain persons of the Japanese race of 16 years of age or over resident in Canada, who have made written requests for repatriation. It includes either a national of Japan, a person who is a naturalized British subject, or a natural-born British subject, provided their requests were made before certain dates and were not revoked prior to the making by the Minister of an order for deportation.

The third category of persons includes the wife and children under 16 years of age of any person against whom an order for deportation is made. They may be included in the order.

These Orders in Council are expressed to have been made under the authority of the *War Measures Act*, R.S.C. 1927, c. 206. It is stated and established that these Orders were made only after a suitable arrangement had been made with General MacArthur, Supreme Commander for the Allied Powers in Japan.

Following the adoption of the Orders, representations were made to the Acting Minister of Justice by and on behalf of a number of Canadian organizations and societies expressing the opinion based on advice of legal counsel that the Orders were *ultra vires* and requesting a reference to the Supreme Court of Canada to test the question. An action had even been commenced against the Attorney-General of Canada for a declaration that the Orders in Council were *ultra vires*, illegal and void. It was, therefore, felt that, in the circumstances, in the public interest, the opinion of the Supreme Court of Canada should be obtained upon the question of the validity of the aforesaid Orders in Council, because in the opinion of the Acting Minister of Justice, they raised an important question of law touching the interpretation of Dominion legislation. Therefore, His Excellency the Governor-General in Council, on the recommendation of the Acting Minister of Justice and under and by virtue of the authority conferred by s. 55 of the Supreme Court Act, R.S.C. 1927, c. 35 referred the following question to the Supreme Court of Canada for hearing and consideration:

Can. S.C. REFERENCE RE DEPORTATION OF JAPANESE. Rinfret C.J.C.

"Are the Orders in Council, dated December 15, 1945, being P.C. 7355, 7356, and 7357, *ultra vires* of the Governor in Council either in whole or in part and, if so, in what particular or particulars and to what extent?

In *Reference re Regulations (Chemicals) under War Measures Act*, [1943], 1 D.L.R. 248, S.C.R. 1, 79 Can. C.C. 1, this Court held that the authority vested in the Governor-General in Council by the *War Measures Act* (its constitutional validity having been finally determined in *Re Gray, Re Habeas Corpus* (1918), 42 D.L.R. 1, 57 S.C.R. 150 and the *Fort Frances* case [*Fort Frances P. & P. Co.* v. *Manitoba Free Press Co.*], [1923], 3 D.L.R. 629, A.C. 695, 25 O.W.N. 60, is legislative in its character; and an Order in Council passed in conformity with the conditions prescribed by, and the provisions of, that Act, *i.e.*, a legislative enactment such as should be deemed necessary and advisable by reason of war, has the effect of an Act of Parliament, although the final responsibility for the acts of the Executive Government rests upon Parliament. Parliament has not abdicated its general legislative powers nor abandoned its control. The subordinate instrumentality, which it has created for exercising the powers, remains responsible directly to Parliament and depends upon the will of Parliament for the continuance of its official existence. Parliament has not effaced itself, and has full power to amend or repeal the *War Measures Act*, or to make ineffective any of the Orders in Council passed in pursuance of its provisions; and if, at any time, Parliament considers that too great a power has been conferred upon the Governor-General in Council, the remedy lies in its own hand.

On this occasion it was stated by Sir Lyman P. Duff, then C.J.C. that (p. 253 D.L.R., pp. 6-7 Can. C.C., pp. 9-10 S.C.R.):

"The *War Measures Act* came before this Court for consideration in 1918 in *Re Gray* (1918), 42 DL.R. 1, 57 S.C.R. 150, and a point of capital importance touching its effect was settled by the decision in that case. It was decided there that the authority vested in the Governor-General in Council is legislative in its character and an order in council which had the effect of radically amending the *Military Service Act*, 1917 (Can.), c.

Can.
S.C.
REFERENCE RE DEPORTATION OF JAPANESE.
Rinfret C.J.C.

19, was held to be valid. The decision involved the principle, which must be taken in this Court to be settled, that an order in council in conformity with the conditions prescribed by, and the provisions of, the *War Measures Act* may have the effect of an Act of Parliament . . . .

"The judgment of the Privy Council in *Fort Frances Pulp & Power Co.* v. *Manitoba Free Press Co.*, [1923] 3 D.L.R. 629, A.C. 695 laid down the principle that, in an emergency such as war, the authority of the Dominion in respect of, and its powers of legislation relating to the peace, order and good government of Canada may, in view of the necessities arising from the emergency, displace or overbear the authority of the Province in relation to a vast field in which the Provinces would otherwise have exclusive jurisdiction."

But any Order made under the *War Measures Act* is subject to two specific provisions: The Governor in Council is empowered to do and authorize such acts and things, and to make such orders and regulations, provided there exists a real or apprehended war, invasion, or insurrection; and also provided that the act or thing done, or the order or regulation made, are such that the Governor in Council, by reason of real or apprehended war, deems them necessary or advisable for the security, defence, peace, order and welfare of Canada.

And at pp. 255-6 D.L.R., pp. 9-10 Can. C.C., p. 12 S.C.R. of the *Chemicals Reference*, Sir Lyman P. Duff states:

"The duty rests upon the Executive Government to decide whether, in the conditions confronting it, it deems it necessary or advisable for the safety of the state to appoint such subordinate agencies and to determine what their powers shall be.

"There is always, of course, some risk of abuse when wide powers are committed in general terms to any body of men. Under the *War Measures Act* the final responsibility for the acts of the Executive rests upon Parliament. Parliament abandons none of its powers, none of its control over the Executive, legal or constitutional.

"The enactment is, of course, of the highest political nature. It is the attribution to the Executive Government of powers legislative in their character, described in terms implying nothing less than a plenary discretion, for securing the safety of the country in time of war. Subject only to the fundamental conditions explained above (and the specific provisions enumerated), when Regulations have been passed by the Governor-General in Council in professed fulfilment of his statutory duty, I cannot agree that it is competent to any Court to canvass the

Can.
S.C.
REFERENCE RE DEPORTATION OF JAPANESE.
Rinfret C.J.C.

considerations which have, or may have, led him to deem such Regulations necessary or advisable for the transcendent objects set forth. The authority and the duty of passing on that question are committed to those who are responsible for the security of the country—the Executive Government itself, under, I repeat, its responsibility to Parliament. The words are too plain for dispute: the measures authorized are such as the Governor-General in Council (not the Courts) deems necessary or advisable."

The Co-operative Committee on Japanese Canadians appeared through counsel in the matter and submitted that the question referred to the Court should be answered in the affirmative, that is to say, that the Orders in Council are wholly *ultra vires* of the Governor in Council.

First, they said that the word "deportation" means, and means exclusively, "the forcible removal of aliens"; and that it is not apt to describe the sending to Japan of Canadian citizens who were either born or naturalized in Canada and who have no connection with Japan other than that of "race". According to them, "deportation" is the return of an alien to the country whence he came and not the exile or banishment of a citizen to an alien country.

In the second place, they said that the purpose of the enumeration in s. 3 of the *War Measures Act* was to indicate that the powers of the Governor in Council "could go even thus far", or to indicate "marginal instances", or "cases in which there might be such doubt that it was better to mention them specifically". For that contention, certain dicta in the *Gray* case, 42 D.L.R. at pp. 3,10-11, 17, 57 S.C.R. at pp. 158, 168, 177, are referred to.

They added that the banishment of subjects by any Court or body for any other reason than conviction of felony is expressly prohibited by heavy penalties by the *Habeas Corpus Act*, 31 Car. II., c. 2.

Moreover, they said that the banishment of nationals, particularly on racial grounds, is contrary to the accepted principles of International Law, such as may be gathered from *A.-G. Can.* v. *Cain*, [1906] A.C. 542 at p. 546.

They also contended that various provisions of the Orders in Council are repugnant to the *British Nationality and Status of Aliens Act*, 1914 (Imp.), c. 17, and that the latter is an Act, to which the *Colonial Laws Validity Act*, 1865 (Imp.), c. 63 applies.

Their conclusion is, of course, that if the Parliament of Can-

Can. S.C.

REFERENCE RE DEPORTATION OF JAPANESE.

Rinfret C.J.C.

ada did not have the power to make laws repugnant to the Imperial statute, it could not delegate such power and could not be assumed to have attempted to do so.

Then they urged that s. 9 of Order in Council P.C. 7355 does away with the right to the writ of *habeas corpus* and, moreover, conflicts with s. 5 of the *War Measures Act;* and they contended that none of the sections, including said s. 9, are severable from the three Orders in Council, so that it cannot be said that the Governor in Council would have passed the Orders at all if some of the sections thereof were being left out, all the provisions of the Orders in Council being interdependent. They argued that it is impossible to say that the Governor in Council would not have abandoned the whole scheme if parts of it had been known to have been *ultra vires.*

A further argument was put forward on the ground that the words "Japanese race" are so vague as to make the provision unenforceable and, for that reason also, the Orders in Council should be set aside.

In respect of the last argument, the Court indicated immediately that it would not be taken into consideration as the question referred to us is whether the Orders in Council are *ultra vires,* and the point whether some words or sentences therein are vague does not fall within that question. The Orders in Council would not be *ultra vires* even if some parts thereof were vague.

The attack upon the use of the word "deportation" is addressed, of course, to that word in the *War Measures Act,* for, in so far as the Orders in Council themselves are concerned, they contain a definition of the word which is said to mean, for the purposes of the Orders, "the removal pursuant to the authority of this Order of any person from any place in Canada to a place outside Canada". There can be no doubt that "deportation" so understood clearly covers the cases and categories of persons affected by the Orders.

But s. 3 of the *War Measures Act,* after stating that the Governor in Council may do and authorize such acts and things, and make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war, invasion or insurrection deem necessary or advisable for the security, defence, peace, order and welfare of Canada, adds: "and for greater certainty, but not so as to restrict the generality of the foregoing terms, it is hereby declared that the powers of the Governor in Council shall extend to all matters coming within the classes of subjects hereinafter enumerated"; and among the

Can. S.C.

REFERENCE RE DEPORTATION OF JAPANESE.

Rinfret C.J.C.

matters enumerated are (cl. (*b*)) "Arrest, detention, exclusion and deportation". The contention of the Co-operative Committee is that, as "deportation" is specifically mentioned in that clause of s. 3, the powers of the Governor in Council, under the *War Measures Act,* are strictly limited to such "deportation" as means "the forcible removal of aliens".

But, to begin with, it is far from being sure that the word "deportation" is limited to what the Co-operative Committee contends. Counsel for the Attorney-General of Canada was able to quote several definitions from standard dictionaries where the meaning of the word is stated to be more extensive. The New English Dictionary, edited by Sir James Murray, LL.D., and Henry Bradley, M.A., known as the Oxford English Dictionary, defines the word: "The action of carrying away; forcible removal *esp.* into exile; transportation."

Webster's New International Dictionary gives: "Act of deporting, or state of being deported; banishment; transportation. In modern law, the removal, from a country, of an alien considered inimical to the public welfare;—distinguished from *transportation* and *extradition.*"

In Worcester's Dictionary: "The act of carrying away; removal; transportation; exile; banishment."

It would follow from the above definitions that the word "exile" could well come under the word "deportation"; and, if it is submitted that "deportation" should, in ordinary language, be used for "the forcible removal of aliens", it should also, according to the above quotations from reputed dictionaries, include the word "exile" which admittedly means the banishment of a national from his country, or, in the words of the interpretation section of the Order itself (7355), "the removal of any person from any place in Canada to a place outside Canada".

However, I would not pause to further consider the objection raised upon that ground, because cl. (*b*) of s. 3 of the *War Measures Act* also contains the word "exclusion", which would be apt to cover the measures that are being adopted through the Orders in Council under consideration; and, moreover, if the measures so adopted are not, as contended, strictly and specifically contemplated by the use of the words "exclusion and deportation" in cl. (*b*), what is now being done pursuant to the Orders in Council is undoubtedly covered by the general terms of the *War Measures Act.* The enumeration therein contained is stated to be only "for greater certainty, but not so as to restrict the generality of the foregoing terms", and, in the first

Can.
S.C.
REFERENCE RE DEPORTATION OF JAPANESE.
Rinfret C.J.C.

part of s. 3 the Governor in Council is given the power to "do and authorize such acts and things, and make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war, invasion or insurrection deem necessary or advisable for the security, defence, peace, order and welfare of Canada". So that the discussion as to the exact meaning of the words "exclusion and deportation" in cl. (*b*) is really immaterial, for either the "acts and things" mentioned in Orders in Council 7355, 7356 and 7357 are covered by these two words or they are not. If they are, *cadit questio;* if they are not, they then come under the general powers conferred by the first part of s. 3.

Order in Council P.C. 7355. Indeed this is the very argument necessary by reason of the war, for the security, defence, peace, order and welfare of Canada, that provision be made accordingly."

The other two Orders in Council, as already pointed out, are merely ancillary to Order in Council P.C. 7355, and, although bearing separate numbers, would have no real existence but for Order in Council P.C. 7355. Indeed this is the very argument of the Co-operative Committee, that they are so completely interdependent that one cannot stand without the others. They are really the subordinate provisions and means for the purpose of carrying out the main Order contained in P.C. 7355. They must be read together and be taken to have been adopted because they were deemed necssary and advisable by reason of the war. This statement of fact made by the Governor in Council, so far as the Court is concerned, cannot be overruled in the circumstances of the matter before us. In the *Fort Frances* case, [1923], 3 D.L.R. 629, A.C. 695, Viscount Haldane had this to say at p. 635 D.L.R., p. 706 A.C.:

"It may be that it has become clear that the crisis which arose is wholly at an end and there is no justification for the continued exercise of an exceptional interference which becomes *ultra vires* when it is no longer called for. In such a case the law as laid down for distribution of powers in the ruling instrument would have to be invoked. But very clear evidence that the crisis had wholly passed away would be required to justify the judiciary, even when the question raised was one of *ultra vires* which it had to decide, in overruling the decision of the Government that exceptional measures were still requisite. In saying what is almost obvious, their Lordships observe themselves to be in accord with the view taken under analogous circumstances by the Supreme Court of the United States, and

Can.
S.C.
REFERENCE RE DEPORTATION OF JAPANESE.
Rinfret C.J.C.

expressed in such decisions as that in October, 1919, in *Hamilton v. Kentucky Distilleries Co.* (1919), 251 U.S. Rep. 146."

Later, in the *Chemicals Reference*, [1943], 1 D.L.R. 249 at p. 256, S.C.R. 1 at p. 13, 79 Can. C.C. 1 at p. 10 Sir Lyman P. Duff points out that "it is perhaps theoretically conceivable that the Court might be required to conclude from the plain terms of the order in council itself that the Governor-General in Council had not deemed the measure to be necessary or advisable, or necessary or advisable by reason of the existence of war".

Such a situation must indeed be rare and certainly it does not arise in the present instance. I repeat the four recitals in P.C. 7355:

"Whereas during the course of the war with Japan certain Japanese nationals manifested their sympathy with or support of Japan by making requests for repatriation to Japan and otherwise;

"And whereas other persons of the Japanese race have requested or may request that they be sent to Japan;

"And whereas it is deemed desirable that provisions be made to deport the classes or persons referred to above;

"And whereas it is considered necessary by reason of the war, for the security, defence, peace, order and welfare of Canada, that provision be made accordingly."

Then comes the following:

"Now, therefore, His Excellency the Governor General in Council, on the recommendation of the Minister of Labour, concurred in by the Secretary of State for External Affairs, and under the authority of the War Measures Act, Chapter 206 of the Revised Statutes of Canada, 1927, is pleased to make and doth hereby make the following Order."

