IMMIGRATION AND PROVINCIAL RIGHTS *

Immigration, as a term of international law, means the act of persons of foreign origin who settle in a country and abide there, with or without hope of return. Under the Immigration Act of Canada an immigrant is "a person who enters Canada with the intention of acquiring Canadian domicile".[1] Immigration means more than entering the country; it also involves settlement, establishing domicile.

An immigrant does not necessarily become a Canadian citizen. He may do so by being naturalized, if an alien; and he does so when he acquires Canadian domicile, if already a British subject.[2] But whether or not he does so, he remains an immigrant.

The subject of this lecture is the respective legislative powers of the Dominion and the Provinces, and in particular to what extent the local legislature may take counter measures should the Dominion adopt an immigration policy prejudicial to a Province.

We shall first consider sections 91 (25) and 95 of the British North America Act 1867; how these sections have been applied; and how they have been interpreted by the Courts.

The Constitution

Section 95, which puts immigration and agriculture on the same footing, defines the respective jurisdictions of the Dominion and Provincial legislatures, as follows:—

> 95.—In each Province the Legislature may make laws in relation to Agriculture in the Province, and to Immigration into the Province; and it is hereby declared that the Parliament of Canada may from Time to Time make laws in relation to Agriculture in all or any of the Provinces, and to Immigration into all or any of the Provinces, and any Law of the Legislature of a Province relative to Agriculture or to Immigration shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of Canada.

It is to be noted also that section 91 (25) confers on the Dominion parliament exclusive legislative authority in matters of "Naturalization and Aliens".

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* Extracts from a lecture by Jean Mercier, K.C., of the Bar of the Province of Quebec, before La Société des Etudes Juridiques, on December 15, 1943, which was originally published in La Revue du Barreau for April 1944 (Vol. 4, p. 149). Translated by Douglas A. Barlow, of the Quebec Bar.

[1] R.S.C. 1927, c. 93 s. 2 (k).

[2] *Id.*, ss. 2 (6), 4.

Resuming section 95, the first part provides that each Province may make laws in relation to immigration into the Province. The second part gives the Federal Parliament like powers in each and all of the Provinces. The third and final part voids Provincial legislation repugnant to that of the Dominion. Does this mean, in fact, that the Provincial power is illusory?

Interpretation

Many opinions have been expressed as to the nature of the B.N.A. Act. At the time of Confederation the founders referred to it as a treaty. Since then, for one school of thought, mainly French-Canadian, it is a pact or a contract, while for another, largely English-Canadian, it is to be treated simply as a statute of the Imperial Parliament. Recently Mr. Edouard Laurent assimilated it to an "institution".[3] In any event all will agree that the Canadian constitution originated in an agreement.

It is therefore of interest to ascertain the intention of the founders, as expressed in the resolutions they adopted at Quebec, and in their statements during debates on Confederation.

We should also bear in mind the rule enunciated by Clement, that "upon a broad, liberal and statesman-like interpretation of those terms (of the B.N.A. Act, setting out the respective legislative powers of the Dominion and the Provinces), clearly defining and yet reconciling them, the stability of our institutions largely depends",[4] and the common law rule that unless a text is ambiguous its terms must be given their ordinary and grammatical meaning.

The Quebec Resolutions

The sections I have cited from the B.N.A. Act are a fairly faithful reflection of the corresponding Quebec resolutions (October 10, 1864), which read as follows:—

> 29.—The general Parliament shall have power to make laws for the peace, welfare and good government of the federated provinces (saving the sovereignty of England), and especially laws respecting the following subjects:—
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> 30.—Naturalization and aliens.
>
> 35.—Immigration.
>
> 36.—Agriculture.

[3] For the meaning of "institution" as a term of jurisprudence, one may refer to the works of the leading contemporary exponent of the theory of "institutions", M. Georges Renard, particularly "La Théorie de L'Institution", Paris, Sirey, 1930.

[4] Clement's Canadian Constitution, 1916 ed., p. 372.

