[HIGH COURT OF AUSTRALIA.]

LI WAN QUAI . . . . . APPELLANT;
DEFENDANT,

AND

CHRISTIE . . . . . RESPONDENT.
INFORMANT,

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

H. C. OF A. 1906.

MELBOURNE, *June* 27, 28, 29.

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

Immigration Restriction Act 1901 (*No.* 17 *of* 1901), *secs.* 3 (*k*), 5—*Prohibited immigrant—Member of crew of vessel—Desertion—Absence from muster—Evasion of an officer—Autrefois acquit—Appeal to Court of General Sessions of Victoria—Power of amendment—Justices Act* 1890 (*Vict.*), (*No.* 1105), *secs.* 133, 185.

A member of the crew of a vessel, not being a public vessel of any government, who, in a port in the Commonwealth, deserts that ship and is absent from a muster of the crew made in pursuance of sec. 3 (*k*) of the *Immigration Restriction Act* 1901, is an immigrant who has evaded an officer, within the meaning of sec. 5 of that Act.

The true test whether a plea of *autrefois acquit* or of *autrefois convict* is a sufficient bar in any particular case is whether the evidence necessary to support the second charge would have been sufficient to procure a legal conviction upon the first.

On an appeal to a Court of General Sessions of Victoria from a conviction by a Court of Petty Sessions, the former Court has, under the *Justices Act* 1890 (Vict.), power to make all proper amendments although the written information is defective.

APPEAL from the Court of General Sessions at Melbourne.

The ship *Changsha* arrived in Melbourne in October 1904, one Li Wan Quai, a Chinese, being a member of the crew. On the 22nd October 1904, when the vessel was about to leave, the crew

H. C. OF A. 1906.

LI WAN QUAI v. CHRISTIE.

was mustered at the direction of Orlando O'Brien, an officer of Customs, but Li Wan Quai was not present, having left the ship. On 31st October 1905, Li Wan Quai was found in Melbourne by J. M. Christie, a detective of Customs, and on the following day the dictation test was put to him. On 28th November 1904 an information had been issued by which Christie charged that Li Wan Quai, on or about 22nd October 1904, at Melbourne, "being one of the crew of the vessel *Changsha* when she arrived at the Port of Melbourne, was in the opinion of Orlando O'Brien, an officer of Customs at that Port, a prohibited immigrant within the meaning of the *Immigration Restriction Act* 1901 and was not present when the crew was mustered by the master of the said vessel when required so to do by the said officer before the master of the said vessel was permitted to leave the said port." On this information Li Wan Quai was brought before the Court of Petty Sessions at Melbourne on 8th November 1905, was convicted of the offence therein charged, the conviction following the language of the information, and was sentenced to imprisonment for 14 days.

From this conviction Li Wan Quai appealed to the Court of General Sessions, and the appeal was heard on 15th December 1905. It being contended that the information disclosed no offence, an application was made by counsel for the informant that it should be amended, but the application was refused and the conviction was quashed.

A second information was then laid by Christie on 5th January 1906, charging that Li Wan Quai on or about 31st October 1905, at Melbourne, was a prohibited immigrant found within the Commonwealth of Australia in evasion of the *Immigration Restriction Act* 1901. Li Wan Quai was arrested on 25th January 1906, and on 31st January 1906 was brought before the Court of Petty Sessions at Melbourne, when the second information was withdrawn and a third information dated 25th January 1906 was substituted, wherein it was charged that Li Wan Quai on or about 31st October 1905 at Melbourne was a prohibited immigrant found within the Commonwealth of Australia in contravention of the *Immigration Restriction Act* 1901. On this

information Li Wan Quai was convicted and sentenced to imprisonment for 7 days.

From this conviction Li Wan Quai appealed to the Court of General Sessions. On this appeal counsel for Li Wan Quai raised the plea of *autrefois convict*, and objected that there was no evidence that Li Wan Quai evaded an officer of Customs. The conviction having been affirmed, Li Wan Quai now appealed to the High Court.