It is clear from this that the Order is made under the authority of the *War Measures Act*. The Japanese nationals referred to in the first recital are covered by the enacting provisions, s. 2(1); "other persons of the Japanese race" referred to in the second recital are dealt with by s. 2(2); "Naturalized British subject of the Japanese race", and by s. 2(3): "natural born British subject of the Japanese race". The third recital states that it is deemed desirable that provision be made to deport these classes who have requested, or (in the case of naturalized or natural born British subjects) who may request that they be sent to Japan, and the fourth recital is surely a plain statement that the Governor-General in Council has deemed it necessary by reason of the war to provide with ref-

Can.
S.C.
REFERENCE RE DEPORTATION OF JAPANESE.
Rinfret C.J.C.

erence to these various classes in the manner set forth in s. 2 of the Order and elsewhere.

It will be noticed that in the first recital dealing with Japanese nationals, the word "repatriation" is used, while in the second recital, dealing with other persons of the Japanese race, the reference is to requests "that they be sent to Japan". After these recitals surely the word "deport", in the third recital, is sufficient, notwithstanding any argument that might on other occasions be made that the word "deport" would not apply to the sending to Japan of natural born British subjects of the Japanese race.

Whatever might be said as to certain of the remarks made in *Price Bros. & Co.* v. *Bd. of Commerce of Canada* (1920), 54 D.L.R. 286, 60 S.C.R. 265, in view of the later decision in the *Fort Frances* case, it is quite clear from a perusal of all the opinions in the former that not only was there before the Court an opinion by the then Minister of Justice that there was no emergency, but also there was no definite statement such as we find in the fourth recital in P.C. 7355. In the *Price Bros.* case [p. 291], Sir Lyman P. Duff referred to the recitals in the Order in Council of December 20, 1919, as being "in themselves sufficient to constrain any Court to the conclusion that the order of January 29 was not preceded or accompanied by any such decision", *i.e.*, a decision "that the particular measure in question is necessary or advisable for reasons which have some relation to the perils actual or possible of real or apprehended war". At p. 636 D.L.R., p. 707 S.C.R. of the *Fort Frances* case appears at least one statement in the Order of December 20, 1919, to which Sir Lyman P. Duff must have been referring, *i.e.*, that it must "'be realised that although no proclamation has been issued declaring that the war no longer exists, actual war conditions have in fact long ago ceased to exist, and consequently existence of war can no longer be urged as a reason in fact for maintaining these extraordinary regulations as necessary or advisable for the security of Canada'." It will be noticed that notwithstanding this reference in the *Fort Frances* case, their Lordships of the Judicial Committee had no difficulty in determining the validity of the Orders in Council there under review.

It is suggested that it cannot be said that the Governor-General in Council really considered it necessary by reason of the war, for the security, defence, peace, order and welfare of Canada that natural born British subjects should be expelled. The argument is that while P.C. 7356 provides that any person who being a British subject by naturalization is deported from

Can.
S.C.
REFERENCE RE DEPORTATION OF JAPANESE.
Rinfret C.J.C.

Canada under P.C. 7355 "shall, as and from the date upon which he leaves Canada in the course of such deportation, cease to be either a British subject or a Canadian national", no provision is made anywhere that a natural born British subject of the Japanese race who is deported shall cease to be a British subject or a Canadian national; and that, therefore, theoretically there would be nothing to prevent such last mentioned person from immediately re-entering Canada. It is sufficient to point out that once such person is expelled from the country and sent to Japan under the arrangements made with General MacArthur, it is inconceivable that any practical difficulty can ever arise. In the history of England examples are not unknown of cases where natural born British subjects have been exiled without any provision being made that they should lose their British nationality.

It has also been suggested that since any natural born British subject of the Japanese race who has made a request to be sent to Japan may revoke in writing such request prior to the making by the Minister of Labour of an order for deportation, it could not be said that the Governor-General in Council really deemed it necessary to provide for the peace, order and good government of Canada to send them to Japan. As to this, and generally, to all such arguments, it must be borne in mind that the Governor-General in Council was dealing with people who had made requests to be sent to Japan or who might after the making of P.C. 7355 make such requests. Surely under the circumstances that existed during the actual hostilities with Japan or in the ensuing months, the Governor-General in Council might well be justified in considering such people a menace to Canada and the mere fact that they were given an opportunity of retraction cannot alter the fact that the Governor-General in Council did so decide. Even if it turned out that every natural born British subject of the Japanese race did withdraw his request, it could not alter the fact as expressed in the Order in Council that it was considered advisable to provide for the event of any number of such class not taking advantage of the opportunity of revocation.

Nor are we concerned with the policy of these measures. As was said by Lord Buckmaster in *Attorney-General* v. *Wilts United Dairies* (1922), 91 L.J. K.B. 897, in dealing with an Order of the Food Controller made in April, 1919: "The only question here is, Were such powers granted?" [p. 900]

That Canada possessed the power to expel an alien from its territory, or to deport him to the country whence he entered it,

Can.
S.C.
REFERENCE RE DEPORTATION OF JAPANESE.
Rinfret C.J.C.

is a question that may now be regarded as settled since the judgment of the Privy Council in *A.-G. Can.* v. *Cain*, *supra*. It was also decided in that case that the power could be delegated to the Government, with the authority to impose such extra-territorial constraint as was necessary to execute the power.

As to the second point raised by the Co-operative Committee. I do not think it can be said that any provision of the Orders in Council now under consideration are repugnant to the *British Nationality and Status of Aliens Act*, 1914 (Imp.), c. 17. It does not seem necessary to me to develop that statement, as, after all, the fact of no conflict can be ascertained only by comparison of the respective provisions of the latter Act and the text of the Orders in Council. Section 26 of the *British Nationality and Status of Aliens Act*, at the beginning, would seem to eliminate any possibility of conflict. The question which naturally comes to one's mind is: Why should Canada not be able to denaturalize the persons whom it had previously naturalized? The loss of the quality of British subject, resulting from the deportation and the denaturalization which takes place under the Orders, must be read, of course, to mean the cessation of the privileges of a British subject only in so far as Canada is concerned. Moreover, the attempt by the Co-operative Committee to apply here the provisions of the *Colonial Laws Validity Act* is, in my opinion, ineffective, because each of the Orders in Council are, by force of the *War Measures Act*, the equivalent of a statute; they have the force of law, and, to all intents and purposes, while they stand, they are exactly on the same footing as an Act of Parliament. It would follow, therefore, that they must be looked upon with regard to the *Statute of Westminster*, 1932 (Can.), p. v, as bearing the date of December 15, 1945, and, consequently, much posterior to the coming into force of that statute. So that being posterior to it and getting the benefit of the *Statute of Westminster* itself, they are thus withdrawn from the application of the *Colonial Laws Validity Act*.

Moreover, the *British Nationality and Status of Aliens Act* cannot be said to have been adopted by Canada. The Canadian Act was an independent enactment, which was intended by the Canadian Parliament here as its own Act, with the consequence that it can be truly said that the *British Nationality and Status of Aliens Act* as such never applied to Canada.

Perhaps a special reference ought to be made to s. 9 of Order in Council P.C. 7355, in respect of which counsel for the Co-

Can.
S.C.
REFERENCE RE DEPORTATION OF JAPANESE.
Rinfret C.J.C.

operative Committee made a very insistent argument that it conflicted with s. 5 of the *War Measures Act* and that it had the effect of abolishing the right to resort to *habeas corpus*. Section 5 in question enacts:

"5. No person who is held for deportation under this Act or under any regulation made thereunder, or is under arrest or detention as an alien enemy, or upon suspicion that he is an alien enemy, or to prevent his departure from Canada, shall be released upon bail or otherwise discharged or tried, without the consent of the Minister of Justice."

Section 9 of P.C. 7355 enacts: "Any person for whom an order for deportation is made and who is detained pending deportation or who is placed under restraint in the course of deportation by virtue of any order or measure made or taken under Section 4 of this Order shall, while so detained or restrained, be deemed to be in legal custody."

I do not see any conflict between the two sections. It is apparent that s. 5 of the Act really deals with the situation anterior to the order for deportation, while s. 9 of the Order deals with the situation after the order for deportation has been made. Even if the two sections dealt with the same situation, it does not follow that because the person detained or restrained is declared to be deemed to be in legal custody under s. 9, it could not happen that the same person could be released upon bail, or otherwise discharged or tried, with the consent of the Minister of Justice.

But, above all, there is a good deal to be said for the contention that s. 9 of the Order is really superfluous, because, if the order for deportation was made, or if the person detained pending deportation, or placed under restraint in the course of deportation, was so placed "by virtue of any order or measure made or taken under Section 4 of this Order", such person is necessarily in legal custody. The whole of s. 9 is predicated upon the assumption that the order for deportation, or detention, or restraint, was properly made or taken under s. 4; and, if the provisions of s. 4 are valid and followed, the necessary consequence is that the person detained, or restrained, is in legal custody. Section 9, therefore, appears to be superfluous, and to have been put there *ex abundanti cautela*, or, in other words, in order to avoid a doubt as to the legality of the detention or restraint. That very legality necessarily results from the fact that any order, or measure, taken under s. 4, means precisely what it says, that is to say an order or measure in conformity with s. 4.

Can.
S.C.
REFERENCE RE DEPORTATION OF JAPANESE.
Rinfret C.J.C.

But I do not think that it can be concluded from the wording of s. 9 that the intention of the Order in Council is that the recourse to *habeas corpus* is thereby abolished. At Bar, counsel for the Crown did not so contend; on the contrary, he stated that it was not. The language of s. 9 refers to an order authorized by Order in Council P.C. 7355 and, therefore, a valid order resulting in legal custody.

In addition to any other argument in respect to s. 9, it may be said that it is clearly severable; and, even if it was held to be *ultra vires*—which, in my opinion, it is not—it is quite evident that declaring it *ultra vires* would not in any way affect the remainder of the several Orders in Council now submitted.

The third recital in P.C. 7355, "And whereas it is deemed desirable that provisions be made to deport the classes of persons referred to above", in terms applies only to the classes referred to in the first two recitals, *i.e.*, Japanese nationals who had manifested their sympathy with or support of Japan by making requests for repatriation to Japan and otherwise, and other persons of the Japanese race who had requested, or might request, that they be sent to Japan. Subsection (4) of s. 2 of the Order, however, provides:

"2(4) The wife and children under sixteen years of age of any person for whom the Minister makes an order for deportation to Japan may be included in such order and deported with such person."

As to children, at what age under sixteen would a consent be of any value? As to both children and wives, it was apparently considered advisable that the Minister should have power to expend the sums mentioned in s. 7 in a desire to keep families together. Even though no request from wives or children under sixteen is required by s-s. (4) of s. 2, it appears that the Governor in Council deemed it necessary for the security, defence, etc., of Canada to authorize the Minister of Labour to include this class in an Order covering a person of either of the first two classes. That the Governor in Council considered the matter necessary may appear without specific words being used, *R. v. Comptroller General of Patents, Ex p. Bayer Products Ltd.*, [1941] 2 K.B. 306 at p. 314, and in this case I am satisfied upon a consideration of all the terms of the Order that this occurred.

My conclusion is that Orders in Council 7355, 7356 and 7357 contain legislation that could have been adopted by Parliament itself; that, under the *War Measures Act*, the Governor in Council was empowered to adopt any legislation that Parliament could have adopted; that such legislation was expressly and impliedly, adopted because it was deemed necessary or advisable for the security, defence, peace, order and welfare of Canada by reason of the existence of war; that the Governor in Council was the sole judge of the necessity or advisability of these measures and it is not competent to any Court to canvass these considerations which may have led the Governor in Council to deem such orders necessary or advisable for the objectives set forth.

Can.
S.C.
REFERENCE RE DEPORTATION OF JAPANESE.
Hudson J.

The authority conferred on the Governor-General in Council is a plenary legislative power, both to adopt the orders and to continue them in force, which is not subject to review in a Court of Justice.

My answer to the question submitted to the Court is, therefore, that the Orders in Council dated December 15, 1945, being P.C. 7355, 7356 and 7357 are not *ultra vires* of the Governor-General in Council either in whole or in part.

We hereby certify to His Excellency the Governor-General in Council that the foregoing are our reasons for the answer to the question referred herein for hearing and consideration.

HUDSON J.:—The question submitted for our opinion is the following: "Are the Orders in Council dated December 15, 1945, being P.C. 7355, 7356 and 7357 *ultra vires* of the Governor in Council, either in whole or in part and, if so, in what particular or particulars?"

These Orders in Council purport to be made under the authority of the *War Measures Act* and provide for the removal from Canada to Japan of a large number of persons of Japanese race, the revocation of naturalization of such of them as have been naturalized, and the disposition of the properties of such persons in Canada.

The reasons given in Order P.C. 7355, which is basic, are stated as follows:

"Whereas during the course of the war with Japan certain Japanese nationals manifested their sympathy with or support of Japan by making requests for repatriation to Japan and otherwise;

"And whereas other persons of the Japanese race have requested or may request that they be sent to Japan;

"And whereas it is deemed desirable that provisions be made to deport the classes of persons referred to above."

The persons to whom this Order applies are of four classes. The first is:

"2(1) Every person of sixteen years of age or over, other

Can.
S.C.
REFERENCE RE DEPORTATION OF JAPANESE.
Hudson J.

than a Canadian national, who is a national of Japan resident in Canada and who,

"(*a*) has, since the date of declaration of war by the Government of Canada against Japan, on December 8, 1941, made a request for repatriation; or

"(*b*) has been in detention at any place in virtue of an order made pursuant to the provisions of the Defence of Canada Regulations or of Order in Council P.C. 946, of the 5th day of February, 1943, as amended by P.C. 5637, of the 16th day of August, 1945, and was so detained as at midnight of September 1, 1945."

By s. 91(25), of the *B.N.A. Act* the Dominion is given exclusive legislative authority in respect of naturalization and aliens, and it was held in the case of *A.-G. Can.* v. *Cain*, [1906] A.C. 542, that the Crown undoubtedly possesses the power to expel an alien from the Dominion of Canada, or to deport him to the country from whence he entered it. In giving the judgment of the Committee, Lord Atkinson said at p. 546: "One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order, and good government, or to its social or material interests."

It was also held that the Dominion has the power to exercise such extra-territorial constraint as is necessary to execute the power.

The second class provided for in the Order includes:

"2(2) Every naturalized British subject of the Japanese race of sixteen years of age or over resident in Canada who has made a request for repatriation may be deported to Japan: Provided that such person has not revoked in writing such request prior to midnight the first day of September, 1945."

It is provided by s. 9 of the *Naturalization Act*, R.S.C. 1927, c. 138, that:

"9. Where the Governor in Council, upon the report of the Minister, is satisfied that a certificate of naturalization granted by the Minister under this Act or granted under any Naturalization Act heretofore in force in Canada has been obtained by false representation or fraud, or by concealment of material circumstances, or that the person to whom the certificate was granted has shown himself by act or speech to be disaffected or disloyal to His Majesty, the Governor in Council shall by order revoke the certificate."

Can.
S.C.
REFERENCE RE DEPORTATION OF JAPANESE.
Hudson J.

Here the request for repatriation by a Japanese has been treated by the Governor in Council as evidence of "disaffection or disloyalty to His Majesty" under the conditions subsisting in Canada at the time, that is, when this country was at war with Japan, or just emerging therefrom.

As the Canadian Parliament have power to grant naturalization, they have equally the power to revoke such naturalization and may delegate such power to the Governor in Council. Once the naturalization is revoked, the person concerned reverts to his original status of being an alien and thus becomes subject to deportation in the same way as any other alien.