43.—The local Legislatures shall have power to make laws respecting the following subjects:—

4.—Agriculture.
5.—Immigration.

45.—In regard to all subjects over which jurisdiction belongs to both the general and local legislatures, the laws of the general Parliament shall control and supersede those made by the local legislature and the latter shall be void so far as they are repugnant to or inconsistent with the former.

CONTEMPORARY OPINIONS

At first glance it would appear that the Fathers of Confederation intended "that the Federation Act must be so construed as to allow no power to the Provincial Legislatures under section 92, which may, by possibility, and if exercised in some extravagant way, interfere with the objects of the Dominion in exercising their powers under section 91"—to use the Privy Council's phrasing for a thesis which it rejected.[5]

In the debates on Confederation, Attorney-General MacDonald said: "In the United States, they commenced in fact by the wrong end. They declared by their constitution that each state was a sovereignty in itself. . . . . Here we have adopted a different system. We have strengthened the General Government."[6]

The debates do however show clearly that in the matter of immigration there should be concurrent jurisdiction. The Honourable Mr. Ryan, speaking for the Irish Catholics, declared: "Again, immigration is a subject which is left to the Local as well as to the General Government to deal with. I think it should be under the care of the General Government entirely."[7]

The Solicitor-General, Mr. H. L. Langevin, also foresaw that "the power of legislation would be exercised concurrently by the Federal Legislature and the Local Legislature . . . . this is a point upon which we invariably insisted, and which was never denied us in the Conference".[8]

And the Honourable A. A. Dorion spoke to the same effect: "It is as plain as can be that immigration is to be under the control of both the local and the general legislatures."[9]

Many similar citations might be made, showing that it was definitely the intention of the founders that there should be

[5] *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575.
[6] DEBATES ON CONFEDERATION, p. 33.
[7] *Id.*, p. 335.
[8] *Id.*, p. 373.
[9] DEBATES ON CONFEDERATION, p. 259.

concurrent jurisdiction in the matter of immigration. The intention at any rate, when the first part of section 95 was put into the Statute, was that it should have a meaning and effect.

"As Long And as Far Only"

In the debates on Confederation the Honourable A. A. Dorion remarked upon the meaning of these words, that if a provincial statute on immigration were not vetoed by the Federal Government, Parliament could adopt a contrary law and there would be conflict immediately.[10] Hence one may infer that in his opinion a province could legislate upon a matter relating to immigration "as long and as far only" as the Dominion had not done so, and even as long as the Dominion had not adopted legislation with which the provincial statute would be incompatible.

Sir John Thompson, Minister of Justice, in a letter to the Government of Nova Scotia in 1894, relative to a statute on immigration adopted by that Province, declared that it was ultra vires the powers of a provincial legislature to adopt a law relating to immigration, Parliament having already passed a law upon the subject. In other words, the Dominion having legislated Provincial powers are extinct.

Mr. Justice Idington, of the Supreme Court of Canada, said in his dissentient judgment in the *Quong Wing* case that here was "another illustration of how the law of a Province, quite good till Parliament asserted its powers, by virtue of section 91, subsection 29, must bend before such assertion of superior power."[11]

In more immediate terms, suppose that in the domain of immigration a Province wished to legislate upon a new point, or one upon which the Dominion had not yet legislated. It could do so, and the statute would be valid, but "as long and as far only" as the Dominion did not adopt incompatible legislation. If this is the case, provincial jurisdiction is indeed not far from illusory.

However, in the *Grand Trunk*[12] and *Attorney General for British Columbia*[13] cases, it was held that "there can be a domain in which the provincial and the Dominion legislation may overlap, in which case neither legislation will be ultra vires, if the field is clear; and if the field is not clear, and in such a domain the two legislations meet, then the Dominion legislation must prevail."

[10] *Id.*, p. 264.
[11] 49 S.C.R., p. 458.
[12] [1907] A.C. 65, p. 68.
[13] [1929] A.C. 111.

