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THE ALIEN LANDOWNER IN CANADA

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Introduction

The ownership of land by aliens¹ is of great topical interest in Canada. Everyone is concerned about foreign economic domination, domination which shows itself in one of its more obvious ways when aliens buy up large tracts of recreational land in Canada, over the heads—it is sometimes said—of the Canadians. Such is public concern that Ottawa is shortly to set up a joint federal-provincial committee to study the whole question. In this article, three aspects of the legal background will be examined: what the law used to be, what the law is today, and the constitutional issues involved in changing the present law. Finally, a more specific topic will be discussed, the eligibility of aliens to receive grants of new land from the Crown.

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I should like to thank the Dean of the Faculty, Philip White, for his help and encouragement in writing this article. I should also like to thank Eric Haythorne, of the Toronto and English Bars, and D. L. Johnston of the University of Toronto Law Faculty, for a great deal of practical help.

¹ The question of who is an alien is a little complicated. Since 1946, there have been three classes—Canadian citizens on the one hand, aliens on the other, and British subjects half-way in between. The land problem principally involves ownership by Americans, who are indisputably aliens, and so it is not proposed to discuss the difficulties raised by British subjects in this context. See E. J. Arnett, *Canadian Regulation of Foreign Investment: The Legal Parameters* (1972), 50 Can. Bar Rev. 213, at p. 227.

I. *The Alien Landowner at Common Law.*

The common law treated the alien landowner with robust xenophobia. The legal position of an alien who aspired to hold land can be summarized in three propositions:

(i) By act of the parties—purchase or devise—an alien could take land, but he could not hold it. His title was good against everyone except the Crown, which could forfeit the land at any time by taking appropriate proceedings.²

(ii) By act of the law—inheritance on intestacy, dower and curtesy—an alien could not even *take* land, much less hold it.³ In such a case, the land would escheat to the Crown automatically.

(iii) On the death of an alien intestate, his heirs could not inherit any land which he possessed at his death, because this too escheated to the Crown. Thus title to land could not be traced through alien ancestors.⁴

These common law rules went with the English settlers to North America, and long remained in force in all of Canada except Quebec. There the civil law was the pre-revolutionary law of France, which was slightly different. An alien could hold land during his lifetime without interference from the Crown. On his death, however, the Crown had the *droit d'aubaine*,⁵ which entitled it to take all his property both real and personal, except in a few exceptional cases.

Even a casual reading of the old cases is enough to show that the common law rules about inheritance by and from aliens caused much inconvenience and injustice.⁶ It was the right of the Crown to forfeit land purchased by an alien, however, which caused the most serious difficulties in Canada, since it lay at the heart of the "alien question" which disturbed the politics of Upper Canada in the early nineteenth century.⁷ Immediately after the American War of Independence, many loyalist settlers moved north to re-settle under

² Co. Lit. 2b. Blackstone, Commentaries on the Laws of England (1776), Vol. I, p. 372.

³ Blackstone, *op. cit.*, Vol. II, p. 249. Chitty on Blackstone (1776-1841), Vol. II, p. 293(n).

⁴ Blackstone, *op. cit.*, Vol. II, p. 250. Originally the rule prevented even the natural-born heirs of an alien from inheriting his land, but the severity of this rule was relaxed by two Acts of Parliament, 1700, 11 & 12 Wil. III, c. 6 and 1752, 25 Geo II, c. 39.

⁵ *Donegani v. Donegani* (1834), 3 Knapp 63 (P.C.). Pothier, *Traité des Personnes et des Choses*, 1re. partie, tit. II, s. 2, *Traité des Successions*, ch. 1, s. 1, in *Oeuvres de Pothier*, by M. Beignot (1861), Vols. VIII, IX.

⁶ *E.g. Irwin v. McBride* (1864), 23 U.C.Q.B. 570, and other cases referred to in the Canadian Abridgement under "Aliens".

⁷ For an account of this, see Head, *The Stranger in our Midst: A Sketch of the Legal Status of the Alien in Canada* (1964), 2 Can. Y. B. Int'l. L. 107.

British rule in Upper Canada. They were followed in later years by many more settlers from the United States, whose reasons for moving were not chiefly loyalty to the Crown. The British Colonial Office and the government of Upper Canada, which feared and disliked these later settlers in the belief that they favoured political union with the United States, set about depriving them of their votes. The Colonial Office took the line that these late arrivals were aliens, and relying on this, began to forfeit their land, on which their right to vote depended. This policy of forfeiture, which caused a minor political crisis in Upper Canada, was only reversed by the British Government in 1827 when it discovered that it interfered with its policy of conscripting United States seamen.⁸ The matter was finally laid to rest in 1849, when the Legislative Assembly and Council of the Province of Canada passed an Act⁹ abolishing the common law rules about landholding by aliens, and giving them the same right to hold land as British subjects.

The common law on this subject seems to have been based, not so much on feudal theory, as on insularity and dislike of foreigners.¹⁰ Coke justified the law by saying that if aliens could hold land, then: "(1) The secrets of the realm might thereby be discovered. (2) The revenues of the realm (the sinews of war, and ornament of peace) should be taken and enjoyed by strangers born. (3) It should tend to the destruction of the realm."¹¹ He then elaborated his third point by telling the tale of the Trojan Horse, by means of which "a very few men in the heart of the city did more mischief in a few hours than ten thousand men without the walls in ten years", and then, clinching the matter with a piece of characteristic pedantry, he pointed out that too many foreign landowners would interfere with the administration of justice because they would be ineligible for jury-service! Blackstone, for once, is blunter and more to the point: "[The common law] seems to be intended by way of punishment for the alien's presumption, in attempting to acquire any landed property."¹² In the absence of any real threat of large-scale alien land ownership such as there is in Canada today, the philosophy of the leading jurists was surprisingly like that of the two village louts in a caricature in a very ancient edition of the English magazine *Punch*: "Who's that?" "A stranger." "Fling a

⁸ By treating American settlers in Canada as aliens, it was impliedly admitting that the American seamen it wished to conscript were also aliens—and so destroying the basis for its claim to be entitled to press them. See Head, *op. cit.*, *ibid.*

⁹ An Act to Repeal 9 Vic. c. 109 and to Make Better Provision for the Naturalization of Aliens, Stat. Prov. Can., 1849, c. 197, s. 12.

¹⁰ See Blackstone, *op. cit.*, footnote 2, Vol. II, p. 249.

¹¹ Calvin's case (1607), 7 Co. Rep. 1a, at pp. 18b.

¹² *Op. cit.*, footnote 2, Vol. I, p. 372.

half-brick at him." This sort of legal reasoning had become less respectable by the second half of the nineteenth century. By then, it was felt to be unnecessary and invidious to maintain such distinctions between alien and citizen landholders.¹³ First in the Provinces of Canada and Nova Scotia, then in British Columbia and Vancouver Island, then in England, and after Confederation in 1867 throughout the country, the law was changed to give aliens equal rights with citizens to hold land.¹⁴

II. *The Alien Landowner—The Law Today.*

(i) *Federal Legislation.*

In 1870 the Parliament of Great Britain passed a Naturalization Act,¹⁵ section 2 of which provided that "real and personal property of every description may be taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a natural-born British subject; and a title to real and personal property of every description may be derived through, from or in succession to an alien, in the same manner in all respects as through, from, or in succession to a natural-born British subject." In 1881 the Parliament of Canada enacted its own Naturalization Act,¹⁶ section 4 of which copied the British Act. This provision has reappeared in all subsequent Canadian Naturalization Acts, and, with the substitution of "Canadian citizen" for "British subject" since the creation of a separate Canadian citizenship in 1946,¹⁷ it is the law of Canada today.¹⁸

(ii) *Provincial Legislation.*

The federal legislation is virtually duplicated by five of the provinces, four of the provincial Acts stemming from laws passed before the Dominion Naturalization Act of 1881. The present law

¹³ See comments of Lord Hatherley introducing the British Naturalization Bill, 1870, quoted in Howell on Naturalization (Carswell 1884), p. 48.

¹⁴ The reference to these Acts are given below.

¹⁵ 1870, 33 Vic., c. 14 (Imp.).

¹⁶ S.C., 1881, c. 13.

¹⁷ Canada Citizenship Act, S.C., 1946, c. 15.

¹⁸ R.S.C., 1970, c. C-19, s. 24. The position will change if Bill C-132, An Act to provide for the review and assessment of acquisitions of control of Canadian business enterprises by certain persons and of the establishment of new businesses in Canada by certain persons, becomes law. The Bill gives the Government administrative powers to forbid persons who are not Canadian citizens ordinarily resident in Canada either to take over Canadian businesses or to set up new businesses in Canada, if it considers it in the public interest to do so. This could lead to considerable indirect restriction of the acquisition of land by aliens. For example, the Government would be able to forbid an alien or group of aliens to acquire a Canadian apartment block to rent out commercially, or to forbid them to buy and develop land in Canada on a commercial basis. See Globe and Mail, 25th Sept. 1972.

of Quebec and Ontario dates from the Act of 1849 to which reference has already been made, which applied throughout Canada East and Canada West. The relevant Ontario provision is now found in the two sections of the Alien's Real Property Act.¹⁹ The Civil Code of the province of Quebec sets out the law of Quebec on the question.²⁰ The relevant British Columbia law²¹ dates from an Act of 1867,²² which replaced earlier laws of the separate colonies of British Columbia²³ and Vancouver Island.²⁴ The present Manitoba provision²⁵ dates from 1873.²⁶ Unlike the enactments in the five above-mentioned provinces, New Brunswick's law on this matter²⁷ was first enacted in 1891,²⁸ after the passage of the federal legislation in 1881.