It must also be remembered that in making the order for deportation, the Governor in Council is doing what the person involved himself had authorized.

The third class of persons included in Order in Council P.C. 7355 consists of:

"2(3) Every natural born British subject of the Japanese race of sixteen years of age or over resident in Canada who has made a request for repatriation may be deported to Japan; Provided that such person has not revoked in writing such request prior to the making by the Minister of an order for deportation."

The form of request for repatriation used by this class was supplied to us by counsel for the Co-operative Committee of Japanese Canadians and reads as follows:

"I, ... (....), ... born .....
(M. or F.) (day, month, year)
registered as a Canadian-born British subject (J. R. No. .....) under Order in Council P. C. No. 9760, dated December 16, 1941, hereby declare my desire to relinquish my British nationality and to assume the status of a National of Japan.

"Further, I request the Government of Canada, under the conditions set out in the Statement of the Minister of Labour dated February 13, 1945, to arrange for and effect my repatriation to Japan.

"I declare that I fully understand the contents of this document, and I voluntarily affix my signature hereto:

Date ..... 1945 .....
SIGNATURE

Place .....

....
WITNESS INTERPRETER

Can.
S.C.
REFERENCE RE DEPORTATION OF JAPANESE.
Hudson J.

Note: All persons sixteen years of age and over are required to sign a separate Declaration.

Application Recommended:

....
R. C. M. P. Commissioner of Japanese Placement.

Date ..... 1945 Date 1945

N. B.—This form in respect to Naturalized British Subjects was the same with the substitution of the words 'Canadian naturalized' for 'Canadian born' in the above form."

It will be observed that, by the terms of the Order in Council, persons in this class have a right to revoke the request at any time before a deportation order has actually been made, so that the order when made is no more than a compliance with such request.

The order as to this class does not impose a loss of citizenship. The form of request signed contains a declaration of a desire to relinquish British nationality and assume the status of a national of Japan. Any change of nationality, however, is left to action by the person himself. Section 16 of the *Naturalization Act* provides that:

"16. A British subject who, when in any foreign state and not under disability, by obtaining a certificate of naturalization or by any other voluntary and formal act becomes naturalized therein, shall thenceforth be deemed to have ceased to be a British subject."

I should say that no question could be raised as to the right of the Governor in Council to facilitate the departure of any member of the Japanese race who desires to make his home in Japan. A question of compulsion can arise only where a person seeks to withdraw his request after the Governor in Council has finally acted on it.

The relationship between a British subject and his sovereign is stated in Blackstone's Commentaries, vol. 1, p. 370, as follows:

"Natural allegiance is therefore perpetual, ... allegiance is a debt due from the subject, upon an implied contract with the prince, that so long as the one affords protection, so long the other will demean himself faithfully. As therefor the prince is always under a constant tie to protect his natural-born subjects, at all times and in all countries, for this reason their allegiance due to him is equally universal and permanent."

The mutual obligations there are spoken of as those arising from an implied contract.

Can.
S.C.
REFERENCE RE DEPORTATION OF JAPANESE.
Hudson J.

It would seem to follow that such obligations could be modified or cancelled by mutual agreement expressed in any way not forbidden by law. The facts here establish a concurrence in some modifications leading to a final extinguishment of all.

The request of the subject states his desire to relinquish his British nationality and to assume the status of a national of Japan and asks the Government of Canada to arrange for and effect his repatriation to Japan. By this he must mean his naturalization in Japan. This is a plain indication that, with him, the ties of race are stronger than the obligations of nationality.

By the order the Governor in Council concurs in his proposal with no qualification, except that the subject is given an option to withdraw his request at any time before the final deportation order is actually made. If there is no withdrawal in time, it would seem that there was in the language of commerce "a firm contract", so that the deportation order when made and carried out will be in fulfilment of the promise made on behalf of the Government.

It remains to consider whether or not Parliament has power to authorize the Governor in Council to make these orders and, if so, whether such power has been delegated.

As to the first two classes, for the reasons already given, I am satisfied that Parliament has that power and can delegate it to the Governor in Council.

As to the third class, there would be more difficulty in upholding the order, were it not for the terms of the request. Ample opportunity has been and still is given to the subject for reconsideration and withdrawal before the final order is made. It would be hard indeed if the Governor in Council, as soon as arrangements for transportation and reception are completed, is not permitted to carry out the arrangement. It has, in my opinion, adequate legislative sanction.

The British Parliament would undoubtedly have power to order the deportation from the realm of a British subject and the Canadian Parliament appears to have similar powers. Under the *B.N.A. Act* it has a right to legislate in regard to the peace, order and good government of Canada and, in heading 25 of s. 91, it is given exclusive power to legislate in regard to aliens and naturalization. Although deportation of a British citizen would not fall within this heading, yet it is of the same character and is a subject which could not be dealt with by a provincial Legislature.

Under the *War Measures Act*, s. 3, the Governor in Council

Can.
S.C.
REFERENCE RE DEPORTATION OF JAPANESE.
Hudson J.

is authorized to do all acts and things and make from time to time such orders and regulations as he may by reason of the existence of real or apprehended war deem necessary or advisable for the security, defence, peace, order and welfare of Canada. This enables the Governor in Council to deal with any subject-matter within the power of Parliament during the prescribed time, which does not conflict with any provision of the *War Measures Act* itself. This was conclusively established in *Re Gray*, 42 D.L.R. 1, 57 S.C.R. 150, and *Fort Frances P. & P. Co.* v. *Manitoba Free Press*, [1923], 3 D.L.R. 629, A.C. 695. As was held by Sir Lyman P. Duff in the *Chemicals Reference*, *[1943]*, 1 D.L.R. 248 at p. 255, S.C.R. 1 at p. 12, 79 Can. C.C. 1 at p. 9:

"The enactment is, of course, of the highest political nature. It is the attribution to the Executive Government of powers legislative in their character, described in terms implying nothing less than a plenary discretion, for securing the safety of the country in time of war."

The Act also provides in s. 2 that it shall be conclusive evidence that war, invasion, or insurrection, real or apprehended, exists and has not ceased until by proclamation it is so declared. No such proclamation was made up to the time these Orders in Council were passed. Even if it were, it was held in the *Fort Frances* case that Parliament still had power to conclude matters under way while the war was still going on.

The Orders with which we are here concerned plainly arose out of matters originating during the war, so that I think the Orders in Council can be taken to be an exercise of the powers vested in Parliament bearing on the subject-matter under consideration.

The very able arguments presented by counsel for the Co-operative Committee of Japanese Canadians have been dealt with by some of the other members of the Court and I shall make brief reference to only two or three.

It was argued that cl. 9 of Order in Council P.C. 7355 might have the effect of depriving a person about to be deported from any right to a writ of *habeas corpus*. I agree with the other members of the Court that such is not a proper interpretation of this clause. I think that where any question of fact bearing on the jurisdiction of the Governor in Council is raised, the person concerned would have a right to put it forward: for example, whether or not he had signed any request or had been induced to sign by misrepresentation or coercion, or whether or not he was of the Japanese race. The validity of

Can.
S.C.
REFERENCE RE DEPORTATION OF JAPANESE.
Rand J.

the Orders depends on the reality of the requests and any individual who wishes to raise a question of fact, so far as it affects him, should not be deprived of an opportunity of establishing his case.

I am in agreement with what Mr. Justice Estey has said in regard to the fourth class, that is, women and children.

The question submitted in this reference is as follows:

"Are the Orders in Council dated December 15, 1945, being P.C. 7355, 7356 and 7357 *ultra vires* of the Governor in Council, either in whole or in part and, if so, in what particular or particulars?"

In my opinion all the Orders in Council are *intra vires* of the Governor in Council with the exception of s. 2(4) of P.C. 7355.

I hereby certify to His Excellency the Governor-General in Council that the foregoing are my reasons for the answer to the question referred herein for hearing and consideration.

RAND J.:—His Excellency in Council has referred to this Court the following question arising out of certain Orders in Council which deal with the deportation of persons of the Japanese race:

"Are the Orders in Council dated December 15, 1945 being P.C. 7355, 7356 and 7357, *ultra vires* of the Governor in Council either in whole or in part, and if so, in what particular or particulars and to what extent?"

The Orders provide for the deportation in certain circumstances of:

(a) Japanese nationals;

(b) Naturalized British subjects of the Japanese race resident in Canada;

(c) Natural born British subjects of the Japanese race resident in Canada; and

(d) The wives and children under 16 years of age of persons in classes (a), (b) and (c).

The power of the Governor in Council to enact legislation by Order is derived from s. 3 of the *War Measures Act*, which so far as it is pertinent here, is as follows:

"3. The Governor in Council may do and authorise such acts and things, and make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war, invasion or insurrection deem necessary or advisable for the security, defence, peace, order and welfare of Canada; and for greater certainty, but not so as to restrict the generality of the foregoing terms, it is hereby declared that the

Can. S.C. REFERENCE RE DEPORTATION OF JAPANESE. Rand J.

powers of the Governor in Council shall extend to all matters coming within the classes of subjects hereinafter enumerated, that is to say:—

"(*b*) Arrest, detention, exclusion and deportation."

Apart from a consideration I shall deal with later, I am bound by decisions of this Court and of the Judicial Committee to attribute to Parliament the intention of clothing the Governor in Council with authority to enact by Order, subject to the provisions of the Act, legislation in a field as wide as that possessed by Parliament itself subject only to any restriction of the power of Parliament under the *B.N.A. Act* to delegate to the Governor in Council: Duff C.J.C., *Chemicals Reference*, [1943], 1 D.L.R. at pp. 253-4, S.C.R. at p. 10, 79 Can. C.C. at pp. 7-8. The condition of the exercise of that power is that the Governor in Council should by reason of the existence of real or apprehended war, invasion or insurrection *deem necessary or advisable for the security, defence, peace, order and welfare of Canada the acts and things which by Order he purports to do*. It is not for the Courts to substitute their view of any such necessity or advisability: but it must appear from the Order or be presumed that that decision has been made, or the condition laid down by Parliament is not fulfilled.

The preamble of Order P.C. 7355 contains the following recitals:

"Whereas during the course of the war with Japan certain Japanese nationals manifested their sympathy with or support of Japan by making requests for repatriation to Japan and otherwise;

And whereas other persons of the Japanese race have requested or may request that they be sent to Japan;

"And whereas it is deemed desirable that provisions be made to deport the classes of persons referred to above;

"And whereas it is considered necessary by reason of the war, for the security, defence, peace, order and welfare of Canada, that provision be made accordingly;

"Now, therefore, His Excellency the Governor General in Council, on the recommendation of the Minister of Labour, concurred in by the Secretary of State for External Affairs, and under the authority of the War Measures Act, Chapter 206 of the Revised Statutes of Canada, 1927, is pleased to make and doth hereby make the following Order."

A request for repatriation is defined as a written request or statement of desire to be repatriated or sent to Japan. Then

Can. S.C. REFERENCE RE DEPORTATION OF JAPANESE. Rand J.

follow specific provisions dealing with the different classes of persons affected.

Of these classes there is first that of Japanese nationals. The preamble quoted recites certain conclusions of the Governor in Council pertinent to jurisdiction, and we are to say whether from these and the operative provisions of the Order we find that the decision which the statute has prescribed as its condition has not been made: *Price Bros. & Co.* v. *Bd. of Commerce*, 54 D.L.R. 286 at p. 291, 60 S.C.R. 265 at p. 272, Duff J. (as he then was):

"In this connection the sole point requiring examination is that which arises out of Mr. Biggar's contention in his admirable argument that Orders in Council made by the Governor-General-in-Council professedly under the authority of sec. 6 of that Act are not judicially revisable. I think such orders are reviewable, in this sense that when in a proper proceeding the validity of them is called into question, it is the duty of a Court of Justice to consider and decide whether the conditions of jurisdiction are fulfilled and if they are not being fulfilled, to pronounce the sentence of the law upon the illegal order.

"One of the conditions of jurisdiction is, in my judgment, that the Governor-in-Council shall decide that the particular measure in question is necessary or advisable for reasons which have some relation to the perils actual or possible of real or apprehended war, (I leave the case of insurrection out of view as having no relevancy) or as having some relation to the prosecution of the war or the objects of it."

R. v. *Comptroller Gen'l of Patents*, [1941] 2 K.B. 306 at p. 318. The language of the preamble is not precisely that employed by the statute, but in relation to this class of persons it appears, I should say, from the Order that the condition has been satisfied. The words "deport" and "repatriation" are appropriate to the return to his native country of an alien. The power of Parliament to deal with aliens is unquestioned, and that field is under delegation to the Governor in Council. The obligation of his own state to receive him must be deemed correlated with the power of the foreign state to expel him, and this has been implemented here by a direction of General MacArthur to which I shall refer later.

As is seen, the second recital of the preamble speaks of "other persons of the Japanese race", but from the operative paragraphs of the Order it is clear that this language refers to both naturalized persons of the Japanese race and natural born British subjects of Canada who have a Japanese racial origin. The

Can.
S.C.
REFERENCE RE DEPORTATION OF JAPANESE.
Rand J.

Order in relation to naturalized subjects must be read with Order 7356 which deals only with that class and is as follows:

"Whereas by Order in Council P.C. 7355 of 15th December, 1945, provision is made for the deportation of persons who, during the course of the war, have requested to be removed or sent to an enemy country or otherwise manifested their sympathy with or support of the enemy powers and have by such actions shown themselves to be unfit for permanent residence in Canada;

"Therefore, His Excellency the Governor General in Council, on the recommendation of the Secretary of State (concurred in by the Secretary of State for External Affairs) and under the authority of the War Measures Act, Chapter 206 of the Revised Statutes of Canada, 1927, is pleased to order and doth hereby order as follows:—

"1. Any person who, being a British subject by naturalization under the Naturalization Act, Chapter 138, R.S.C. 1927, is deported from Canada under the provisions of Order in Council P.C. 7355 of 15th December, 1945, shall, as and from the date upon which he leaves Canada in the course of such deportation, cease to be either a British subject or a Canadian national.

"2. The Secretary of State shall publish in the *Canada Gazette* the names of all persons who have ceased to be British subjects or Canadian nationals by virtue of this Order."

As in the case of Japanese nationals, these two Orders show the jurisdictional decision of the Governor in Council in relation to naturalized Japanese. But a question arises of the relation between revocation by Order 7356 and deportation under Order 7355. No doubt the expulsion was intended to be followed by alienage of the deported persons; but if no or only a partial effect has been brought about by Order 7356, does that modify the operation of Order 7355?

The *Naturalization Act* contains a number of grounds upon which the revocation of naturalization can be effected, but the only one of interest here is that set forth in s. 9 of c. 138, Revised Statutes of Canada, 1927, which is as follows:

"9. Where the Governor in Council, upon the report of the Minister, is satisfied . . . . that the person to whom the certificate was granted has shown himself by act or speech to be disaffected or disloyal to His Majesty, the Governor in Council shall by order revoke the certificate."

