[HIGH COURT OF AUSTRALIA.]

JIRO MURAMATS . . . . . APPELLANT;
COMPLAINANT,

AND

THE COMMONWEALTH ELECTORAL OFFICER FOR THE STATE OF WESTERN AUSTRALIA . . . . . } RESPONDENT.
DEFENDANT.

ON APPEAL FROM A COURT OF PETTY SESSIONS OF WESTERN AUSTRALIA.

H. C. OF A 1923.

PERTH, *Sept.* 19, 21.

Knox C.J., Higgins, Gavan Duffy and Starke JJ.

Electoral Law (*Commonwealth*)—*Commonwealth Parliament*—*Right to enrolment on electoral roll*—*Aboriginal native of Asia or Islands of Pacific*—*Japanese*—*Naturalized person*—*Effect of enrolment on roll for Legislative Assembly of Western Australia*—*Evidence*—*Public history*—*The Constitution* (63 & 64 *Vict. c.* 12), *sec.* 41*—*Commonwealth Electoral Act* 1918-1922 (*No.* 27 *of* 1918—*No.* 14 *of* 1922), *sec.* 39 (5)*—*Electoral Act* 1907 (*W.A.*) (*No.* 27 *of* 1907), *secs.* 17, 18*—*Naturalization Act* 1903-1917 (*No.* 11 *of* 1903—*No.* 25 *of* 1917), *secs.* 4, 8—*Evidence Act* 1906 (*W.A.*) (*No.* 28 *of* 1906), *sec.* 72.

Practice—*High Court*—*Appeal from inferior Court of State exercising Federal jurisdiction*—*Extension of time for appealing*—*Court of Petty Sessions of Western Australia*—*Order to review*—*Rules of the High Court* 1911, *Part I., Order LIII., r.* 6; *Part II., Sec. III.*; *Sec. IV., rr.* 1, 7—*Justices Act* 1902-1920 (*W.A.*) (*No.* 11 *of* 1902—*No.* 28 *of* 1920), *secs.* 197, 206b.

* Sec. 41 of the Constitution is as follows: "No adult person who has or acquires a right to vote at elections for the more numerous House of the Parliament of a State shall, while the right continues, be prevented by any law of the Commonwealth from voting at elections for either House of the Parliament of the Commonwealth."

Sec. 39 (5) of the *Commonwealth Electoral Act* 1918-1922 provides that "No aboriginal native of Australia, Asia, Africa, or the Islands of the Pacific (except New Zealand) shall be entitled to have his name placed on or retained on any roll or to vote at any Senate election or House of Representatives election unless so entitled under section forty-one of the Constitution."

Sec. 17 of the *Electoral Act* 1907

Held, that an aboriginal native of Asia or the Islands of the Pacific who was naturalized within the meaning of the *Naturalization Act* 1903-1917 is, under sec. 18 of the *Electoral Act* 1907 (W.A.), disqualified from voting at an election notwithstanding that he has pursuant to sec. 17 been enrolled as an elector, and therefore that he is not within the protection of sec. 41 of the Constitution, and accordingly is disqualified by sec. 39 (5) of the *Commonwealth Electoral Act* 1918-1922 from being enrolled or voting at an election for the Senate or House of Representatives.

Held, also, that a Japanese born in Japan is an aboriginal native of Asia or the Islands of the Pacific within the meaning of sec. 39 (5) of the *Commonwealth Electoral Act* 1918-1922 and sec. 18 of the *Electoral Act* 1907 (W.A.).

Per Higgins J. Where an appeal from a Court of Petty Sessions of Western Australia to the High Court is brought by way of order to review, the High Court may, under Order LIII., r. 6, of the Rules of the High Court, enlarge the time for obtaining the order nisi notwithstanding that the time limited by sec. 197 of the *Justices Act* 1902-1920 (W.A.) has expired.

APPEAL from a Court of Petty Sessions of Western Australia.