The law of the five remaining provinces needs more careful consideration.

Alberta had no statute on this topic until 1942, when the Land Sales Prohibition Act was passed.²⁹ Section 2 of this distinctly peculiar piece of legislation provided that "no person either by himself or by his servant or agent shall sell or agree to sell any land to any enemy alien or Hutterite,³⁰ or to any trustee or other person on behalf of any enemy alien or Hutterite". The inhabitants of Alberta were encouraged to obey the other terms of this Act by section 7, which visited contraventions with fines of up to \$2,000.00

¹⁹ R.S.O., 1970, c. 19. But Ontario has restricted the grant of Crown lands to aliens. See *infra*, p. 415.

²⁰ Quebec Civil Code, Arts 18 and 609.

²¹ The Aliens Act, R.S.B.C., 1960, c. 8. But British Columbia restricts grants of Crown land to aliens, see *infra*, p. 415.

²² An Ordinance to assimilate the Law regarding Aliens in all parts of the Colony of British Columbia, 2nd April 1867. B.C. Laws, 1871, no. 93.

²³ Proclamation of 14th May 1859. Appendix to B.C. Laws, 1871, no. 14.

²⁴ An Act to Enable Aliens to hold and transmit Real Estate, 28th Oct. 1861. Appendix to B.C. Laws, 1871, no. 7.

²⁵ The Law of Property Act, R.S.M., 1970, c. L-90, s. 2. But Manitoba restricts grants of Crown land to aliens. See *infra*, p. 415.

²⁶ An Act respecting Aliens, S.M., 1873, c. 43.

²⁷ The Property Act, R.S.N.B., 1952, c. 177, s. 9.

²⁸ An Act to enable Aliens to acquire, hold and convey Real Estate in this Province, S.N.B., 1891, c. 13.

²⁹ S.A., 1942, c. 16.

³⁰ The Hutterite Brethren are an exclusive Anabaptist sect that originated in the Tyrol in 1528, and which eventually fled to Canada to avoid persecution elsewhere. Hutterites are unpopular in Alberta partly because they are exclusive, partly because they are pacifists, and partly because their communal landholding and primitive standards of comfort enable them to produce food cheaply and undersell their neighbours. Legislation restricting their right to hold land was continued in force after the war when the Communal Property Act 1947 was passed. This was unsuccessfully challenged as unconstitutional in *Walter v. A.-G. for Alberta*, [1969] S.C.R. 383, and was eventually repealed in 1972 because the Alberta Government felt it to be inconsistent with the Alberta Bill of Rights of that year. Angry farmers who did not share these constitutional scruples staged protests in Edmonton against the repeal.

and a year in prison. In the following year, the Act was disallowed by the Governor General in Council,³¹ whereupon it was re-enacted in amended form, so that it penalized sales to Hutterites, but made no reference to enemy aliens.³² In 1972, a Bill³³ was introduced to amend the Public Lands Act of the province to forbid all grants of new land to aliens, and also to provide that where such a grant was made to a Canadian, the land should re-vest in the Crown if it later came into the hands of an alien. In a different way, this Bill was almost as peculiar as the original Land Sales Prohibition Act. Although it would only have applied to original grants of Crown land initially, the eventual effect would have been to create a kind of alien-proof land tenure over large areas of the province, and so to re-introduce the old common law on alien landholding mercifully abolished in the nineteenth century. Fortunately, the Bill in its original form was dropped and the matter referred to a Select Committee, which pointed out the legal difficulties involved.³⁴ Now the Alberta legislature has just passed a more moderate measure to restrain grants of public land to aliens.³⁵

Saskatchewan, like Alberta, had no separate legislation on alien landholding for many years. In 1947 the province enacted a Bill of Rights, section 10 of which provided that: "Every person and every class of persons shall enjoy the right to acquire by purchase, to own in fee simple or otherwise, to lease, rent and to occupy any lands, messuages, tenements or hereditaments, corporeal or incorporeal, of every nature and description, and every estate or interest therein, whether legal or equitable, without discrimination because of the race, creed, religion, colour or ethnic or national origin of such person or class of persons."³⁶ At first sight, the section appears to double the federal legislation in giving aliens an unrestricted right to hold land, but this may not be so. There is authority for the view that a law protecting persons from discrimination on account of their "national origin" does not prevent discrimination against persons because of their nationality.³⁷ Thus this Act may not affect the position of aliens at all. Saskatchewan may soon change the position of alien landholders for the worse, however. In 1972 a Bill was introduced to prohibit the sale of farmland in Saskatchewan to anyone not resident in the province.³⁸ This

³¹ P.C. No. 2820, 1943 Canada Gazette, No. 17, p. 1694.

³² S.A., 1944, c. 15. Replaced by the Communal Property Act, S.A., 1947, c. 16.

³³ Bill No. 107 of 1972.

³⁴ Alberta Select Committee on Foreign Investment: Interim Report on Public and Private Lands and Supplementary Report, Oct. 31st 1972.

³⁵ An Act to Amend the Public Lands Act, Bill No. 55 of 1973.

³⁶ S.S., 1947, c. 35. See now The Saskatchewan Bill of Rights, R.S.S., 1965, c. 378, s. 9.

³⁷ *London Borough of Ealing v. Race Relations Board*, [1972] A.C. 342.

³⁸ Bill 115 of 1972.

was dropped and the matter referred to a legislative committee, which, by a majority, proposed controls different from those contained in the original Bill,³⁹ favouring a restriction on alien rather than on non-resident holders of farm-land, coupled with a general prohibition on the ownership of farm-land by corporations, with exceptions for incorporated family farms and agricultural co-operatives. The government of Saskatchewan is said to be considering the implementation of this report during the next session of the legislature.⁴⁰

Nova Scotia has a Real Property Act⁴¹ sections 1 and 2 of which almost double the federal legislation enabling aliens to hold land, and which have their origins in an Act of 1854.⁴² Recently, however, concern has been growing in the province over the ownership of land by non-residents, many or most of whom are aliens. In 1969 an Act was passed to compel non-residents to disclose their holdings of land in a special register.⁴³ In 1973, two Bills were introduced in the legislature, one to impose a tax on owners of land in Nova Scotia who were resident outside Canada,⁴⁴ and the other to prohibit landholding by such persons except with the consent of a special administrative board.⁴⁵ The government has dropped both of these Bills, but they may form the basis of future legislation.⁴⁶

Prince Edward Island is the province with the greatest restrictions on the acquisition of land by outsiders. In 1939, it enacted a statute which completely contradicted the federal legislation enabling aliens to hold land freely in Canada by forbidding them to hold more than 200 acres in the province without the consent of the Lieutenant Governor in Council.⁴⁷ In 1964, the amount of land an alien was allowed to hold without permission was reduced to ten acres, the shore frontage of which must not exceed five chains.⁴⁸ Then in 1972 the law was changed again to impose the restriction on all persons not resident in the province. The provision now reads as follows: "Unless he receives permission so to do from the Lieu-

³⁹ Report of the Legislative Committee on Foreign Ownership of Farm Land in Saskatchewan, 17th April 1973.

⁴⁰ *Leader-Post*, May 2nd 1973—"Land Tenure Controls Almost a Sure Bet."

⁴¹ R.S.N.S., 1967, c. 261.

⁴² An Act to Remove all Disability to Take and Hold Real Estate by Reason of Alienage, N.S. Laws, 1854, c. 19.

⁴³ Land Holdings Disclosure Act, S.N.S., 1969, c. 13.

⁴⁴ An Act to Amend ch. 13 of the Acts of 1969.

⁴⁵ An Act Respecting the Approval of Purchases of Land Holdings by Non-Residents.

⁴⁶ I am indebted to the government of Nova Scotia for this information.

⁴⁷ Real Property Act, S.P.E.I., 1939, c. 44, s. 4; R.S.P.E.I., 1951, c. 138, s. 3.

⁴⁸ An Act to Amend the Real Property Act, S.P.E.I., 1964, c. 27.

tenant Governor in Council, no person who is not a resident of the Province of Prince Edward Island shall take, acquire, hold⁴⁹ or in any other manner receive, either himself, or through a trustee, corporation or any such the like, title to any real property in the Province of Prince Edward Island the aggregate total of which exceeds ten acres, nor to any real property in the Province of Prince Edward Island the aggregate total of which has a shore frontage in excess of five chains.⁵⁰ A Royal Commission in the province recently recommended strengthening the law still further by imposing discriminatory taxation on non-resident landholders, and by preventing the evasion of the existing restriction through corporations resident in the province.⁵¹ Even before the report was published, the Premier was promising to implement its proposals. Meanwhile, the restrictions have been challenged in court as unconstitutional.⁵²

Newfoundland enacted a statute giving aliens full rights to hold land in 1900,⁵³ and similar legislation remained on the statute-book until the colony joined Canada in 1949. The provision was repealed in 1952,⁵⁴ however, and since then Newfoundland has had no legislation on the general right of an alien to hold land. But Newfoundland has an Act to ban grants of Crown land to persons not resident in the province.⁵⁵

III. *The Alien Landowner — The Constitutional Position.*⁵⁶

Is a provincial legislature entitled to pass a statute like the recently repealed section of the Prince Edward Island Real Property Act,⁵⁷ or like the legislation proposed for Saskatchewan,⁵⁸ which limits the right of an alien to hold land within the province? And if such provincial legislation is *ultra vires*, can a legislature produce a similar result by restricting landholding by anyone, citizen or alien, who is not resident in the province? Both of these questions must now be examined.

