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the conduct of any proceedings which may be taken in reference to the consideration and determination of the appellant's claim to a pension, the composition of the board of directors summoned to consider and determine the question, and as to subsequent costs, and generally as to any matter incidental to or consequential upon this order.

Their Lordships will humbly advise His Majesty that an order ought to be made to the effect of the above minutes.

Their Lordships regret that the costs of the appellant will fall upon the fund, and that they have no means of throwing these costs on the persons who are really to blame.

The respondents will pay the costs of the appeal.

Solicitors for appellant: *Blake & Redden.*

Solicitors for respondents: *Lawrence Jones & Co.*

[PRIVY COUNCIL.]

J. C.* 1906 — *July* 6, 27.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA . . . . . APPELLANT;

AND

EVERETT E. CAIN . . . . . RESPONDENT.

ATTORNEY-GENERAL FOR THE DOMINION OF CANADA . . . . . APPELLANT;

AND

GILHULA . . . . . RESPONDENT.

ON APPEAL FROM THE HIGH COURT (KING'S BENCH) OF ONTARIO.

CONSOLIDATED APPEALS.

Power of Dominion Parliament—Validity of Dominion Act 60 & 61 *Vict. c.* 11, *s.* 6, *amended by* 1 *Edw.* 7, *c.* 13—*Power to expel and deport Aliens.*

Held, that s. 6 of the Dominion statute 60 & 61 Vict. c. 11, as amended by 1 Edw. 7, c. 13, s. 13, is intra vires of the Dominion Parliament.

The Crown undoubtedly possessed the power to expel an alien from

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* *Present:* LORD MACNAGHTEN, LORD DUNEDIN, LORD ATKINSON, SIR ARTHUR WILSON, and SIR HENRI ELZÉAR TASCHEREAU.

the Dominion of Canada, or to deport him to the country whence he entered it. The above Act, assented to by the Crown, delegated that power to the Dominion Government, which includes and authorizes them to impose such extra-territorial constraint as is necessary to execute the power.

APPEAL from orders made by Anglin J. on June 17, 1905, discharging the respondents from custody. The question decided was whether s. 6 of Dominion Act 60 & 61 Vict. c. 11, as amended by 61 Vict. c. 2 and 1 Edw. 7, c. 13, is ultra or intra vires of the Dominion Parliament.

On May 23, 1905, the appellant issued two warrants under these Acts to take the respondents, then residing in the province of Ontario, and return them to the United States of America. On being arrested the respondents were discharged on a writ of habeas corpus solely on the ground that the above Acts were ultra vires. Anglin J. held that the Parliament of Canada had no power to pass s. 6 of the Act in question. His view was that the use of the words "returned to" in s. 6 implied the exercise of constraining force outside the territorial limits of Canada, and that no colonial Legislature had power to enact legislation to be actively enforced beyond the boundaries of the Colony; and accordingly he held that s. 6 was ultra vires.

Newcombe, K.C., and *Shepley, K.C.*, for the appellant, contended that the statutes in question were intra vires of the Dominion Parliament, as being laws for the peace, order, and good government of Canada. They were enacted in the execution of that Parliament's enumerated powers with regard to—(*a*) the regulation of trade and commerce, (*b*) naturalization and aliens: see British North America Act, 1867, s. 91; and also 28 & 29 Vict. c. 63. Reference was made to *Riel* v. *Reg.* (1); *Hodge* v. *Reg.* (2); *In re Criminal Code Sections relating to Bigamy* (3); *Reg.* v. *Brierly.* (4)

J. A. Robinson and *Duncan*, for the respondents, contended that the Court below was right in holding the statutes to be ultra vires for the reasons assigned, viz., that they involved an

(1) (1885) 10 App. Cas. 675, 678.
(2) (1883) 9 App. Cas. 117.
(3) (1897) 27 Sup. Ct. Can. Rep. 461, 481, 483.
(4) (1887) 14 Ont. Rep. 525, 531, 533.

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assumption of extra-territorial jurisdiction. The constraining force of the officer acting under the Attorney-General's warrant cannot cease the moment the respondents are outside the Dominion, for they are directed to be "returned to" the United States, which involves, or may involve, the application of force outside the Dominion.

1906 *July* 27.