Order 7356 does not refer to any naturalized person being "disaffected or disloyal": it deals only with the deportation of a person under Order 7355, and this in turn puts the deportation

Can.
S.C.
REFERENCE RE DEPORTATION OF JAPANESE.
Rand J.

on the fact of a request for repatriation which has not been revoked in writing prior to September 1, 1945. Are we to imply from this language that the Governor in Council is satisfied in each case of the disaffection or disloyalty of the naturalized person? Here is a penal provision of a drastic nature, and as it affects British subjects, I am unable to supply that conclusion by implication. The revocation for that cause seems to require the aid of the *War Measures Act* to enable the Governor in Council, as distinguished from the Secretary of State for Canada, to act under the *Naturalization Act*, but in either case, action must be strictly within the provisions of the latter as to grounds in order to bring about the revocation. It was argued that as Parliament could rescind the adoption, the Governor in Council could revoke on any ground he might see fit: but that view, I think, misconceives the foundation of the *Naturalization Act*. The legislative efficacy under which the naturalization arises is that of the *British Nationality and Status of Aliens Act*, Part II of which has been "adopted" by the Canadian Parliament. That word would seem to mean simply that the Canadian Parliament has cleared the way for the extension to Canada of an Imperial Act providing an empire naturalization. That Act directly authorises the Canadian Government to exercise the powers it creates. The form of the Canadian statute is not *ex facie* strictly in accordance with that conception, but if we look upon it as an exercise of Canadian legislative jurisdiction then that jurisdiction must be deemed to be by way of a specific investment additional to the *B.N.A. Act*, but limited strictly to the precise language of the Imperial Act. No question of the *Colonial Laws Validity Act* arises because of the express power under the statute to rescind the adoption. But naturalization effecting an empire-wide status lies outside of the legislative power of Canada under s. 91 of the *Constitutional Act*: and as the conditions of revocation have not been complied with, the status of British subject has not been destroyed.

Another view of these statutes might be that each member of the Commonwealth with concurrent action of the others itself enacts empire-wide legislation which in relation to grant or revocation of naturalization it would be at liberty to amend at its pleasure without affecting the recognition accorded by the other members. But that is not the legislative design of the *British Nationality and Status of Aliens Act*.

But Order 7356 declares a cessor also of being a Canadian national and in this goes beyond status. By the *Canadian Nationals Act*, R.S.C. 1927, c. 21, a Canadian national is a British

subject who is a Canadian citizen within the definition of the *Immigration Act*, R.S.C. 1927, c. 93. The latter for the purpose here requires a Canadian domicile: and the right to residence in Canada appears to be what the Order takes away from the deported person. With the country of origin consenting to his return, the requirement for permanent exclusion is obtained. In these circumstances I am unable to say that the failure in revocation of naturalization is of such a nature as to affect the operation of Order 7355.

In relation to the third class, natural born British subjects resident in Canada, serious questions arise.

I observe first that the expulsion of persons in the other two classes is in conjunction with an order or the equivalent of an order made by General MacArthur for their reception as repatriates in Japan. The letters passing between the Governments of Canada and the United States make it clear that what was asked for and conceded was "repatriation". That word is defined in Order 7355 in effect as either a "return" to Japan or "being sent" to that country, but obviously that definition is irrelevant to the meaning of the word as it is used in the communications between the two countries. "Repatriation" means simply a return to the patria or fatherland, and it has no relation to the compulsory transfer of a natural born British subject to a foreign country. Whatever legal rights it may confer to enter or to remain in Japan do not apply to such a subject.

Banishment with or without the loss of citizenship status or rights, as an effective exile over a period of time, whatever its feasibility in the early political organization of the world is today, considering the tenacity with which every foot of land and water is now sought and held, a legislative and executive impossibility. Admittedly one sovereignty has no legal power to force its own citizen into the territory of another. It is quite the case that banishment and exile were known to the common law, but in each it was either a deportation to politically unorganized lands, a transportation to a British colony by way of punishment for a criminal offence, or a voluntary exile made either by way of abjuration of the realm or as fulfillment of a condition in a pardon or other remission or as an avoidance of punishment requiring self-exile. In none of these situations is there the slightest suggestion of compulsory invasion of another's territory.

The process and effects of deportation of natural born British subjects under the Order seem to be these: a physical compulsion to leave Canadian shores; a *de facto* but not *de jure* entry upon Japanese territory; no citizenship rights in Japan and a retention of the rights of Canadian citizenship.

Now I must deal with this case as if, instead of a Canadian national of Japanese origin, I were dealing with that of a natural born Canadian national of English extraction who sympathized with Mosley or a French-Canadian national who supported Petain or an Irish-Canadian national who thought de-Valera's course justified. I am asked to hold that, without a convention with those countries, the Government may, under the *War Measures Act* and without affecting the national status or the citizenship rights of these persons, issue an order for their deportation, to those foreign shores. I am unable to agree with that contention.

In these days, we are familiar with exchanges or transfers of sections of population from one country to another by agreement or imposed, but they are carried out as changes of nationality as well as of country: a deprivation of citizenship rights by one state and an investment of them by the other. That is not what is done or intended to be done by the Order with which I am dealing.

I think that Parliament in enacting the *War Measures Act* must have contemplated, as a fundamental assumption underlying the statute, the delegation of legislative power of a strictly legal character only, and must have intended to restrict the Governor in Council to measures or actions in which full juridical quality would inhere: that power without recognized legal character would be excluded. What is proposed here is not juridical: it is an act envisaging the violation of the sovereign rights of another state by an invasion of its territory and an affront to its dignity as represented by the occupying power. This quality, of course, is not present in the case of an alien: there the authority of expulsion is a necessary corollary to that of the right to exclude: *A.-G. Can.* v. *Cain*, [1906] A.C. 542: but the fundamental distinction between the two cases is, I think, unquestionable. As a further illustration of the principle invoked, I mention the presumption against the power to make retroactive orders, which I suggest would bind the Governor in Council, though there is no such restriction on Parliament.

On another ground I would come to the same conclusion. In Order 7355 the recital which, among others, relates to natural born British subjects, refers only to a request to be sent to Japan, implying, as I think, a continuing request: the general recital of "desirability" that provision be made to deport and

Can.
S.C.
REFERENCE RE DEPORTATION OF JAPANESE.
Rand J.

the declaration of the necessity to make provision accordingly, apply to all three classes. The right to revoke the request by the natural born Canadian national is preserved up to the issue of the order for deportation and this time limit is simply an administrative convenience. "Deportation" connotes only a single act and no period of time beyond the accomplishment of the expulsion. There is nothing in the Order to prevent such a Canadian from returning at once to the land of his birth. The contrast with the alien is obvious; once an alien leaves this country, he must establish a right given him by the Legislature to return: at common law he has no right to enter which is recognized in our Courts: *Musgrove* v. *Toy*, [1891] A.C. 272. Considering, then, that the operation of the Order against the British subject by birth is placed solely upon a request which implies a continuing desire to leave this country, that the Order contemplates as well the withdrawal of persons voluntarily and enables the Minister to make financial arrangements to that end, in conjunction with the other circumstances I have detailed, I find in the Order clear evidence that that act of expulsion is not deemed by the Governor in Council either necessary or advisable for the peace, order or welfare of this country by reason of war; and the essential condition of the provision for compulsion is lacking.

The members of the family of a Canadian national may under Order 7355 be included in the deportation order. If revocation of naturalization takes place, the status of the wife and minor children may thereby be affected. But where by the Order only incidents of the status of the husband and father are reached, the full citizenship rights of the wife and minor children continue. It was not seriously urged that the Governor in Council has deemed the expulsion of such persons advisable or necessary to the peace or welfare of Canada for any reason arising out of war; the most suggested was that it was advisable to the peace and welfare of individual families; but that purpose does not seem to be among the objects of Parliament's delegation of legislative power to the Governor in Council.

Mr. Cartwright argued that the war emergency must be deemed to have ended when the *War Measures Act* became inoperative on January 1st of this year. But that, I think, confuses the emergency with a particular period of it to which particular legislation is related. The emergency as a state of fact underlies both the *War Measures Act* and the *National Emergency Transitional Powers Act*, 1945 (Can.), c. 25 which came into force on January 1, 1946.

Can.
S.C.
REFERENCE RE DEPORTATION OF JAPANESE.
Kellock J.

Then it was argued that s. 9 of Order 7355 is *ultra vires* because of conflict with s. 6 of the *War Measures Act*. But an "order" for deportation under Order 7355 means one that carries with it the force of law. The "legal custody" which is declared relates only to the agents or instruments by which the restraint is effected: *Liversidge* v. *Sir John Anderson*, [1942] A.C. 206 at p. 273.

I would therefore answer the question as follows:

1. Order 7355 is *intra vires* of the Governor in Council in relation to Japanese nationals and to persons of the Japanese race naturalized under the *Naturalization Act* of Canada as well as to persons voluntarily leaving Canada; but is *ultra vires* in relation to the compulsory deportation of natural born British subjects resident in Canada, and of wives and children under 16 who do not come within the first two classes.

2. Order 7356 is *ultra vires* of the Governor in Council to the exient that it purports to revoke the naturalization of persons of the Japanese race under the *Naturalization Act*, but it is *intra vires* so far as it takes away incidental rights and privileges of such persons as Canadian nationals.

3. Order 7357 is *intra vires* of the Governor in Council, subject to the observance of the requirements of the *Naturalization Act* as to grounds for the revocation of naturalization.

I hereby certify to His Excellency the Governor-General in Council that the foregoing are my reasons for the answer to the question referred herein for hearing and consideration.

KELLOCK J.:—By Order in Council of January 8, 1946, P.C. 45, His Excellency The Governor-General in Council referred to this Court pursuant to the provisions of s. 55 of the *Supreme Court Act*, R.S.C. 1927, c. 35 the following question, namely:

"Are the Orders in Council, dated December 15, 1945, being P.C. 7355, 7356 and 7357, ultra vires of the Governor in Council either in whole or in part, and, if so, in what particular or particulars and to what extent?"

The first named Order, P.C. 7355, contains the following recitals:

"Whereas during the course of the war with Japan certain Japanese nationals manifested their sympathy with or support of Japan by making requests for repatriation to Japan and otherwise;

"And whereas other persons of the Japanese race have requested or may request that they be sent to Japan;

Can.
S.C.
REFERENCE RE DEPORTATION OF JAPANESE.
Kellock J.

"And whereas it is deemed desirable that provisions be made to deport the classes of persons referred to above;

"And whereas it is considered necessary by reason of the war, for the security, defence, peace, order and welfare of Canada, that provision be made accordingly;

"Now, therefore, His Excellency the Governor General in Council, on the recommendation of the Minister of Labour, concurred in by the Secretary of State for External Affairs, and under the authority of the War Measures Act, Chapter 206 of the Revised Statutes of Canada, 1927, is pleased to make and doth hereby make the following Order."

By s. 2(1), it is provided that every person of 16 years of age or over other than a "Canadian national" who is a national of Japan resident in Canada and who (*a*) has, since the date of declaration of war by the Government of Canada against Japan on December 8, 1941, made a request for repatriation; or (*b*) has been in detention at any place in virtue of an order made pursuant to the provisions of the Defence of Canada Regulations or of Order in Council P.C. 946, of February 5, 1943, as amended by P.C. 5637, of August 16, 1943, and was so detained as at midnight of September 1, 1945, may be deported to Japan. By s-s. (2), provision is made for the deportation to Japan of every naturalized British subject of the Japanese race of 16 years of age or over resident in Canada who has made a request for repatriation, provided that the same had not been revoked in writing prior to midnight of September 1, 1945. Subsection (3) makes similar provision with respect to natural born British subjects of the Japanese race of 16 years of age or over, provided that requests in the case of these persons are not revoked in writing prior to the making by the Minister of Labour of a deportation order. By s-s. (4), the Minister may include in any order for deportation the wife and children under 16 years of age of any deportee.

By s. 3 a request for repatriation shall be deemed final and irrevocable for the purposes of the order, subject only to the provisions for revocation already mentioned.

By s. 9, it is provided that any deportee detained pending deportation or placed under restraint in the course of deportation shall be deemed to be in legal custody.

By the second Order, P.C. 7356, it is provided, with respect to any person naturalized under the provisions of the *Naturalization Act*, R.S.C. 1927, c. 138, and who is deported, that he shall, from the date upon which he leaves Canada, cease to be a

Can.
S.C.
REFERENCE RE DEPORTATION OF JAPANESE.
Kellock J.

British subject or a Canadian national. By the *Canadian Nationals Act*, R.S.C. 1927, c. 21 it is provided:

"2. The following persons are Canadian Nationals, viz:—

"(*a*) Any British subject who is a Canadian citizen within the meaning of the Immigration Act;

"(*b*) The wife of any such citizen;

"(*c*) Any person born out of Canada, whose father was a Canadian National at the time of that person's birth, or with regard to persons born before the third day of May, one thousand nine hundred and twenty-one, any person whose father at the time of such birth, possessed all the qualifications of a Canadian National, as defined in this Act.

"3(1)(*a*) Any person who by reason of his having been born in Canada is a Canadian National, but who at his birth or during his minority became under the law of Great Britain or of any self-governing Dominion of the British Empire, a national also of that Kingdom or Dominion, and is still such a national; and

"(*b*) Any person who though born out of Canada is a Canadian National;

may, if of full age and not under disability, make a declaration, renouncing his Canadian nationality.

"(2) Such declaration may be made before a notary public or other person authorized to administer oaths in the locality in which the declaration is made, and may be in the form set out in the Schedule to this Act.

"(3) The declarant shall transmit his declaration to the Secretary of State of Canada and upon the Secretary of State being satisfied of the sufficiency of the declaration and that it has been duly executed, it shall be filed of record, whereupon the declarant shall cease to be a Canadian National, and a certified copy of the declaration shall be forwarded to the declarant with an endorsement thereon that the original declaration has been filed of record."

By the third Order, P.C. 7357, provision is made for the appointment of a Commission to make inquiry concerning the activities, loyalty and the extent of cooperation with the Government of Canada during the war of Japanese nationals and naturalized persons of the Japanese race in Canada in cases where their names are referred to the Commission by the Minister for investigation with a view to recommending whether, in the circumstances of any such case, such person should be deported. It is further provided that notwithstanding any provision of P.C. 7355, the Commission may, at the request of the Minister inquire into the case of any naturalized British sub-

Can.
S.C.
REFERENCE RE DEPORTATION OF JAPANESE.
Kellock J.

ject of the Japanese race who has made a request for repatriation which is final under the terms of the said Order in Council and may make such recommendations with respect to such case as the Commission deems advisable. It is further provided that any person of the Japanese race recommended by the Commission for deportation shall be subject to deportation under the provisions of Order in Council P.C. 7355, and where any person is so recommended for deportation he shall, from the date on which he leaves Canada in the course of such deportation, cease to be a British subject or a "Canadian national."

All of the above Orders purport to be made pursuant to the provisions of the *War Measures Act*, R.S.C. 1927, c. 206.

On December 28, 1945, P.C. 7414 [[1946] S.O.R. 5] was passed. By this Order it is recited that the *National Emergency Transitional Powers Act*, 1945 (Can.), c. 25 is to come into force on the first of January, 1946, and by its terms provides that on and after that day the war, for the purposes of the *War Measures Act*, shall be deemed no longer to exist, that under s. 4 of the first mentioned Act the Governor in Council may order that Orders and Regulations lawfully made under the *War Measures Act*, or pursuant to authority created thereunder in force immediately before January 1, 1946, shall, while the *National Emergency Transitional Powers Act*, 1945, is in force, continue in full force and effect subject to amendment or revocation thereunder, and that all Orders and Regulations so made and in force immediately before the day the *National Emergency Transitional Powers Act*, 1945, comes into force, shall, while that Act is in force continue in full force and effect subject to amendment or revocation under that Act.

In pursuance of the Order of reference to this Court, we heard argument on behalf of the Attorney-General of Canada, the Attorney-General of British Columbia and the Cooperative Committee of Japanese Canadians. Counsel for the Attorney-General of British Columbia supported the submissions of counsel for the Attorney-General of Canada, while counsel for the Committee attacked the validity of the Orders in question.