⁴⁹ This word suggesting that the Act is retrospective, although this was probably not the intention of the legislature.

⁵⁰ An Act to Amend the Real Property Act, S.P.E.I., 1972, c. 40.

⁵¹ Interim Report of the Royal Commission on Land Ownership and Use, Jan. 24th 1973.

⁵² *Morgan and Jacobsen v. A.-G. for Prince Edward Island and Blaquiere*, Supreme Court of Prince Edward Island, July 25th 1973. The Attorney General of Prince Edward Island kindly informed me of these proceedings, which are still going on.

⁵³ An Act to confer certain rights on Aliens, S. Nfld., 1900 (2nd Sess.), c. 7.

⁵⁴ The Revised Statutes Act, S. Nfld., 1952, No. 72, s. 8(2), repeals earlier Newfoundland statutory provisions omitted from the Revised Statutes of Newfoundland 1952. The relevant provision was so omitted.

⁵⁵ Crown Lands (Amendment) Act, S. Nfld., 1971, No. 46. See *infra*, p. 415.

⁵⁶ E. J. Arnett, *op. cit.*, footnote 1; Alberta Report, *op. cit.*, footnote 34, Appendix E.

⁵⁷ *Supra*, footnote 47.

⁵⁸ *Supra*, footnote 39.

(a) *Is Provincial Legislation Against Alien Landowners Valid?*

Under section 92(13) of the British North America Act, a provincial legislature has exclusive authority to make laws governing "property and civil rights" within the province. The scope of this section was recently considered by the Supreme Court of Canada in *Walter v. A.-G. for Alberta*,⁵⁹ in which a group of Hutterites challenged a statute of Alberta⁶⁰ which severely restricted the sale of land to members of their religious faith. The statute was held *intra vires* the Alberta legislature because it concerned property and civil rights, although it was openly discriminatory against a particular group of persons identified by their religious allegiance. "It would seem to me to be clear that a provincial legislature can enact laws governing the ownership of land within the province and that legislation enacted in relation to that subject must fall within 92 (13), and must be valid unless it can be said to be in relation to a class of subject specifically enumerated in s. 91 of the British North America Act, or otherwise within the exclusive federal jurisdiction."⁶¹ One such class of subjects "specifically enumerated in s. 91" is "naturalization and aliens", which is expressly reserved for Parliament by subsection 25.

Here it is worth stressing rather an obvious point. Although legislation restricting the right of an alien to hold land appears to involve both property and civil rights and naturalization and aliens, if we use these phrases loosely, there is no possibility of applying the "double aspect" doctrine here. As we have already seen, Parliament has enacted a law purporting to give aliens the fullest right to hold land in Canada. Provincial legislation restricting landholding by aliens is in direct conflict with federal legislation. Therefore the only question is whether or not the federal legislation was validly enacted.

Thus everything turns on whether the federal power to legislate concerning "naturalization and aliens" includes the power to decree what the property rights of aliens shall be—a question which it is not easy to answer, since the leading cases are confusing and hard to reconcile with one another.

⁵⁹ *Supra*, footnote 30.

⁶⁰ The Communal Property Act, *supra*, footnote 32, the successor to The Land Sales Prohibition Act, *supra*, footnote 32. Alberta repealed its anti-Hutterite legislation in 1972. See *supra*, footnote 30.

⁶¹ *Supra*, footnote 30, at p. 389, per Martland J. The legislation was challenged as being a restriction on religious freedom, a matter which was alleged to be the exclusive concern of Parliament after *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299. The Supreme Court of Canada decided that the legislation did not constitute a restriction on religious freedom, and thus did not need to decide whether religious freedom was a federal matter. The case is further discussed *infra*, p. 411.

- (i) *The Leading Cases—Union Colliery Co. of British Columbia v. Bryden, and Cunningham and A.-G. for British Columbia v. Tomey Homma.*

*Bryden's case*⁶² arose out of an attempt by the British Columbia legislature to keep Chinese labour out of coal mines in the province. In 1890 the British Columbia legislature amended its Coal Mines Regulation Act, so that section 4 prohibited the employment of "Chinamen" in such a mine.⁶³ The Privy Council took this elegant legislative term to mean "Chinese alien or naturalized British subject formerly a Chinese alien", and refused to give it the wider meaning of "person of Chinese race". The full importance of this finding, which took the matter several steps nearer "naturalization and aliens" than it appears to be at first sight, will be seen later on. The Privy Council then went on to say that the civil rights of aliens and naturalized persons came well within the scope of "naturalization and aliens"; "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 privileges pertaining to residents in Canada after they have been naturalized."⁶⁴ Lord Watson concluded by saying that although the Act was partly concerned with "local works and undertakings" and "property and civil rights"—topics within the exclusive control of the provincial legislature by section 92(10) and (13) of the British North America Act—the predominant purpose of the amendment to the Coal Mines Regulation Act was to put aliens and naturalized citizens of Chinese origin out of work in British Columbia. "[T]he leading feature of the enactments consists in this . . . that they established 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."⁶⁵ Thus the Act was "in pith and substance" about naturalization and aliens, and so *ultra vires* the legislature of British Columbia.

The Privy Council considered the meaning of "naturalization and aliens" again four years later in *Cunningham and A.-G. for B.C. v. Tomey Homma*.⁶⁶ The British Columbia Provincial Elections Act⁶⁷ provided that no "Japanese" should be placed on the electoral roll. This enactment was challenged as *ultra vires* on the strength of the decision in *Bryden's case*, the contention succeeding in the British Columbia courts at first instance⁶⁸ and on appeal.⁶⁹ The

⁶² [1899] A.C. 580 (P.C.).

⁶³ S.B.C., 1890, c. 33, amending S.B.C., 1877, c. 122.

⁶⁴ *Supra*, footnote 62, at p. 586.

⁶⁵ *Ibid.*, at p. 587.

⁶⁶ [1903] A.C. 151 (P.C.).

⁶⁷ R.S.B.C., 1897, c. 67, s. 8. The disputed section was inserted in 1895, S.B.C., 1895, c. 20.

⁶⁸ (1900), 7 B.C.R. 368.

⁶⁹ (1901), 8 B.C.R. 76.

Privy Council, however, took another view of the matter. Lord Halsbury, who delivered the advice to the Crown, began by deciding that this piece of legislation, unlike that in *Bryden's* case, was directed at everyone of Japanese *race*, whether aliens, naturalized persons, or natural-born British subjects, and hence was really nothing to do with "naturalization and aliens" at all. Then he interpreted the phrase "naturalization and aliens" restrictively, saying that section 91(25) of the British North America Act "does not purport to deal with 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".⁷⁰ *Bryden's* case he distinguished by saying 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, to prohibit their continued residence in that province, since it prohibited their earning their living in that province".⁷¹ In other words, the statute in *Bryden's* case, although it purported to regulate coal-mines, was really only a legislative sham designed to put aliens out of work, whereas the Provincial Elections Act was different—according to Lord Halsbury—because it really did regulate elections in the province. Thus it was *intra vires* the provincial legislature because it was an "amendment of the constitution of the province", a matter reserved for the provincial legislature by section 92(1) of the British North America Act.

It is hard to draw any clear guidance from these two cases. *Bryden's* case treats the federal power to legislate about "naturalization and aliens" as including the power to regulate the status and rights of aliens and naturalized subjects in Canada, and so appears to be authority for saying that no provincial legislature has the power to deprive an alien of the right to hold land contrary to the terms of a federal statute. On the other hand, *Tomey Homma's* case is equally categorical that the federal power over "naturalization and aliens" does *not* extend to include the power to regulate the rights and disabilities of aliens and naturalized persons, and according to this case, legislation like the Prince Edward Island Real Property Act as it stood before 1972 would be *intra vires* the provincial legislature. Within four years, the Judicial Committee seems to have erected side by side two similar sign-posts, each pointing in opposite directions to what is supposed to be the same place. Whether we decide that provincial legislation limiting the

⁷⁰ *Supra*, footnote 66, at p. 156. *Italics mine*.

⁷¹ *Ibid.*, at p. 157.

right of an alien to hold land is constitutional or not depends on which sign-post we choose to follow.

(ii) *Does Bryden's Case Survive Tomey Homma's Case as Authority on S. 91(25)?*

The simplest way out of the dilemma is to say that the first sign-post is wrong and the second one is right—in other words, that *Bryden's* case was impliedly overruled in *Tomey Homma's* case on this point, and it is the second case which should be followed. One commentator at least takes this line. Willes Chitty concludes his note⁷² on the topic by saying that “*Bryden's* case is no longer a real authority—either it was decided on particular facts that appear, not in that judgment, but in the later case of *Cunningham v. Tomey Homma*, or on more mature consideration the Judicial Committee found it necessary to repudiate or explain away the decision”. It is submitted, however, that the matter is more complicated than this, that the later case did not overrule the earlier, and that they are in fact distinguishable. This conclusion is reached by studying the treatment given to *Bryden's* case by the Canadian courts after the *Tomey Homma* decision.

Despite the apparent inconsistency of the two cases, no later court has been prepared to hold *Bryden's* case overruled.⁷³ The strongest assertion that *Bryden's* case is still good law comes from the British Columbia Court of Appeal in *Re Coal Mines Regulation Act*.⁷⁴ Fortified by the decision in *Tomey Homma's* case, the British Columbia government began a new campaign to drive Chinese labour out of the coal-mines. The legislature had earlier enacted a slightly revised amendment⁷⁵ to the Coal Mines Regulation Act which was declared unconstitutional in *Bryden's* case, and the government referred the new but almost identical statute to the courts

⁷² Printed in “notes and annotations” at the beginning of Vol. 63 of the Supreme Court of Canada Reports (1923), p. 27.

