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*Feb. 12.
*Feb. 23.

QUONG-WING .... APPELLANT;

AND

HIS MAJESTY THE KING .... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF SASKATCHEWAN.

Constitutional law—Criminal law—Legislation respecting Orientals—Chinese places of business—Employment of white females—Statute— 2 Geo. V. c. 17 (Sask.)—"B.N.A. Act, 1867," ss. 91, 92—Local and private matters — Property and civil rights — Naturalized British subject—Conviction under provincial statute.

The provisions of the statute of the Province of Saskatchewan, 2 Geo. V. ch. 17, containing a prohibition against the employment of white female labour in places of business and amusement kept or managed by Chinamen, sanctioned by fine and imprisonment, is *intra vires* of the Provincial Legislature. *Union Colliery Co.* v. *Bryden* ([1899] A.C. 580), and *Cunningham* v. *Tomey Homma* ([1903] A.C. 151), referred to.

Per Duff J.—The imposition of penalties for the purpose of enforcing the provisions of a provincial statute does not, in itself, amount to legislation on the subject-matter of criminal law within the meaning of item 27 of the 91st section of the "British North America Act, 1867." *Hodge* v. *The Queen* (9 App. Cas. 117), *The Attorney-General of Ontario* v. *The Attorney-General for the Dominion* ([1896] A.C. 348), and *The Attorney-General of Manitoba* v. *The Manitoba Licence Holders' Association* ([1902] A.C. 73), referred to.

The judgment appealed from (4 West. W.R. 1135) was affirmed, Idington J. dissenting.

(Leave to appeal to the Privy Council refused, 19th May, 1914.)

APPEAL from the judgment of the Supreme Court of Saskatchewan(1), upon a case stated by the police magistrate of the City of Moose Jaw, Sask., upon the conviction by him of the appellant on a charge of employing white females in contravention of the provisions of the Saskatchewan statute, 2 Geo. V. ch. 17.

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

(1) 4 West. W.R. 1135.

The case stated by the police magistrate was, as follows:—

"In the matter of the Act respecting the employment of female labour in certain capacities, being chapter seventeen (17) of the statutes of Saskatchewan, 1912, and a certain conviction of Quong Wing thereunder made by W. F. Dunn, police magistrate in and for the City of Moose Jaw, in the Province of Saskatchewan on the twenty-seventh (27th) day of May, 1912, on the information of W. P. Johnson, chief of police in and for the City of Moose Jaw.

"Case stated by W. F. Dunn, police magistrate in and for the City of Moose Jaw under the provisions of the Criminal Code of Canada in that behalf.

"On the twenty-first (21st) day of May, 1912, an information was laid under oath before me by the above-named W. P. Johnson for that the said Quong Wing on the twentieth (20th) day of May, 1912, at the City of Moose Jaw, in the Province of Saskatchewan, he being a Chinaman and the owner, keeper or manager of a place of business, known as the 'C. E. R. Restaurant,' in the City of Moose Jaw, did employ in the said restaurant, as waitresses, two white women, to wit, one Mabel Hopham and one Nellie Lane, contrary to the Act respecting the employment of white female labour in certain capacities, being chapter seventeen (17) of the statutes of Saskatchewan, 1912. On the twenty-seventh (27th) day of May, 1912, the said charge was duly heard before me, the said information having been first amended by striking out the words 'or manager' and substituting in the place thereof the word 'and' so as to make the information read 'owner and keeper' after which the said information was re-sworn, in the presence of both parties and

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after hearing the evidence adduced and the statements of the said W. P. Johnson and Quong Wing and their counsel I found the said Quong Wing guilty of the said offence and convicted him therefor, but, at the request of the counsel for the said Quong Wing I state the following case for the opinion of this honourable court.

"I find on the evidence:—

"1. That the accused Quong Wing was born in China and of Chinese parents.

"2. That the said accused was on the date of the alleged offence a naturalized British subject.

"3. That on the twentieth (20th) day of May, 1912, the said accused was the keeper of a restaurant known as the 'C. E. R. Restaurant' in the City of Moose Jaw, in the Province of Saskatchewan.

"4. That on the said twentieth day of May, 1912, the said accused had in his employ as waitresses in the said restaurant one Mabel Hopham and one Nellie Lane, and that the said Mabel Hopham and Nellie Lane are white women.

"The counsel for the said Quong Wing desires to question the validity of the said conviction on the following grounds:—

"1. That it is erroneous in point of law.

"2. That the said Act, chapter seventeen (17) of the statutes of Saskatchewan, 1912, is *ultra vires*.

"3. That the court had no jurisdiction.

The questions submitted for the judgment of this honourable court being:—

"1. Whether the premises described as being the place in which the alleged white women worked is included in the Act under which the information was laid.

"2. Whether any offence under the said Act is disclosed.

"3. Whether the accused, being a naturalized British subject, is one of the persons prohibited by the Act from employing female labour.

"4. Whether the said Act under which the said information was laid is *ultra vires*.

"5. Whether the conviction was in excess of the jurisdiction of the court."

"Dated at Moose Jaw, this ninth (9th) day of November, A.D. 1912.

(Sgd.) W. F. DUNN,
Police Magistrate in and for
the City of Moose Jaw."

By the judgment now appealed from, the conviction of the appellant was affirmed.