Field Barrett, for the appellant. Apart from evasion of an officer by an immigrant, or the landing of an immigrant at a place where no officer is stationed, the dictation test cannot be applied to an immigrant except within one year after he has entered the Commonwealth: See sec. 5 of the *Immigration Restriction Act* 1901. There must be affirmative evidence of evasion. The mere fact that a member of a crew leaves his ship and enters the Commonwealth is not evidence of evasion. That being so, the prosecution cannot rely on the failure to pass the dictation test in order to constitute the appellant a prohibited immigrant. The only offence created by sec. 3 (*k*), which is the only provision on which the prosecution can rely, is that of entering the Commonwealth. Section 7 does not create the offence of being found within the Commonwealth, for that section must be read with sec. 3. If the offence was that of entering the Commonwealth, the prosecution should have taken place within 12 months of the entry: *Justices Act* 1890, sec. 201.

It was the duty of the Court of General Sessions under sec. 133 of the *Justices Act* 1890 to have amended the first conviction: See also sec. 185. The appellant was therefore in jeopardy, and the plea of *autrefois convict*, or rather of *res judicata*, is an answer to the second prosecution. The facts relied on were the same in both prosecutions and therefore that plea is good. *Riley* v. *Brown* (1); *R.* v. *Miles* (2); *R.* v. *Friel* (3); *R.* v. *Tancock* (4). In *Chia Gee* v. *Martin* (5) the same facts were not before the Court on both occasions, here they were. There could only be one conviction for the offence of being found within the Common-

(1) 17 Cox C.C., 79.
(2) 24 Q.B.D., 423.
(3) 17 Cox C.C., 325.
(4) 13 Cox C.C., 217.
(5) 3 C.L.R., 649.

H. C. OF A. 1906.

LI WAN QUAI v. CHRISTIE.

wealth. There is power to deport a prohibited immigrant, so that, once there is a conviction for being found within the Commonwealth, the offence is purged: *See Bannister* v. *Sullivan* (1).

[GRIFFITH C.J. referred to *R.* v. *Hull* (2), and *Ex parte Spencer, Sherwood* v. *Spencer* (3).]

Coldham and *Mackey*, for the respondent. The principle laid down in the last mentioned case governs the present case. The evidence necessary to support the second conviction must be such as to have been sufficient to secure a conviction on the first charge. A person might have entered the Commonwealth quite lawfully, and yet a conviction might be subsequently had against him for being found within the Commonwealth. Here the entry was lawful although, by reason of the appellant having been absent from the muster of the crew, that entry is to be deemed to have been unlawful. There is no evidence that the appellant was ever convicted or acquitted of any offence prior to the conviction the subject of this appeal. A conviction which has been set aside is not a bar to a subsequent conviction for the same offence: *R.* v. *Drury* (4). The Court should look at the first conviction as it stood without considering whether there was power in the Court of General Sessions to have amended it: *R.* v. *Green* (5). There is evidence that the appellant had evaded an officer, and in that case he would come within sec. 5 of the *Immigration Restriction Act* 1901. The fact that he left the ship with the intention of remaining away is evidence of evasion.

Field Barrett in reply.

Cur adv. vult.

GRIFFITH C.J. This is an appeal from the Court of General Sessions at Melbourne dismissing an appeal from a decision of justices by which the appellant was convicted on the charge that, on the 31st October 1905, he, being a prohibited immigrant, was found within the Commonwealth in contravention of the *Immigration Restriction Act* 1901. The evidence given in support of

(1) 20 Cox C.C., 685.
(2) (1902) S.R. Qd., 53.
(3) 2 C.L.R., 250.
(4) 18 L.J.M.C., 189.
(5) 26 L.J.M.C., 17.

the information was shortly this:—In October 1904 the appellant had arrived in Victoria in the ship "*Changsha*," being one of the crew. He was absent from a muster of the crew called in accordance with sec. 3 (*k*) of the *Immigration Restriction Act* 1901, whereupon the officer who made the muster formed the opinion, as he said in evidence, "He was in my opinion a prohibited immigrant." The appellant was apparently not discovered until 31st October 1905, when the respondent found him, and proceeded to apply to him the dictation test, which he failed to pass. The information was then laid, accusing the appellant of being on that date a prohibited immigrant found within the Commonwealth.

The argument that the appellant was a prohibited immigrant was based on two separate provisions of sec. 5, which enacts that:—"(1) Any immigrant who evades an officer or who enters the Commonwealth at any place where no officer is stationed may if at any time thereafter he is found within the Commonwealth be asked to comply with the requirements of paragraph (*a*) of section three, and shall if he fails to do so be deemed to be a prohibited immigrant offending against this Act: (2) Any immigrant may at any time within one year after he has entered the Commonwealth be asked to comply with the requirements of paragraph (*a*) of section three, and shall if he fails to do so be deemed to be a prohibited immigrant offending against this Act." Under the second paragraph of that section the test must be applied within twelve months of the entry, but, under the first paragraph, in the case of an immigrant who evades an officer, it may be applied at any time.