⁷³ In *Quong-Wing v. R.* (1914), 49 S.C.R. 440, the Supreme Court of Canada had to consider the two cases in order to determine the validity of a Saskatchewan statute prohibiting the employment of white women by orientals in their businesses. The court applied *Tomey Homma's* case, but distinguished *Bryden's* case and did not say it had been overruled. The same court managed to reconcile the two cases in *Brooks-Bidlake v. A.-G. for B.C.* (1923), 63 S.C.R. 466, aff'd. by P.C., [1923] A.C. 450, and again in *In Re Employment of Aliens* (1922), 63 S.C.R. 293, aff'd. by P.C., [1924] A.C. 203, where Duff J. devoted a large part of his judgment to reconciling them, and where Anglin and Brodeur JJ. also felt that the cases could, with difficulty, be reconciled, *ibid.* at pp. 319, 333, 337. More recently, the Supreme Court of Canada looked at the cases again in *Winner v. S.M.T. and A.-G. for New Brunswick*, [1951] S.C.R. 887, aff'd. by P.C., [1954] A.C. 541, and again seemed to think they were reconcilable. See also *Re Ye Foo*, [1925] 2 D.L.R. 1131 (Ont.). *Contra: Re Daniluk*, [1935] 1 W.W.R. 142 (Sask.).

⁷⁴ (1904), 10 B.C.R. 408.

⁷⁵ S.B.C., 1903, c. 17.

of the province, hoping they would say that *Bryden's* case was now bad law, and that a prohibition on the employment of Chinese in coal-mines was now legal. The British Columbia Full Court rejected this argument on appeal, applied *Bryden's* case, and declared the new statute, like its predecessor, *ultra vires*.

In view of these later cases, it is impossible to write off *Bryden's* case as impliedly overruled. We must accept both cases as rightly decided, and hard though it may be, try to find which one is most analogous to the question in hand.

(iii) *Suggested Distinctions Between the Cases.*

If we accept that *Bryden's* case was rightly decided, we must reject part of what Lord Halsbury said in *Tomey Homma's* case. He said clearly and categorically that the authority of Parliament over naturalization and aliens "does not purport to deal with the consequences of either alienage or naturalization . . . 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". In *Bryden's* case the Privy Council declared the Coal Mines Regulation Act *ultra vires* because it infringed the federal power to legislate about naturalization and aliens by depriving certain aliens and naturalized persons of certain rights because of their alien and naturalized status. In other words, the Act in question was *ultra vires* because it created certain consequences that followed from certain persons being aliens and naturalized persons. Either *Bryden's* case is wrong, or else Lord Halsbury's dicta are wrong—the two cannot possibly stand together—and since we have decided that *Bryden's* case still stands, it must be Lord Halsbury who is wrong. Despite what he said, the power of Parliament to legislate about naturalization and aliens *does* extend to cover at least some of the consequences of naturalization and alienage.⁷⁶ The question is—which consequences? Is the acquisition of capacity to hold land one of them?

One way of answering this question is by turning to the famous judgment of Rand J. in *Winner v. S.M.T. and A.-G. for New Brunswick*.⁷⁷ He discussed *Bryden's* case and *Tomey Homma's*

⁷⁶ The conclusion that despite *Tomey Homma's* case Parliament has some authority to legislate about the consequences of naturalization and alienage is supported by dicta of high authority. Viscount Cave L.C., delivering the judgment of the Privy Council in *Brooks-Bidlake v. A.-G. for B.C.* recognized that "section 91 reserves to the Dominion Parliament the general right to legislate as to the rights and disabilities of aliens and naturalized persons . . .", *supra*, footnote 73, at p. 457 (A.C.), and Duff J. in the Supreme Court of Canada said the same in *Re Employment of Aliens*: "The Dominion authority in respect of aliens . . . comprehends the right to define the rights and disabilities of aliens in a general way", *supra*, footnote 73, at p. 332 (S.C.R.).

⁷⁷ *Supra*, footnote 73. See *infra*, pp. 409-410.

case and he distinguished them by saying that "the incidents of status must be distinguished from elements or attributes necessarily involved in status itself".⁷⁸ According to *Rand J. Tomey Homma's* case involved the first kind of incident, and *Bryden's* case an element involved in status itself.

This appears to be the idea behind what *Rand J.* is saying. It is false to draw a line between the power to say who is an alien, and the power to say what the rights of an alien shall be. Alienage is a *status*. A status means a certain legal standing—that is to say, the entitlement in law to certain rights and the subjection in law to certain disabilities. Status cannot exist in the air. Except in relation to certain essential rights and duties, the word means nothing. Therefore the power to determine who is and who is not an alien must necessarily involve the power to give him or to withhold from him certain "essential rights". The provincial statute in *Bryden's case* was *ultra vires* because it purported to regulate one of these "essential rights"—the right of an alien lawfully present in Canada to settle in what province he likes⁷⁹—which could only be altered by the Parliament of Canada. The statute in *Tomey Homma's case*, however, was not *ultra vires*, because the right which it affected—the right to vote in a provincial election—was not one of these "essential rights" with which only the federal Parliament could deal.⁸⁰

If this rather abstract and metaphysical approach is correct, then to discover whether provincial legislation depriving an alien of the right to acquire land is *ultra vires* we must decide into which class the right to acquire property falls. Is it one of these "essential rights" forming part of status itself? It may or may not be. The difficulty with saying that the capacity to acquire property is an "essential element in status itself" in the case of aliens is that it must then follow that it is an "essential element in status itself" in the case of citizens as well. Parliament alone is competent to legislate about Canadian citizenship. Therefore Parliament alone would be able to grant or destroy the capacity of a citizen to acquire property in Canada, and a provincial legislature would be unable to affect his capacity in this respect. Yet, as we shall see later, a provincial legislature appears to have ample power to vary the capacity of

⁷⁸ *Ibid.*, at p. 919 (S.C.R.).

⁷⁹ It has to be the "right to settle in what Province he likes" rather than the "right to work" because the statute held *intra vires* in *Brooks-Bidlake v. R.* infringed the right of an alien to work. The finding that the statute in *Bryden's case* infringed the right to work so seriously that it tended to drive the Chinese out of the province can be used to distinguish *Bryden's case* from *Brooks-Bidlake v. R.*, although in view of the relative importance of lumbering and coal-mining in British Columbia, it is more likely that the statute in *Brooks-Bidlake v. R.* would have driven the Chinese out of the province than the statute in *Bryden's case*!

⁸⁰ See Lefroy, *Canada's Federal System* (1913), pp. 308-309.

groups of citizens to acquire property.⁸¹ This suggests that the capacity to acquire property is not "an essential right forming part of status itself", and on this kind of analysis, it is probably *Tomey Homma's* case rather than *Bryden's* case which applies to provincial legislation forbidding aliens to hold land.

However, even if the right to hold land is not one of Rand J.'s "essential rights", it may still be a right which, in the case of an alien, only Parliament can alter. We can compare aliens with Dominion corporations.⁸² In *John Deere Plow Co. v. Wharton*,⁸³ where the Privy Council decided that a provincial legislature could not directly limit the capacity of a Dominion corporation, it reached this conclusion partly by analogy with the inability of a province to destroy the capacity of an alien—for which it held *Bryden's* case to be authority. This implies that what a province cannot do to a Dominion corporation, it cannot do to an alien either. One of the things which a province cannot do to a Dominion corporation is to forbid it, *qua* Dominion corporation, to hold land. In *Great West Saddlery v. R.*,⁸⁴ it was held that while a province could validly enact a mortmain statute which would curtail the right of any corporation, Dominion or provincial, to hold land within the province, it could not pass an Act limiting the rights of Dominion corporations alone. If the analogy between Dominion corporations and aliens is sound, it is clearly *Bryden's* case which governs provincial attempts to limit landholding by aliens, and such attempts are *ultra vires*, because only Parliament can directly interfere with their civil capacity.

Apart from Rand J.'s "essential rights" analysis, there are also at least three other ways in which this difficult pair of cases may be distinguished. Each points to the conclusion that it is *Bryden's* case which is nearest to the matter in hand.

The first is that whereas the Coal Mines Regulation Act discriminated against persons on grounds of alienage, the Provincial Elections Act did so on grounds of *race*, irrespective of nationality.⁸⁵ Lord Watson went to considerable trouble in *Bryden's* case to find (both against the evidence and the dictates of common-sense) that "Chinaman" means "alien or naturalized Chinese" and not "person of Chinese race".⁸⁶ It was only by doing so that he was able to

⁸¹ See *infra*, p. 412.

⁸² Arnett, *op. cit.*, footnote 1, at p. 223.

⁸³ [1915] A.C. 330, at pp. 343-344. ⁸⁴ [1921] 2 A.C. 91.

⁸⁵ See Head, *op. cit.*, footnote 7, at p. 126.

