[HIGH COURT OF AUSTRALIA.]

CHRISTIE . . . . . APPELLANT;
INFORMANT,

AND

AH SHEUNG . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE COURT OF PETTY SESSIONS AT MELBOURNE, VICTORIA.

H. C. OF A. 1906.

MELBOURNE, *June* 26, 27, 29.

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

Immigration Restriction Act 1901 (*No.* 17 *of* 1901), *sec.* 7—*Prohibited immigrant—Naturalized subject—Evidence—Finding of Supreme Court on habeas corpus.*

On the return of a *habeas corpus* to L. to produce the body of A., a Chinese, L. alleged that he held A. under the authority of the Commonwealth Immigration Acts as being a prohibited immigrant. The Judge of the Supreme Court of Victoria who heard the matter found as a fact, upon the affidavits read before him, that A. was identical with a naturalized Victorian subject of the King of that name, and was domiciled in Victoria, and, holding that such Acts did not apply to him, ordered his release. On a subsequent prosecution of A. under those Acts for being a prohibited immigrant found within the Commonwealth:

Held, that such judgment was not admissible evidence upon the question of fact of the identity of A.

APPEAL from a Police Magistrate sitting as a Court of Petty Sessions at Melbourne, Victoria.

Ah Sheung, a Chinese, arrived in Melbourne on board the steamship *Tsinan*, and was prevented from landing by Charles Lindberg, the captain of the vessel, on the ground that he was a prohibited immigrant within the meaning of the Immigration Restriction Acts, inasmuch as he had failed to pass the dictation test. On 30th March 1906, a writ of *habeas corpus* issued out of

the Supreme Court of Victoria commanding Lindberg to have the body of Ah Sheung before a Judge of that Court, together with the cause of his being taken and detained by Lindberg.

On the return of the writ before *Cussen* J., the learned Judge found on the evidence before him, which was brought by affidavit, that Ah Sheung was the same person as a naturalized Victorian subject of the King of that name, and held that for that reason Ah Sheung was not an "immigrant" within the meaning of the Immigration Restriction Acts, and he thereupon ordered the release of Ah Sheung: [*Ah Sheung* v. *Lindberg* (1).]

Subsequently Ah Sheung was prosecuted before a Police Magistrate sitting as a Court of Petty Sessions, on the information of John Mitchell Christie, charging that he was a prohibited immigrant found within the Commonwealth on 30th March 1906.

The defence was set up that the defendant was a naturalized Victorian subject of the King, and the judgment of *Cussen* J. was put in evidence to prove that fact. The Police Magistrate held that such evidence was admissible and was conclusive, and refused to hear other evidence on the subject, and, following the law as laid down in that judgment, he dismissed the information.

From this decision the informant appealed to the High Court.

Bryant, for the appellant. The finding by *Cussen* J. was not evidence of the fact that the defendant was a naturalized Victorian subject of the King, and should not have been admitted. The Police Magistrate should have received oral evidence as to the question in dispute.

H. Barrett and *Arthur*, for the respondent. That Ah Sheung was a naturalized Victorian subject of the King was *res judicata*. The question of a man's nationality is one of status. It is a right *in rem*. Therefore, the fact having once been determined by the Supreme Court, the determination is binding until upset on appeal: See *Duchess of Kingston's Case* (2); *Reg.* v. *Hutchings* (3).

Bryant, in reply.

Cur. adv. vult.

(1) (1906) V.L.R., 323; 27 A.L.T., 189.

(2) II. Sm. L.C. 11th ed., p. 751, *n.*

(3) 6 Q.B.D., 300.

H. C. OF A. 1906.

CHRISTIE v. AH SHEUNG.

GRIFFITH C.J. This is an appeal from the decision of a Police Magistrate dismissing a charge against the respondent that he was a prohibited immigrant found within the Commonwealth on 30th March 1906. Before the magistrate sufficient *primâ facie* evidence was given to prove that the respondent was a prohibited immigrant in that he had failed to pass the dictation test. The defence set up was that he was a naturalized subject of the King in Victoria. It was admitted that there was a person named Ah Sheung who was a naturalized subject of the King in Victoria, but the identity of the respondent with that person was disputed. In support of the defence a judgment of *Cussen* J. was tendered in evidence and was admitted, in which that learned Judge had, in a controversy between the respondent and the master of the ship by which he came to Victoria, arrived at the conclusion on the evidence then before him that the respondent was the person named in the letters of naturalization. That judgment on that fact is conclusive only as between the master of the ship and the respondent, but it is clearly inadmissible evidence of the fact as between the Commonwealth or the King and the respondent. The evidence therefore ought not to have been received. It was the duty of the magistrate to ascertain for himself whether the respondent was or was not the person named in the letters of naturalization. If on a re-hearing the magistrate comes to the conclusion on the facts that the respondent is not that person, it will be his duty to convict. *Cussen* J. was of opinion that, if the respondent was the person named in the letters of naturalization, he was not a prohibited immigrant. But before that question of law can arise it must be ascertained whether the respondent is that person. So far as this case is concerned, the decision of the magistrate is wrong. He considered himself bound by the finding of fact of *Cussen* J. As to the matter of law, he would naturally follow the opinion of the learned Judge. But on the question of fact he was not bound by the judgment. That judgment was not admissible or relevant as to the question of identity, and the magistrate ought not to have acted upon it. The case must, therefore, go back to the magistrate for re-hearing.

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Appeal allowed. Order absolute. Case remitted to the magistrate for re-hearing.

Solicitor, for appellant, *Charles Powers*, Crown Solicitor for the Commonwealth.

Solicitor, for respondent, *Sabelberg*, Melbourne.

B. L.

[HIGH COURT OF AUSTRALIA.]

ROUT . . . . . APPELLANT;
PLAINTIFF,

AND

THOMPSON AND SEARSON . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA. (HOMBERG J.)

H. C. OF A. 1905.

ADELAIDE, *Nov.* 3.

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

The case turned solely on questions of fact.

The judgment of the Supreme Court of South Australia (2nd June 1905) was affirmed.

Appeal dismissed with costs.

Solicitor, for appellant, *Nesbit.*

Solicitor, for respondents, *Stuart.*

H. E. M.