July 1914

IN THE COURT OF APPEAL

IN THE MATTER OF)
MUNSHI SINGH) JUDGMENT OF

THE HONOURABLE CHIEF JUSTICE MACDONALD.

The appellant Munshi Singh who seeks to enter Canada as an immigrant, is a native of India and a British subject. He is one of a large number of immigrants who have come to the port of Vancouver in the Komagata Maru. He was denied permission to land, and after formal proceedings were had before a Board of Inquiry he was rejected and an order was made by the Board for his deportation. He then applied to a Judge for a writ of habeas corpus to test the legality of his detention and from the refusal of the writ he now appeals to this Court.

On the threshold of the case is the question of the constitutionality of the Immigration Act. That the king with the advice and consent of the Imperial Parliament had the power to make laws for the exclusion from British possessions of immigrants, whether British subjects or not, has not been questioned, as indeed it could not be doubted. By the terms of the British North America Act the Parliament of Canada is clothed with sovereign power in matters relating to immigration into any part of the Dominion. No residue of authority except the power of disallowance is left with the Imperial Parliament, and hence subject to that power which has not been exercised with respect to the Immigration Act, Canada's authority to admit immigrants of any or every race or nationality, on any terms she pleases, is complete "Authority as plenary and as ample.....as the Imperial Parliament in the plenitude of its power possess and could bestow."

The next question is as to whether or not the three orders in council under which the immigration authorities have acted in rejecting the appellant conform to the authority given by the Immigration Act to the Governor in Council to make such orders. Section 3 of the Act specifies certain prohibited classes and then provides that other restrictions may be effected by order in council pursuant to sections 37 and 38. So much of section 37 as is relevant to this case reads:-

> "Regulations made by the Governor in Council under this Act may provide as a condition to permission to land in Canada that immigrants and tourists shall possess in their own right money to a prescribed minimum amount, which amount may vary according to the race, occupation or destination of such immigrant or tourist, and otherwise according to the circumstances."

In pursuance of this authority the Governor in Council made a regulation known as P.C. 24, which reads:-

> "From and after the date hereof no immigrant of any Asiatic race shall be permitted to land in Canada unless such immigrant possess in his own right money to the amount of at least two hundred dollars. Provided that this regulation shall not apply to any person who is a native or subject of an Asiatic Country as to which special statutory regulations inconsistent with this regulation are in force, or with which there is in operation a special treaty, agreement or convention binding the Government of Canada if the provisions of this regulation be inconsistent with the stipulations of such treaty, agreement or convention."

Much ingenious argument was directed to this section and order, the principal contention being that the order goes beyond the authority given by the section and discriminates against a particular race. The section is not well drawn, but the manifest intention of its framers was to enable the Governor in Council to make regulations which would empower immigration officers to exclude from Canada an immigrant or a tourist now possessed of a specified sum of money, and

that in making such regulation he might have regard to the race, occupation and destination of the immigrant or tourist. It contemplates that discriminition with respect to race which the order in council makes when it subjects the person of Asiatic race to the monetary test. The contention is that because the Asiatic race was singled out and the test not applied to other races, there was an unjust discrimination not authorized by that section. The proviso in P.C. 24 which excepts from the monetary test natives of Asiatic countries with whom we have treaties or conventions affecting immigration, or whose subjects are admitted under other statutory laws or regulations, was referred to as further supporting this contention, but in my opinion the conditions which made such a proviso necessary are important as showing that section 37 could not be and was not intended to have been made operative without discrimination in favour of some races whose legal status to be admitted to Canada was already fixed by statute or treaty.

The Board of Inquiry acted also under another order in council passed on the 7th. of January, 1914, and known as P.C. 23, the authority for which is derived from s.s. (a) of section 38 of the Immigration Act. That sub-section enables the Governor in Council by proclamation or order to-

> "prohibit the landing in Canada or at any specified port of entry in Canada of any immigrant who has come to Canada otherwise than by continuous journey from the country of which he is a native or naturalized citizen, and upon a through ticket purchased in that country, or prepaid in Canada."

The order in council is identical in language with the sub-section and hence no doubt arises as to its conforming to the Act. The fact is conceded that the appel-

lant did not and could not comply with this regulation. His passage was taken from Hong Kong, and though that is a British possession he cannot even in a technical sense be said to be a native citizen of Hong Kong, while in the popular sense in which I am convinced the term "native citizen" is used in section 38, it would be absurd to call him such. The ppellant's suggestion is that a British subject born in one part of the King's possession is a native citizen of every other part. This, I am confident, was not the meaning attached to the term "native citizen" by Parliament.