⁸⁶ See the definitions of "Chinese" in the following B.C. statutes: An Act to prevent Chinese from acquiring Crown Lands, S.B.C., 1884, c. 2; An Act to prevent the Immigration of Chinese, S.B.C., 1884, c. 3; The Chinese Regulation Act, S.B.C., 1884, c. 4. But Lord Watson's view was supported by various B.C. cases decided when every Chinese in the province was either an alien or a naturalized person. *R. v. Wing Chong* (1885), 1 B.C.R. II 150.

decide that the statute in question had anything to do with naturalization and aliens at all. On the other hand, Lord Halsbury in *Tomey Homma's* case began by saying that the Act before him discriminated against all persons of a certain race, and so had nothing to do with naturalization and aliens. *Tomey Homma's* case could have been decided on this ground alone, because however odious to the modern constitutional lawyer racial discrimination may be, it is not open to attack on the grounds on which it was attacked there, that it infringed the federal authority over naturalization and aliens. The two cases have been distinguished on this ground on a number of occasions in the past in which Canadian courts have upheld provincial statutes discriminating on grounds of race rather than nationality.⁸⁷ It is certainly open to the courts to distinguish the cases on this ground in the future. And if the cases are distinguished on this ground, of course, it is *Bryden's* case which applies to a provincial statute which discriminates against *aliens*, which would then be invalid.

Secondly, as Professor Laskin suggests, there appears to be "a tenable distinction between provincial legislation which confers a privilege, e.g. the right to vote, and provincial legislation which denies to persons advantages which are ordinarily available, e.g. work in coal mines".⁸⁸ This is even more obviously true if we look at the cases through the eyes of a judge at the turn of the century, when everyone did not have the right to vote, and when, unlike today, a man out of work usually had to starve. If we take this distinction, the question is whether the right to hold land is a "privilege" or "an advantage otherwise available". In Canada today, where the tendency is for homes to be owned rather than rented, surely to deny this right to aliens is to deny them "an advantage otherwise available" rather than a "privilege"—at any rate, where resident aliens are concerned.

Thirdly, it is possible to draw a clear distinction between the power to amend the constitution of the province, under which the statute in *Tomey Homma's* case was passed, and the power to legislate about local works and undertakings or property and civil rights within the province, under which British Columbia purported to pass the invalid section of the Coal Mines Regulation Act. If power to amend the constitution of the province does not include a comprehensive power to say who is entitled to vote and who is not, it is difficult to think of anything which it does include—which means that the Privy Council was almost bound to reach the result it did in *Tomey Homma's* case. On the other hand, the powers purported

⁸⁷ *R. v. Quong Wing*, *supra*, footnote 73.

⁸⁸ Canadian Constitutional Law (3rd ed., 1969), p. 996. *In Re Coal Mines Regulation Act*, *supra*, footnote 74, per Irving J., at p. 416.

to be used in enacting section 4 of the Coal Mines Regulation Act were much more vague and general, and to use them to exclude aliens from employment in the province was hardly an obvious application of them. Since a province which enacted a prohibition on landholding by aliens would presumably claim to do so under the same powers which British Columbia unsuccessfully claimed to have used in *Bryden's* case, it looks as if it is *Bryden's* case that supplies the answer.⁸⁹

(iv) *Conclusion: Provincial Legislation Against Alien Landowners is Ultra Vires.*

The leading constitutional cases establish a strong case for saying that an attempt by a provincial government to forbid aliens to hold land in Canada is *ultra vires*, because it contradicts their right to hold land in Canada as if they were citizens, validly conferred on them by Parliament in the Canada Citizenship Act, through its power under section 91(25) of the British North America Act to make laws concerning naturalization and aliens.⁹⁰ The conclusion that section 24 of the Canada Citizenship Act is a valid exercise of section 91(25) is also supported by various other pieces of evidence. There are dicta in various important cases to the effect that section 91(25) confers the power to govern the civil capacity of an alien, as well as to decide who shall be an alien.⁹¹

⁸⁹ There is also a fourth distinction between the cases, originally taken in *Tomey Homma's* case itself, and the ground on which the cases have been distinguished a number of times since. It is said that whereas the statute in *Tomey Homma's* case was what it purported to be—an Act really intended to regulate local elections—the statute in *Bryden's* case was a sort of legislative wolf in sheep's clothing. It was not, so it is said, an Act to regulate the running of coal-mines, but simply a device "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 the province since it prohibited their earning their living in that province", *supra*, footnote 66, at p. 157. This distinction is unconvincing however, since it is hard to see how a statute forbidding aliens to vote is any less a statute "about aliens" than one forbidding them to hold land.

⁹⁰ There is also the further possibility that as against aliens of certain nationalities, provincial legislation restraining foreign investment would infringe the Federal power to implement treaties with foreign powers. Of course, this question depends on the extent to which the Federal power to implement treaties enables it to legislate in areas where it would not be competent otherwise—a doubtful question: *In Re Employment of Aliens*, *supra*, footnote 73 (P.C.). *Re Regulation of Radio Communications in Canada*, [1932] A.C. 304 (P.C.) and *A.-G. for Canada v. A.-G. for Ontario*, [1937] A.C. 327 (P.C.). This is discussed by Arnett, *op. cit.*, footnote 1, and also by R. J. Poole, Solicitor, whose opinion is annexed to the Alberta Interim Report, *op. cit.*, footnote 34.

⁹¹ As well as authority collected at footnote 76 above, see dicta in *A.-G. for Canada v. A.-G. for Alberta*, [1916] 1 A.C. 588 (P.C.); *A.-G. for Ontario v. Reciprocal Insurers*, [1924] A.C. 328 (P.C.); and *Re Insurance Act of Canada*, [1932] A.C. 41 (P.C.), dealt with by Arnett, *op. cit.*, *ibid.*, at pp. 221-226.

There are various decisions from provincial courts to the effect that the federal Act applies to give aliens the right to hold land in the province.⁹² There is the history of several provincial statutes, which also points the same way: the disallowance of the original Land Sales Prohibition Act of Alberta, apparently because it prohibited sales of land to enemy aliens, and its later re-enactment in a form penalizing sales to Hutterites only, and the disappearance of the Newfoundland legislation permitting aliens to hold land in the Colony, which was repealed after Confederation, presumably because it was felt to be redundant in view of the Dominion legislation.

It appears that legislation on landholding by aliens, if there is to be any, must come from Ottawa. "The Dominion Parliament alone can legislate in relation to them merely as aliens."⁹³

(b) *Is Provincial Legislation Against Non-resident Landowners Valid?*

If a province is unable to deprive aliens of their general right to hold land, is it able to procure something like the same result by prohibiting landholding by anyone, alien or citizen, who is not resident in the province?⁹⁴ The recent trend of provincial legislation,⁹⁵ especially in the Maritimes, makes this a highly topical matter. It has already provoked public controversy,⁹⁶ and the validity of legislation of this kind is now being challenged in the courts.

We have already seen that although the courts have struck down provincial legislation directed at aliens as *ultra vires*, they have upheld provincial legislation directed at all persons of a certain race, whether citizens or aliens, although aliens happened to be among those affected. Similarly, we have seen that although a province is not competent to pass an Act depriving Dominion corporations of the right to hold land in the province, a Dominion corporation will nevertheless be bound by a provincial statute which restricts the rights of all corporations, Dominion or provincial, to hold land in the province. This suggests that although a provincial

⁹² *Young v. Milne* (1889), 28 N.B.R. 186; *Re Kvasnak*, [1951] 3 D.L.R. 412 (Sask. C.A.); *Re Lukac* (1963), 40 D.L.R. (2d) 120 (Alta S.C.). *Contra: Re Daniluk*, *supra*, footnote 73.

⁹³ Lefroy, *op. cit.*, footnote 80, p. 308. This also appears to be the view of Arnett, *op. cit.*, footnote 1, and that of Poole, *op. cit.*, footnote 90.

⁹⁴ See Alberta Interim Report, *op. cit.*, footnote 34.

⁹⁵ See *supra*, section II.

⁹⁶ There was a sharp dispute about this kind of legislation at the provincial Premiers' Conference in 1972, where no agreement could be reached on the matter—Globe and Mail, August 4th and 5th, 1972. See also the leading article "Land Control—not War" in Globe and Mail, 3rd May, 1973: "By discriminating against land purchases by Canadians who live in other provinces, the Maritime governments are using techniques that would delight a Quebec separatist. Is Canadian citizenship worthless in another province?"

statute prohibiting landholding by aliens would be *ultra vires*, a provincial statute which discriminated against all non-residents—citizens as well as aliens—would be *intra vires*, although large numbers of aliens would find their rights affected. However, the matter is more complicated than this, because there are two possible reasons why this kind of legislation could still be open to attack.

(i) *Legislation Against Non-residents Void if Really Directed Against Aliens.*

It is a commonplace of Canadian constitutional law that "a colourable device will not prevail".⁹⁷ Neither Parliament nor legislature may invade an area it is forbidden to enter by pretending to do something else. Thus Parliament could not regulate the business of insurance within the province of Ontario by purporting to legislate about aliens,⁹⁸ and conversely, the legislature of British Columbia failed to validate the invalid section 4 of the Coal Mines Regulation by dressing it up as a law to prevent fatal accidents in coal mines through the presence of Chinese miners.⁹⁹ Provincial legislation against "non-resident" landowners would undoubtedly be invalid if a court found it to be secretly directed at aliens alone.

Would the courts take these recent "non-resident" statutes to be "alien" statutes in disguise?

The existing statutes and current Bills against non-resident landholders all come from the Maritime provinces. In the two Bills introduced in Nova Scotia,¹⁰⁰ "non-resident" means a person not living in Canada, not someone who lives outside Nova Scotia. It follows that almost the only people to be caught by the proposed legislation would be aliens—which might well make these Bills unconstitutional as clandestine legislation on naturalization and aliens.¹⁰¹ The same is probably not true of the legislation in Prince Edward Island, however. Here, "non-resident" means a non-resi-

⁹⁷ *Ladore v. Bennett*, [1939] A.C. 468, at p. 482, per Lord Atkin.