The issues raised on the present appeal are stated in the judgments now reported.

G. F. Henderson K.C. for the appellant.

J. N. Fish K.C. for the respondent.

THE CHIEF JUSTICE.—The appellant, a Chinaman and a naturalized Canadian citizen, was convicted of employing white female servants contrary to the provisions of chapter 17 of the statutes of Saskatchewan, 1912, and, for his defence, he contends that the Act in question is *ultra vires* of the provincial legislature.

It is urged that the aim of the Act is to deprive the defendant and the Chinese generally, whether naturalized or not, of the rights ordinarily enjoyed by the other inhabitants of the Province of Saskatchewan and that the subject-matter of the Act is within the

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exclusive legislative authority of the Parliament of Canada.

The Act in question reads as follows:—

1. No person shall employ in any capacity any white woman or girl or permit any white woman or girl to reside or lodge in or to work in or, save as a *bonâ fide* customer in a public apartment thereof only, to frequent any restaurant, laundry or other place of business or amusement owned, kept or managed by any Chinaman.

2. Any employer guilty of any contravention or violation of this Act, shall, upon summary conviction be liable to a penalty not exceeding $100 and, in default of payment, to imprisonment for a term not exceeding two months.

In terms the section purports merely to regulate places of business and resorts owned and managed by Chinese, independent of nationality, in the interest of the morals of women and girls in Saskatchewan. There are many factory Acts passed by provincial legislatures to fix the age of employment and to provide for proper accommodation for workmen and the convenience of the sexes which are intended not only to safeguard the bodily health, but also the morals of Canadian workers, and I fail to understand the difference in principle between that legislation and this.

It is also undoubted that the legislatures authorize the making by municipalities of disciplinary and police regulations to prevent disorders on Sundays and at night, and in that connection to compel tavern and saloon keepers to close their drinking places at certain hours. Why should those legislatures not have power to enact that women and girls should not be employed in certain industries or in certain places or by a certain class of people? This legislation may affect the civil rights of Chinamen, but it is primarily directed to the protection of children and girls.

The Chinaman is not deprived of the right to employ others, but the classes from which he may select his employees are limited. In certain factories women or children under a certain age are not permitted to work at all, and, in others, they may not be employed except subject to certain restrictions in the interest of the employee's bodily and moral welfare. The difference between the restrictions imposed on all Canadians by such legislation and those resulting from the Act in question is one of degree, not of kind.

I would dismiss the appeal with costs.

DAVIES J.—The question on this appeal is not one as to the policy or justice of the Act in question, but solely as to the power of the provincial legislature to pass it. There is no doubt that, as enacted, it seriously affects the civil rights of the Chinamen in Saskatchewan, whether they are aliens or naturalized British subjects. If the language of Lord Watson, in delivering the judgment of the Judicial Committee of the Privy Council in *Union Colliery Company of British Columbia* v. *Bryden*(1) was to be accepted as the correct interpretation of the law defining the powers of the Dominion Parliament to legislate on the subject-matter of "naturalization and aliens" assigned to it by item 25 of section 91 of the "British North America Act, 1867," I would feel some difficulty in upholding the legislation now under review. Lord Watson there said, at page 586:—

But section 91, sub-section 25, might, possibly, be construed as conferring that power in case of naturalized aliens after naturalization. The subject of "naturalization" seems, *primâ facie*, to include the power of enacting what shall be the consequences of naturalization, or, in other words, what shall be the rights and privileges pertaining to residents in Canada after they have been naturalized. It does not appear to their Lordships to be necessary, in the present case, to consider the precise meaning which the term "naturalization"

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was intended to bear, as it occurs in section 91, sub-section 25. But it seems clear that the expression "aliens," occurring in that clause, refers to and, at least, includes all aliens who have not yet been naturalized; and the words "no Chinaman," as they are used in section 4 of the provincial Act, were, probably, meant to denote, and they certainly include every adult Chinaman who has not been naturalized.

And, at page 587:—

But the leading feature of the enactments consists in this — that they have, and can have, no application except to Chinamen who are aliens or naturalized subjects, and that they establish no rule or regulation except that these aliens or naturalized subjects shall not work, or be allowed to work, in underground coal mines within the Province of British Columbia.

Their Lordships see no reason to doubt that, by virtue of section 91, sub-section 25, the legislature of the Dominion is invested with exclusive authority in all matters which directly concern the rights, privileges and disabilities of the class of Chinamen who are resident in the provinces of Canada. They are also of opinion that the whole pith and substance of the enactments of section 4 of the "Coal Mines Regulation Act," in so far as objected to by the appellant company, consists in establishing a statutory prohibition which affects aliens or naturalized subjects, and, therefore, trench upon the exclusive authority of the Parliament of Canada.

If the

exclusive authority on all matters which directly concern the rights, privileges and disabilities of the class of Chinamen who are resident in the provinces of Canada

is vested in the Dominion Parliament by sub-section 25 of section 91 of the "British North America Act, 1867," it would, to my mind, afford a strong argument that the legislation now in question should be held *ultra vires*.