Counsel also contended that the powers conferred on the Governor in Council under this sub-section could be exercised by him only and in respect of each immigrant claiming admission. In other words that the Governor in Council should adjudicate upon each and every claim to admission. Such a construction of the section is repugnant to the whole Act and to the language of the section itself.

Then again sub-section (c) of section 38 authorizes the Governor in Council to-

> "prohibit for a stated period, or permanently, the landing in Canada, or the landing at any specified port of entry of Canada, of immigrants belonging to any race deemed unsuited to the climate or requirements of Canada, or of immigrants of any specified class, occupation or character."

In pursuance of this authority the Order in Council P.C. 897 was passed on the 31st. of March, 1914. It provides that from and after its date and until the 30th. September 1914, the landing at any specified port of entry in British Columbia of any immigrant who is an artisan or a labourer is prohibited. Among the specified ports of

entry is the port of Vancouver. It is not contended that this order does not conform to the section. The complaint is that the Board of Inquiry erroneously held that the appellant was a labourer and not a farmer as he claimed to be.

The onus of proof is by the Act cast upon the immigrant to show that he does not belong to a prohibited class. He failed to convince the Board that he was not a labourer, and one of the questions involved in this appeal is as to whether this Court can review the decision of the Board on that question. Section 23 reads:-

> "No court, and no judge or officer thereof, shall have jurisdiction to review, quash, reverse, restrain or otherwise interfere with any proceeding, decision or order of the Minister or of any Board of Inquiry, or officer in charge, had, made or given under the authority and in accordance with the provisions of this Act relating to the detention or deportation of any rejected immigrant, passenger or other person, upon any ground whatsoever, unless such person is a Canadian citizen or has Canadian domicile."

Had the Board of Inquiry acted without jurisdiction or upon orders in council made without authority, or upon a statute which was unconstitutional, no doubt the Court could and would interfere to prevent what in that case would be an illegal detention.

As in my opinion the Immigration Act is not unconstitutional, and the order in council, P.C. 897 is not ultra vires, and as the Board was legally seized of the subject of the inquiry, I think the Court cannot review a decision upon a question which the Board was authorized to decide. The appellant, if he have just cause of complaint is not without redress as an appeal to the Minister of the Interior is given by this Act

The result is that in my opinion the British North America Act vested in the Parliament of Canada sovereign power over immigration in Canada; that that power includes the right to exclude British subjects not even excepting those born in the United Kingdom; that each of the orders in council in question here was authorized by the Immigration Act; that each one of them would bar the appellant; that the Board of Inquiry acted within its jurisdiction and in accordance with the provisions of the Act; and that its decision, which is not impeached on the ground of fraud, that the appellant is a labourer is not open to review except by the Minister of the Interior.

It follows that the Appeal must be dismissed.

"J.A. MACDONALD"

C.J.A.

Victoria, B.C.
6th. July, 1914.

CERTIFIED A CORRECT COPY OF

B.H.TYNWHITE DRAKE,

REGISTRAR. "

re Munshi Singh

COURT OF APPEAL.

JUDGMENT OF

THE HONOURABLE MR. JUSTICE IRVING.

By Section 95 of the B.N.A. Act passed by the Imperial Parliament, the legislative and executive powers of the Crown were delegated to the Parliament of Canada in "relation to immigration into all or any of the Provinces of Canada", and by section 91, sub-section 25, in the distribution of the legislative powers the Parliament of Canada was authorized to deal with all matters coming within the class of subject embraced within the words "naturalization and aliens."

In respect of the matters so delegated to Canada the Dominion has an authority as plenary and as ample as the Imperial Parliament in the plentitude of its power possessed and could bestow; (Hodge v. The Queen (1883) 9 App. Cas. 130.)

Under the authority so conferred, Canada has a right to make laws for the exclusion or expulsion of aliens; that was so held in the case of aliens in the Atty. Genl. of Canada v. Cain (1906) App. Cas., 542, and it seems to me plain beyond question that Canada has a right also to make laws for the exclusion and expulsion from Canada of British subjects whether of Asiatic race or or European race, irrespective of whether they come from Calcutta or London. It is with reference to a British subject of Asiatic race, coming from Hongkong, that we are now dealing, but what has been done by Parliament with reference to one of an Asiatic race can be done with reference to any European

race (should Parliament think proper). In the statute The Immigration Act, passed in 1910 and amended in 1911, we find a list of prohibited classes of persons who, irrespective of nationality or race, are not permitted to land in Canada. This list includes persons mentally and physically defective; diseased persons, criminals; beggars and vagrants; charity immigrants and also "per-"sons who do not fulfil, meet or comply with the condi-"tions and requirements of any regulations which for the "time being are in force and applicable to such persons "under section 37 or section 38 of this Act." Under those sections (which I need not set out) three orders in council have been passed, viz; No. 23, which prohibits the landing in Canada of any immigrant (i.e.irrespective of race or nationality) who has come to Canada (i.e. any part of Canada) otherwise than by continuous journey from the country of which he is a native or naturalized citizen, and upon a through ticket purchased in that country or prepaid in Canada.