⁹⁸ *Supra*, footnote 91.

⁹⁹ *Supra*, p. 400. See also *Walter v. A.G. for Alberta* (1967), 60 D.L.R. (2d) 253, at p. 264, per Johnson J. A., *aff'd.*, *supra*, footnote 30.

¹⁰⁰ *Supra*, p. 395.

¹⁰¹ The same might have been true of the Saskatchewan proposal to discriminate against non-residents, had it been enacted. See *supra*, footnote 38. Although the premier of Saskatchewan said: "We think that if very large blocks of farm land are owned outside our province for investment it does not help solve the problem if the absentee landlord happens to reside in Toronto", *Globe and Mail*, August 4th, 1972, the relevant Saskatchewan Bill had an interesting provision giving the government power to make regulations "classifying non-resident persons" in order to place different restrictions on each class. The Saskatchewan Minister of Agriculture told the Alberta Select Committee on Foreign Investment that this was to enable Alberta to exempt Canadian citizens living in other provinces from the restrictions! See the report of the Alberta Committee, *op. cit.*, footnote 34, Appendix F, p. 3.

dent of Prince Edward Island. The evils which this province fears are declining agriculture, destruction of the countryside by the haphazard spread of summer cottages on lots which lie untended for most of the year, and a rising price of land making it impossible for the next generation of Prince Edward Islanders to buy land there—all problems which arise whether the outside purchasers are American or Canadian.¹⁰² The critics of this legislation up to now have been other Canadians, complaining that it was *not* directed against aliens alone.¹⁰³ So this legislation is not open to attack as colourable legislation against aliens.

(ii) *Legislation Against Non-residents Possibly Void Even if it is Not Colourable—Can a Province Validly Prohibit a Canadian Citizen to Hold Land if He is Resident in Another Province?*

Is a provincial legislature competent to enact a law which restricts the right of a Canadian citizen to hold land in that province merely because he lives in a different province? If it is not, then surely a provincial statute purporting to restrict the rights of non-residents to hold land will be invalid even in so far as it affects aliens. "Non-residents" must fall into two classes—non-resident aliens and non-resident Canadian citizens.¹⁰⁴ If the provincial statute is ineffective to prohibit a non-resident Canadian citizen holding land, the only people against whom the statute could operate would be non-resident aliens. Then, surely, the statute would be bound to fail as infringing the Federal power to legislate about aliens, although the provincial legislature never intended it to be so limited in its scope, and hoped to catch non-resident Canadian citizens in the net as well.

Let us now see whether a province has any power to prohibit Canadian citizens resident outside the province to hold land inside it.

It is axiomatic that province A has no power whatsoever to legislate with respect to property and civil rights in province B.¹⁰⁵ Is provincial legislation prohibiting landholding by Canadian citizens resident in another province invalid as affecting extra-provincial civil rights?

¹⁰² In Prince Edward Island, non-residents already own six-and-a-half percent of the total area of the province, and eleven percent of the coast. See Prince Edward Island, Interim Report of the Royal Commission on Land Ownership and Use. The province fears it may be twenty-five per cent by the year 2,000, even with the present controls, according to a spokesman for the P.E.I. Land Use Service Centre—Financial Post, Nov. 4th, 1972. Canadians from other provinces own 50,000 acres and Americans only 40,500, but these figures are misleading since purchase by aliens has been restricted since 1939, but purchase by Canadians only since 1972.

¹⁰³ See *supra*, footnote 96.

¹⁰⁴ They could of course be British subjects, and thus fall into neither class, but as to this see footnote 1.

¹⁰⁵ *Royal Bank v. R.*, [1913] A.C. 283.

The answer depends on where the property and civil rights with which we are concerned are legally situated. In cases involving some right which is not attached to a piece of tangible property, it is admittedly difficult to say in which province the right is situated, and here the case-law is confusing and open to conflicting interpretations.¹⁰⁶ However, where, as here, the right is attached to a piece of tangible property, the answer is surely quite clear. The property and civil rights are legally situated in the province where the property lies, irrespective of where the owner is, and that province is the only body competent to legislate with respect to them. As Lefroy says: "... if property and civil rights have such a local position in the province, that the legislative arm can reach them, the provincial legislature has . . . jurisdiction over them, no matter where the domicile of the owner of them may be."¹⁰⁷ Thus even as regards land the owner of which lives outside the province, the province can validly enact laws about its ownership under section 92(13) of the British North America Act, unless those laws clash with "a class of subject specifically enumerated in s. 91 of the British North America Act or otherwise within the exclusive Federal jurisdiction"¹⁰⁸

Then could the kind of legislation under discussion be said to invade some exclusively federal area of jurisdiction? If so, which one? The first possibility seems to be "civil liberties" in some shape or form, or, as Rand J. calls them, "incidents of Canadian citizenship"¹⁰⁹

The first and obvious hurdle to cross here would be to persuade a court that in Canada civil liberties exist as a separate legislative topic at all, let alone as an exclusive federal preserve, since "it is still fighting ground whether civil liberties issues are segregable from otherwise valid provincial legislation in which they are involved".¹¹⁰ Canada has no equivalent to the Fourteenth Amendment to the Constitution of the United States—"No state shall make or enforce any law which shall abridge the privileges or immunities

¹⁰⁶ See Tremblay, *Les compétences législatives au Canada et les pouvoirs provinciaux en matière de propriété et de droits civils* (1967), p. 285.

¹⁰⁷ *Op. cit.*, footnote 80, p. 510, Tremblay, *op. cit.*, *ibid.*, p. 280. Where land is concerned, this is in accordance with established principles of private international law. See Dicey and Morris, *The Conflict of Laws* (8th ed., 1967), Rule 80. "All rights over, or in relation to, an immovable [land] are . . . governed by the law of the country where the immovable is situated [*lex situs*]."

¹⁰⁸ *Walter v. A.-G. for Alberta*, *supra*, footnote 30, at p. 389.

¹⁰⁹ *Winner v. S.M.T. and A.-G. for New Brunswick*, *supra*, footnote 73, at p. 919 (S.C.R.); *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at pp. 140-141; *Switzman v. Ebling*, [1957] S.C.R. 285, at p. 303.

¹¹⁰ Laskin, *op. cit.*, footnote 88, p. 973. As examples of the continuing uncertainty, Laskin gives the *Imperial Oil* case, [1963] S.C.R. 584, and *McKay v. R.*, [1965] S.C.R. 798. We can now add *Walter v. A.-G. for Alberta*, *supra*, footnote 30.

of citizens of the United States", and if civil liberties exist as a federal topic of legislation, it can only be because this can be inferred from the British North America Act as a whole. Whether or not this can properly be inferred is, of course, one of the most debated questions in Canadian constitutional law today.

Broadly speaking, there are two approaches to the controversy.¹¹¹ The first approach is fundamentalist. Sections 91 and 92 of the British North America Act are treated like two rows of named coat-hooks on opposite sides of a passage. The court, like a cloak-room attendant, looks at the name on each coat, and hangs it on the appropriate hook. If no coat-hook exactly matches the name inside the coat, the court hangs it on the hook with the most similar name.¹¹² In the absence of any hook marked "civil liberties" the coat goes on the hook marked with the name of the subject in connection with which the civil liberties issue arose, and in the case of legislation prohibiting citizens resident outside a province from holding land within it, this would be "property and civil rights", because the issue arose from an alteration of the land-law of the province. The second approach is the constructive approach, with which Rand J. is particularly associated.¹¹³ According to this, it can properly be inferred from the British North America Act that civil liberties are a separate topic, and one of exclusively federal concern. Firstly, it is said that section 91(25) of the British North America Act gives Parliament the power not only to legislate about naturalization and aliens, but also about Canadian citizenship in general. Citizenship, like alienage, is a status. As we have seen,¹¹⁴ a status is a certain legal standing, which means the entitlement in law to certain rights and the subjection in law to certain duties. Therefore the exclusive federal power to legislate about citizenship must carry with it the exclusive power to create and vary the fundamental rights of a citizen, "those elements and attributes necessarily involved in status itself".¹¹⁵

Which approach would a court take when faced with a provincial statute of the kind we are considering? Would it adopt a "coat-hook" approach, according to which such legislation is unquestionably valid?—or would it take the "constructive" approach, and be prepared to consider civil liberties a federal topic, which could be

¹¹¹ This is an over-simplification. Schmeiser lists no less than six different approaches in *Civil Liberties in Canada* (1964).

¹¹² Hence the misguided attempt to give "civil liberties" to the provinces because this looks like "property and civil rights". See Laskin, *An Inquiry into the Diefenbaker Bill of Rights* (1959), 37 Can. Bar Rev. 77, at p. 118.

¹¹³ Because of his famous statement of the rights of a Canadian citizen in *Winner v. S.M.T. and A.-G. for New Brunswick* and other authority cited in note 109.

¹¹⁴ *Supra*, p. 402.

¹¹⁵ *Winner v. S.M.T. and A.-G. for New Brunswick*, *supra*, footnote 109.

infringed by this kind of provincial legislation? *Walter v. A.-G. for Alberta*¹¹⁶ which is the modern case most in point since it concerns a provincial prohibition on the acquisition of land by a particular group of citizens, points to a cautious "coat-hook" approach in such a case. There the Supreme Court of Canada refused to admit that even freedom of worship was a federal matter, let alone civil liberties in general, of which freedom of worship is just a single example. However, even if we assume for argument's sake that civil liberties in general are a federal matter, and hence beyond the reach of the provincial legislatures, the question is still only half-answered. We still have to find some particular civil liberty which is infringed when a province prohibits citizens resident outside it from holding land within its borders.