But in the later case of *Cunningham* v. *Tomey Homma*(1) the Judicial Committee modified the views of the construction of sub-section 25 of section 91 stated in the Union Colliery decision. Their Lordships say, at pages 156-157:—

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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, sub-section 25, would involve that absurdity. *The truth is that the language of that section does not purport to deal with the consequences of either alienage or naturalization.* It, undoubtedly, reserves these subjects for the exclusive jurisdiction of the Dominion — that is to say, it is for the Dominion to determine what shall constitute either the one or the other, but the question *as to what consequcnces shall follow from either* is not touched. The right of protection and the obligations of allegiance are necessarily involved in the nationality conferred by naturalization; but the privileges attached to it, where these depend upon residence, are quite independent of nationality.

Reading the *Union Colliery Case*(1), therefore, as explained in this later case, and accepting their Lordships' interpretation of sub-section 25 of section 91, that

its language does not purport to deal with the consequences of either alienage or naturalization,

and that, while it exclusively reserves these subjects to the jurisdiction of the Dominion in so far as to determine what shall constitute either alienage or naturalization, it does not touch the question of what consequences shall follow from either, I am relieved from the difficulty I would otherwise feel.

The legislation under review does not, in this view, trespass upon the exclusive power of the Dominion legislature. It does deal with the subject-matter of "property and civil rights" within the province, exclusively assigned to the provincial legislatures, and so dealing cannot be held *ultra vires,* however harshly it may bear upon Chinamen, *naturalized or not,* residing in the province. There is no inherent right in any class of the community to employ women and children which the legislature may not modify or take away al-

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together. There is nothing in the "British North America Act" which says that such legislation may not be class legislation. Once it is decided that the subject-matter of the employment of white women is within the exclusive powers of the provincial legislature and does not infringe upon any of the enumerated subject-matters assigned to the Dominion, then such provincial powers are plenary.

What objects or motives may have controlled or induced the passage of the legislation in question I do not know. Once I find its subject-matter is not within the power of the Dominion Parliament and is within that of the provincial legislature, I cannot inquire into its policy or justice or into the motives which prompted its passage.

But, in the present case, I have no reason to conclude that the legislation is not such as may be defended upon the highest grounds.

The regulations impeached in the *Union Colliery Case*(1) were, as stated by the Judicial Committee, in the later case of *Tomey Homma*(2),

> not really aimed at the regulation of coal mines at all, but were in truth devised to deprive the Chinese, naturalized or not, of the ordinary rights of the inhabitants of British Columbia and, in effect, to prohibit their continued residence in that province, since it prohibited their earning their living in that province.

I think the pith and substance of the legislation now before us is entirely different. Its object and purpose is the protection of white women and girls; and the prohibition of their employment or residence, or lodging, or working, etc., in any place of business or amusement owned, kept or managed by any Chinaman is for the purpose of ensuring that

(1) [1899] A.C. 580.
(2) [1903] A.C. 151, at p. 157.

protection. Such legislation does not, in my judgment, come within the class of legislation or regulation which the Judicial Committee held *ultra vires* of the provincial legislatures in the case of *The Union Collieries* v. *Bryden*(1).

The right to employ white women in any capacity or in any class of business is a civil right, and legislation upon that subject is clearly within the powers of the provincial legislatures. The right to guarantee and ensure their protection from a moral standpoint is, in my opinion, within such provincial powers and, if the legislation is *bonâ fide* for that purpose, it will be upheld even though it may operate prejudicially to one class or race of people.

There is no doubt in my mind that the prohibition is a racial one and that it does not cease to operate because a Chinaman becomes naturalized. It extends and was intended to extend to all Chinamen as such, naturalized or aliens. Questions which might arise in cases of mixed blood do not arise here.

The Chinaman prosecuted in this case was found to have been born in China and of Chinese parents and, although, at the date of the offence charged, he had become a naturalized British subject, and had changed his political allegiance, he had not ceased to be a "Chinaman" within the meaning of that word as used in the statute. This would accord with the interpretation of the word "Chinaman" adopted by the Judicial Committee in the case of *The Union Colliery Company* v. *Bryden*(1).

The prohibition against the employment of white women was not aimed at alien Chinamen simply or at Chinamen having any political affiliations. It was

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against "any Chinaman" whether owing allegiance to the rulers of the Chinese Empire, or the United States Republic, or the British Crown. In other words, it was not aimed at any class of Chinamen, or at the political status of Chinamen, but at Chinamen as men of a particular race or blood, and whether aliens or naturalized.

For these reasons I would dismiss the appeal with costs.

IDINGTON J. (dissenting).—The Legislature of Saskatchewan, by chapter 17 of the statutes of 1912, intituled "An Act to prevent the Employment of Female Labour in certain capacities" enacted as follows:

> 1. No person shall employ in any capacity any white woman or girl or permit any white woman or girl to reside or lodge in or to work in or, save as a *bonâ fide* customer in a public apartment thereof only, to frequent any restaurant, laundry or other place of business or amusement owned, kept or managed by any *Japanese*, Chinaman *or other Oriental person*

which is followed by a penal clause under which appellant has been convicted. That conviction has been maintained by the Supreme Court of Saskatchewan in a judgment from which the learned Chief Justice of that court dissented.

The first question raised is whether or not the appellant, who is admitted to have been born in China, of Chinese parents, but was at the time of the alleged offence a naturalized British subject, falls within the Act. It is quite clear that the term "any Chinaman" may, in the plain, ordinary sense of the words, be so construed as to include naturalized British subjects. It is, to my mind, equally clear that, having regard to many considerations, to some of which I am about to advert, a proper and effective meaning may be given to this term without extending it to cover the naturalized British subject.