No. 24 decrees that no immigrant of an Asiatic race shall be permitted to land in Canada unless such immigrant possess in his own right money to the amount of at least $200. There is a proviso to this regulation which need not be set out.

The Third, No. 297 prohibits from and after the 31st. March, 1914, until after the 30th. of September, 1914, the landing at any port (i.e. of the ports of entry therein named) in British Columbia, of any (i.e. irrespective of race) artisan or labourer, skilled or unskilled. Vancouver, B.C. is of the ports named.

For non-compliance with the conditions in each

of these three orders in council Munshi Singh, a Punjabi, who came to Canada in the S.S. Komagata Maru on the 22nd. day of May, 1914, was refused permission to land and ordered to be deported in the said vessel, and in the meantime is being detained against his will a prisoner on board the said ship. At least I presume so, as an application for writs of Habeas Corpus has been made on his behalf. The affidavit is silent on the point of legal restraint;

In re Parker (Canadian Prisoner's case) 5M. & W. 32; and in Ex p. Child ( ) 15 C.B. 238, it was laid down that th application for habeas corpus should be supported by an affidavit by the person applying showing that he is illegally restrained. This omission I think shows that the true point for our determination has not been appreciated. Our duty is to determine on this appeal whether the applicant is illegally restrained, and although we have in that connection to consider the provisions of the Immigration Act-nevertheless out duty is not to determine whether or not Munshi Singh ought to be admitted. We are not a Court of Appeal from the decision of the Board of Inquiry.

Assuming then that he complains that he is illegally restrained under the warrant of deportation of the Board of Inquiry, I am of opinion that his appeal is hopeless. There is a complete chain of authority from the Sovereign with the assent of the Imperial Parliament down to the Board of Inquiry, and the proceedings are on their face regular in every respect.

Many and varied were the attacks made on the three orders in council by counsel for the applicant. It

was said that under section 37 ~~of~~ the Governor General in Council could not enact absolute prohibitions under the guise of regulations. The three orders are not absolute prohibitions. No. 23 shows how an immigrant may come into Canada by coming direct or prepaying his passage in Canada; No. 24 permits an Asiatic having more than $200 to come in; and No. 897 is a temporary measure in force for a limited period, and applicable only to the Coast of British Columbia and confined to a certain class of persons. These orders in council are truly regulations and because they do prohibit the landing of this particular applicant at a Port on the Pacific Coast, they do not lose their character of regulation. With the policy of the statute we are not concerned. That is for Parliament. The question for us is as to the applicant's illegal restraint.

But even if the orders in council were positive prohibitions, I am of opinion that such orders in council would be sanctioned by the statute.

Exception was taken to the form of the order in council No. 24. It was said quite gravely that the Governor General in Council under section 37 could only deal with individual cases as they occurred from time to time. That making an anticipatory order was not contemplated by Parliament, and that in any event the Governor in Council should have a fixed sum of money as a perequisite for all immigrants, and then if he chose to do so he might deal with different races. These arguments seem to me to have no weight and do not require any answer.

As to No. 897 made under the authority of section 38, Mr. Cassidy contended that there was no legal

or sufficient evidence before the Board to sustain the findings of fact and that there was no evidence that Munshi Singh was an unskilled labourer and therefore there was a want of jurisdiction on the part of the Board to deal with his case. Mr. Ritchie interposed an objection to our dealing with these grounds, and called our attention to section 23 of the Act; that section can be dealt with later.

I will assume for the present that the point is open for our consideration. Mr. Cassidy's argument was founded on the fact that Munshi Singh stated on oath that he had been a farmer in India and that the Board could not in the face of his sworn statement find that he was a labourer. By section 16 where the question of the right to enter Canada is raised, the burden of proof rests upon the person claiming such right.

Courts of Justice frequently refuse to accept as trustworthy the sworn statement of a man so as to satisfy the onus of proof; e.g. Rowley v. Rowley (1854) 23 L.J. Ch. 275, where the Judge declined to accept the evidence of the solicitor who prepared the deed in question that it was not delivered as a deed byt as an escrow only.

