
RETURN

To an Order of the House for a Return of a copy of the Judgment delivered by the Privy Council *In Re* Tomhey Homma.

D. M. EBERTS,

Attorney-General's Department,
April 8th, 1903.

Attorney-General.

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Collector of Voters for the Electoral District of Vancouver City and the Attorney-General for the Province of British Columbia v. Tomhey Homma and the Attorney-General for the Dominion of Canada, from the Supreme Court of British Columbia, delivered the 17th December, 1902.

Present at the Hearing: The Lord Chancellor, Lord Macnaghten, Lord Davey, Lord Robertson and Lord Lindley.

(Delivered by the Lord Chancellor.)

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

There is no doubt that, if it is within the capacity of the Province to enact the electoral law, the claimant is disqualified by the express language of the Statute, but it is contended that the 91st and 92nd sections of the British North America Act have deprived the Province of the power of making any such provision as to disqualify a naturalised Japanese from electoral privileges. It is maintained that section 91 (25) enacts that the whole subject of naturalisation is reserved to the exclusive jurisdiction of the Dominion, while the Naturalisation Act of Canada enacts that a naturalised alien shall within Canada be entitled to all political and other rights, powers, and privileges to which a natural-born British subject is entitled in Canada. To this it is replied that by section 92 (1) the constitution of the Province and any amendment of it are placed under the exclusive control of the Provincial Legislature. The question which their Lordships have to determine is which of these two views is the right one, and in determining that question the policy or impolicy of such an enactment as that which excludes a particular race from the franchise is not a topic which their Lordships are entitled to consider.

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

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

Could it be suggested that the Province of British Columbia could not exclude an alien from the franchise in that Province? Yet if the mere mention of alienage in the enactment could make the law *ultra vires*, such a construction of section 91 (25) would involve that absurdity. The truth is that the language of that section does not purport to deal with the consequences of either alienage or naturalisation. It undoubtedly reserves these subjects for the exclusive jurisdiction of the Dominion, that is to say, it is for the Dominion to determine what shall constitute either the one or the other, but the question as to what consequences shall follow from either is not touched. The right of protection and the obligations of allegiance are necessarily involved in the nationality conferred by naturalisation, but the privileges attached to it, where these depend upon residence, are quite independent of nationality.

This indeed seems to have been the opinion of the learned Judges below, but they were under the impression that they were precluded from acting on their own judgment by the decision of this Board in the case of the *Union Colliery Company v. Bryden*, 1899 A.C., 587. That case depended upon totally different grounds. This Board dealing with the particular facts of the case came to the conclusion that the regulations there impeached were not really aimed at the regulation of coal mines at all, but were in truth devised to deprive the Chinese, naturalised or not, of the ordinary rights of the inhabitants of British Columbia and, in effect, to prohibit their continued residence in that Province, since it prohibited their earning their living in that Province. It is obvious that such a decision can have no relation to the question whether any naturalised person has an inherent right to the suffrage within the Province in which he resides.

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