Mr. Cartwright argues that the Orders in Council here in question deal with a matter which, in the absence of the emergency of war, would fall within the competence of the provincial Legislatures as being property and civil rights. He contends that to restrict the liberty of the subject where no crime has been committed is an interference with a civil right and he referred to the decision of the Court of Appeal of Ontario in *R.* v. *MacKenzie*, [1946] 1 D.L.R. 584 at p. 594, 85 Can. C.C. 233 at pp. 239-40, [1945] O.R. 787 at p. 796. The contention is that the Orders in Council are in their nature preventive and are not within the sphere of criminal law. It is conceded, however, that, by reason of war, a new aspect of the business of government arises which justifies legislation by the Dominion Parliament in this aspect on matters normally exclusively within s. 92 of the *B.N.A. Act*. It is also conceded that such legislation may continue to be justified after actual war has ceased but while conditions arising out of war continue, and reference is made to *Fort Frances P. & P. Co.* v. *Manitoba Free Press Co.*, [1923], 3 D.L.R. 629, A.C. 695. Counsel contends, however, that Parliament by the enactment of the *National Emergency Transitional Powers Act*, 1945 has recognized that the emergency of war which justified or required the enactment of the *War Measures Act* ceased on January 1, 1946. It is further contended that as the Act of 1945 does not include the provisions contained in cl. (*b*) of s-s. (1) of s. 3 of the *War Measures Act*, this constitutes a declaration by Parliament that in respect to the matters included in such clause there is no continuing necessity for the exercise of extraordinary powers by the Governor in Council from January 1, 1946, by reason of the emergency of war or of any continuing transitional post-war emergency.

Can.
S.C.
REFERENCE RE DEPORTATION OF JAPANESE.
Kellock J.

Under the provisions of s. 2 of the *War Measures Act*, the issue of a proclamation is to constitute conclusive evidence that war, real or apprehended, exists or has existed for any period of time therein stated and of its continuance until, which has not yet happened, by the issue of a further proclamation, it is declared that the war no longer exists.

The Act of 1945 recites among other things as follows: "And whereas the national emergency arising out of the war has continued since the unconditional surrender of Germany and Japan and is still continuing; And where as it is essential in the national interest that certain transitional powers continue to be exercisable by the Governor in Council during the continuation of the exceptional conditions brought about by the war and it is preferable that such transitional powers be exercised hereafter under special authority in that behalf conferred by Parliament instead of being exercised under the *War Measures Act;* And whereas in the existing circumstances it may be necessary that certain acts and things done and authorized and certain orders and regulations made under the *War Measures Act* be continued in force and that it is essential that the Governor in Council be authorized to do and authorize such further acts and things

Can.
S.C.
REFERENCE RE DEPORTATION OF JAPANESE.
Kellock J.

and make such further orders and regulations as he may deem necessary or advisable by reason of the emergency and for the purpose of the discontinuance, in an orderly manner as the emergency permits, of measures adopted during and by reason of the emergency.''

By s. 2, the Governor in Council may do and authorize such acts and things and make from time to time such Orders and Regulations, as he may, by reason of the continued existence of the national emergency arising out of the war against Germany and Japan, deem necessary or advisable for the purpose of certain specified matters including, by cl. (*e*), ''continuing or discontinuing in an orderly manner, as the emergency permits, measures adopted during and by reason of the war''. Section 4 provides:

''4. Without prejudice to any other power conferred by this Act, the Governor in Council may order that the orders and regulations lawfully made under the *War Measures Act* or pursuant to authority created under the said Act in force immediately before the day this Act comes into force shall, while this Act is in force, continue in full force and effect subject to amendment or revocation under this Act.''

By s. 5, provision is made for the Act to come into force on January 1, 1946, and it is declared that ''on and after that day the war against Germany and Japan shall, for the purposes of the *War Measures Act*, be deemed no longer to exist''.

It would appear that the effect of the declaration in s. 5 just referred to is, so far as the *War Measures Act* is concerned, to render that statute no longer available as authority for Orders or Regulations thereunder. However, the statute of 1945 becomes the authority for the Orders and Regulations for which it provides, and an Order in Council of December 28, 1945, P.C. 7414, passed under its provisions and pursuant to s. 12 of the *Interpretation Act*, provides that ''all orders and regulations lawfully made under the War Measures Act or pursuant to authority created under the said Act in force immediately before the day The National Emergency Transitional Powers Act, 1945, comes into force shall, while that Act is in force, continue in full force and effect subject to amendment or revocation under that Act''. I think, therefore, that although the Orders in Council here in question cease to derive any force from the provisions of the *War Measures Act* from and after January 1, 1946, after that date, they derive their force from the Statute of 1945, by reason of the existence of the emergency therein referred to. I do not think, therefore, that effect can be given to the argument of Mr. Cartwright that Parliament has declared by the Statute of 1945 that there is no continuing necessity for the exercise of such powers as were formerly contained in s-s. (1) of s. 3 of the *War Measures Act*.

Can.
S.C.
REFERENCE RE DEPORTATION OF JAPANESE.
Kellock J.

With the exception of the above argument, no other attack (apart from the question of severability) was made upon the Orders which affects the validity of the Orders with respect to nationals of Japan. As I know of no other ground of invalidity in this respect, I would hold the Orders valid with respect to this class of person.

It was next argued on behalf of the Committee that the Orders in Council in question in so far as they provide for the removal from Canada of persons other than aliens are not authorized by the provisions of the *War Measures Act*.

It will be convenient, in considering this submission to quote s. 3 of that Act:

''3. The Governor in Council may do and authorize such acts and things, and make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war, invasion or insurrection deem necessary or advisable for the security, defence, peace, order and welfare of Canada; and for greater certainty, but not so as to restrict the generality of the foregoing terms, it is hereby declared that the powers of the Governor in Council shall extend to all matters coming within the classes of subjects hereinafter enumerated, that is to say.''

As will be observed, ''deportation'' is not defined in the Act but by s. 1(*a*) of P.C. 7355 it is defined as ''the removal pursuant to the authority of this Order of any person from any place in Canada to a place outside Canada.'' (It is also to be observed that the words used in subsections (1) (2) and (3) of s. 2 of P.C. 7355 are ''deported to Japan.'') The contention on behalf of the Committee in effect is that these provisions are not authorized by the provisions of the *War Measures Act*.

Counsel for the Attorneys-General contend that ''deportation'' as used in the statute is wide enough to include the meaning given to it by the definition in the Order but that, in any event, the definition in the Order is authorized by the earlier general language of s-s. (1) of the Act.

In *Re Gray*, 42 D.L.R. 1, 57 S.C.R. 150, Fitzpatrick C.J.C. said with reference to the specified subjects in the subsection at p. 3 D.L.R., p. 158 S.C.R., ''that the reason for introducing specifications was that those specified subjects were more or less remote from those which were connected with the war, and it was

Can.
S.C.
REFERENCE RE DEPORTATION OF JAPANESE.
Kellock J.

therefore thought expedient to declare explicitly that the legislative power of the government could go *even thus far*". Duff J., as he then was, said at p. 10 D.L.R., p. 168 S.C.R., "There is in the second branch of the section an enumeration (an enumeration let it be said rather of groups of subjects which it appears to have been thought might possibly be regarded as 'marginal instances' as to which there might conceivably arise some controversy whether or not they fell within the first branch of the section) . . . "

At p. 17 D.L.R., p. 177 S.C.R., Anglin J., as he then was, with whom Fitzpatrick C.J.C. also agreed, said "the specification should be deemed to be of cases in which there might be such doubt as to whether they fell within the ambit of the general terms—wide as they are—that *ex abundanti cautela*—it was safer to mention them specifically."

In Murray's New English Dictionary, "deportation" is defined as "to carry away", "carry off", "remove", "transport", "especially to remove into exile", "to banish". "Exile" by the same authority is defined as "enforced removal from one's native land according to an edict or sentence", "penal expatriation or banishment", "the state or condition of being penally banished", "enforced residence in some foreign land"; and "banish" is defined as "to put to the ban", "proclaim as an outlaw", "to outlaw", "to condemn (a person) by public edict or sentence to leave the country", "to exile, expatriate".

Counsel for the Attorney-General of Canada also called our attention to the definition of "deportation" in Webster's New International Dictionary, namely, the "Act of deporting, or state of being deported; banishment; transportation. In modern law, the removal, from a country, of an alien considered inimical to the public welfare;—distinguished from *transportation* and *extradition*". This last is evidently taken from the judgment of Gray J. in *Fong Yue Ting* v. *United States* (1893), 149 U.S. 698 at p. 709 as follows: "Strictly speaking, 'transportation,' 'extradition' and 'deportation,' although each has the effect of removing a person from the country, are different things, and have different purposes. 'Transportation' is by way of punishment of one convicted of an offence against the laws of the country. 'Extradition' is the surrender to another country of one accused of an offence against its laws, there to be tried, and, if found guilty, punished. 'Deportation' is the removal of an alien out of the country, simply because his presence is deemed inconsistent with the public welfare, and without any punishment being imposed or contemplated, either under the laws of the

Can.
S.C.
REFERENCE RE DEPORTATION OF JAPANESE.
Kellock J.

country out of which he is sent, or of those of the country to which he is taken."

Mr. Geoffrion points out that the Court in the case last cited was in fact dealing only with aliens and that the portion of the judgment quoted was *obiter*. He says in any event that the judgment is not binding on this Court.

The importance or relevance of the above situation is, of course, not from any binding effect it may have, but as illustrating a meaning assigned to the word in question in a modern statute dealing with a cognate subject. This use of the word in such a statute, although of another jurisdiction, leads naturally to the inquiry as to the meaning with which the word is used in statutes of Parliament and particularly in the *War Measures Act*.

To consider the word merely as the equivalent of "remove" or "carry away", as in fact it may be used, is to give effect to the contention of counsel for the Attorneys-General. To consider it, however, as the equivalent of "to remove into exile" or "to banish" involves the idea of penal consequences, such as was involved in the old sentence of outlawry now abolished in criminal cases by the provisions of s. 1031 of the *Cr. Code*. Such a meaning, in my opinion, is not apt in the case of citizens who have committed no offence, and as to whom there is no charge, no trial and no conviction, nor is it apt in modern times in application to a natural born citizen of a country as it involves the idea that there is some other country to which the citizen may be sent, which is under some obligation to receive him by reason of some previous connection of the citizen with that country. No country is under any obligation to receive the natural born citizens of another country and any attempt to force such a citizen upon another country would involve an infringement of sovereignty.

In Bar on Private International Law, 2nd ed., pp. 136-7, the author says: "However far a State may go in hospitably receiving foreigners, still foreigners who are dangerous to the community, or in need of relief from the poor law, may be refused a right of residence, and in extraordinary cases at least that right may be limited by special legislation to some other effect. On the other hand, no State can in these days effectively refuse to receive back into its own territory subjects of its own, who have been rejected by a foreign country. The banishment of a State's own subjects, a power which is still sometimes exercised as an exceptional political measure, in truth can only be exercised with the knowledge that it is contrary to the rules of

Can.
S.C.
REFERENCE RE DEPORTATION OF JAPANESE.
Kellock J.

public law, and that it is impossible to carry it out in so far as other States refuse to receive the exiles."

It may be that the removal of citizens of one country to another country can be arranged with the consent of the latter, but it is to be observed in the present case that the consent of Japan through General MacArthur, the Supreme Commander for the Allied Powers, is a consent to "repatriation" and nothing else. "Repatriation" is defined by Murray as "to return to one's country", "to restore a person to his *own* country." Thus in the present case there is no consent to the reception of natural born Canadians who have no country but Canada. Japan is a sovereign power subject to the control of the powers represented by General MacArthur and no act such as is here in question can be legally done without his consent. The fact that the removal of a natural born Canadian to another country would involve an infringement of the sovereignty of the latter country apart from the consent of that country at a time when Canada has formally recognized the end of hostilities, and that the Government of Japan is now as above stated, is, in my opinion, strong ground for construing the statute in question, in the absence of clear language, in a manner which does not involve such a result.

It is relevant here to refer to the official communication from the Government of Canada to General MacArthur to which the consent of the latter relates. That communication is contained in a letter of September 17, 1945, to the Canadian Ambassador at Washington and reads as follows:

"There are approximately 24,000 people of Japanese origin now resident in Canada. About 10,000 (including dependents) have expressed a desire to be repatriated to Japan. There are also about 500 Japanese nationals now interned whom it will probably be desired to deport. At a later date it is probable that there will be some additional deportees and voluntary repatriates who will also have to be removed. The Canadian Government is anxious to proceed with repatriation and deportation as soon as this can be done without causing you embarrassment. It is difficult to proceed with redistribution and relaxation of control over Japanese remaining in Canada until repatriates and deportees are removed.

"It is proposed that repatriates and deportees from Canada should be given free transportation for themselves and their effects and provided with a maintenance grant upon repatriation sufficient to take care of their immediate needs, also that they be permitted to transfer remainder of their funds to Japan.

Can.
S.C.
REFERENCE RE DEPORTATION OF JAPANESE.
Kellock J.

"You will appreciate the desire of the Canadian Government to proceed with these plans as soon as possible. The Canadian Government would be grateful for your advice as to the earliest date on which you would be prepared to have these people arrive in Japan."

It is to be observed that the word "deport" in the above communication is used only with respect to aliens. The word "repatriate" used with respect to the other persons is properly usable only with respect to persons other than natural born Canadian citizens. In my opinion, this communication affords the best evidence as to the sense in which the word "deport" is understood in this country. I have already indicated, nowhere in the communication is it used with reference to natural born Canadian citizens and even the word "repatriate" as applied to such persons is not appropriate. What is being done in the case of such persons is expatriation.

Counsel for the Committee further argues that where the personal liberty of the subject is in question, the view most favourable to the preservation of that liberty should be accepted. In *R.* v. *Halliday*, [1917] A.C. 260, Lord Atkinson said at p. 274: "For myself I must say that I never could appreciate the contention that statutes invading the liberty of the subject should be construed after one manner, and statutes not invading it after another, that certain words should in the first class have a meaning put upon them different from what the same words would have put upon them when used in the second. I think the tribunal whose duty it is to interpret the statute of the one class or the other should endeavour to find out what, according to the well-known rules and principles of construction, the statute means, and if the meaning be clear to apply it in that sense. Should the statute be ambiguous, equally susceptible of two meanings, one leading to an invasion of the liberty of the subject, and the other not, it may well be that the latter should be preferred on the ground of the presumed intention of the Legislature not to interfere with it."

Pollock C.B. in *Bowditch* v. *Balchin* (1850), 5 Exch. 378 at p. 381, 155 E.R. 165, cited with approval by Lord Wright in *Barnard* v. *Gorman*, [1941] 3 All E.R. 45 at p. 55, said at p. 381: "In a case in which the liberty of the subject is concerned, we cannot go beyond the natural construction of the statute."

I turn to statutes in force in 1927 when the statutory revision of that year was made. The *Immigration Act*, R.S.C. 1927, c. 93, s. 2(*c*) contains a definition of the word "deportation" for the purposes of that Act. It is defined as "the removal under

Can.
S.C.
REFERENCE RE DEPORTATION OF JAPANESE.
Kellock J.

authority of this Act of any rejected immigrant or other person, or of any immigrant or other person who has already been landed in Canada, or who has entered or who remains in Canada contrary to any provision of this Act, from any place in Canada at which such immigrant or other person is rejected or detained to the place whence he came to Canada, or to the country of his birth or citizenship".