So the words "as long and as far only" of section 95 must be given their ordinary and grammatical meaning. For the 1929 decision (known as the *Fish Canning Case*) is the most recent one, and it makes law, so to speak.

It is to be noted that when Dominion and Provincial legislation come into conflict in a field of concurrent jurisdiction, "Dominion enactments, when competent, override but cannot directly repeal provincial legislation. Whether they have in a particular instance effected virtual repeal by repugnancy is a question for adjudication by the tribunals, and cannot be determined by either the Dominion or provincial legislature."[14]

Immigration Laws of Quebec and Nova Scotia

The Province of Quebec has adopted various laws on immigration—laws that do not in fact conflict with Dominion legislation in that field.

There was firstly an Act of 1875 "to encourage Canadians in the United States, European immigrants and inhabitants of the Province, to establish themselves upon the wild lands of the Crown."[15]

Later there was the statute of 1899, still in force as chapter 326, R.S.Q. 1941. Its purpose is to compel every society that proposes to "place" children in the Province, to lay before the Lieutenant-Governor its object and system of working, and to satisfy the Lieutenant-Governor that it proposes to bring in only children of good morals. This is one example of Provincial legislation intended to restrict the entry into the Province of immigrants, but undesirable ones.

Again, section 3 of cap. 103 R.S.Q. 1941 declares that "the functions, powers and duties of the Minister (of Colonization) consist in the control and management throughout the Province of. . . . immigration. . ."

Here then are three examples of Quebec legislation relating to immigration, but as will be seen they are auxiliary rather than repugnant to the Dominion statutes. The second of the three Acts mentioned is restrictive in character, but it applies only to societies operating in the Province, and it affects child immigrants but indirectly.

In 1894, Nova Scotia passed an Act relating to indigent immigrants. It provided in substance that if the master of a

[14] *The Prohibition Case*, [1896] A.C. 348.
[15] 38 Vict., c. 3.

ship disembarked at Halifax any person without means and likely to become a burden on the City, and refused to take him aboard again upon request by the City, the master would be liable to a fine or to imprisonment. The statement of Sir John Thompson, which I cited, occurs in his letter advising the Government of Nova Scotia that this Act was surely *ultra vires*, since the Federal Government had already legislated in the matter. He decided not to contest the Act, for the reason that in certain instances, it might serve a useful purpose.[16]

It may then be said that, as regards laws bearing strictly and directly upon immigration, the Federal power is paramount. In applying the rule, however, one must bear in mind the "aspect doctrine", exemplified in certain Privy Council cases. It has happened from time to time that under the guise of legislation upon a matter within its jurisdiction the Dominion has adopted laws upon matters reserved exclusively to the Provinces. Such legislation is none the less *ultra vires*, for distinction must be made between reality and appearance, principal and accessory, essential and contingent.[17]

Does it follow that the Provinces may accomplish indirectly what they may not do directly — that they may indeed validly enact legislation repugnant to a Federal statute on immigration?

In any definition of immigration we find the concept of abiding in or inhabiting the territory, and if one analyzes that concept into its essential and contingent connotations one finds that its essential element is dwelling or residing in the territory, which element may be accompanied in practice by other features, such as the enjoyment of political rights, property rights, and so on. The latter however are contingent or non-essential, since at one time or other the immigrant may dwell or reside in the territory without enjoying one or more of such rights.

And these contingent features, so far as listed in section 92 of the B.N.A. Act, may be the subject of valid Provincial legislation, even though it be repugnant to Dominion statutes on immigration, as the following cases will show.

Oriental Immigration

The statutes, litigation and decisions which we shall study arose out of the oriental immigration into British Columbia between 1880 and 1914.[18]

[16] Lefroy, A. H. F., Canada's Federal System, 1913, p. 669.
[17] *Hodge* v. *The Queen* (1883), 9 App. Cas. 117; *Grand Trunk* v. *Canada*, [1907] A.C. 65.
[18] *Cf.* The Makers of Canada, Vol. XX, pp. 336 *et seq.*

In 1882 the people of British Columbia were beginning to worry about the number of Chinese in the Province. An inquiry by the Dominion Government revealed that the Canadian Pacific Railway was bringing in coolies in great numbers. Without such labour, it was said, the railway could not be built.