Again, Berney v. Norwich (1867) 36 L.J. Ec. 12, where Sir W. Earle said:-

> "A tribunal trying questions of fact, lii performs its duty if it adopts every statement on oath, not contradicted by sworn testimony."

The point is not what he was in India, but what he will be there. On the evidence adduced I think the Board was right in coming to the conclusion that in this country he would be an unskilled labourer.

As to Mr. Bird's argument that the Immigration Act was ultra vires because it amounted to an interference with civil rights- a subject committed by the 92nd. section of the B.N.A. Act to the province- I would say that where power to prevent a prohibited immigrant from landing in Canada, or if landed to expel him, is given to a legislative body such as the Dominion Parliament, that power carried with it power to impose all things necessary to carry out the prohibition or expulsion. That is well illustrated in the Atty. Genl.of CanadaCain,supra. We must remember that where the Dominion Parliament enters a field of legislation committed to it that body occupies that field fully and to the exclusion of the Province. It was intended that their legislation should be effective.

Section 23 to which our attention was particularly invited, deals with two classes of persons, namely, Canadian citizen or person having a Canadian domicile- that is one class; the other class is "any rejected immigrant passenger or other person, not being a Canadian citizen or having a Ca adian domicile. With respect to the first class, in my opinion the rights of the civil Courts to intervene has not been taken away. In such cases the courts have a right to interfere by certiorari. With reference to the second class, the jurisdiction of the court to review, quash, reverse, restrain or otherwise interfere, I shall not say has been taken away, but does not exist. The right to certiorari in the second class is limited to want of jurisdiction or excess of jurisdiction or fraud. In cases where the right to certiorari is taken away by statute, the courts can nevertheless inquire as

to the facts which go to the jurisdiction- that is, facts collateral to the matters they are to determine; but as to the merits of the case, the tribunal appointed is the sole judge. A person may apply to a civil Court to determine whether he falls within one class or other, but once it is established that he is a rejected immigrant or passenger, under the authority and in accordance with the Act, and is not a Canadian citizen or has not a Canadian domicile, then the Civil Court has no jurisdiction to investigate the correctness of the decision. In R. v. Bennett ( ) 1 Ont. 445, relied upon by Mr. Cassidy the right to certiorari had not been taken away- therefore it was open to the Court there to consider whether there was "any" evidence. The Courts in dealing with a Canadian citizen under this Act would have that right- but it is otherwise as to persons in the other class. That Parliament has distinguished between the right of those who are citizens of Canada and those who are not, gives point to the argument that the Act itself, subject matter and language together, contemplates all matters relating to the detention and deportation of any rejected immigrant &c., under this statute being dealt with by the executive, and not with the judicial department of the Government. Provision is made for an appeal to the Minister.

I would dismiss the appeal.

Victoria, B.C.

6th. July, 1914. sd. P. AE. Irving.

J.A.

CERTIFIED A CORRECT COPY

B.H.Tynwhite Drake

Registrar.

COURT OF APPEAL

6th. July, 1914.

RE MUNSHI SINGH.

MARTIN J.A. This is an appeal by one Munshi Singh (who describes himself in his affidavit as "a native of India and a British subject", coming from the Punjab in that country "to Canada for the purpose of making this my permanent home") from the order of Mr. Justice Murphy, dismissing his application for a writ of habeas corpus by means of which he seeks to be discharged from his present detention by immigration officers on board the "Komagata Maru" under an Order by the Immigration Board of Inquiry at the Port of Vancouver, dated 25th. June, 1914, whereby he has been rejected as an immigrant prohibited from landing in Canada and ordered to be deported from Canada by said ship, which brought him to Vancouver on the 22nd. of May last.

Many questions were raised before us, some not legal but directed to the policy which led up to the statutes and orders in council under review, with respect to which to repeat an extract I gave in re The Coal Mines Regulation Act (1904) 10 B.C. 408, at 419 "a case on the employment of Chinese in Coal mines) from the decision of their Lordships of the Privy Council in Tomey Homma's case (1903) A.C. 151, at 155, as follows:-

> "The policy of such an enactment as that which excludes a particular race from the franchise is not a topic which their Lordships are entitled to consider."