At the Court of Petty Sessions at Perth a complaint was heard whereby Jiro Muramats alleged that on 3rd May 1923 H. R. Way, the Commonwealth Electoral Officer for the State of Western Australia, rejected the claim of Jiro Muramats to have his name enrolled on the Commonwealth electoral roll for the Subdivision of Roebourne of the Division of Kalgoorlie of the State of Western Australia, and applied for an order directing that his name be enrolled by such officer under the provisions of sec. 58 (1) of the *Commonwealth Electoral Act* 1918-1922. At the hearing it was admitted that the complainant was a Japanese born in Japan, and had been naturalized in Victoria; and that an order had been made by the Police Magistrate at Roebourne directing that the complainant

(W.A.) provides that "(1) Subject to the disqualifications hereinafter set out, every person not under twenty-one years of age, who (*a*) is a natural-born or naturalized subject of His Majesty; and (*b*) has resided in Western Australia for six months continuously; and (*c*) has resided in the district for which he claims to be enrolled for a continuous period of one month immediately preceding the date of his claim, shall be entitled, subject to the provisions of this Act, to be enrolled as an elector, and when enrolled, and so long as he continues to reside in the district for which he is enrolled, to vote at the election of a member of the Legislative Assembly for that district." Sec. 18 provides that "Every person, nevertheless, shall be disqualified from being enrolled as an elector, or, if enrolled, from voting at any election, who . . . (*d*) is an aboriginal native of Australia, Asia, Africa, or of the Islands of the Pacific, or a person of the half-blood."

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should be placed on the roll of electors for the more numerous House of the Parliament of Western Australia, and that he was so enrolled. The Police Magistrate, on 19th June 1923, dismissed the application, stating that a man of Japanese race born in Japan must, in the absence of evidence, be held to be an aboriginal native of Asia or the Pacific Islands; that under sec. 39 (5) of the *Commonwealth Electoral Act* the complainant was not entitled to be enrolled or to vote at a Commonwealth parliamentary election unless he was protected by sec. 41 of the Constitution; and that that section did not protect him, because, in spite of his name being upon the State roll, he was disqualified from voting by the *Electoral Act* 1907 (W.A.) by reason of his being an aboriginal native of Asia or the Pacific Islands.

From that decision the complainant now appealed to the High Court by way of order to review.

By the order nisi to review (which was made by *Higgins* J. on 14th September 1923) it was also ordered that the time for making the application for an order to review should be extended.

Other material facts are stated in the judgment of *Higgins* J. hereunder.

Le Mesurier, for the appellant. The Police Magistrate at Roebourne having enrolled the appellant, he was entitled to vote under sec. 17 of the *Electoral Act* 1907 (W.A.). Although the appellant was born in Japan he is not an aboriginal native of Japan. (See the definition of "aboriginal" in the *Oxford Dictionary*; *Evidence Act* 1906 (W.A.), No. 28, sec. 72; *Taylor on Evidence*, 10th ed., p. 19, sec. 18; *Taylor* v. *Barclay* (1); *Encyclopædia Britannica*, 11th ed., vol. I., pp. 67, 441; vol. XV., p. 165.) Under the *Naturalization Act* 1903-1917, sec. 8, the appellant is entitled to vote and has the qualifications therein referred to, and does not come within sec. 18 of the Western Australian Act.

Dwyer, for the respondent, was not called on.

Cur. adv. vult.

(1) (1828) 2 Sim., 213.

The following written judgments were delivered :—

KNOX C.J., GAVAN DUFFY AND STARKE JJ. In this case we do not think it necessary to decide whether this Court has jurisdiction to entertain an appeal from the decision of the magistrate or whether, when the time limited for applying for an order nisi to review that decision had expired, it could be extended ; for we are clearly of opinion that the order of the magistrate was right.

HIGGINS J. This is an order to review a decision of a Police Magistrate at Perth, exercising Federal jurisdiction. The Police Magistrate has refused an application made by Muramats to be enrolled on the Commonwealth electoral roll. The appellant was born in Japan, and is a Japanese ; but he came to Australia in 1893, was naturalized in Victoria in 1899, and has resided at Cossack in Western Australia since 1900. By the naturalization in Victoria he is naturalized for the purposes of the Commonwealth (*Naturalization Act* 1903, sec. 4) ; and he is entitled to all political and other rights of a natural-born British subject (sec. 8). But, of course, even a natural-born British subject must comply with the provisions of the Commonwealth electoral laws as to enrolment on the electoral roll.

By an order of a Police Magistrate at Roebourne, made on 25th May 1922, Muramats was placed on the electoral roll for the Legislative Assembly of Western Australia ; and there has been no appeal from that order. In September 1922 Muramats applied to the Commonwealth Electoral Officer to be enrolled on the Commonwealth electoral roll ; the officer refused ; and, on appeal to the Police Magistrate at Perth, the appeal was dismissed.