When the railway was completed the coal-mine owners found a use for these immigrants. They made contracts with societies (one was known as the Nippon Supply Company) which undertook to bring in 500 Japanese over a period of five years, their wages to be paid through the society.

The Province adopted a number of laws directly restricting this mass settlement within its territories. It tried, for example, to increase the entry fee of $50.00 already imposed on Chinese by the Dominion, and to make it apply also to Japanese. This law, however, was disavowed, upon request of the Imperial Government (according to Mr. Ralph Smith—Hansard, 1907, Dec. 16, p. 735), because of the treaty then existing between the United Kingdom and Japan mutually permitting the entry of their respective subjects into the possessions and colonies of the other. (In this connection, however, Section 132 of the B.N.A. Act should not be overlooked).

Let us see now what attitude the Privy Council took towards two of these statutes.

Union Colliery v. Bryden [19]

The first judgment was in 1899, in the *Union Colliery* v. *Bryden* case. It declared *ultra vires* the B.C. Coal Mines Regulation Act, of 1890, which prohibited coal-mine owners from employing Chinese of full age in underground work. While this judgment runs counter to the thesis set out above, the Privy Council effectively reversed itself in the next case, as we shall see. It is advisable however to study the case, for a better understanding of the doctrine that was ultimately established.

There is no doubt that "regarded merely as a coal working regulation", the law was within the purview of Section 92, subsection 13, of the B.N.A. Act.

The Privy Council held that "its exclusive application to Chinamen who are aliens or naturalized subjects establishes a statutory prohibition which is within the exclusive authority of the Dominion Parliament conferred by Section 91, subsection 25, in regard to naturalization and aliens". "The subject of naturali-

[19] [1899] A.C. 580.

zation, or in other words, what shall be the rights and privileges pertaining to residents in Canada after they have been naturalized."[20] Note that Section 5 of our Federal Naturalization Act says that a naturalized citizen is "entitled to all political and other rights, powers and privileges . . . . to which a natural-born British subject is entitled".

While this reasoning is attractive, it was later rejected, as we shall see.

In this case, Lord Watson applied the "aspect doctrine". He held the statute to be *ultra vires* because under the appearance of an Act relating to work in the coal-mines, in reality its purpose was to prevent the Chinese from working and earning their living. "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. . . . ." [21]

Cunningham v. Tomey Homma[22]

Four years later the Privy Council had again to rule upon the validity of a B.C. Act directed to restricting oriental immigration. It reversed the lower courts which, following the Union Colliery judgment, had held the Act *ultra vires*. It decided that a Province had a right to adopt legislation like the Act in issue, which provided (in section 8) that "no Chinaman, Japanese or Indian shall have his name placed on the register of voters for any electoral district or be entitled to vote at any election. Any collector of votes who shall insert the name of any Chinaman, Japanese or Indian in any such register shall . . . . be liable to a penalty not exceeding $50."[23]

Their Lordships, in upholding this statute, reasoned as follows:—

Under subsection 1 of section 92 of the B.N.A. Act a Province has the power to adopt and amend its electoral law, and the claim that it had not the right to deprive an alien of his suffrage would involve absurdity.[23] In fact, the electoral laws, both Provincial and Federal, require that an elector be a British subject.

[20] *Id.*, 586.
[21] *Id.*, 587.
[22] [1903] A.C. 151.
[23] *Id.*, 152.

On the other hand, the B.N.A. Act "undoubtedly reserves these subjects (naturalization and aliens) for the exclusive jurisdiction of the Dominion"[24] under subsection 25 of section 91. Does this mean that "the mere mention of alienage"[25] in a Provincial statute makes it void? Obviously not. Thus, the statute in issue "has not necessarily anything to do with either, since a child born of Japanese parents in Vancouver City is a natural-born subject of the King, and would be equally excluded from the possession of the franchise".[26]

The said law affects the consequences of alienage and naturalization, but according to the Committee, a distinction must be made: 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. The former are of Dominion jurisdiction, but a Provincial law, otherwise constitutional, is not invalid because it affects the latter.