The effect of this kind of legislation is to deprive a large class of Canadian citizens of the right to acquire real property in the province in question. Can it be said that the right to acquire real property is a "civil liberty" or an "incident of Canadian citizenship" with which the provincial legislature has no power to deal? The case for saying this looks good at first sight. The right to acquire property has been recognized as a "human right" in most of the various catalogues of such rights that have been drawn up from time to time. It appeared in the Declaration of the Rights of Man¹¹⁷ at the beginning of the French Revolution of 1789, it forms part of the Universal Declaration of Human Rights of the United Nations,¹¹⁸ and it is supposedly a right which is protected by the Canadian Bill of Rights.¹¹⁹ One of the features which distinguished a slave from a free man was that a slave had no right to acquire any property. One of the many reasons why the Fourteenth Amendment to the Constitution of the United States was made was to ensure that, after the abolition of slavery, this particular incapacity was not re-introduced;¹²⁰ and it was undoubtedly the Fourteenth Amendment which Rand J. had in mind when he proclaimed the

¹¹⁶ *Supra*, footnote 30.

¹¹⁷ Art. 2: "Le but de toute association politique est la conservation des droits naturels et imprescriptibles de l'homme. Ces droits sont la liberté, la propriété, la sûreté et la résistance à l'oppression."

¹¹⁸ Art. 17(1): "Everyone has the right to own property alone as well as in association with others." Cf. American Declaration of the Rights and Duties of Man, Bogota, 1948, Art. 23.

¹¹⁹ S.C., 1960, c. 44, s. 1(a). Of course, the fact that the right to enjoy property is protected by the Canadian Bill of Rights does not invalidate provincial legislation which adversely affects this right. Like any other federal statute, the Canadian Bill of Rights only applies in so far as the matter is within the competence of the Parliament of Canada.

¹²⁰ See Frank and Munro, The Original Understanding of "Equal Protection of the Laws" (1950), 50 Col. L. Rev. 131, quoted by Tarnopolsky, The Canadian Bill of Rights (1966), p. 209.

immutable rights of a Canadian citizen in *Winner v. S.M.T. and A.-G. for New Brunswick*.¹²¹

The argument breaks down, however, when we remember that in Canada, civil capacity to acquire property has always been regarded as an indisputably provincial concern. No one has ever questioned the right of a province to vary the capacity of infants,¹²² for example, or of married women or lunatics. If a province is able to alter the capacity of a group of citizens to acquire property according to their age, sex or mental capacity, then it is hard to see why a province should not also be able to do so on some less respectable ground, like residence, or even colour. Indeed, there are cases in which the courts have upheld provincial legislation creating similar distinctions between the civil capacity of citizens of different races. In *Quong-Wing v. R.*,¹²³ the Supreme Court of Canada upheld a Saskatchewan law which had the effect of depriving Chinese and Japanese Canadians of the capacity to employ white women. Another case in point is *Walter v. A.-G. for Alberta*,¹²⁴ where the Supreme Court of Canada upheld legislation from Alberta forbidding the acquisition of land by colonies of Hutterites. If we admit that a province can validly reduce the capacity of a class of citizens to hold property on reasonable grounds, then we must also admit that it can do so on unreasonable grounds as well. This is because the courts always steadfastly refuse to apply any test of "reasonableness" in deciding whether or not provincial—or federal—legislation is *ultra vires*.¹²⁵

The point, surely, is that there are different kinds of civil liberty. There are *political* civil liberties, like the right to free speech and the right to worship the God of one's choice, and there are *economic* and *egalitarian* civil liberties.¹²⁶ It is only political civil liberty which is a federal concern, and which no provincial legislature may touch.¹²⁷ Civil liberties of other kinds—particularly economic and egalitarian civil liberties—may be altered by a provincial legislature, provided that they are not altered in a way which inter-

¹²¹ *Supra*, footnote 73. See McWhinney (1932), 30 Can. Bar Rev. 832.

¹²² *E.g.* British Columbia Infants Act, R.S.B.C., 1960, c. 193, which in effect enacts the British Infants Relief Act, 1874, and so makes the law of the province different from that of any other part of Canada in this respect.

¹²³ *Supra*, footnote 73.

¹²⁴ *Supra*, footnote 30.

¹²⁵ *Union Colliery Co. v. Bryden*, *supra*, footnote 62, at p. 585. *R. v. Stanley* (1935), 64 C.C.C. 385 (Alta C.A.).

¹²⁶ Laskin, *op. cit.*, footnote 112, at pp. 80-82; Tarnopolsky, *op. cit.*, footnote 120, ch. II.

¹²⁷ On this point, Canadian writers appear to agree, from Laskin to Tremblay. Laskin, *op. cit.*, *ibid.*, at pp. 104, 126; Tremblay, *op. cit.*, footnote 106, ch. V. See, for example, the constitutional position of legislation involving racial discrimination: Tarnopolsky, *op. cit.*, *ibid.*, p. 53, *R. v. McKay* (1956), 5 D.L.R. (2d) 403; *Quong-Wing v. R.*, *supra*, footnote 73.

feres with a political civil liberty, such as freedom of worship, or any other federal matter, such as naturalization and aliens. The right to acquire property is either an economic or an egalitarian civil liberty; it is certainly not a political civil liberty.¹²⁸ Thus it cannot be said that provincial legislation prohibiting the acquisition of land in the province by Canadians resident outside it is *ultra vires* as infringing a civil liberty which is untouchable except by Parliament.¹²⁹

There is only one way in which it is possible to decide that a province has no power to forbid landholding by a Canadian citizen resident in another province. It has been said that Parliament can make any law which is needed to keep the Constitution of Canada in being: "powers requisite for the protection of the constitution itself arise by necessary implication from the British North America Act as a whole".¹³⁰ Perhaps it is permissible to take this a step further, and to infer from this a parallel overriding limitation on the powers of the legislatures—that whereas Parliament has power to do anything necessary to preserve the federal constitution of Canada, the legislatures have no power to do anything that would break it up. This could be what Rand J. really had in mind when he enunciated the immutable rights of a Canadian citizen in *Winner v. S.M.T. and A.-G. for New Brunswick*¹³¹ since he justified his statement by adding that if the provinces could interfere with these rights, "the country could be converted into a number of enclaves and the 'union' which the original provinces sought and obtained disrupted".¹³² But this is to take a bold and radical line with the British North America Act which recent constitutional cases, such as *Walter v. A.-G. for Alberta*,¹³³ hardly encourage. So it is submitted that a province is entitled to pass legislation of the kind in question, "Balkanization" though it may be.

IV. Legislation Against Grants of New Land to Aliens.

All that has been said so far concerns only the general capacity of an alien to hold land in Canada, and seen in isolation, it gives a misleading impression of the position of the alien landowner in this country. Enormous tracts of land in Canada still belong to the Crown. On paper, the figures are staggering—almost ninety per

¹²⁸ Laskin, *op. cit.*, *ibid.*, p. 126. Tarnopolsky, *op. cit.*, *ibid.*, ch. II, ss 4 and 6.

¹²⁹ However, see Prof. Schmeiser's contrary views reported in the *Globe and Mail*, Aug. 17th 1972.

¹³⁰ *Re Alberta Statutes*, [1938] S.C.R. 100, at p. 133, per Duff J.; *Fort Francis Pulp and Paper Co. v. Manitoba Free Press*, [1923] A.C. 695 (P.C.).

¹³¹ *Supra*, footnote 73, at p. 918 (S.C.R.).

¹³² *Ibid.*, at p. 920.

¹³³ *Supra*, footnote 30.

cent of the surface of the country is vested in the Crown, either in right of Canada or in right of the provinces.¹³⁴ Not all of this ninety per cent is open to Crown grant, however, since a substantial part is appropriated as parks, Indian reserves, and so on.¹³⁵ Furthermore, a great part of what remains is virtually uninhabitable, although this is still highly important for the minerals that underlie it.¹³⁶ Nevertheless, the amount of unappropriated Crown land in Canada makes the question of an alien's eligibility for such a grant almost as important as his general capacity to hold land. Grants of Crown land are made by the government of Canada, or by the government of the province in the case of provincial Crown land. In every case¹³⁷ the grant will be made on conditions laid down in the public lands legislation of the authority making the grant, or set out in rules and orders made thereunder. An examination of this legislation shows that on the question of Crown grants to aliens, the law in Canada has long been both more restrictive and less uniform than it is on his general capacity to hold land.

(i) *Federal Legislation on Crown Grants to Aliens.*

At one time, the relevant statute was the Dominion Lands Act, 1908,¹³⁸ which provided that grants of land for homesteads should only be made to British subjects, or to those who declared their intention of becoming British subjects. The Dominion Lands Act has now been replaced by the Territorial Lands Act¹³⁹ and by the Public Lands Grants Act,¹⁴⁰ which empower the government to dispose of Crown lands, and to make all sorts of regulations to do with this. The Territorial Lands Regulations¹⁴¹ govern straightforward grants of land to settlers, and contain no restrictions on the nationality of applicants. This is different from the position under the Oil and Gas Regulations,¹⁴² which prohibit grants of oil and gas leases to those who are not Canadian citizens, and to foreign corporations. Similar restrictions apply to grants of mining leases.¹⁴³

¹³⁴ Total area of Canada 3,851,809 sq. miles. Only 411,276 sq. miles are in private hands, according to figures for 1971 printed in Canada Yearbook for 1972.

