[HIGH COURT OF AUSTRALIA.]

CHIA GEE, AH KOW, CHOW CHEE AND ONG SEET . . . . . APPELLANTS;
DEFENDANTS,

AND

MARTIN . . . . . RESPONDENT.
COMPLAINANT,

CHOW QUIN AND ANOTHER . . . APPELLANTS;
DEFENDANTS,

AND

MARTIN . . . . . RESPONDENT.
COMPLAINANT,

ON APPEAL FROM THE POLICE COURT HOLDEN AT PERTH, WESTERN AUSTRALIA.

H. C. OF A. 1905.

PERTH, *Oct.* 19, 20.

Griffith C.J., Barton and O'Connor JJ.

Prohibited immigrants—Education test—Language, by whom to be chosen—Autrefois acquit—Immigrant landed under restraint of law—"Immigrant," meaning of—Unconstitutional—Prior domicil in Commonwealth—Immigration Restriction Act 1901 (*No.* 17 *of* 1901), *secs.* 3, 5, 7—*Colonial Laws Validity Act* (28 & 29 *Vict.*), *c.* 63, *sec.* 2.

The test whether a previous dismissal is a bar to a further prosecution is whether the evidence necessary to support the second prosecution would have been sufficient to procure a legal conviction on the first.

It is therefore no defence to a prosecution for "being a prohibited immigrant found within the Commonwealth" on 2nd June, that the accused was previously convicted on a similar charge laid as of 13th January, and that such conviction was quashed.

It is for the officer, and not the immigrant, to select the European language for the purpose of applying the test under sec. 3 (*a*) of the *Immigration Restriction Act* 1901.

H. C. OF A. 1905.

CHIA GEE v. MARTIN.

CHOW QUIN v. MARTIN.

Where prohibited immigrants were discovered as stowaways, arrested on board ship at Fremantle, and brought ashore in custody, it is no defence to a subsequent prosecution for being prohibited immigrants found within the Commonwealth, that they were brought ashore in the custody of the law.

In order to prove that a person who enters the Commonwealth is an "immigrant" within the meaning of the *Immigration Restriction Act* 1901, it is not necessary to prove that he intended to remain in the Commonwealth for any definite period.

Under the Act of 1901, a person formerly domiciled in the Commonwealth might be convicted of being a prohibited immigrant if he did not satisfy the proper officer that he had been so domiciled.

APPEALS from orders of the Police Court, holden at Perth, Western Australia.

In the beginning of January 1905, the appellants, all of whom were Chinese, were discovered by the Customs authorities as stowaways on board the s.s. *Charon*. They were thereupon arrested and brought before the Police Court at Fremantle charged with being prohibited immigrants found within the Commonwealth on 13th January in contravention of the *Immigration Restriction Act* 1901. They were sentenced to imprisonment by the magistrate, but the conviction was subsequently quashed by *Burnside* J. on the ground that the test was not properly applied. Immediately after release, they were re-arrested, subjected again to the test, and on failure to pass it, were taken to the Police Court at Perth and charged with being guilty of a similar offence on 2nd June. They were convicted and sentenced to two months imprisonment. Appeals against the convictions were made to the Supreme Court of Western Australia, and it was there ordered that the questions raised in the appeals should be argued before the High Court.

Le Mesurier, for the appellants. The test clause in the *Immigration Restriction Act* 1901, sec. 3 (*a*) is unconstitutional, as being *ultra vires* the Constitution, and also in conflict with the provisions of the *Colonial Laws Validity Act* (28 & 29 Vict.) c. 63, sec. 2.

The Constitution, sec. 51 (xxvii.) gives no power to the Commonwealth Parliament to prescribe any such condition as this, to enable a person to gain entry into the Commonwealth. Any such

condition is void as being contrary to the provisions of the *Colonial Laws Validity Act*. Sec. 2 of that Act provides that "any Colonial Law which is . . . repugnant to the provisions of any Act of Parliament extending to the colony . . . or repugnant to any Order or Regulation made under Authority of such Act . . . shall be read subject to such Act, Order, or Regulation, and shall to the extent of such repugnancy . . . be . . . void and inoperative."