The judgment of their Lordships was delivered by

LORD ATKINSON. The question for decision in this case is whether s. 6 of the Dominion statute 60 & 61 Vict. c. 11 (styled in the respondents' case "The Alien Labour Act"), as amended by 1 Edw. 7, c. 13, s. 13, is or is not ultra vires of the Dominion Legislature.

In the events which have happened the question has in this instance become more or less an academic one, inasmuch as the two persons arrested under the Attorney-General's warrant granted under the authority of s. 6 were on June 17, 1905, discharged from custody by order of Anglin J., and, a year having therefore elapsed since the date of their entry into Canada, they cannot be re-arrested.

Sect. 9 of 60 & 61 Vict. c. 11 has been amended by 61 Vict. c. 2, and ss. 1, 6 and 9 of the Alien Labour Act, as amended, are in the terms following:

"(1.) From and after the passing of this Act it shall be unlawful for any person, company, partnership or corporation, in any manner to prepay the transportation, or in any way to assist or encourage the importation or immigration of any alien or foreigner into Canada, under contract or agreement, parole or special, express or implied, made previous to the importation of such alien or foreigner, to perform labour or service of any kind in Canada."

"(6.) The Attorney-General of Canada, in case he shall be satisfied that an immigrant has been allowed to land in Canada contrary to the prohibition of this Act, may cause such immigrant, within the period of one year after landing or entry, to be taken into custody and returned to the country whence he came, at the expense of the owner of the importing vessel, or, if he entered from an adjoining country, at the expense of the person,

partnership, company, or corporation violating s. 1 of this Act."

"(9.) This Act shall apply only to the importation or immigration of such persons as reside in or are citizens of such foreign countries as have enacted and retained in force, or as enact and retain in force, laws or ordinances applying to Canada, of a character similar to this Act."

The validity of s. 6 was impeached on several grounds, and was held to transcend the powers of the Dominion Parliament, inasmuch as it purported to authorize the Attorney-General or his delegate to deprive persons against whom it was to be enforced of their liberty without the territorial limits of Canada, and upon this point alone the decision of the case turned. It was conceded in argument before their Lordships, on the principle of law laid down by this Board in the case of *MacLeod* v. *Attorney-General for New South Wales* (1), that the statute must, if possible, be construed as merely intending to authorize the deportation of the alien across the seas to the country whence he came if he was imported into Canada by sea, or if he entered from an adjoining country, to authorize his expulsion from Canada across the Canadian frontier into that adjoining country. The judgment of the learned judge was, in effect, based upon the practical impossibility of expelling an alien from Canada into an adjoining country without such an exercise of extra-territorial constraint of his person by the Canadian officer as the Dominion Parliament could not authorize. No special significance was attached to the word "return." The reasoning of the judgment would apply with equal force if the word used had been "expel" or "deport" instead of "return."

In 1763 Canada and all its dependencies, with the sovereignty, property, and possession, and all other rights which had at any time been held or acquired by the Crown of France, were ceded to Great Britain: *St. Catherine's Milling and Lumber Co.* v. *Reg.* (2) Upon that event the Crown of England became possessed of all legislative and executive powers within the country so ceded to it, and, save so far as it has since parted with these powers by legislation, royal proclamation, or voluntary grant, it

(1) [1891] A. C. 455, at p. 459. (2) (1888) 14 App. Cas. 46, at p. 53.

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is still possessed of them. One of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order, and good government, or to its social or material interests: Vattel, Law of Nations, book 1, s. 231; book 2, s. 125. The Imperial Government might delegate those powers to the governor or the Government of one of the Colonies, either by royal proclamation which has the force of a statute—*Campbell* v. *Hall* (1)—or by a statute of the Imperial Parliament, or by the statute of a local Parliament to which the Crown has assented. If this delegation has taken place, the depositary or depositaries of the executive and legislative powers and authority of the Crown can exercise those powers and that authority to the extent delegated as effectively as the Crown could itself have exercised them. The following cases establish these propositions: *In re Adam* (2); *Donegani* v. *Donegani* (3); *Cameron* v. *Kyte* (4); *Jephson* v. *Riera*. (5) But as it is conceded that by the law of nations the supreme power in every State has the right to make laws for the exclusion or expulsion of aliens, and to enforce those laws, it necessarily follows that the State has the power to do those things which must be done in the very act of expulsion, if the right to expel is to be exercised effectively at all, notwithstanding the fact that constraint upon the person of the alien outside the boundaries of the State or the commission of a trespass by the State officer on the territories of its neighbour in the manner pointed out by Anglin J. in his judgment should thereby result. Accordingly it was in *In re Adam* (2) definitely decided that the Crown had power to remove a foreigner by force from the island of Mauritius, though, of course, the removal in that case would necessarily involve an imprisonment of the alien outside British territory, in the ship on board of which he would be put while it traversed the high seas.