The appellant relies on sec. 41 of the Constitution of Australia : "No adult person who has or acquires a right to vote at elections for the more numerous House of the Parliament of a State" (the Legislative Assembly) "shall, while the right continues, be prevented by any law of the Commonwealth from voting at elections for either House of the Parliament of the Commonwealth." The Commonwealth Electoral Officer contends that, although the appellant has established against the State his right to be on the roll for the Legislative Assembly, he has not shown that he has a right to vote for

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the Assembly, within the meaning of sec. 41 of the Constitution. The question turns mainly on the meaning of secs. 17 and 18 of the Western Australian *Electoral Act* of 1907. By sec. 17, "*subject to the disqualifications hereinafter set out*, every person not under twenty-one years of age, who (*a*) is a natural-born or naturalized subject of His Majesty; and (*b*) has resided in Western Australia for six months continuously; and (*c*) has resided in the district for which he claims to be enrolled for a continuous period of one month immediately preceding the date of his claim, shall be entitled, subject to the provisions of this Act, to be enrolled as an elector, and when enrolled, and so long as he continues to reside in the district for which he is enrolled, to vote at the election of a member of the Legislative Assembly for that district." Now, Muramats has fulfilled all the conditions stated in this sec. 17; and if the section were not "subject to the disqualification hereinafter set out," his right to vote at elections for the Assembly, and therefore to be enrolled on the Commonwealth roll, would seem to be clear. But sec. 18 is as follows: "Every person, nevertheless, shall be disqualified from being enrolled as an elector" (for a Western Australian election), "*or, if enrolled, from voting at any election*, who" (*a*) is of unsound mind; (*b*) is dependent on the State for relief, &c.; (*c*) has been convicted &c.; "(*d*) is an aboriginal native of Australia, Asia, Africa, or the Islands of the Pacific, or a person of the half-blood." The plain meaning of this sec. 18, unless it can be qualified in the light of other sections, is that even if by some means Muramats has become enrolled on the State roll he is, nevertheless, not entitled to vote at an election for the State Assembly, if he is an aboriginal native of Asia, the Pacific Islands, &c. This reading seems to negative the provision in sec. 17 that any person who is enrolled is "entitled to vote"; and if one could find a meaning for sec. 18 which would reconcile it with sec. 17, that meaning ought to be adopted. But sec. 17 is expressly enacted as "subject to the disqualifications hereinafter mentioned": sec. 18 dominates sec. 17. Moreover, sec. 118 shows that a person may be on the roll, and yet not entitled to vote. For, under sec. 118, the presiding officer at an election can put to a person on the roll this question (amongst others):

"Are you disqualified from voting?" If the answer be "No," the answer is conclusive for the purpose of the polling; but, under sec. 161, the Court of Disputed Returns may inquire whether the vote was improperly admitted.

Under these circumstances, I am of opinion that Muramats has not established what is necessary under sec. 41 of the Constitution, that he has a right to vote for the Legislative Assembly; and that, therefore, he cannot claim Commonwealth enrolment by virtue of sec. 41. Under sec. 39 (5) of the *Commonwealth Electoral Act* 1918-1922 no aboriginal native of Australia, Asia, or the Islands of the Pacific, &c., is entitled to have his name placed on the Commonwealth roll or to vote "unless so entitled under section forty-one of the Constitution," and Muramats is not entitled under sec. 41.

Perhaps I ought to say that I have considered the effect of the decision of the Roebourne Police Magistrate, under the State Act. Not only did the magistrate place the appellant on the State roll, but he found (par. 2 (*c*) of the affidavit) "that it was not proved that Mr. Muramats was an aboriginal native of any country." Assuming (not deciding) that this finding on which the order was based is conclusive as against the State electoral authorities, it is certainly not conclusive against the Commonwealth authorities. For they were not parties to the proceedings at Roebourne.

This opinion as to sec. 41 of the Constitution makes it necessary to consider whether it is established, by the evidence in this case, that Muramats is an "aboriginal native of Asia or the Islands of the Pacific" within the meaning of sec. 39 (5) of the *Commonwealth Electoral Act*. I accept Mr. *Le Mesurier's* argument that the burden of proof of this fact rests on the respondent. But the burden of proof shifts when it is admitted, as here, that Muramats was born in Japan and is a Japanese. It is not sufficient for him even to show that his race is not "aboriginal" to Japan; he must show that it is not aboriginal to Asia or the Islands of the Pacific. For the purpose of proof, Mr. *Le Mesurier* wants to use articles in the *Encyclopædia Britannica* on "Aborigines," "Ainu," "Japan." He refers us to the Western Australian *Evidence Act* 1906, sec. 72: "All Courts and persons acting judicially may, in matters of public history,