[GRIFFITH C.J.—Can you refer to any Act of the Imperial Parliament, Order or Regulation, to which this provision is repugnant?]

Magna Charta, and all the subsequent acts confirming the great charter.

No law of the Commonwealth is valid which interferes with treaty rights. [He referred to several treaties between Great Britain and foreign nations; and *Cooper* v. *Stuart* (1), *Davidson* v. *New Orleans* (2), and *State* v. *Loomis* (3).]

The test is an impossible one in some cases, and the maxim applies: *lex non cogit ad impossibilia*. The immigrant is entitled to select any language he chooses for the purposes of the test.

To establish a case against the appellants, it must be proved that they were immigrating. The *Immigration Restriction Act* 1901 only applies to such aliens as enter the Commonwealth with the intention of remaining: *United States* v. *Burke* (4).

[O'CONNOR J.—That was a decision as to the crews of visiting ships. Under the Commonwealth Act the crews are expressly exempted.]

The test was not properly applied. After arrest they were taken to the police station. The intention of the officer was to make them write out a particular passage of fifty words. The interpreter did not ask them to write out the particular passage, but just to write out fifty words in English.

[GRIFFITH C.J.—All the words were read to them, and they were given to understand that they were to write those words in English.]

There was no proof by the Commonwealth that the defendants

(1) 14 App. Cas., 286.
(2) 96 U.S., 97.
(3) Thayer, 930.
(4) 99 Fed. Rep., 895.

H. C. OF A. 1905.

CHIA GEE v. MARTIN.

CHOW QUIN v. MARTIN.

did not come within the classes excepted by the Act. *Justices Act* 1902 (No. 11), sec. 72.

The appellants were convicted previously on a similar charge, and the conviction was quashed. The defence therefore of *autrefois acquit* applies: *Pilcher* v. *Stafford* (1); *R.* v. *Justices of Portsmouth* (2).

The appellants were improperly before the Court. There was no authority for the constable to arrest and take them before the Court. They were not responsible for being found within the Commonwealth on 2nd June. They had no opportunity to leave, and cannot, as they were forced to be there, be said to have been "found within" the Commonwealth. The terminus of the ship was Fremantle. They were on bail; but the bail bond did not take them out of the custody of the law.

Barker, for the respondent, was asked to confine his argument to the last point. The point was not taken below, and cannot be taken now for the first time. There was evidence that the appellants came here intending to remain, not merely as travellers. This was their terminus. There is no evidence of what the requirements of their recognizance are, whether personal attendance was required or whether they could appear by counsel or attorney. The first convictions were quashed because the test was wrongly applied on 13th January. It must therefore be regarded as never having been put at all until 2nd June. The application of the test on that date relates back to the 13th January; when the immigrants first landed. [He cited the *Queen* v. *Weil* (3).]

Le Mesurier, in reply.

GRIFFITH C.J. A number of objections have been taken to the convictions in this case, all of which are unsubstantial. To some of them it is not necessary to refer. The first point made by Mr. Le Mesurier was that the *Immigration Restriction Act* 1901 was unconstitutional, because its provisions were contrary to the provisions of *Magna Charta*, and the Statutes which had since

(1) 4 B. & S., 775.
(2) (1892) 1 Q.B., 491.
(3) 9 Q.B.D., 701.