The Act, by its title, refers to female labour and then proceeds to deal with only the case of white women.

In truth, its evident purpose is to curtail or restrict the rights of Chinamen.

In view of the provisions of the "Naturalization Act," under and pursuant to which the appellant, presumably, has become a naturalized British subject, one must have the gravest doubt if it ever was intended to apply such legislation to one so naturalized.

The "Naturalization Act," in force long before and at the time of the creation of the Province of Saskatchewan, and ever since, provided by section 4 for aliens acquiring and holding real and personal property, and by section 24, as follows:—

24. An alien to whom a certificate of naturalization is granted shall, within Canada, be entitled to all political and other rights, powers and privileges, and be subject to all obligations to which a natural-born British subject is entitled or subject within Canada, with this qualification, that he shall not, when within the limits of the foreign state of which he was a subject previously to obtaining his certificate of naturalization, be deemed to be a British subject unless he has ceased to be a subject of that state in pursuance of the laws thereof, or in pursuance of a treaty or convention to that effect.

These enactments rest upon the class No. 25 of the classification of subjects assigned, by section 91 of the "British North America Act, 1867," to the exclusive jurisdiction of the Dominion Parliament, and which reads as follows: "Naturalization and Aliens." The political rights given any one, whether naturalized or natural-born British subjects, may in many respects be limited and varied by the legislation of a province, even if discriminating in favour of one section or class as against another. Some political rights

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or limitations thereof may be obviously beyond the power of such legislature. But the "other rights, powers and privileges" (if meaning anything) of natural-born British subjects to be shared by naturalized British subjects, do not so clearly fall within the powers of the legislatures to discriminate with regard to as between classes or sections of the community.

It may well be argued that the highly prized gifts of equal freedom and equal opportunity before the law, are so characteristic of the tendency of all British modes of thinking and acting in relation thereto, that they are not to be impaired by the whims of a legislature; and that equality taken away unless and until forfeited for causes which civilized men recognize as valid.

For example, is it competent for a legislature to create a system of slavery and, above all, such a system as applied to naturalized British subjects? This legislation is but a piece of the product of the mode of thought that begot and maintained slavery; not so long ago fiercely claimed to be a laudable system of governing those incapable of governing themselves.

Again, it may also be well argued that, within the exclusive powers given to the Dominion Parliament over the subject of naturalization and aliens, there is implied the power to guarantee to all naturalized subjects that equality of freedom and opportunity to which I have adverted. And I ask, has it not done so by the foregoing provision of the "Naturalization Act"?

It is quite clear that, if the Dominion Government so desire, it can, by the use of the veto power given it over all local provincial legislation insist upon the preservation of this equality of freedom and opportunity.

It is equally clear that a casual consideration of this Saskatchewan Act might not arrest the attention of those whose duty it is to consider and determine whether or not any provincial Act should be vetoed. It might well be that, in regard to such an Act respecting aliens, those discharging the duty relative to the veto power might let it go for what it might be worth, knowing that, as to them, Parliament could later intervene; whereas other considerations might arise as to naturalized subjects and the duty to protect those naturalized be overlooked by reason of the general term used.

It may be that the guarantee which I incline to think is implied in the "Naturalization Act" covers the ground. If so, there is then in this Act that which, as applied to the appellant (a naturalized subject) is *ultra vires* the legislature.

If so, this conviction falls to the ground. Much stress is laid, on the one hand, upon the expression of opinion in the judgment of the Judicial Committee of the Privy Council in the case of *The Union Colliery Co.* v. *Bryden*(1), and, on the other hand, in that in the judgment of the same court in the case of *Cunningham* v. *Tomey Homma*(2).

I may observe that a decision is only binding for that which is necessary to the decision of the case and add that, perhaps, neither expression of opinion now relied upon by the respective parties hereto was actually necessary for the determination of the case. Perhaps neither decision, in itself, can be said to be conclusive by way of governing the questions to be resolved herein. But of the two the former, certainly, so far as one can gather from the report, touches more

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nearly or directly the point involved in the present inquiry.

Of course, such opinions, even if *obiter dicta,* are entitled to that weight to be given such eminent authority. What was clearly decided in the first case was that such comprehensive language as used in the regulation in question and, I rather think, aimed chiefly at alien Chinamen, was *ultra vires,* and, in the other, that the political right to vote was something within the express power of the legislature to give or withhold or restrict as it should see fit. This latter point in no way touches what is raised herein.

With the very greatest respect, I submit that the *obiter dictum,* relative to the limitations of the power existent in the Dominion Parliament by virtue of the assignment to it of paramount legislative authority over the subject of "naturalization and aliens" never was intended to be treated or taken in the sense now sought to be attributed to it, and, if bearing such implication, that it is not maintainable.

Canada, for example, is deeply interested as a whole and always has been in the colonization of its waste lands by aliens expecting to become British subjects, and surely the power over naturalization must involve in its exercise many considerations relative to the future status of such people as invited to go there and accept the guarantees and inducements offered them. To define and forever determine beyond the power of any legislature to alter the status of such people and measure out their rights by that enjoyed by the native-born seems to me a power implied in the power over "naturalization and aliens." Many incidental powers have, as something implied in the other powers, contained in the same category, been

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held as attached thereto or to be used as part thereof with less excuse for the implication of incidental power there in question than would be involved in going a good deal further than I suggest in the execution of this power over "naturalization and aliens" the Dominion Parliament may go.