And quite recently in Attorney Genera l for Ontario v. Attorney General for Canada (1912) 81 L.J. P.C. 210, in delivering an illuminating judgment (if I may be permitted so to refer to it) on some aspects of the constitution of Canada, and the relation of the Courts thereto, the then Lord Chancellor (the Earl Loreburn) said, at p.212, with respect to the powers conferred upon Canada by the Imperial Parliament;-

> "In 1867, the desire of Canada for a definite Constitution embracing the entire Dominion was embodied in the British North America Act. Now there can be no doubt that under this organic instrument the powers distributed between the Dominion on the one hand and the provinces on the other hand cover the whole

> Canada. It would be subversive of the entire scheme and policy of the Act to assume that any point of internal self-government was witheld from Canada.....For whatever belongs to self-government in Canada belongs either to the Dominion or to the Provinces within the limits of the B.N.A. Act."

And at p.213 he speaks of"....The interpretation of a completely self-governing Constitution founded upon a written organic instrument, such as the British North America Act."

The power and duty of the Courts under the constitution he thus defines, at ppl 213 and 216;-

> "A Court of Law has nothing to do with a Canadian Act of Parliament lawfully passed except to give it effect according to its tenor.....It cannot be too strongly put that with the wisdom or expediency or policy of an Act, lawfully passed, no Court has a word to say."

> "The policy of the Canadian Parliament.....is exclusively the business of the Canadian people and is no common concern of this Board.

With respect to the legal questions, they have been reduced in number and scope because it was conceded at the end of the argument (as it ought to have been at the beginning) that since the federal parliament has already occupied the common field of legislation conferred upon both federal and provincial parliaments by section 95 of the B.N. A. Act., therefore the authority of the former must prevail; cf. In re Narain Singh (1908) 13 B.C. 477. But whilst this is conceded and also that in the primary exercise of such authority the federal jurisdiction may incidenxtally, yet substantially trench upon one or more of the classes of subjects exclusively assigned to provincial jurisdiction by section 92, e.g. "property and civil rights in the province", so long as such intrenchment does not exceed what may be necessary to effectuate such federal jurisdiction, yet it is submitted that in the case at bar this line of intrenchment should be drawn so as to declare that though a British Subject may not, by the exercise of due federal jurisdiction, be permitted to land as an immigrant in Canada, yet the said jurisdiction is exhausted by this prevention and he cannot be detained or deported because once he comes within the territorial waters of Canada the exercise of such control over his person comes within the said class of "property and civil rights in the province". Many

observations may be made on the promise of this submission as regards territorial waters and civil rights, but assuming the promise is correct there is one complete and final answer to the whole contention and it is that as a matter of fact, and of reasonable necessity in the carrying out, completely and effectively, of "laws in relation to Immigration into all or any of the Provinces (Sec. 95)", an immigrant is not immediately divested of that character, and freed from the operation of laws relating to the subject-matter of i migration merely because he happens to come within the three mile limit. Whatever else may be said of him that character, and the federal jurisdiction which controls it, continues in general to attach to him at least till after he is permitted to land in conformity with this Act. Indeed it cannot be doubted that he may be subject to such jurisdiction for an indefinite time and may be deported, e.g. as at present provided by section 40 of the Act, "within three years after landing" for the causes therein specified. It can hardly be seriously contended that an immigrant who on a dark night swims ashore from a ship, eludes the preventive officers, and hides in the woods, or, to quote section 33 (7) "who enters Canada by force of misrepresentation or stealth, or otherwise contrary to any provision of this Act", thereby acquires such "civil rights in the Province" he elects to enter, that he threw off the federal jurisdiction with that portion of his clothing which he presumably left behind him when taking to the water. The truth is, of course, that the exercise of federal jurisdiction necessarily often affects civil rights, including primarily, personal liberty, the most striking illustration of which occurs in connection with quarantine (sub-section 11) wherein whole shiploads of people, traders, merchants, tourists, immigrants and others, have been frequently detained for weeks at a time in quarantine stations on shore. Some of the cases are to be found conveniently collected in Lefroy on "Canada's Federal System" 1913, at p.488 et. seq., and the Lord Chancellor (the Earl Loreburn) adverts to the subjects in the Attorney General's case above cited. The best illustration of the domination of federal

jurisdiction over even provincial public property is to be found in Attorney General of British Columbia v. Can. Pac. Rly. Co. (190405) 11 B.C. 289, wherein the view I ventured to express that the Parliament of Canada had the power to appropriate provincial public lands for the purposes of a railway connecting two or more provinces received the approval of their Lordships of the Privy Council; (1906) 75 L.J. P.C. 38.