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literature, science, or art, refer, for the purposes of evidence, to such published books, maps, or charts as such Courts or persons consider to be of authority on the subjects to which they respectively relate." This section, according to the marginal note, is taken from a New Zealand Act, No. 16 of 1905, sec. 42. It certainly goes further than the English law; but how far is uncertain. It does not say that we are to take judicial notice of Japanese history, or pre-history. It is left doubtful whether the books should not be put in evidence; doubtful also whether events which took place in Japan hundreds of years ago can be treated as matters of "public history"—as distinguished from speculative or conjectural history. But, assuming that we may consider the articles on this appeal, the results are negative. Under the article "Japan," it appears that a learned anthropologist thought it "the most plausible hypothesis" that men of the Manchu-Korean type in Japan descended from Korean colonists who, in pre-historic times, settled there; and that men of the Mongol and the Malay type settled there also; but that before that time there was a tribe of immigrants who appear to have crossed over from north-eastern Asia—the Ainus—"usually spoken of as the aboriginal inhabitants of Japan." That means, of course, from the point of view of the present Japanese, who are the result of an amalgamation of races. Under "Ainu," it is said that little is known of their earliest history, but it is improbable that they are, as has been urged, the aborigines of Japan. "The most accurate researches go to prove that they were immigrants, who reached Yezo from the Kuriles, and . . . colonized . . . exterminating a race of pit-dwellers." Under "Aborigines," we find that the word was first applied to a mythical people of central Italy, whom Cato regarded as Hellenic immigrants. "In modern times, the term 'Aborigines' has been extended in signification, and is used to indicate the inhabitants found in a country at its first discovery, in contradistinction to colonies or new races, the time of whose introduction into the country is known." This is not material on which Courts can act in applying an Australian statute. In my opinion, the word "aboriginal" in sec. 18 of the *Electoral Act* of Western Australia, and in sec. 39 (5) of the *Commonwealth Electoral Act*, means "aboriginal" in the vernacular

meaning of the word as used in an Act addressed to inhabitants of Australia or Western Australia. Whom would Australians treat as aboriginal natives of Australia or of Asia ? In the *Oxford Dictionary* the adjective " aboriginal " is said to mean " first or earliest so far as history [not pre-history] or science gives record " ; but it is said to mean also " dwelling in any country before the arrival of later (European) colonists." The substantive " aboriginal " is defined as " an aboriginal inhabitant of any land, now usually as distinguished from subsequent European colonists." In other words, those are aboriginals (for Australian Acts) who are of the stock that inhabited the land at the time that Europeans came to it. It may be, as some assert, that there was a race peopling Australia before those whom we call " the Australian aborigines," and that the Tasmanian blacks were the remnant of that race, driven from Australia ; it may be that before the present Japanese came to Japan there was a previous race called " Ainus," and again before them pit-dwellers ; but such a fact would not prevent the present Australian black people from being the aborigines of Australia from the point of view of white settlers or of Australian laws, or prevent the present Japanese from being the aborigines of Japan as contradistinguished from the Europeans and Americans who have settled in Japan in and after the nineteenth century. In my opinion, Japanese persons, born in Japan, must be treated for the purpose of these electoral Acts as aboriginal natives of Japan as well as of Asia or the islands of the Pacific.

In making the order nisi to review, I had at first a doubt as to my power to make it after the expiration of the one month allowed (unless the time were enlarged) by the Western Australian *Justices Act* 1902-1920 (sec. 197). The decision of the Perth magistrate was given on 19th June 1923 ; and the order nisi is dated 14th September current. But no objection has been taken on this score ; and, in my opinion, the enlargement of the time is justified under our *Appeal Rules*, Sec. IV., rr. 1, 7, and Sec. III. ; *High Court Rules*, Order LIII., r. 6 ; *Justices Act* 1902-1920 (W.A.), sec. 206b. The case of *Delph Singh* v. *Karbowsky* (1) does not apply to this case ; for there

(1) (1914) 18 C.L.R., 197.

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the difficulty arose from the provision in Sec. III., r. 12, that an appeal should be deemed to be "abandoned" if security were not given within three months after the service of notice of appeal. Here there was not, and could not be, any service of such notice till the order nisi was made.

For these reasons I agree that the order nisi should be discharged with costs.

It is satisfactory to find that the appellant is not prevented by his technical slip from getting the substantive question settled.

Appeal dismissed with costs.

Solicitor for the appellant, *C. J. R. Le Mesurier*, Perth.

Solicitor for the respondent, *Gordon H. Castle*, Crown Solicitor for the Commonwealth, by *Dwyer, Unmack & Thomas*, Perth.