"Immigrant" is defined in cl. (*h*) of the same section as "a person who enters Canada with the intention of acquiring Canadian domicile, and for the purposes of this Act every person entering Canada shall be presumed to be an immigrant *unless* belonging to one of the following classes of persons, hereinafter called 'non-immigrant classes'". Here follows a long list of classes, the first of which is "Canadian citizens; and persons who have Canadian domicile". "Canadian citizen" in turn is defined by cl. (*b*) of the section as "(i) a person born in Canada who has not become an alien; (ii) a British subject who has Canadian domicile; or (iii) a person naturalized under the laws of Canada who has not subsequently become an alien or lost Canadian domicile". By s. 3 the classes of persons who may be denied entry to Canada, or who, having entered Canada, may be removed, do not include Canadian citizens or persons with Canadian domicile. "Deportation" does not apply to them. The same situation exists under the provisions of the *Chinese Immigration Act*, R.S.C. 1927, c. 95; *Shin Shim* v. *The King*, [1938], 4 D.L.R. 88, S.C.R. 378, 70 Can. C.C. 321.

Again by the *Opium and Narcotic Drug Act*, 1929 (Can.), c. 49, s. 26, any *alien* convicted of certain enumerated offences may be deported under the provisions of the *Immigration Act* "relating to enquiry, detention and deportation." We have not been referred to and I have not been able to find any other statute of Parliament where the word "deportation" is used. In *Eshugbayi Eleko* v. *Government of Nigeria*, [1931] A.C. 662, the legislation there in question used the word "deported" with reference to the removal of a citizen from one part of Nigeria to another. I have not been able to find, however, any instance in which the word has been used in any statute in modern times with the connotation for which counsel for the Attorneys-General contend.

Apart from its now suggested meaning in the *War Measures Act*, therefore, the word has not been used previously by Parliament in any statute with regard to natural born citizens. This being so and the word itself having, in varying contexts, as set out above, a wider or a narrower meaning, I think it is

Can.
S.C.
REFERENCE RE DEPORTATION OF JAPANESE.
Kellock J.

the duty of the Court in such circumstances to adopt the canon of construction expressed in the passages from the judgments already cited and by Lord Hewart L.C.J. in *The King* v. *Chapman*, [1931] 2 K.B. 606 at p. 609, where, referring to Maxwell on Statutes, 7th ed., p. 244, he said: "'Where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of interpretation fail to solve, the benefit of the doubt should be given to the subject and against the Legislature which has failed to explain itself.'"

When one looks at the enumerated powers in cl. (*b*), "arrest, detention, exclusion and deportation", it is not unreasonable to conclude that in the case of citizens the powers of arrest, and detention added to the existing sanctions of the criminal law might well have been regarded by Parliament as ample, with the additional powers of exclusion and deportation in the case of other persons. All the powers given to the executive by the statute are emergency powers and in the scheme of things laid down in the statute it is not easy to see how Parliament either did or would contemplate the extension to natural born citizens, at least, of the power of removal from the state. These considerations, therefore, lead also to the conclusion which I have already expressed.

When once it is determined that the specified power of "deportation" is not as wide as the definition in P.C. 7355, I do not think that what is lacking can be made up, in a case like the present, by the general words with which the subsection begins. These words, or indeed, the particular word "deportation" itself, are not to be interpreted as authorizing what is really an illegal act, namely the infringement of the sovereignty of another country, unless that intention is clearly expressed. In my opinion, therefore, in so far as the Orders in Council provide for the removal of natural born Canadian citizens against their will, they are invalid. Consequently, the provisions which purport to prevent such persons withdrawing their requests at any time and in any manner cannot be supported.

Mr. Geoffrion also founded himself upon the word "exclusion," but admitted that, as commonly used at least, it means "to prevent entry". In Murray's New English Dictionary "exclude" is defined as "to bar or keep out (what is already outside);" "to shut out (persons, living things);" "to hinder from entering". It is by the same authority also defined as "to put out," "to banish," "expel." As used in s. 3 of the *War Measures Act* in the context of cl. (*b*) of s. 3(1) I think it is used as the equivalent of expulsion. In *A.-G. Can.* v. *Cain*,

Can.
S.C.
REFERENCE RE DEPORTATION OF JAPANESE.
Kellock J.

[1906] A.C. 542, Lord Atkinson, dealing with the validity of section 6 of the then *Alien Labour Act* of Canada, 60 & 61 Vict., c. 11 as amended by 1 Edw. VII., c. 13, s. 13 said at p. 547: "The power of expulsion is in truth but the complement of the power of exclusion. If entry be prohibited it would seem to follow that the Government which has the power to exclude should have the power to expel the alien who enters in opposition to its laws." I cite this passage only as an illustration of the use of the word "exclude" in relation to a subject-matter allied to the subject-matter here under consideration. The power of "deportation" is used in the statute in my opinion as the complement of the power of "exclusion".

Mr. Cartwright further argued that at the time that the *War Measures Act* was passed in 1914 and also at the time of the revision of 1927 Parliament could not have authorized the Governor in Council to make Orders or Regulations repugnant to Part II of the *British Nationality and Status of Aliens Act*, 1914 (Imp.), c. 17, as Parliament apart from a rescission of the adoption of that Act had not that power itself. He contends that the Orders here in question in so far as they affect naturalized British subjects of the Japanese race are repugnant to the provisions of the Imperial Act, and he contends that even had Parliament purported to legislate with respect to this class of person as in the Orders in Council, such legislation would be invalid by reason of the provisions of the *Colonial Laws Validity Act*, 1865 (Imp.) c. 63. Mr. Cartwright further contends that although Parliament since the passing of the *Statute of Westminster* in 1931 is not subject to such a limitation, nevertheless, Parliament was so subject in 1914 and 1927 and has not since 1931 re-enacted the *War Measures Act* so that there is no "law made after the commencement of this Act [the *Statute of Westminster*] by the Parliament of a Dominion": s. 2(1) of the *Statute of Westminster*. Mr. Geoffrion submits on the other hand that the Imperial Act of 1914 was never adopted by Canada. In view of s-s. (4) of s. 9 of the Imperial Act which provides for the rescission at any time by a Dominion which has adopted the provisions of Part II of the Act, it does not seem necessary to consider the bearing, if any, of the *Colonial Laws Validity Act*. It is first necessary to consider the question as to whether or not there was an adoption of Part II by Canada.

While it would doubtless have been sufficient and perhaps preferable for Parliament to have adopted the provisions of Part II merely by legislating in express terms to that effect, I think

Can.
S.C.
REFERENCE RE DEPORTATION OF JAPANESE.
Kellock J.

that Parliament has done the same thing in another way. By 10-11 Geo. V., c. 59, passed in 1920, the provisions of the former *Naturalization Acts* of 1914 were revived. Mr. Geoffrion points out that the first Act of 1914 was in fact passed by Parliament before the date of the passing of the Imperial Act and that the latter when passed differed from the Canadian Act. In the second Act of 1914 the differences between the Canadian and the Imperial legislation were enacted by Parliament and this Act contains a recital that Parliament had "adopted" the Imperial Act by the first Act of 1914. Mr. Geoffrion contends that in fact that was not so. However that may be, I think the Act of 1920 by reviving the Acts of 1914, both of which had been repealed in 1919, which would include the declaration in the second Act as to the adoption of the Imperial Act is a declaration by Parliament in 1920 that the Imperial legislation was adopted. In Foote's Private International Law, 5th ed., p. 35 the author states that Canada, Australia and Newfoundland did adopt the Act and I think that as to Canada that is a correct statement.

There has been no rescission of this adoption by Parliament and there is no attempt at rescission in the Orders in Council in question and it is provided, in any event, by s. 9(4) of the Imperial Act that rescission is not to affect legal rights previously acquired. Section 26(1), however, provides that nothing in the Act shall prevent any Legislature or Government of any British possession from treating differently different classes of British subjects. As to persons whose Certificates of Naturalization have been granted under the Act elsewhere than in Canada, it is provided by s-s. (5) of s. 7 of the Imperial legislation of 1918, 8 & 9 Geo. V., c. 38, that such a Certificate may be revoked in accordance with the section "with the concurrence of the Government of that part of His Majesty's dominions in which the certificate was granted".

As to naturalized persons, therefore, whose certificates were granted outside of Canada their status, by virtue of the Imperial Act, may not be affected by unilateral action on the part of Canada, but by reason of the provisions of s. 26(1) the rights and liabilities incidental to status are left to Canada. This provision was the law existing before the statute as applied in *Re Henry Adam* (1837), 1 Moo. P.C. 460, 12 E.R. 889. No one would suggest that the provisions of the *Immigration Act*, R.S.C. 1927, c. 93 which excluded from Canada British subjects coming within the classes mentioned in s. 3 of that Act are in any way in conflict with the provisions of Part II of the

Can.
S.C.
REFERENCE RE DEPORTATION OF JAPANESE.
Kellock J.

Imperial statute and the same may be said of the provisions of the *Chinese Immigration Act*, R.S.C. 1927, c. 95. It follows, therefore, that it is competent for Parliament to deny to British subjects naturalized outside of Canada the right of residence in Canada, but not to interfere with their status except upon the terms set forth in the Imperial Act, including the concurrence of whatever other government is concerned, nor in the case of persons naturalized in Canada to revoke naturalization except upon the terms of the Imperial Act, but again in the case of such persons it is competent to interfere with the rights and liabilities flowing from such status.

Order P.C. 7355 recites in the case of Japanese nationals that they have manifested their sympathy with or support of Japan by making requests for repatriation to Japan and otherwise, but there is no similar recital in the case of naturalized or natural born subjects. The recital with which P.C. 7356 begins is not to be interpreted, in my opinion, as broadening the scope of the recital in P.C. 7355. The loss of naturalization declared by Order 7356 is merely consequent upon physical removal of the persons concerned from Canada. It is not put upon any ground of disaffection upon which it might have been put under the provisions of s. 7 of the Imperial Act as amended in 1918. The omission so to place it must, in my opinion, be taken to be deliberate, and as the ground upon which it is in fact put is not available under the terms of the Act in question, Order 7356 is invalid in so far as it purports to revoke naturalization but valid otherwise, and the provisions of Order 7355 which deny to naturalized persons the right of continued residence in Canada are valid.

As to the fourth class of persons dealt with by the Orders in question, namely, the wives and children under 16 years of age "of any person for whom the Minister makes an order for deportation to Japan" my opinion is that the Orders in Council are invalid. It may be that some of the persons within this class are also within some one or other of the other classes and their position to that extent has already been dealt with. As to those who are not, however, there is nothing in any of the Orders to show that the Governor in Council considers their removal necessary or advisable within the ambit of the *War Measures Act*. The only attempt made in argument to support the Orders in the case of this class of persons was the contention that the provision for their enforced removal was a humanitarian measure to prevent separation of families. That is not sufficient

Can.
S.C.
REFERENCE RE DEPORTATION OF JAPANESE.
Kellock J.

however. In *R.* v. *Comptroller General of Patents*, [1941] 2 K.B. 306 at p. 316 Clauson L.J. said:

"It has been said that there might be a case where, on the face of it, a regulation was bad. If that means that if, on reading the Order in Council making the regulation, it seems in fact that it did not appear to His Majesty to be necessary or expedient for the relevant purposes to make the regulation, I agree that, on the face of the order, it would be inoperative" under this section.

This was referred to by Duff C.J.C. in the *Chemicals* case, [1943], 1 D.L.R. 248 at p. 256, S.C.R. 1 at p. 13, 79 Can. C.C. 1 at p. 10. In my opinion, the Orders in Council here in question fall within the circumstances described by Clauson L.J. and are to the extent already indicated, invalid.

Mr. Cartwright further argued that s. 9 of P.C. 7355 was invalid as contrary to s. 5 of the *War Measures Act* itself, in which it is implicit that a person held for deportation may with the consent of the Minister of Justice have the ordinary remedy by way of *habeas corpus*. Mr. Cartwright argued that the words "be deemed to be in legal custody" in s. 9 rules out this remedy.

I do not think this argument is well-founded. The argument is that an order valid on its face, would by reason of the words quoted, preclude all *habeas corpus* proceedings, even although the person held on the basis of such order did not belong to any of the classes mentioned in the Order in Council.

The point arose in *R.* v. *Home Secretary, Ex p. Greene*, [1941] 3 All E.R. 104; in the House of Lords at p. 388. In the Court of Appeal at p. 121 Goddard L.J. said: "I am of opinion that, where, on the return, an order or warrant which is valid on the face is produced, it is for the prisoner to prove the facts necessary to controvert it."

A little lower down on the same page he said:

"Before dealing with the subsidiary points raised by counsel for the appellant, I will deal with the question whether para. (8) of the regulation itself takes away the right to apply for a writ. It is said that, if it does not, the words 'shall be deemed to be in lawful custody' are otiose, and it is claimed that, if the order purports to show that the prisoner is detained under the regulation, he must be deemed to be in lawful custody. I do not think that this is the meaning of, or the reason for, the clause. If the order has been irregularly made, the prisoner is not detained in pursuance of but despite the regulation. It is to be noted that the Aliens Restriction Order, 1916, contained

Can.
S.C.
REFERENCE RE DEPORTATION OF JAPANESE.
Kellock J.

a similar provision. It provided that an alien might be put on board a ship and detained in such manner as the Secretary of State directed, and that, while so detained, should be deemed to be in lawful custody. In *R.* v. *Chiswick Police Station Superintendent, Ex p. Sacksteder*, [1918] 1 K.B. 578, I think that Pickford L.J., at p. 584, took the same view as that which I have expressed of this provision. The object of the clause, in my opinion, is to provide that, once an order of detention is made, the person named in the order may be kept in custody anywhere, and not only in a lawful prison, even if the Secretary of State has not specified in the order a particular place for his internment."

See also the judgment of MacKinnon L.J. at p. 116. In the House of Lords I refer to the judgment of Viscount Maugham at pp. 348-9; Lord MacMillan at p. 370; Lord Wright at pp. 380-1, 394; Lord Wright at pp. 402-3. In my opinion the principles enunciated in these judgments are applicable to the point raised by Mr. Cartwright and I do not think that the paragraph objected to is other than valid.

Mr. Cartwright further argued that the provisions of Order 7355 relating to the sale of real and personal property of deportees by the Custodian of Enemy Property was invalid as repugnant to s. 7 of the *War Measures Act*. "Appropriate" is defined by Murray among other definitions as "to take possession of for one's own". I think it is in this sense that "appropriation" is used in the *War Measures Act* and I do not think that the provisions of P.C. 7355 amount to appropriation in that sense.

Mr. Cartwright next argued that the Orders in Council constitute one scheme and the invalid parts are not severable from those parts which are valid. In fact it is stated in the factum of the Attorney-General of Canada that "the latter two Orders in Council have no operation except by reason of the first Order in Council. The three Orders in Council constitute one scheme the validity of which depends on the first Order in Council P.C. 7355". In my opinion, however, applying the proper principle to this question the Orders are severable.

The question submitted on this reference is as follows: "Are the Orders in Council dated December 15, 1945, being P.C. 7355, 7356 and 7357 *ultra vires* of the Governor in Council either in whole or in part and if so in what particular or particulars and to what extent?"

I would answer the question as follows:

Can.
S.C.
REFERENCE RE DEPORTATION OF JAPANESE.
Estey J.

1. Order P.C. 7355 is valid except in the following particulars:

(a) Subsection (3) of s. 2 and s. 3 are invalid in so far as they authorize the deportation of natural born British subjects who do not wish to leave Canada, and in so far as it prevents such persons from withdrawing consents at any time and in any manner.

(b) Subsection (4) of s. 2 is invalid *in toto*.