(1) (1774) 1 Cowper, 204.
(2) (1837) 1 Moo. P. C. 460, at pp. 472-6.
(3) (1835) 3 Knapp, 63, at p. 88
(4) (1835) 3 Knapp, 332, at p. 343.
(5) (1835) 3 Knapp. 130.

The question, therefore, for decision in this case resolves itself into this: Has the Act 60 & 61 Vict. c. 11, assented to by the Crown, clothed the Dominion Government with the power the Crown itself theretofore undoubtedly possessed to expel an alien from the Dominion, or to deport him to the country whence he entered the Dominion? If it has, then the fact that extra-territorial constraint must necessarily be exercised in effecting the expulsion cannot invalidate the warrant directing expulsion issued under the provisions of the statute which authorizes the expulsion.

It has already been decided in *Musgrove* v. *Chun Teeong Toy* (1) that the Government of the Colony of Victoria, by virtue of the powers with which it was invested to make laws for the peace, order, and good government of the Colony, had authority to pass a law preventing aliens from entering the Colony of Victoria. On the authority of this case s. 1 of the above-mentioned statute would be intra vires of the Dominion Parliament. The enforcement of the provisions of this section no doubt would not involve extra-territorial constraint, but it would involve the exercise of sovereign powers closely allied to the power of expulsion and based on the same principles. The power of expulsion is in truth but the complement of the power of exclusion. If entry be prohibited it would seem to follow that the Government which has the power to exclude should have the power to expel the alien who enters in opposition to its laws. In *Hodge* v. *Reg.* (2) it was decided that a colonial Legislature has within the limits prescribed by the statute which created it "an authority as plenary and as ample . . . . as the Imperial Parliament in the plenitude of its power possessed and could bestow." If, therefore, power to expel aliens who had entered Canada against the laws of the Dominion was by this statute given to the Government of the Dominion, as their Lordships think it was, it necessarily follows that the statute has also given them power to impose that extra-territorial constraint which is necessary to enable them to expel those aliens from their borders to the same extent as the Imperial Government could itself have imposed the constraint for a similar purpose had the statute never been passed.

(1) [1891] A. C. 272. (2) 9 App. Cas. 117.

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Their Lordships therefore think that the decision of Anglin J. was wrong, and that the appeal should be allowed, and will so humbly advise His Majesty.

Having regard to the arrangement as to costs made with the Attorney-General at the hearing of the petition for special leave to appeal, and to all the circumstances of the case, their Lordships direct the appellant to pay the costs of the respondents as between solicitor and client.

Solicitors for appellant: *Charles Russell & Co.*
Solicitors for respondents: *Blake & Redden.*

[PRIVY COUNCIL.]

J. C.* 1906] *July* 27.

WILFLEY ORE CONCENTRATOR SYNDICATE, LIMITED . . . . . } PLAINTIFFS;

AND

N. GUTHRIDGE, LIMITED . . . . . DEFENDANTS.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Practice—Special Leave to Appeal—Decree of High Court of Australia.

Where on a petition of special leave to appeal from the High Court of Australia it appeared that the law as laid down by that Court could not be objected to:—

Held, that the question of the application of that law to the particular case involving simply the construction of a document, however substantial as between the parties, was not one of public importance, and that there was no sufficient ground shewn for granting the petition.

THIS was a petition by the appellants for special leave to appeal from a judgment of the High Court dated March 20, 1906. It stated that Hood J., in the Supreme Court of Victoria, had found that the respondents were infringing the petitioners' letters patent for an invention entitled "improvements in ore concentrators," and decreed an injunction and damages; that the High Court had reversed this decree, holding that the said letters patent had been anticipated by a publication in a magazine or newspaper known as the *Engineering and Mining Journal of New*

* *Present:* LORD DAVEY, SIR ARTHUR WILSON, and SIR ALFRED WILLS.