¹³⁵ 379,686 sq. miles according to figures for 1971. This still leaves 1,510,127 sq. miles of unappropriated federal land, and 1,550,720 sq. miles of unappropriated provincial land.

¹³⁶ Mineral rights *etc.* are not dealt with in this article.

¹³⁷ Except in Prince Edward Island, which has no Public Lands Act, since it has virtually no public land either. A mere 133 sq. miles of the Island are Crown land. Cf. Quebec: 551,360 sq. miles of Crown land.

¹³⁸ S.C., 1908, c. 20.

¹³⁹ R.S.C., 1970, c. T-6.

¹⁴⁰ R.S.C., 1970, c. P-29.

¹⁴¹ SOR/66-1.

¹⁴² SOR/61-253, ss 55, 73-13.

¹⁴³ SOR/62-249, s. 20.

(ii) *Provincial Legislation on Crown Grants to Aliens.*

Four provinces have severe restrictions on grants of Crown land to aliens. British Columbia prohibits such grants altogether by the Land Act 1970.¹⁴⁴ A Newfoundland Act in effect does the same, but does so indirectly by means of a ban on grants of Crown land to persons not resident in the province.¹⁴⁵ Alberta has also recently amended its Public Lands Act¹⁴⁶ to create a comprehensive ban on Crown grants to aliens;¹⁴⁷ prior to this it used to restrict only certain kinds of grants to aliens, such as grants of land for homesteads,¹⁴⁸ and leases for some agricultural purposes.¹⁴⁹ There is also a comprehensive ban on Crown grants to aliens in Manitoba, with an exception in favour of aliens ordinarily resident in the province. There is no such restriction in the Manitoba Crown Lands Act,¹⁵⁰ but the government has made a regulation to this effect¹⁵¹ under delegated powers to regulate the disposal of Crown lands generally.

Ontario and Quebec, like Manitoba, delegate the power to regulate the disposal of Crown land to the government.¹⁵² In neither province is there any sweeping restriction on grants to aliens, but in Ontario a recent regulation restricts the lease of Crown land for summer resorts to Canadian citizens,¹⁵³ and Quebec turns its distaste for alien influence to commercial account by charging aliens higher rents than citizens for Crown land to be used for summer resorts, ski resorts, and so on.¹⁵⁴

There appear to be no restrictions on grants of Crown land to aliens in Saskatchewan, New Brunswick or Nova Scotia. The Saskatchewan Crown lands legislation¹⁵⁵ delegates powers to the government similar to those delegated to the governments of Manitoba, Ontario and Quebec, but no regulations have so far been

¹⁴⁴ S.B.C., 1970, c. 17, s. 7(3).

¹⁴⁵ Crown Lands (Amendment) Act 1971, S. Nfld., 1971, no. 46. This Act has yet to be brought into force by proclamation.

¹⁴⁶ R.S.A., 1970, c. 297.

¹⁴⁷ An Act to Amend the Public Lands Act, Bill 55 of 1973.

¹⁴⁸ Public Lands Act, *supra*, footnote 146, s. 83.

¹⁴⁹ *Ibid.*, s. 116; Alta Reg. 325/66, s. 7, 432/66, s. 3(1), 233/67, s. 4(1), 309/69, s. 3(a), 309/71, s. 6, 319/71, s. 7(1).

¹⁵⁰ R.S.M., 1970, C-340.

¹⁵¹ Man. Reg. 99/63, s. 53, 8/64, ss 9, 18. Which makes it hard to understand what was said to the Alberta Committee: "Crown land has not been sold since 1930 but the government continues to lease it and Americans are as eligible as anyone else." See Alberta Report, *op. cit.*, footnote 34, App. F, p. 4.

¹⁵² Public Lands Act, R.S.O., 1970, c. 380, s. 18(1). Lands and Forests Act, R.S.Q., 1964, c. 92, ss 4, 23.

¹⁵³ Ont. Reg. 246/71, s. 12.

¹⁵⁴ Quebec Lands and Forests Reg. No. 9A (1972).

¹⁵⁵ An Act Respecting the Sale and Lease of Certain Lands belonging to Her Majesty, R.S.S., 1965, c. 70. The Provincial Lands Act, R.S.S., 1965, c. 48, s. 20.

made which affect aliens. The Crown Lands Act of New Brunswick¹⁵⁶ prescribes who is eligible for grants of land for settlement, and aliens are included; the Minister and the Lieutenant-Governor are able to make regulations governing disposal of Crown lands for other purposes, but they have made none so far which restrict such grants to citizens alone. Nova Scotia has no restrictions at all on Crown grants to aliens, nor do the terms of the various Acts¹⁵⁷ permit the introduction of restrictions of this kind by delegated legislation.

Prince Edward Island has no Crown land legislation, nor has it any Crown lands to dispose of.

(iii) *Constitutional Position of Restrictions on Crown Grants to Aliens.*

We have seen that although it is probably only Parliament which is competent to enact a general restriction on the right of an alien to hold land in Canada, the matter is open to dispute. The constitutional position of restrictions on grants of Crown land to aliens, is, by contrast, quite clear. Just as Parliament is competent to forbid grants of federal land to aliens, so is a provincial legislature able to forbid grants of provincial Crown land to aliens.

"The management and sale of the public lands belonging to the Province" is given to the provincial legislatures by section 92(5) of the British North America Act. Two leading cases hold that provincial legislation regulating the disposal of public land is not *ultra vires* because it discriminates against aliens. Both cases, like *Bryden's* case and *Tomey Homma's*, arose from "yellow peril" legislation in the province of British Columbia. The British Columbia legislature enacted that licences to cut timber on Crown land should only be granted on condition that no Chinese or Japanese were employed as labourers.¹⁵⁸ In *Brooks-Bidlake v. A.-G. for B.C.*¹⁵⁹ this law was attacked as an infringement of the federal power to make laws respecting naturalization and aliens, but the Privy Council upheld the Supreme Court of Canada in holding that the legislation was not open to attack on this ground. The courts took the view that the power to sell the public lands of the province conferred by section 92(5) necessarily implied the power to say to whom, and on what terms, the land should be sold. The power in question was therefore like the power to amend the con-

¹⁵⁶ R.S.N.B., 1952, c. 53, s. 53. See also s. 74(1). Apparently New Brunswick rarely makes grants of Crown land to anyone—see Alberta Report, *op. cit.*, footnote 34, App. F, p. 8.

¹⁵⁷ Lands and Forests Act, R.S.N.S., 1967, c. 163, s. 21, and s. 33 *et seq.* Beaches and Foreshores Act, R.S.N.S., 1967, c. 19, s. 1. Grants of Crown land are also rare in Nova Scotia—see Alberta Report, *ibid.*, App. F, p. 5.

¹⁵⁸ Oriental Orders in Council Validation Act, S.B.C., 1921, c. 49.

¹⁵⁹ *Supra*, footnote 73.

stitution of the province considered in the *Tomey Homma* case, and could be used to discriminate against aliens without infringing the federal power under section 91(25).¹⁶⁰ In a later case,¹⁶¹ which also went to the Privy Council, it was again held that such provincial legislation was not *ultra vires* on this ground,¹⁶² and Duff J. said in the Supreme Court of Canada that a provincial restriction on the grant of Crown land to aliens would also be *intra vires*. In deciding who was entitled to a grant of Crown land, the province of British Columbia was not "entering a sphere which does not properly belong to it in enacting that such persons shall be either British subjects or those who have declared their intention to become British subjects".¹⁶³

So it seems that a province can enact restrictions on the grant of Crown land to aliens without encroaching on the federal power over naturalization and aliens or coming into conflict with federal legislation passed thereunder. However, if it is to do so, surely it ought to do so by amending its public lands Act rather than by delegated legislation, as is the case in Ontario and Manitoba. Even if such regulations do not conflict with federal legislation, it is a little difficult to square them with provincial legislation in force in both Ontario and Manitoba, entitling an alien to *take* as well as to hold land in every respect as if he were a citizen.¹⁶⁴

Conclusion

It might be helpful to conclude this discussion of the law affecting the alien landowner in Canada with a summary of what the divisions of legislative competence appear to be.

(1) It is beyond the competence of a provincial legislature to deprive aliens of the right to hold land in the province, because the status of aliens in Canada is a federal matter under section 91(25) of the British North America Act.

(2) Section 92(13) of the British North America Act probably entitles a provincial legislature to forbid the ownership of land within the province by anyone who lives outside it, whether he is

¹⁶⁰ *Brookes-Bidlake v. A.-G. for B.C.* also supports the possible distinction between the *Bryden* and *Tomey Homma* cases on the ground that one involved "a privilege" and the other "a right ordinarily available", *supra*, p. 404.

¹⁶¹ *Re Employment of Aliens*, *supra*, footnote 73.

¹⁶² The legislation was held *ultra vires* in this case, but on another ground. It was held to conflict with the Japanese Treaty Act 1913, S.C., 1913, c. 27, a federal Act passed to implement the terms of an Imperial treaty with Japan, which thus overrode contrary provincial legislation by virtue of s. 132 of the British North America Act. One term of the Japanese Treaty Act provided for the protection of Japanese nationals in Canada.

¹⁶³ *Supra*, footnote 73, at p. 327 (S.C.R.).

¹⁶⁴ *Supra*, footnotes 19 and 25.

a citizen or an alien. However, this legislation would be *ultra vires* if it was merely a colourable attempt to restrict the acquisition of land by aliens alone.

(3) Section 92(5) of the British North America Act entitles a provincial legislature to enact that no alien shall receive a grant of public land from the province.