2. Section 1 of Order P.C. 7356 is invalid in so far as it provides for loss of the status of a British subject.

3. Order P.C. 7357 is valid save in so far as it may purport to authorize a departure from the provisions of the *British Nationality and Status of Aliens Act*, 1914.

I hereby certify to His Excellency the Governor-General in Council that the foregoing are my reasons for the answer to the question referred herein for hearing and consideration.

ESTEY J.:—The three Orders in Council P.C. 7355, 7356 and 7357, with which we are here concerned, were passed under the authority of the *War Measures Act*, R.S.C. 1927, c. 206, on December 15, 1945, and continued by Order in Council P.C. 7414 passed under the authority of s. 4 of the *National Emergency Transitional Powers Act*, 1945 (Can.), c. 25.

Counsel for the Committee submits, apart from any other question respecting the validity of these Orders, they ceased to be effective when the *National Emergency Transitional Powers Act* came into force on January 1, 1946. He points out that these Orders to be valid must be within the ambit of the *War Measures Act* and therefore passed as provided in the third section thereof "by reason of the existence of real or apprehended war." That Parliament in enacting the *National Emergency Transitional Powers Act* embodied in s. 5 thereof a declaration that on and after January 1, 1946, the war against Germany and Japan, for the purposes of the *War Measures Act*, should be deemed no longer to exist, and that therefore these Orders, even if valid when made on December 15, 1945, ceased to be effective as of January 1, 1946. Section 5 of the *National Emergency Transitional Powers Act*, 1945, reads as follows:

"5. This Act shall come into force on the first day of January, one thousand nine hundred and forty-six, and on and after that day the war against Germany and Japan shall, for the purposes of the *War Measures Act*, be deemed no longer to exist."

This provision that "the war against . . . Japan shall . . . be deemed no longer to exist" is specifically limited in its applica-

Can.
S.C.
REFERENCE RE DEPORTATION OF JAPANESE.
Estey J.

tion to the provisions of the *War Measures Act* and in effect merely removes the basis on which Orders in Council may be passed under that Act. It is not and does not purport to be a proclamation under s. 2 of the *War Measures Act*, declaring "that the war, invasion or insurrection no longer exists". Section 2 of the *War Measures Act* provides:

"2. The issue of a proclamation by His Majesty, or under the authority of the Governor in Council shall be conclusive evidence that war, invasion, or insurrection, real or apprehended, exists and has existed for any period of time therein stated, and of its continuance, until by the issue of a further proclamation it is declared that the war, invasion or insurrection no longer exists."

This section contemplates a period after the conclusion of actual combat during which the period of emergency caused by the war will continue. Parliament gave expression to the same view when it passed the *National Emergency Transitional Powers Act*, 1945, and embodied in the preamble thereof:

"The national emergency arising out of the war has continued since the unconditional surrender of Germany and Japan and is still continuing."

Parliament did recognize that the intensity and magnitude of the emergency had changed and diminished and under the provisions of this Act curtailed the extensive powers exercised by the Governor in Council under the *War Measures Act*.

The question whether an emergency exists or not is primarily a matter for Parliament, and through the *National Emergency Transitional Powers Act*, 1945, Parliament is doing in a general way what was done in special cases following the last war. One of these was considered in *Fort Frances P. & P. Co.* v. *Manitoba Free Press*, [1923], 3 D.L.R. 629 at p. 635, A.C. 695, where Viscount Haldane, in delivering the judgment of the Privy Council, stated: "But very clear evidence that the crisis had wholly passed away would be required to justify the judiciary, even when the question raised was one of *ultra vires* which it had to decide, in over-ruling the decision of the Government that exceptional measures were still requisite."

And at p. 636: "At what date did the disturbed state of Canada which the war had produced so entirely pass away that the legislative measures relied on in the present case became *ultra vires?* It is enough to say that there is no clear and unmistakable evidence that the Government was in error in thinking that the necessity was still in existence at the dates on

Can.
S.C.
REFERENCE RE DEPORTATION OF JAPANESE.
Estey J.

which the action in question was taken by the Paper Control Tribunal."

Apart from the provision embodied in s. 5 of the *National Emergency Transitional Powers Act*, 1945, there was no suggestion that the emergency arising out of the war no longer existed.

Then it is provided in s. 4 of the *National Emergency Transitional Powers Act*, 1945:

"4. Without prejudice to any other power conferred by this Act, the Governor in Council may order that the orders and regulations lawfully made under the *War Measures Act* or pursuant to authority created under the said Act in force immediately before the day this Act comes into force shall, while this Act is in force, continue in full force and effect subject to amendment or revocation under this Act."

Parliament by this provision expressly authorized the Governor in Council to continue not some but any or all of the Orders in Council already passed and still in force under the *War Measures Act*. The Governor in Council, acting under this authority, on December 28, 1945, passed Order in Council P.C. 7414 whereby it was ordered that:

". . . all orders and regulations lawfully made under the War Measures Act or pursuant to authority created under the said Act in force immediately before the day The National Emergency Transitional Powers Act, 1945, comes into force shall, while that Act is in force, continue in full force and effect subject to amendment or revocation under that Act."

This Order in Council, passed under said s. 4, continues as effective the Orders in Council here in question, namely P.C. 7355, 7356 and 7357.

The fact that Order in Council P.C. 7414 was made and dated December 28, 1945, and therefore prior to the coming into force of the *National Emergency Transitional Powers Act*, 1945, on January 1, 1946, does not affect its validity as such a procedure is provided for in s. 12 of the *Interpretation Act*, R.S.C. 1927, c. 1.

Counsel for the Committee submitted that if these Orders were still effective as above indicated that the provisions thereof, at least in part, exceeded the powers delegatd by Parliament under the *War Measures Act* to the Governor in Council. That the Governor in Council can only legislate by Order in Council within the powers so delegated is stated by my Lord the Chief Justice in *Re Chemicals*, [1943] 1 D.L.R. 248 at p. 260, S.C.R. 1 at p. 17, 79 Can. C.C. 1 at p. 15:

Can.
S.C.
REFERENCE RE DEPORTATION OF JAPANESE.
Estey J.

"The powers conferred upon the Governor in Council by the *War Measures Act* constitute a law-making authority, an authority to pass legislative enactments such as should be deemed necessary and advisable by reason of war; and, when acting within those limits, the Governor in Council is vested with plenary powers of legislation as large and of the same nature as those of Parliament itself (Lord Selborne in *The Queen* v. *Burah* (1878), 3 App. Cas. 889). Within the ambit of the Act by which his authority is measured, the Governor in Council is given the same authority as is vested in Parliament itself. He has been given a law-making power."

That it is an enactment to enable the Government to deal effectively in time of emergency with matters of security, defence, peace, order and welfare of Canada, and that its language should be so construed has been emphasized in this Court. Fitzpatrick C.J.C.: "It seems to me obvious that parliament intended, as the language used implies, to clothe the executive with the widest powers in time of danger. Taken literally, the language of the section contains unlimited powers": *Re Gray*, 42 D.L.R. 1 at p. 4, 57 S.C.R. 150 at p. 158.

Kerwin J.: "The provisions of s-s. (1) of s. 3 are in as wide terms as may be imagined. As Mr. Justice Anglin stated in *Re Gray*, 42 D.L.R. 1 'more comprehensive language it would be difficult to find' ": *Re Chemicals*, [1943], 1 D.L.R. 248 at p. 271, S.C.R. 1 at p. 29, 79 Can. C.C. 1 at p. 28.

It is under the *War Measures Act* that these three Orders in Council have been passed. There is much to be said for the view that they should be read and construed as a code or a unit designed in the main to carry out the express desires of those of the Japanese race who have requested the Government to arrange for their going to Japan. It is true that in addition to those who have made requests, these Orders provide for the return to Japan of those Japanese nationals who were interned during the war and remained so on September 1, 1945. They also provide for a Commission to inquire and recommend with respect to certain Japanese nationals and naturalized persons of the Japanese race in Canada. They also provide that the wives and the children under sixteen of any one with respect to whom an order for deportation has been made "may be included". These provisions will be more particularly discussed hereafter, but they do not detract from the main intent and purpose underlying the passage of these Orders in Council.

That these Orders do not apply to all of the Japanese race in Canada but in the main to those only who have requested that they be sent to Japan is made plain in the recitals to P.C. 7355:

"Whereas during the course of the war with Japan certain Japanese nationals manifested their sympathy with or support of Japan by making requests for repatriation to Japan and otherwise;

"And whereas other persons of the Japanese race have requested or may request that they be sent to Japan;

"And whereas it is deemed desirable that provisions be made to deport the classes of persons referred to above;

"And whereas it is considered necessary by reason of the war, for the security, defence, peace, order and welfare of Canada, that provision be made accordingly."

This Order includes provisions for revocation of the request on the part of those of the Japanese race who were naturalized or born in Canada. It seems appropriate that this purpose and intent be kept in mind throughout an examination of the provisions and construction of these Orders in Council. Such was the position taken in England as evidenced by the statement of Lord Maugham:

"My Lords, I think we should approach the construction of reg. 18B of the Defence (General) Regulations without any general presumption as to its meaning except the universal presumption, applicable to Orders in Council and other like instruments, that, if there is a reasonable doubt as to the meaning of the words used, we should prefer a construction which will carry into effect the plain intention of those responsible for the Order in Council rather than one which will defeat that intention": *Liversidge* v. *Sir John Anderson*, [1942] A.C. 206 at p. 219.

Counsel for the Committee submitted that the word "deportation" as used in s. 3 of the *War Measures Act* is restricted to the deportation of aliens, and as these Orders made under that Act deal with other than aliens, the Governor in Council has exceeded his authority. The standard dictionaries do not agree as to the precise meaning of this word. It is restricted to aliens in *Fong Yue Ting* v. *United States*, 149 U.S. 698 at p. 709. It is applied to native-born in *Eshugbayi Eleko* v. *Government of Nigeria*, [1931] A.C. 662. As defined in the *Immigration Act*, R.S.C. 1927, c. 93, it is not restricted to aliens. Upon this reference it is not necessary to precisely define the word. It is enough to emphasize that as it is applied in law it is a compulsory sending out of, or as stated in the Oxford Dictionary "a forcible removal", and that while it need not be restricted to aliens, it does apply to them.

Can.
S.C.
REFERENCE RE DEPORTATION OF JAPANESE.
Estey J.

Can.
S.C.
REFERENCE RE DEPORTATION OF JAPANESE.
Estey J.

The first of these Orders in Council, P.C. 7355, deals with four groups. Paragraph 2(1) provides for those Japanese nationals who either have made a request for repatriation since December 8, 1941, or were detained under the *Defence of Canada Regulations* and so detained on September 1, 1945. These Japanese nationals are aliens and as such are subject to deportation. The provision of the Order in Council providing for their deportation is valid. *A.-G. Can. v. Cain*, [1906] A.C. 542 at p. 546, where Lord Atkinson states as follows: "One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order, and good government, or to its social or material interests."

The second group is dealt with under s. 2(2) of P.C. 7355. It provides for the deportation of those of the Japanese race who have become naturalized, who have requested repatriation since the declaration of war and who have not revoked that request prior to midnight of September 1, 1945. It is contended that the Parliament of Canada has no power to revoke this naturalization except by virtue of the provisions of the *Naturalization Act*, R.S.C. 1927, c. 138. More particularly because it adopts, as Part II of the *Naturalization Act*, Part II of the *British Nationality and Status of Aliens Act*, 1914 (Imp.), c. 17, and amendments thereto as contemplated by the latter Act; the purpose and intent being to make for greater uniformity in the procedure and requirements of British nationality and the granting of naturalization certificates throughout specified parts of the British Commonwealth of Nations. It also provides for the revocation of these certificates. Section 9 in part reads as follows:

"9(1) Where the Governor in Council, upon the report of the Minister, is satisfied . . . that the person to whom the certificate was granted has shown himself by act or speech to be disaffected or disloyal to His Majesty, the Governor in Council shall by order revoke the certificate."

This provision was enacted by the Parliament of Great Britain in 1918, being an Act to amend the *British Nationality and Status of Aliens Act*, 1914 (8 & 9 Geo. V., c. 38), and was enacted in Canada by an Act to revise and amend the *Naturalization Act*, 1914 (1920 (Can.), c. 59). These amendments were made as a result of the experiences arising out of the last war

Can.
S.C.
REFERENCE RE DEPORTATION OF JAPANESE.
Estey J.

and deal specifically with and greatly enlarge the provisions for revocation of naturalization. Westlake's Private International Law, 7th ed., p. 371, referring to this particular legislation:

"The powers of revocation are large and somewhat vague; and the idea of a nationality conditional on good behaviour and on keeping in close touch with the British dominions is one new in English law. Experience alone will show whether it will be desirable to keep it as a permanent variety of citizenship."

And again, referring to the same legislation, at p. 372: "The legislature or government of any British possession has the same power to grant a certificate of naturalization as the secretary of state has under the Act; and the provisions of the Act as to the grant and revocation of the certificate of naturalization apply."

This s. 9 provides authority for the revocation of a certificate of naturalization when the recipient thereof shows "himself by act or speech to be disaffected or disloyal to His Majesty". A revocation at least by that government which has granted same and issued the certificate therefor. This appears from the entire section, but is made abundantly clear by s-s. (6) hereafter quoted, which goes further and envisages the cancellation by one government of a naturalization granted by another government in some other part of His Majesty's Dominions. It was contended by Mr. Geoffrion that Canada had not adopted Part II but had enacted a new Act modelled after the British Act. In either view, in my opinion the legislation provides for revocation by the government granting the naturalization.

It seems to me that if during a state of war and the emergency resulting therefrom one so naturalized makes a request in writing for repatriation, he does so because of the war and matters associated therewith. The making of such a request and the persistence therein, as in this case to September 1, 1945, a date after the cessation of hostilities, provides evidence that with respect to such a person his affections are not with Canada, the land of his adoption, but rather with the country from which he originally came. The effect of such conduct is a matter for the consideration of the responsible authorities of the State.

The only question with which we are here concerned is whether the Governor in Council had authority under the *War Measures Act* to provide for the deporation and the revocation of certificates of naturalization by Order in Council P.C. 7355. In my opinion the authority here exercised could in peacetime be exercised under the *Naturalization Act*. In time of emergency this can be accomplished under the *War Measures Act*

Can.
S.C.
REFERENCE RE DEPORTATION OF JAPANESE.
Estey J.

through the medium of the Governor in Council passing an Order in Council and therefore in my opinion this paragraph in Order in Council P.C. 7355 is valid: *Re Gray*, 42 D.L.R. 1, 57 S.C.R. 150.

The same s. 9 contains a sub-paragraph (6) reading as follows:

"9(6) Where a person to whom a certificate of naturalization has been granted in some other part of His Majesty's dominions is resident in Canada, the certificate may be revoked in accordance with this section by the Governor in Council, with the concurrence of the Government of that part of His Majesty's dominions in which the certificate was granted."

A paragraph to the same effect is in the Imperial Act (s. 7(5), c. 38, 8 & 9 Geo. V.). It expressly contemplates the revocation of naturalization certificates granted by some other government in His Majesty's Dominions, but that this right will not be exercised without the concurrence of that government which granted it. This may conceivably affect some parties, although we were supplied with no information upon the point. If there be some, we can rely upon the government in the exercise of these powers to respect any statutory obligations which it has assumed toward other component parts of the British Commonwealth of Nations. I do not think the existence of such an undertaking invalidates this paragraph.