Such being the powers of the federal government, I turn then, first, to section 38 (a) of the Immigration Act and the Order in Council of 7th. January, 1914, No. 23, relating to a continuous journey and through ticket, which are relied upon as a justification of the said deportation order. The appellant first contends that said order in council is invalid because no express power is given to the Governor in Council to alter or rescind any "proclamation or order", and therefore the powers of the Governor in Council have in this respect been exhausted by his order in council and on the same subject dated the 9th. of May, 1910, 920, which has been held to be invalid; In re Narain Singh (1913) 18 B.C. 506. The point is, however, clearly covered by section 31 (g) of the Interpretation Act relating to "rules, regulations or by-laws" and conferring the right to"rescind, revoke, amend, or vary" the same, which language covers the proclamation or order "authorized by section 38", because whatever they may be termed these proclamations and orders are in fact "regulations" and indeed are so styled in the heading of the fasciculus of sections numbered 37 to 30 inclusive, viz; "Regulations as to monetary and other requirements, etc." Then, second, it is contended that as the applicant came direct from Hong Kong and is a British subject he as a citizen of the Empire and therefore a native of the whole of it, is a native of Hong Kong, which is a part of it, and so his journey from that place to this was "a continuous journey from the country of which he is a native", and his ticket "a through ticket therefrom. But it is obvious from the context, and the whole Act, that the expression "country of which he is a native, is used in a geographical and not racial or national sense, and therefore does

not assist the applicant.

In the third place it is said that the Governor in Council has power to deal only with the case of each individual immigrant as he arrives ("An immigrant who has come to Canada", as the section puts it), and therefore an omnibus order dealing in advance with immigrants in general is invalid. But the expression "any immigrant" includes all immigrants and I confess I cannot see the force of this contention, which would be a very impractical one to work out as a general rule, leading as it would inevitably to great delay and confusion in a vast country like Canada where a constant stream of immigrants is arriving at many ports. The fact that this order is a general prohibition does not prevent the Governor in Council from making a special one to meet a particular case "whenever he deems it necessary or expedient." Up to the present time he has only deemed it "expedient" to make a general order dealing with all immigrants alike, and it is somewhat strange that this should be objected to when we have heard so much of the undesirability of any discrimination in these regulations. This order in carrying out the Governor in Council's conception of expediency as it exists at present only follows, as has been pointed out, the exact words of the section, but I am unable to see how that can detract from its efficacy.

I next turn to the Order in Council of 31st. March, 1914, No. 897, prohibiting until after the 30th. of September next, the landing in British Columbia of all "labourers, skilled or unskilled," This is made under sub-section (c) of section 38 and is objected to on the ground that there was no evidence before the Board of Inquiry on which it could reasonably found its finding that Munshi Singh was an "unskilled labourer" or a labourer of any kind, and therefore it lacked jurisdiction to make said order. It was however objected on behalf of the Board that under section 23-

> "No Court and no judge or officer thereof (has) jurisdiction to review, quash, reverse, restrain or otherwise interfere with any proceeding, decision, or order of the Minister or of any Board of Inquiry or officer in charge, had, made or given under the authority and in accordance with the provisions of this Act relating to the detention or deportation of any rejected immigrant passenger pr person, upon any ground whatsoever, unless such person is a Canadian citizen of has Canadian domicile."

This is a very sweeping and unusual enactment both as regards its object and wording, going direct to the question of our jurisdiction and it is not really similar, with one exception to be noted, to

those sections which have been dealt with in the cases cited to us 6
or which I have examined. In my opinion it stands by itself and having regard to the subject matter and the exceptional circumstances which often will necessarily surround cases arising out of it, I think Parliament intended that it should be taken to mean just what it says and be given full effect to, which can and ought to be done, as applied to the present case, by holding that once the Board has duly entered upon an enquiry over which it has been given jurisdiction by the statutes and its orders or regulations there can be no interference "upon any ground whatsoever" with its subsequent proceedings or with the decision or order it decides to make so long as said decision or order is one that the Board is empowered to make; it could not, for example, make an order for fine and imprisonment instead of deportation, which of often involves detention; Colonial Bank of Australia v. Willan (1874) 5 P.C. 417; Rex . v. Woodhouse (1906) 2 K.B. 501, 515-6. This is what I understand the expression "under the authority and in accordance with the provisions of this "Act" to mean. It cannot meanthat it is a condition precedent to the right of the Board to take any action that its proceedings must be in all respects regular, because that would require and insure complete and absolute compliance, from beginning to end, and consequently there would be no cause or reason for "reviewing or "interfering" with something that was already perfect in itself. This is, in truth, exemplified by the present case because in one sense, clearly the inquiry as a matter of fact was "held under the authority of the Act and in accordance with "its provisions, as the Board was properly constituted when it entered upon its duties, and finally made an order within the Statute on the face of it, and no objection is taken to the regularity of its proceedings but simply to the fact that it did not properly weigh the evidence before it and hold it to be insufficient. That there was some evidence before it cannot be denied, because section 16 says that "where the question of the right to enter Canada under this act is raised the "burden of proof shall rest upon the immigrant, passenger or other person claiming such right". This reversal of the usual course of a trial in effect means that he must meet what is equivalent to a prima facie case having been made out against him, because if he gives no evidence his application fails, and in attempting to do so he gave evidence which I need only say was of such an inadequate character, and fell so far short of what might reasonably have been expected in the circumstances, that I am not surprised it failed to convince the Board of his veracity. This is one of the very things