Some of these guarantees might depend on conventions with other powers, and I should hesitate to hamper the exercise of the power by any such limitations thereon as a provincial legislature might think fit to impose.

That power must be treated as the other powers categorically assigned to Parliament by section 91 of the "British North America Act, 1867," in a wide and statesmanlike fashion.

All these considerations have, in a measure, been observed in the provisions of the "Naturalization Act," and in framing the provision I have quoted and other like provisions.

No one can, as of right, become naturalized. He must reside for three years in this country and thus become known to those who have to aid in his qualifying himself by shewing that he is of good character. Unless and until he fulfil these conditions he cannot come within the class to which appellant belongs.

The appellant having, under the "Naturalization Act" (as I think fair to infer) become a British subject, he has presumably been certified to as a man of good character and enjoying the assurance, conveyed in section thereof which I have quoted, of equal treatment with other British subjects, I shall not willingly impute an intention to the legislature to violate that assurance by this legislation specially aimed at his

ditions of section 50(b), and is incompetent.

For reasons, however, which I gave in full *In re*

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fellow-countrymen in origin. Indeed, in a piece of legislation alleged to have been promoted in the interests of morality, it would seem a strange thing to find it founded upon a breach of good faith which lies at the root of nearly all morality worth bothering one's head about.

Having regard to all the foregoing considerations and the further consideration that this is a penal statute and, therefore, to be read and construed according to the principle applicable to such like statutes, I think this is one of the relatively few instances in which we can depart from the cardinal rule of interpreting all documents, including statutes, according to the plain ordinary reading of the language used, and, with Bowen L.J., in *Wandsworth Board of Works* v. *United Telephone Co.* (1), ask ourselves if these words so read are capable of two constructions and, if so, say:—

> It is wise to adopt such a construction as is based upon the assumption that Parliament merely intended to give so much power as was necessary for carrying out the objects of the Act, and not to give any unnecessary powers.

Or say, with Keating J., in *Boon* v. *Howard* (in 1874) (2), at page 308:—

> If the words are susceptible of a reasonable and also of an unreasonable construction, the former construction must prevail.

Other like cases are collected in Hardcastle (3 ed.), at pages 174 *et seq.*

Looked at from this point of view I am constrained to think that this Act must be construed as applicable only to those Chinamen who have not become naturalized British subjects, and is not applicable to the appellant who has become such.

(1) 13 Q.B.D. 904. (2) L.R. 9 C.P. 277.

Whether it is *ultra vires* or *intra vires* the alien Chinamen is a question with which, in this view, I have nothing to do.

Yet, in deference to the argument put forward in way of so interpreting the "British North America Act" that the reservation to Parliament at the end of section 91 of the powers enumerated in said section 91 must apply only in its limitation to item number 16 of section 92, instead of as usually construed, so far as necessary to each and all of the enumerated powers given by that section, I may be permitted to say that I wholly dissent from the view put forward. I look upon the powers given Parliament in the twenty-nine enumerated classes set forth in section 91, so far as necessary to give efficacy thereto, as paramount to anything contained elsewhere as in section 92.

Subject thereto, and some other special powers given Parliament, the powers given the legislatures are exclusive and cannot be infringed upon or restricted save by the veto power. There is, however, the possibility of legislation by a legislature being held good until Parliament asserts its powers in conflict therewith.

Until this relation of the powers respectively given Parliament and the legislatures and their order of priority and superiority is thoroughly comprehended and acted upon, there is sure to be confusion in working the system and that confusion invites and induces still greater confusion when the place of the residual power has to be fixed and the relation thereof to these considered.

The maintenance of the warehouse receipts given banks by virtue of the "Bank Act," as against local legislation resting upon authority over property and

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civil rights, as held in *Tennant* v. *The Union Bank of Canada*(1) illustrates how unfounded is the argument put forward. And the case of the *Grand Trunk Railway Company* v. *The Attorney-General of Canada* (2), relative to the power of a railway company to contract itself out of the provision of the "Railway Act" prohibiting such a contract with its employees, is another illustration of how the law of a province, quite good till Parliament asserted its power, by virtue of section 91, sub-section 29, must bend before such assertion of superior power.

The fact that Parliament has, in regard to naturalization, intervened, has much weight with me in reaching the conclusion I have as a reason why the legislature must not be presumed to have decided to ignore what is enacted by Parliament.

I am by no means to be held as deciding the effect of that legislation by Parliament. All I say, in way of deciding herein, is that until, in such case, the legislature makes it clear that it intended to question the effect of that legislation, I need go no further than say it has not clearly expressed its intention to assert and exercise such a doubtful right.

It is an attempt to cover and classify by an ambiguous term the case of a man who is in truth and fact what the term used clearly implies, and may return home any day, with that of a man who may have bid good-bye forever to his native land, induced to do so by the assurances offered him. I may add that we are not instructed as to the exact relation between China and Great Britain in regard to the position of the appellant, and, for the present purpose, that is immaterial, but I can conceive of further considera-

(1) [1894] A.C. 31. (2) [1907] A.C. 65.

tions of this sort of legislation rendering more full information necessary than this case does.