The third group is dealt with under s. 2(3) of P.C. 7355. It is the natural-born British subject of the Japanese race who has "made a request for repatriation", and who has not "revoked in writing such request prior to the making by the Minister of an order for deportation". It is not only the request but the persistence in that request that is emphasized by s. 2(2) and 2(3). The naturalized citizen of the Japanese race might have revoked up to midnight of September 1, 1945. The natural-born British subject of the Japanese race may revoke at any time up to the moment of the Minister making his order. At the hearing counsel stated no order had been made and would not be made until after this decision is handed down. With respect to this group the right to revoke still remains, but unless that right to revoke is exercised as above indicated the Governor in Council concluded that with respect to such a person it was "necessary by reason of the war for the security . . ." he should go to Japan.

It is contended that these people are being compelled to go, are being deported. In reality they are going because they made the request to go and have persisted in that request as

Can.
S.C.
REFERENCE RE DEPORTATION OF JAPANESE.
Estey J.

evidenced by their not revoking same. The Government, in compliance with their request, has arranged for their transportation, the cost thereof, the disposition of their property and the dispatch of the proceeds therefrom to them in Japan, and has arranged for their own reception in Japan. In making these arrangements pursuant to the requests of the parties, it was only reasonable, if not necessary, that some date be fixed when revocation could not be made. It appears that this Order in Council fixes the last practical date upon which revocation ought to be permitted.

In no real sense can this be regarded as deportation. It is the procedure of deportation founded upon the request of the respective individuals to go to Japan and to become a citizen of Japan. It is not a "forcible removal". There is no element of compulsion, a going against the will that is present in deportation. For reasons of their own these British subjects, entitled to the benefits and privileges and obligated to discharge the duties and responsibilities of British subjects at a critical time in the history of this country, intimate a desire to return to the country of their racial origin and to remain and become citizens of that country.

If these same parties went to Japan and acquired a citizenship there, the *Naturalization Act*, R.S.C. 1927, c. 138, s. 16, provides for their being deprived of British citizenship. A similar provision is contained in the Imperial Act, 4 & 5 Geo. V., c. 17, s. 13. This cancellation of citizenship is recognized by the comity of nations. The basis, therefore, is disaffection as evidenced by the voluntary acquisition of nationality in the country of their now residence. The people with whom we are here concerned have expressed their disaffection for Canada and set forth their affection for Japan. They have coupled therewith a desire to go to Japan. The Governor in Council under the circumstances decided to facilitate their going by perfecting the arrangements therefor as above indicated. This is more a matter of policy for the Government than a question of jurisdiction for the Courts.

It should be observed that their British citizenship is not cancelled by these Orders in Council. It is therefore suggested that at some future date they may return to Canada. That is a matter for the authorities and one which they have no doubt considered. In any event, it does not affect the validity of the Order and is not a matter to be considered upon this reference.

In my opinion the Parliament of Canada could so legislate and this paragraph is valid.

Can.
S.C.
REFERENCE RE DEPORTATION OF JAPANESE.
Estey J.

The fourth group is dealt with in s. 2(4). It affects the wife and children under 16 years of age of any person for whom the Minister makes an order for deportation to Japan and provides that they "may be included in such order and deported with such person". It is possible that some of the wives may be classed under s. 2(1), 2(2) or 2(3), but apart from those it will be observed that they may be sent away notwithstanding they have not signed a request, nor is there any recital or statement on the part of the Governor in Council that "such is necessary or advisable for the security . . ." as required by the *War Measures Act*. Moreover, under the *Naturalization Act*, and particularly the amendments thereto in 1931, it may be that many of the wives were born in Canada, still retain their British citizenship and desire to remain here. There is, therefore, involved with respect to them an element of compulsion which under this Order in Council cannot be justified.

It was suggested that this paragraph was included that families might not be separated. That is desirable, and that may be all that was contemplated. As passed the paragraph goes much further. It may be amended under the provisions of s. 4 of the *National Emergency Transitional Powers Act* to take care of such cases and not involve the possibility of a British subject who has not signed a request, and therefore entitled to remain in Canada, being compelled to go to Japan because her husband has requested that he go. It is difficult to phrase a rule that should apply to all of the children, but generally speaking the children ought not to be sent unless both parents are going. In my opinion, as drafted this paragraph cannot be supported as valid.

Counsel for the Committee submits that s. 6 of P.C. 7355 is beyond the powers of the Governor in Council because it is in conflict with s. 7 of the *War Measures Act*. I do not think that contention is tenable. Section 7 of the *War Measures Act* is dealing with the appropriation of property by His Majesty for which compensation is to be made, and in the event of no agreement as to the compensation it will be determined by the Exchequer or other designated Court. In s. 6 of P.C. 7355 His Majesty is not appropriating property in that sense, but is taking possession of the property, disposing of same and transmitting the proceeds, less expenses incurred therewith, to the owner who has gone to Japan under one of these Orders. No question of compensation is involved. The sections deal with entirely different matters with respect to which there is no conflict.

Counsel for the Committee also submits that s. 9 of P.C. 7355 is *ultra vires* in that it is contrary to the provisions of s. 5 of the *War Measures Act*. Section 9 reads as follows:

Can.
S.C.
REFERENCE RE DEPORTATION OF JAPANESE.
Estey J.

"9. Any person for whom an order for deportation is made and who is detained pending deportation or who is placed under restraint in the course of deportation by virtue of any order or measure made or taken under Section 4 of this Order shall, while so detained or restrained, be deemed to be in legal custody."

Section 5 of the *War Measures Act* reads as follows:

"5. No person .who is held for deportation under this Act or under any regulation made thereunder, or is under arrest or detention as an alien enemy, or upon suspicion that he is an alien enemy, or to prevent his departure from Canada, shall be released upon bail or otherwise discharged or tried, without the consent of the Minister of Justice."

In particular counsel contends that s. 9 deprives a person detained under Order in Council P.C. 7355 of the right to have the legality of his detention inquired into under *habeas corpus* proceedings because by its express provisions the legality of the custody is finally determined in the words "deemed to be in legal custody", and therefore a return to the writ that the person was so detained would preclude further inquiry. While s. 5 of the *War Measures Act* specifically contemplates such proceedings with the consent of the Minister of Justice, this s. 9 purports to take away the right thereto and is therefore beyond the powers of the Governor in Council.

It should be observed that there are no express words in s. 9 which deny the party detained the right to apply for a writ of *habeas corpus* nor provide that a return as above indicated would preclude further inquiry. This writ and its availability to the subject is jealously guarded by the Courts. It is one of the methods by which the subject may question the legality of his detention and is regarded as an assurance to the subject that he will not be illegally held under arrest or detention. Therefore, it has become an established rule that only express language or language so definite as to point directly and imperatively to such a conclusion will be sufficient to deprive the subject of the benefit of this writ. In *Shin Shim* v. *The King*, [1938], 4 D.L.R. 88, S.C.R. 378, 70 Can. C.C. 321, notwithstanding the strong language of the *Chinese Immigration Act*, R.S.C. 1927, c. 95, a procedure by way of a writ of *habeas corpus* was held to be open to a party detained under that Act who desired to raise the question that she was a British subject,

Can.
S.C.
REFERENCE RE DEPORTATION OF JAPANESE.
Estey J.

notwithstanding the decision of the Controller of Chinese Immigration to the contrary.

The *Defence (General) Regulations*, 1939, as adopted by the Government of Great Britain, include as s. 8:

"8. Any person detained in pursuance of this regulation shall be deemed to be in lawful custody and shall be detained in such place as may be authorized by the Secretary of State and in accordance with instructions issued by him."

The words "deemed to be in lawful custody" are identical in meaning and effect to those used in s. 9 of P.C. 7355, and yet an application for writ of *habeas corpus* was heard notwithstanding the provisions of s. 8. *The King* v. *Secretary of State for Home Affairs*, [1941] 1 K.B. 72; *Greene* v. *Secretary of State for Home Affairs*, [1942] A.C. 284. In the former case s. 8 was not referred to, or if so not seriously pressed. In the latter it was specifically raised as a bar to the writ of *habeas corpus* both in the Court of Appeal and before the House of Lords. In the Court of Appeal ([1942] 1 K.B. 87), Lord Justice Goddard at pp. 116-17 specifically deals with this provision as follows:

"I will deal with the question whether para. (8) of the regulation itself takes away the right to apply for a writ. It is said that, if it does not, the words 'shall be deemed to be in lawful custody' are otiose, and it is claimed that, if the order purports to show that the prisoner is detained under the regulation, he must be deemed to be in lawful custody. I do not think that this is the meaning or the reason for the paragraph. If the order has been irregularily made the prisoner is not detained in pursuance of, but despite, the regulation. It is to be noted that the Aliens Restriction Order, 1916, contained a similar provision. It provided that an alien might be put on board a ship and detained in such a manner as the Secretary of State directed, and while so detained should be deemed to be in lawful custody. In *ex parte Sacksteder*, [1918] 1 K.B. 578, 584, I think that Pickford L.J. took the same view that I have expressed of this provision. The object of the paragraph, in my opinion, is to provide that once an order of detention is made, the person named in the order may be kept in custody anywhere, and not only in a lawful prison, even if the Secretary of State has not specified in the order a particular place for his internment, which he can do later."

In the House of Lords Lord Wright speaks as follows:

"In the first place, para. 8 of the regulation does not, in my opinion, render lawful a detention which is, apart from para. 8, unlawful and unwarranted by the Secretary's powers. It is inserted to settle possible doubts as to prison law and practice": *Liversidge* v. *Sir John Anderson*, [1942] A.C. 206 at p. 273.

Can.
S.C.
REFERENCE RE DEPORTATION OF JAPANESE.
Estey J.

A perusal of this s. 9 will indicate how apt are the words of Lord Goddard in ascertaining its effect. It reads in part:

"Any person ..... who is detained ..... or who is placed under restraint in the course of deportation. ..... shall ..... while so detained or restrained, be deemed to be in legal custody."

It is his detention or restraint, wherever that may be, that will "be deemed to be in legal custody". It does not preclude an inquiry as to whether that legal custody is justified or legal within the terms of the Order in Council. It does not therefore deprive the party so detained or restrained of his right to apply for a writ of *habeas corpus*. This suggested conflict between s. 9 and s. 5 in my opinion does not exist.

It is contended that the right of a British subject to reside and to remain in Canada is a civil right and further that s. 6 of Order in Council P.C. 7355 providing for the protection, sale and dispatch of the proceeds to Japan realized from the sale of property belonging to a party who has been deported, is also a matter of property and civil rights; that under the *B.N.A. Act* by s. 92(13) such matters are of provincial jurisdiction and in so far as the Parliament of Canada may purport to legislate with respect thereto, that legislation will be *ultra vires* and therefore in so far as these Orders in Council being legislation purporting to deal with these matters they are *ultra vires*.

The validity and effect of these contentions under normal conditions need not be here examined. These Orders in Council constitute legislation passed under circumstances of an emergency when the relationship between the Dominion and the Provinces is for the time being somewhat changed. Similar questions were raised in *Fort Frances P. & P. Co.* v. *Manitoba Free Press*, [1923], 3 D.L.R. 629, A.C. 695, and the answer there given is applicable to this case. Viscount Haldane (pp. 634-5 D.L.R., pp. 704-5 A.C.):

"It is proprietary and civil rights in new relations, which they do not present in normal times, that have to be dealt with; and these relations, which affect Canada as an entirety, fall within sec. 91, because in their fulness they extend beyond what sec. 92 can really cover. The kind of power adequate for dealing with them is only to be found in that part of the constitution which establishes power in the state as a whole. For it is

Can.
S.C.
REFERENCE RE DEPORTATION OF JAPANESE.
Estey J.

not one that can be reliably provided for by depending on collective action of the legislatures of the individual Provinces agreeing for the purpose. That the basic instrument on which the character of the entire constitution depends should be construed as providing for such centralised power in an emergency situation follows from the manifestation in the language of the Act of the principle that the instrument has among its purposes to provide for the State regarded as a whole, and for the expression and influence of its public opinion as such . . .

"Their Lordships, therefore, entertain no doubt that however the wording of secs. 91 and 92 may have laid down a framework under which, as a general principle, the Dominion Parliament is to be excluded from trenching on property and civil rights in the Provinces of Canada, yet in a sufficiently great emergency such as that arising out of war, there is implied the power to deal adequately with that emergency for the safety of the Dominion as a whole. The enumeration in sec. 92 is not in any way repealed in the event of such an occurrence, but a new aspect of the business of Government is recognised as emerging, an aspect which is not covered or precluded by the general words in which powers are assigned to the legislatures of the Provinces as individual units. Where an exact line of demarcation will lie in such cases it may not be easy to lay down *à priori*, nor is it necessary."

In view of the foregoing authority, the contentions that the provisions of these Orders in Council are in these regards *ultra vires* the Governor in Council under the *War Measures Act* are not tenable.

The second of these Orders in Council, P.C. 7356, provides that: "Any person who, being a British subject by naturalization . . . . is deported from Canada under the provisions of Order in Council P.C. 7355 . . . . shall . . . . cease to be either a British subject or a Canadian national."

It concerns only those of the Japanese race who have been naturalized in Canada and have been dealt with under s. 2(2) of Order in Council 7355, and for the reasons there discussed, in my opinion this Order in Council is valid.

The third Order in Council, P.C. 7357, sets up a Commission of three persons:

"1 . . . . to make inquiry concerning the activities, loyalty and the extent of co-operation with the Government of Canada during the war of Japanese nationals and naturalized persons of the Japanese race in Canada in cases where their names are referred to the Commission by the Minister of Labour for investigation with a view to recommending whether in the circumstances of any such case such person should be deported."

Can.
S.C.
REFERENCE RE DEPORTATION OF JAPANESE.
Estey J.

The authority of the Government to order such an inquiry cannot be questioned. The power of Parliament to legislate with respect to Japanese nationals and naturalized persons of the Japanese race has already been discussed when dealing with s. 2(1) and 2(2) of P.C. 7355. In any event, this Commission is but a fact-finding body with power to recommend to the Minister. Any order for deportation as a consequence thereof is upon the recommendation of the Minister, and the Governor in Council may pass such under s. 2(1) or 2(2) of P.C. 7355.

In the second paragraph thereof the Commission has power to review the case of any person of the Japanese race who was naturalized in Canada and who made a request for repatriation notwithstanding the provisions of Order in Council P.C. 7355. This is obviously but providing an opportunity for the reviewing of the case of one who has been ordered to be deported as a consequence of his request, and notwithstanding that he did not withdraw same before September 1, 1945.

In my opinion these Orders in Council, except with respect of one group dealt with in s. 2(4) of P.C. 7355, are as passed within the competency of the Governor in Council under the *War Measures Act;* that s. 2(4) of P.C. 7355, being as passed invalid, does not affect the validity of the other provisions of the Orders in Council. In my opinion with respect to the different groups the provisions of these Orders in Council are severable: *Brooks-Bidlake & Whittall Ltd.* v. *A.-G. B.C.*, [1923], 2 D.L.R. 189, A.C. 450.

The question submitted on this reference is as follows: "Are the Orders in Council, dated December 15, 1945, being P.C. 7355, 7356 and 7357, *ultra vires* of the Governor in Council either in whole or in part and, if so, in what particular or particulars and to what extent?"

In my opinion all of the Orders in Council are *intra vires* of the Governor in Council, with the exception of s. 2(4) of P.C. 7355.

GUARANTY TRUST CO. v. FLEMING AND TALBOT.

Ont.
H.C.

Ontario High Court, Urquhart J. May 15, 1946.

Discovery & Inspection III B 1, 5—Action by trustee of bankrupt against debtors—Right to examine bankrupt for discovery—Examining officer of bankrupt corporation—

An action brought by or in the name of the trustee in bankruptcy of a bankrupt against persons who are his debtors is an