The statute then was directed against orientals as a race and not as aliens or naturalized subjects. It affected a group of persons distinguished from others by blood, origin and characteristic customs (none of which matters are contemplated by section 91).

It is true that subsection 25 of section 91 declares that naturalization is of exclusive Federal jurisdiction, and that the Naturalization Act of Canada provides that "A person to whom a certificate of naturalization is granted by the Minister shall, subject to the provisions of this Act, be entitled to all political and other rights, powers and privileges, be subject to all obligations, duties and liabilities, to which a natural-born British subject is entitled or subject, and as from the date of his naturalization have to all intents and purposes the status of a natural-born British subject".[27] Their Lordships did not rule upon the validity of this section, but stated only that whatever the very wide phrase "political rights" might mean, "it cannot be held to give necessarily a right to the suffrage in all or any of the provinces".

CONTRADICTION

The Judicial Committee distinguished the *Union Colliery* case: "That case depended upon totally different grounds. This

[24] *Id.*, 156.
[25] *Id.*, 156.
[26] [1903] A.C., p. 156.
[27] R.S.C. 1925, c. 138, s. 5.

Board, dealing with the particular facts of that 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, naturalized or not, of the ordinary rights of the inhabitants of British Columbia and in effect 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 naturalized person has an inherent right to the suffrage within the province in which he resides."

In fact, however, there is a contradiction between the principles enunciated in the two judgments.

In the *Union Colliery* case their Lordships said that: "The subject of naturalization seems, *prima facie*, to include the power of enacting what shall be the consequences of naturalization, or in other words, what shall be the rights and the privileges pertaining to residents in Canada after they have been naturalized."

In the *Tomey Homma* case, on the other hand, their Lordships stated that while it was for the Dominion to define aliens and to lay down the procedure for naturalization, "the language of that section (s. 91, subs. 25) does not purport to deal with the consequences of either alienage or naturalization". The contradiction is patent. Their Lordships continue in even more explicit terms: "The right of protection and the obligation 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."

I submit that had the Privy Council not wished to reverse the *Union Colliery* doctrine, it would have made a distinction between the right of earning a living, which may certainly be counted among the foremost natural and imprescriptible rights, and political rights, which are but a means of preserving the former. It did not take such a distinction, and it would seem to follow that all rights, public and private, are, in its opinion upon an equal footing, so far as the present question is concerned. There may be some qualification to be made to this statement however, since the remark that the statute in issue in the *Union Colliery* case "prohibited their earning their living in that province", goes rather far. The Chinese immigrants were denied only the right to work in the coal mines; and even though that might have been the most important means open to them for earning a living, the law did not prohibit them from adopting other means, such as fishing or colonization.

QUONG WING v. THE KING [28]

In the *Quong Wing* case, 1914, the Supreme Court of Canada, having to choose between the two aforesaid doctrines, elected to follow the latter one, Idington J. dissenting; and as leave to appeal to the Privy Council was refused, that doctrine may be taken as established.

In this case the Supreme Court maintained the validity of a Saskatchewan Act which provided that: "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 *bona 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".

As Mr. Justice Idington said: "The evident purpose (of the Act) is to curtail or restrict the rights of Chinamen," and though by its title the Act referred to female labour, it dealt only with the case of white women. It was discriminatory legislation directed against one class of society, a race. The learned judge differed from his colleagues in holding that the *Union Colliery* doctrine governed, rather than that of the *Tomey Homma* case.