And, if the like term "Chinaman," as used here and in *The Union Colliery Co.* v. *Bryden*(1), is to be read as extending to such, when naturalized British subjects, then the decision therein must bind us herein.

I think, therefore, that this appeal should be allowed with costs.

DUFF J.—The first question to be considered is a question of jurisdiction which was raised during the course of the argument. The appeal comes before us by leave, under section 37(*c*), but an order made under that provision does not conclude the question of jurisdiction which arises here. Section 36, sub-section "*b*," provides in express terms that there shall be "no appeal in a criminal case except as provided in the Criminal Code." In the judgments of three members of the court in *Re McNutt*(2), the word "criminal," as it appears in section 39, sub-section "*c*" (and it is obviously used in the same sense in sub-section "*a*," section 36) was construed in the broad sense as applying to proceedings for the punishment of offences under provincial penal enactments, which, if passed by a legislature exercising authority unrestricted as to subject-matter would, according to the general principles, be classified as criminal law. See pages 261, 267 and 286.

If these views correctly interpret the word "criminal" in section 39(*c*), it would follow, I think, that the appeal in the present case comes within the prohibitions of section 36(*b*), and is incompetent.

For reasons, however, which I gave in full *In re*

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McNutt(1), I think the phrases "criminal case" and "criminal charge" in these provisions of the "Supreme Court Act" must be read in the narrow sense there indicated, and in my view the prohibitions contained in sub-sections "*a*" and "*b*," of section 36, have no application to judgments in proceedings under provincial penal statutes.

The statute in question came into force on the 1st of May, 1912, and is in the following words:—

1. No person shall employ in any capacity any white woman or girl or permit any white woman or girl to reside or lodge in or to work in or, save as a *bonâ fide* customer in a public apartment thereof only, to frequent any restaurant, laundry or other place of business or amusement owned, kept or managed by any *Japanese*, Chinaman *or other Oriental person*.

2. Any employer guilty of any contravention or violation of this Act shall, upon summary conviction, be liable to a penalty not exceeding $100 and, in default of payment, to imprisonment for a term not exceeding two months.

3. This Act shall come into force on the first of May, 1912.

On the 27th of May, 1912, the appellant, who was a restaurant keeper, was convicted by the police magistrate of Moose Jaw of the offence of employing white female servants in contravention of the provisions of this Act. On the 11th of January, 1913, the Act was amended by striking out the italicized words in the last two lines of section 1, its application being thereby limited to "Chinamen."

The appellant, at the time of the alleged offence, had been naturalized under the naturalization laws of Canada.

The first question for consideration, which is the substantial question on the appeal, is whether, assuming that this statute is not in conflict with any Act passed by the Parliament of Canada, it is within

(1) 47 Can. S.C.R. 259.

the scope of the legislative powers of the Province of Saskatchewan.

It might plausibly be contended that it is legislation in relation to any one of these three classes of subjects: "local undertakings," section 92 ("B.N.A. Act"), item 10, or "property and civil rights" within Saskatchewan, section 92(13), or "matters merely local or private" in Saskatchewan, section 92(16). For the purposes of this judgment it may be assumed that the words "any restaurant, laundry or other place of business or amusement" are not in this enactment descriptive of "local works or undertakings" within the meaning of section 92(10); and I shall assume further that (although the legislation does unquestionably deal with civil rights) the real purpose of it is to abate or prevent a "local evil" and that considerations similar to those which influenced the minds of the Judicial Committee in *The Attorney-General of Manitoba* v. *The Manitoba Licence-Holders' Association*(1), lead to the conclusion that the Act ought to be regarded as enacted under section 92(16), "matters merely local or private within the province," rather than under section 92 (13), "property and civil rights within the province." There can be no doubt that, *primâ facie,* legislation prohibiting the employment of specified classes of persons in particular occupations on grounds which touch the public health, the public morality or the public order from the "local and provincial point of view" may fall within the domain of the authority conferred upon the provinces by section 92(16). Such legislation stands upon precisely the same footing in relation to the respective powers of

(1) [1902] A.C. 73.

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the provinces and of the Dominion as the legislation providing for the local prohibition of the sale of liquor, the validity of which legislation has been sustained by several well-known decisions of the Judicial Committee, including that already referred to.

The enactment is not necessarily brought within the category of "criminal law," as that phrase is used in section 91 of the "British North America Act, 1867," by the fact merely that it consists simply of a prohibition and of clauses prescribing penalties for the non-observance of the substantive provisions. The decisions in *Hodge* v. *The Queen*(1), and in the *Attorney-General for Ontario* v. *The Attorney-General for the Dominion*(2) as well as in the *Attorney-General of Manitoba* v. *The Manitoba Licence-Holders' Association*(3), already mentioned, established that the provinces may, under section 92(16) of the "British North America Act, 1867," suppress a provincial evil by prohibiting *simpliciter* the doing of the acts which constitute the evil or the maintaining of conditions affording a favourable *milieu* for it, under the sanction of penalties authorized by section 92(15).

The authority of the legislature of Saskatchewan to enact this statute now before us is disputed upon the ground that the Act is really and truly legislation in relation to a matter which falls within the subject assigned exclusively to the Dominion by section 91 (25), "aliens and naturalization," and to which, therefore, the jurisdiction of the province does not extend. This is said to be shewn by the decision of the Privy Council in *The Union Colliery Co.* v. *Bryden* (4).