confirmed it, and also inconsistent with certain treaties. The contention that a law of the Commonwealth is invalid because it is not in conformity with *Magna Charta* is not one for serious refutation. As to the objection that the provisions of the Act are invalid as being in conflict with treaties, it is sufficient to say that some day perhaps that question may be raised for decision, but it is not raised now. There is no treaty in existence which is relevant to the present case, and therefore it is not necessary to say anything about that argument. A point *primâ facie* of more validity was that these men had previously been convicted of the same offence, and that the convictions had been quashed. It appears that the convictions were quashed on the ground that the test had not then been applied to them, that is to say, that they had never been informed in a language which they could understand of what they were required to do. The test whether a previous conviction is a bar to a further prosecution is whether the evidence necessary to support the second prosecution would have been sufficient to procure a legal conviction on the first. In this case the appellants were charged with being prohibited immigrants within the meaning of sec. 7 of the *Immigration Restriction Act* 1901, found within the Commonwealth on 2nd June. The previous charge was of being prohibited immigrants found within the Commonwealth on 13th January. Of course, it is obvious that the evidence required to show that they were prohibited immigrants found within the Commonwealth on 2nd June could not have been sufficient to procure a legal conviction on a charge of being within the Commonwealth on 13th January. It was then suggested that the immigrant was entitled to select the European language from which he was to write fifty words from dictation. The words of the Act are: "Any person who . . . . . fails to write out at dictation and sign . . . . . a passage of fifty words in length in an European language directed by the officer." From that it is plain that it is for the officer, and not for the immigrant, to select the passage. The last point taken, and taken before us for the first time, is that the men did not come here voluntarily, but that they were brought here in the custody of the law, and had only been discharged from the custody of the law when they were arrested.

H. C. OF A. 1905.

CHIA GEE v. MARTIN.

CHOW QUIN v. MARTIN.

The facts are that the men came as stowaways on a ship trading between the terminal ports of Singapore and Fremantle, and came in the ship to the end of her voyage. There was, therefore, obviously, evidence that they did not come to the Commonwealth merely intending to enter its territory as members of a crew of a ship coming here and going away again in the ordinary course of their business. When they were found in the Commonwealth on 2nd June, after the previous convictions had been quashed, they were here in pursuance of their original intention. They had entered the Commonwealth voluntarily, they were found here, and they failed to comply with the test. They therefore brought themselves clearly within the terms of sec. 5, sub-sec. (2) of the Act. All the ingredients of the offence are clearly proved. It was suggested that the term "immigrant" in this Act means a person "who arrives in the Commonwealth with the intention of becoming a permanent resident." The word may have that meaning in some contexts. When you are contrasting immigrants with members of a crew, that may be a convenient distinction to take, but the purpose of this Act is clearly to prevent entry into the Commonwealth; the test is one to be applied on entry, and the question whether a man is an immigrant must be a matter capable of being determined then and there. It would be reducing the Act to a nullity if it were held that the test of whether a man were an immigrant or not was to be some intention in his mind, which intention the Commonwealth authorities might have no means of discovering. If there could be any doubt on the subject, it is removed by the words of sec. 5, sub-sec. (2), which speak of an immigrant, "at any time within one year after he has entered the Commonwealth." The term "immigrant" is clearly satisfied by the act of coming into the Commonwealth. The case of the crew of a ship is excepted by sec. 3, sub-sec. (*k*).

BARTON J. I concur.

O'CONNOR J. I concur.

CHOW QUIN AND ANOTHER *v.* MARTIN.

Le Mesurier, for appellants. As to two of the appellants, they were previously domiciled in Western Australia, but left the State

without having obtained an exemption certificate. Under these circumstances, the magistrate was wrong in holding them liable to the test on their return.

Barker, for respondent, was not called upon.

GRIFFITH C.J. The only additional point made in this case is that the appellants had been previously domiciled in Western Australia, within the Act, and therefore were not "immigrants." In the last case the question arose as to what was the meaning of the word "immigrant" as used in the Act, and we expressed our opinion as to the meaning of the term. It is now suggested that that decision does not apply to persons who have already been in Australia. The intention of the legislature in that regard is clearly expressed in sub-secs. (*h*) and (*n*) of sec. 3. There is no doubt that, if these men had satisfied the proper officer that they had been formerly domiciled in the Commonwealth, they were entitled to come back, and could not have been convicted of being prohibited immigrants; and I think it is to be regretted that they did not ask for an adjournment of the cases in order to have an opportunity of tendering evidence to the officer. However, we are now only concerned with the convictions, and the convictions are technically right; but I doubt if the facts were properly represented to the authorities. As I have said, however, we can only deal with the convictions before us, and there is no doubt they are proper convictions.

BARTON J. I agree.

O'CONNOR J. I agree.

Appeals dismissed with costs.

Solicitor, for appellants, *Le Mesurier.*
Solicitor, for respondent, *Crown Solicitor.*

H. E. M.