In the present case it appeared that the appellant deserted his ship and was absent at the muster. The appellant cannot be heard to say that he did not know that he ought to have given an opportunity of being submitted to the dictation test. Persons coming here from abroad cannot escape by saying they do not know the law. In my opinion, therefore, he was a person who evaded an officer within the meaning of sec. 5, and the test was therefore lawfully put to him, although it was not put to him until more than twelve months after the muster was held. Thereupon he became a prohibited immigrant, and being found within the Commonwealth, he was liable to be convicted under sec. 7.

H. C. OF A. 1906.

LI WAN QUAI v. CHRISTIE.

Griffith C.J.

With respect to the argument founded on the second paragraph, the opinion of the Court has previously been stated in the judgment in *Preston* v. *Donohoe* (1). In the present case there may perhaps be some difficulty in applying the evidence to establish the offence. It is, however, unnecessary to say anything further on that point, because the fact of the appellant being a prohibited immigrant was clearly established by his failure to pass the dictation test, he being a person who, in my opinion, had evaded an officer. Therefore, the conviction so far as that goes is right.

Another objection was taken in the nature of a plea of *autrefois acquit*, or, as it is better stated, on the ground that a man may not be twice vexed for the same cause. That arises from this state of facts. When the appellant first entered the Commonwealth, on 28th October 1904, an information was sworn charging that he was, in the opinion of an officer of Customs, a prohibited immigrant, and was not present when the crew was mustered, and a summons was issued thereon. The appellant, having been found more than a year afterwards, in October 1905, was on 8th November brought before the Police Court on that information, and was convicted of the offence therein charged. He appealed to the Court of General Ssssions on the ground, amongst others, that the conviction, which followed the information, disclosed no offence. The Chairman of that Court was of opinion that that contention was right and quashed the conviction. It is said that, under these circumstances, the matter of the charge against the appellant in the information of 28th November 1904, on which he was convicted on 8th November 1905, was substantially the same as that of the charge against him in the information of 25th January 1906, on which he was convicted on 31st January 1906. The Chairman of General Sessions held, as I have said, that the information in the first case disclosed no offence. Application was made to him to amend the information—it may be, perhaps, that it was the conviction which should have been amended—but he refused to do so. I myself cannot entertain a doubt that he had power to amend. But, he having refused to amend, what effect must be given to the conviction which really disclosed no offence, but

(1) 3 C.L.R., 1089.

which might have been amended so as to render the appellant liable to punishment? Probably the better opinion is that as a matter of law it ought to be held that the appellant was never in jeopardy, but I express no decided opinion upon the point. In order that a previous conviction or discharge can be a bar to subsequent proceedings, the charges must be substantially the same. The true test whether such a plea is a sufficient bar in any particular case is, whether the evidence necessary to support the second charge would have been sufficient to procure a legal conviction upon the first: See *R.* v. *Drury* (1), and other cases cited in *Archbold's Criminal Pleading*, 21st ed., p. 148. The charge on the second prosecution was that on 31st October 1905, the appellant was a prohibited immigrant found within the Commonwealth. It is obvious that the evidence to support that charge might, at any rate, not have been sufficient to support the charge that the appellant entered the Commonwealth on 22nd October 1904. The charges do not relate to the same day or to the same offence. One offence is entering the Commonwealth, the other is being found within the Commonwealth. It is, no doubt, true that a man cannot be found within the Commonwealth unless he has entered it before the prosecution. On a prosecution for entering the Commonwealth time runs from the entry, but on a prosecution for being a prohibited immigrant found within the Commonwealth the time runs from the time when the two events concur, that is to say, being found within the Commonwealth and being a prohibited immigrant. In this case those two events did not concur until 31st October 1905. Therefore the offences were not substantially the same, and that objection fails. In my opinion, the decision of the Chairman of General Sessions was right, and the appeal should be dismissed.

BARTON J. I am of the same opinion for the same reasons.

O'CONNOR J. I concur.

Appeal dismissed.

Solicitor for appellant, *Field Barrett*, Melbourne.

Solicitor for respondent, *Chas. Powers, Crown Solicitor for the Commonwealth.*

B. L.

(1) 3 C. & K., 193.