(1) 9 App. Cas. 117.
(2) [1896] A.C. 348.
(3) [1902] A.C. 73.
(4) [1899] A.C. 580.

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I think that, on the proper construction of this Act (and this appears to me to be the decisive point), it applies to persons of the races mentioned without regard to nationality. According to the common understanding of the words "Japanese, Chinaman or other Oriental person," they would embrace persons otherwise answering the description who, as being born in British territory (Singapore, Hong Kong, Victoria or Vancouver, for instance), are natural born subjects of His Majesty equally with persons of other nationalities. The terms Chinaman and Chinese, as generally used in Canadian legislation, point to a classification based upon origin, upon racial or personal characteristics and habits, rather than upon nationality or allegiance. The "Chinese Immigration Act," for example, R.S.C., 1906, ch. 95 (sec. 2 (*d*) and sec. 7) particularly illustrates this; and the judgment of Mr. Justice Martin, *In re "The Coal Mines Regulation Act"*(1), at pages 421 and 428, gives other illustrations. Indeed, the presence of the phrase "other Oriental persons" seems to make it clear, even if there could otherwise have been any doubt upon the point, that the legislature is not dealing with these classes of persons according to nationality, but as persons of a certain origin or persons having certain common characteristics and habits sufficiently indicated by the language used. *Primâ facie*, therefore, the Act is not an Act dealing with aliens or with naturalized subjects as such. It seems also impossible to say that the Act is, in its practical operation, limited to aliens and naturalized subjects. From the figures given by the census of 1911 it appears that, while the total Chinese population of the three west-

(1) 10 B.C. Rep. 408.

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ern provinces was about 22,000, there were about 1,700 persons born in Canada classed as Chinese, nearly all of whom would be found in those provinces; and these, of course, are natural born subjects of His Majesty. There are at this moment in Western Canada, moreover, considerable numbers of people unquestionably embraced within the description "Oriental persons" who have come to this country from other parts of His Majesty's territorial dominions and as regards nationality stand in the same category. The Act would (giving its words their usual meaning) apply to all these; and there can be no sound reason for suggesting that they can, consistently with the objects of the enactment, be excluded from the field of its operation.

The appellant's attack is really based upon a certain interpretation of the decision of their Lordships of the Judicial Committee in *The Union Colliery Co.* v. *Bryden*(1). Lord Watson, in delivering their Lordships' judgment, at page 587, said:—

> But the leading feature of the enactments consists in this — that they have, and can have, no application except to Chinamen who are aliens or naturalized subjects, and that they establish no rule or regulation except that these aliens or naturalized subjects shall not work, or be allowed to work, in underground coal mines within the Province of British Columbia. * * *
>
> They are also of opinion that the whole pith and substance of the enactments or section 4 of the "Coal Mines Regulation Act," in so far as objected to by the appellant company, consists in establishing a statutory prohibition which affects aliens or naturalized subjects, and, therefore, trench upon the exclusive authority of the Parliament of Canada.

Of the legislation before us it would be impossible to say that "it has and can have no application except to "Orientals" who are aliens or naturalized subjects," as I have already pointed out. It seems equally im-

(1) [1899] A.C. 580.

possible to affirm that it establishes any rule or regulation at all comparable to regulations of the character described by His Lordship, viz.,

that these aliens or naturalized subjects shall not work or be allowed to work in certain industries,

and, lastly, it would be going quite beyond what is warranted by anything like a fair reading of the statute before us to say of it that

it establishes no rule or regulation except a rule or regulation laying a prohibition upon aliens or naturalized subjects.

Orientals are not prohibited in terms from carrying on any establishment of the kind mentioned. Nor is there any ground for supposing that the effect of the prohibition created by the statute will be to prevent such persons carrying on any such business. It would require some evidence of it to convince me that the right and opportunity to employ white women is, in any business sense, a necessary condition for the effective carrying on by Orientals of restaurants and laundries and like establishments in the Western provinces of Canada. Neither is there any ground for supposing that this legislation is designed to deprive Orientals of the opportunity of gaining a livelihood.

There is nothing in the Act itself to indicate that the legislature is doing anything more than attempting to deal according to its lights (as it is its duty to do) with a strictly local situation. In the sparsely inhabited Western provinces of this country the presence of Orientals in comparatively considerable numbers not infrequently raises questions for public discussion and treatment, and, sometimes in an acute degree, which in more thickly populated countries would excite little or no general interest. One can

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without difficulty figure to one's self the considerations which may have influenced the Saskatchewan Legislature in dealing with the practice of white girls taking employment in such circumstances as are within the contemplation of this Act; considerations, for example, touching the interests of immigrant European women, and considerations touching the effect of such a practice upon the local relations between Europeans and Orientals; to say nothing of considerations affecting the administration of the law. And, in view of all this, I think, with great respect, it is quite impossible to apply with justice to this enactment the observation of Lord Watson in the *Bryden Case*(1), that "the whole pith and substance of it is that it establishes a prohibition affecting" Orientals. For these reasons, I think, apart altogether from the decision in *Cunningham* v. *Tomey Homma*(2), to which I am about to refer, that the question of the legality of this statute is not ruled by the decision in *Bryden's Case*(1).