The Chief Justice, Sir Charles Fitzpatrick, said: "It is 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 women and girls."[29]

Mr. Justice Davis stated that if the *Union Colliery* doctrine was sound, it "would afford a strong argument that the legislation now in question should be held ultra vires", but that in the later *Tomey Homma* case "the Judicial Committee modified the views of the construction of subsection 25 of section 91 stated in the *Union Colliery* decision,"[30] And later, that by the explanation of the latter decision, in the *Tomey Homma* judgment, "I am relieved from the difficulty I would otherwise feel."[31]

[28] 49 S.C.R. 440.
[29] 49 S.C.R. 444.
[30] *Id.*, 446.
[31] 49 S.C.R. 447.

He added that "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 altogether,"[32] And farther on: "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."[33] And such legislation "will be upheld even though it may operate prejudicially to one class or race of people."[34]

Mr. Justice Duff was of opinion that the decisive point was that the Act applied "to persons of the races mentioned without regard to nationality". "The terms Chinamen 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 Act is not an Act dealing with aliens or with naturalized subjects as such".[35] "Nor is there any ground for supposing that this legislation is designed to deprive Orientals of the opportunity of gaining a livelihood."[36]

The learned judge was of opinion that the legality of the statute was not governed by the decision in the *Union Colliery* case, and that the Court was not entitled to pass over the authoritative interpretation of that decision given in the *Tomey Homma* case. "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."[37]

Mr. Justice Duff calls attention to the eminent judges who ruled upon the *Tomey Homma* case, the strong pleading against the provincial view, and the time spent by their Lordships upon the case, and he concludes that the Supreme Court was not entitled to adopt a view which was distinctly and categorically rejected in that judgment.

The learned judge refers to what is now section 5 of the Naturalization Act, which provides that a naturalized subject is entitled to "all political and other rights, powers and privileges. . to which a natural-born British subject is entitled." He declares that, "It is unnecessary to consider whether or not this section goes beyond the powers of the Dominion in respect of the subject

[32] *Id.*, 447.
[33] *Id.*, 449.
[34] *Id.*, 449.
[35] *Id.*, 463.
[36] *Id.*, 465.
[37] 49 S.C.R. 466.

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. . . . This much seems clear: That section cannot fairly be construed as conferring upon persons naturalized. . . . 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 B.N.A.Act 1867."[38]

Conclusion

I realize the danger of attempting to deduce general rules from judgments —a danger clearly indicated in the final remarks of their Lordships in *Cunningham* v. *Tomey Homma*. However, the cases we have reviewed do justify the conclusion that a province may validly adopt legislation bearing directly and essentially upon a matter enumerated in section 92 of the B.N.A Act, and which deprives a class of persons or one or more races of their *political* rights. A province might thus take away the right of suffrage, or of eligibility for election, or to hold office, and other similar rights, from an entire group distinguished by its origin or racial or personal characteristics. Such legislation would obviously be an indirect impediment to the immigration of members of the group concerned.

Could a province likewise take away the *civil rights* of the members of a group? Apparently yes; and the reasoning is simple.

In the *Tomey Homma* case the Privy Council said in effect: A local legislature has jurisdiction to amend its electoral law. It may, and in fact it does, disenfranchise judges, women, minors, etc. It may extend the list to include Japanese, Orientals, etc.

But civil rights are also a matter of exclusive provincial jurisdiction. The legislature may take away certain civil rights from married women, minors and so on. It might add a race or a group to the list. It seems to me that if discriminatory legislation is valid in the case of political rights, it must be equally valid in the case of civil rights. It was certainly a matter of civil rights in the *Quong Wing* case.

It goes without saying that a local legislature might adopt special legislation favouring certain classes of immigrants.

To sum up, I submit that the Dominion and the Provinces have concurrent power, in their respective territories, to adopt legislation relating strictly and directly to immigration; that

[38] *Id.*, 469.

where the field is clear either may validly legislate; but that if a provincial statute is repugnant to a Dominion statute the latter must prevail, provided however, that it belongs to the courts alone to decide if the provincial statute is thereby abrogated; and finally, that provincial legislation that encroaches upon non-essential consequences of alienage or naturalization or is repugnant to a Dominion Statute on immigration, is constitutional if it bears essentially upon a matter within exclusive provincial jurisdiction.

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