that the statute I think intends should not be reviewed, and it is for that reason that the hand of the court is arrested and it is directed not to "interfere with any proceedings" which the Board is engaged in, either at the time they are pending or after, by restraining order or otherwise, "upon any ground whatsoever". I am fortified in this opinion by two other things viz (1) that by the same section the Court is allowed to interfere in two specified cases viz; "where such person is a Canadian citizen or has Canadian domicile", which emphasizes the intention to arrest the ordinary powers of the Court in all other cases, and (2) that Parliament has not left the supplicant without a remedy for he has a special one provided in lieu of the ordinary one taken away, viz in the appeal to the Minister against the decision of the Board given him by section 19. The excepted case above referred to is in re Lee Him (1910) 15 B.C. 163, which is somewhat similar in principle being a decision that there was no appeal, except to the Minsteer of Customs, from the decision of the Collector of Customs, that a Chinese immigrant applying to enter Canada was not a merchant under section 7 (c) of the Chinese Immigration Act. cap. 95, R.S.C. 1906. That case is, in my opinion correctly denied and support is given to this view by something not mentioned in the judgment, viz; that by the next section 8 a right is given to His Majesty, and not to the immigrant, to contest the validity of any certificate," and such contestation shall be heard "and determined in a summary manner by any judge of a superior court of any province of Canada where such certificate is produced." All this goes to show that there is nothing strange or unusual in holding the view that in these immigration matters it was the intention of Parliament that certain questions, at least, relating to immigrants should be speedily and summarily decided, on the spot, so to speak by executive Officers of the Crown.

This being the view I take of section 23, I therefore have no power to consider the objection of the applicant to the evidence, and I have only "reviewed" as briefly as possible the "proceedings" of the Board relating to the evidence before it in order to make my meanin clear. This is not one of those cases

where an antecedent fact has to be found so as to confer jurisdiction to enter upon a hearing or inquiry; that is quite a distinct question. But in case I should be wrong on this legal point then alternatively I am satisfied that there was evidence before the Board to give it jurisdiction and support its finding, because of the defects I have already noted in the evidence, Demeanour is often all important in such cases, and as their ~~Lordships~~ Lordships of the Privy Council said in Khoo v. Lim (1912) A.C. 323, at 325, "The trial judge ".....sees the demeanour of the witnesses and can estimate their intelligence, position and character in a way not open to the Courts who deal with later stages of the case." These remarks apply much more strongly to this Board of Inquiry of three members dealing with matters of which they have special knowledge and experience.

A final objection to this Order 897 was taken, that though Canada had the power under section 95 of the B.N.A. Act, to legislate with respect "to immigration into all or any of the Provinces" yet as it had not done so as to British Columbia in particular therefore the Governor in Council had no power to do so by making this order which relates only to this Province. But this ignores the wording of section (c) which says that he may prohibit "the landing at any specified port of entry in Canada" and that is all the order has done, and though all the ports specified in the order happen to be in this Province, their geographical ~~xxxxxxxx~~ situation does not destroy the power to close them for the purposes of the Act.

Such being my views on the effect of sub-sections (a) and (c) of section 38, it follows that the order of deportation may and should be supported under orders in Council Nos. 23 and 897.

But if necessary it may also be supported under Order in Council No. 24 dated 7th. of January, 1914, made in pursuance of section 37, requiring an "immigrant of any Asiatic race" to "possess in his own right money to the amount of at least two hundred dollars" It is contended at the outset, and assuming the order to be otherwise valid, that the expression "Asiatic race", is ethnologically incorrect and too indefinite to be capable of application. The

expression must be construed "according to the common understanding of the words" as Mr. Justice Duff said in the very recent issue in the Supreme Court of Canada if Quong Wing v. The King (1914) 49 S.C. 400 at 463, in referring to the Japanese, Chinese and other Oriental races (a subject which

I discussed at length as regards the Chinese race in this province in the case he there refers to) and if so, there is no uncertainty about its meaning and application. We speak constantly about European, Asiatic and even Latin-American races, and no one doubts what the people at large understand thereby. But "Asiatic" race" is moreover a proper expression ethnologically, as may be conveniently seen by reference to the Encyclopaedia Britannica (11th. Ed) under the Article Asia in vol. 2 p. 749, col. 1, where the exact expression "asiatic races" occurs in an account of the ethnology of that continent; and cf. also the articles on the ethnology and races of Europe, vol. 9, p. 919; Africa, vol. 1, pp. 325-6 America; Vol. 1 pp. 810-1; Australia, vol. 2 pp. 954-5; and Polynesia, vol. 22 p. 33.