I think, however, that in applying *Bryden's Case* (1) we are not entitled to pass over the authoritative interpretation of that decision which was pronounced some years later by the Judicial Committee itself in *Cunningham* v. *Tomey Homma*(2). The legislation their Lordships had to examine in the last mentioned case, it is true, related to a different subject-matter. Their Lordships, however, put their decision upon grounds that appear to be strictly appropriate to the question raised on this appeal. Starting from the point that the enactment then in controversy was *primâ facie* within the scope of the powers conferred by section 92(1), they proceeded to examine the ques-

(1) [1899] A.C. 580.
(2) [1903] A.C. 151.

tion whether, according to the true construction of section 91(25), the subject-matter of it really fell within the subject of "aliens and naturalization"; and, in order to pass upon that point, their Lordships considered and expounded the meaning of that article.

At pages 156 and 157, Lord Halsbury, delivering their Lordships' judgment, says:—

If the mere mention of alienage in the enactment could make the law *ultra vires*, such a construction of section 91, sub-section 25, would involve that absurdity. The truth is that the language of that section does not purport to deal with the consequences of either alienage or naturalization. It undoubtedly reserves these subjects for the exclusive jurisdiction of the Dominion — that is to say, it is for the Dominion to determine what shall constitute either the one or the other. but the question as to what consequences shall follow from either is not touched. The right of protection and the obligations of allegiance are necessarily involved in the nationality conferred by naturalization; but the privileges attached to it, where these depend upon residence, are quite independent of nationality.

It was hardly disputed that if this passage stood alone the argument of the appellant must fail. But it is said that this passage is *obiter* and is inconsistent with and, indeed, contradictory of certain passages in Lord Watson's judgment in *Bryden's Case*(1), which passages, it is contended, give the true ground of the decision in that case and, consequently, are binding upon us. I have already said what I have to say as to the effect of Lord Watson's judgment; but I think this last mentioned argument is completely answered by reference to a subsequent passage of Lord Halsbury's judgment in *Cunningham's Case*(2), at page 157. It is as follows:—

That case depended upon totally different grounds. This Board, dealing with the particular facts of the case, came to the conclusion that the regulations there impeached were not really aimed at the regulation of coal mines at all, but were in truth devised to deprive

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the Chinese, naturalized or not, of the ordinary rights of the inhabitants of British Columbia and, in effect, to prohibit their continued residence in that province, since it prohibited their earning their living in that province.

That is an interpretation of *Bryden's Case*(1) which it appears to me to be our duty to accept.

It should not be forgotten that the very eminent judges (Lord Halsbury, Lord Macnaghten, Lord Davey, Lord Robertson and Lord Lindley), constituting the Board which heard the appeal in *Cunningham's Case*(2), had that case before them for something like six months after it had been very fully argued by Mr. Blake against the provincial view; and, in delivering the considered judgment of the Board, Lord Halsbury, as we have seen, examines and sums up the effect of the decision in *Bryden's Case*(1), which the courts in British Columbia had believed themselves to be following in passing upon *Cunningham's Case*(2). In these circumstances, whatever might otherwise have been one's view of their Lordships' judgment in *Bryden Case*(1), we should not be entitled to adopt and act upon a view as to the construction of item 25 of section 91 ("B.N.A. Act"), which was distinctly and categorically rejected in the later judgment.

There is one more point to be noted. Section 24 of the "Naturalization Act," ch. 77, of the Revised Statutes of Canada, 1906, provides as follows:—

24. An alien to whom a certificate of naturalization is granted shall, within Canada, be entitled to all political and other rights, powers and privileges, and be subject to all obligations, to which a natural-born British subject is entitled or subject within Canada, with this qualification that he shall *not*, when within the limits of the foreign state of which he was a subject previously to obtaining his certificate of naturalization, be deemed to be a British subject, unless he has ceased to be a subject of that state in pursuance of

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the laws thereof, or in pursuance of a treaty or convention to that effect.

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It is unnecessary to consider whether or not this section goes beyond the powers of the Dominion in respect of the subject of naturalization, or whether "the rights, powers and privileges" referred to therein ought to be construed as meaning those only which are implied by the "protection" that is referred to as the correlative of allegiance in the passage above quoted from the judgment of the Judicial Committee in *Cunningham's Case*(1). This much seems clear: The section cannot fairly be construed as conferring upon persons naturalized under the provisions of the "Naturalization Act," a status in which they are exempt from the operation of laws passed by a provincial legislature in relation to the subjects of section 92 of the "British North America Act, 1867," and applying to native-born subjects of His Majesty in like manner as to naturalized subjects and aliens. If the enactment in question had been confined to Orientals who are native-born British subjects it would have been impossible to argue that there was any sort of invasion of the Dominion jurisdiction under section 91 (25); and it seems equally impossible to say that this legislation deprives any Oriental, who is a naturalized subject, of any of "the rights, powers and privileges" which an Oriental, who is a native-born British subject, is allowed to exercise or retain.

ANGLIN J. agreed with Davies J.

Appeal dismissed with costs.

Solicitors for the appellant: *MacCraken, Henderson, Greene & Herridge.*

Solicitor for the respondent: *T. A. Colclough.*

(1) [1903] A.C. 151.