I am unable to take the view that the order goes beyond the section. No difficulty occurs in reading the word "and" as "or" in the expression "immigrants and tourists" so as to give the obvious meaning according to a well known canon of construction, and the very word "or" is to be found in the expression "immigrants or tourists" in the 6th. line of the same section. The language, therefore, being disjunctive the order may properly deal with immigrants alone as it has done. But it is further objected that even so, it must first deal with all races as a whole by prescribing a minimum amount in general and may then make variations for particular races, and because it has only dealt with "any Asiatic race" it is bad. I am unable to construe the statute in such a narrow and too technical manner.
The objection would be satisfied if the orders said first

that immigrants of all races should be allowed to land if they had only one cent in their possession, but those of "any Asiatic race" must have $500. That would be a general order with a particular variation. But it would also be a ridiculuous and empty formality (as well as an offensive emphasis of race discrimination which diplomatically it would be desirable to avoid) and this statute and order deal with matters of substance. In spirit and effect the order means that as to the races of the world in general the minimum if prescribed would be so small as to be infinitesimal and therefore negligible- (according to the maxim de Minimis non curat lex but as to Asiatic races it is a matter of substance and is correspondingly "prescribed". I do not doubt that, reading the whole section as applied to the subject matter, the order essentially and substantially conforms with the section on which it is founded.

On this topic especially, the decision of Hunter C.J. In re Narain Singh (1913) 18 B.C. 506, was referred to and its soundness challenged, particularly in connection with Order in Council No. 924, of 9th. May, 1910, which has never been rescinded and is put forward as a valid order, despite the ruling of Hunter C.J., in answer to the said demand for a general "prescription" of an amount for immigrants (if that should be held necessary as it first deals with all immigrants, prescribing a minimum of $25.00, with the exception at the end in favour of "Any Asiatic race", and the present order 24 would therefore be regarded as a still later variation requiring Asiatic races to pay $200. This Court is not bound by that decision, and after a careful review of it, I do not, with all respect, agree with it, at least as to the $200. clause, which is all I am now concerned with, and I note that the writ of habeas corpus therein had been refused by Mr. Justice Murphy before it had been granted by Chief Justice Hunter. The order there in question No. 926 provided that the immigrant should not be allowed to enter Canada "unless in actual and personal possession in his or her own right of two "hundred dollars". I

cannot agree that in effect this language goes beyond the reasonable intendement and scope of section 37 which says that "immigrants and tourists shall possess in their own right money to a prescribed minimum amou t" (i.e. the said sum of $200.) the learned judge gives as his reason for taking the contrary view that-

> "If an immigrant had the money in his own right in a Victoria bank at the time of his arrival, he would satisfy the requirements of the statute, but not those of the Order in Council."

I venture to hold the contrary view, however, that the statute, having regard to the circumstances and necessities of the subject matter clearly intended by the words "possess in (his) own right money" that he should have and possess it when and where he would under that section be called upon to produce it, viz. on the ship's deck before he was allowed to land. "In his own right" here means nothing more nor less than his own money, not that of an employer, or the shipowner, exhibited as his own to deceive the immigration officer, and it is therefore inevitable that the possession must be his own actual one and not that of "a Victoria bank", or a Prince Rupert merchant, or a Nanaimo mill-hand, or an Ottawa cousin, or a Singapore money-lender, or a Delhi father, because if once the idea of personal possession then and there when demanded to comply with the Act, can be eliminated then the money may be in possession of any one in any place; as well in Siam as Victoria, because no line of demarcation in place of person can on any principle be drawn, and a "Victoria Bank" or any British Columbia or other bank or business house is not nominated or given preference by the statute as a place of deposit over any other place or person. And what, for example is to become of the immigrant while the case of a disputed and long delayed question of fact as to whether or no he really has $200. "in his own right" in, say, a bank in Siam, is being laboriously determined by the Immigration authorities here, and how is it going to be determined, and by what machinery, unless by the production of the money itself?