Solicitors, for appellant, *Crick & Carrol.*

Solicitor, for respondent, *The Crown Solicitor for New South Wales.*

C. A. W.

H. C. OF A. 1906.

PRIOR v. SHERWOOD.

[HIGH COURT OF AUSTRALIA.]

## PRESTON v. DONOHOE.

## GORDON v. DONOHOE.

*Prohibited Immigrant—Member of ship's crew absent from muster—"Opinion of the officer"—Construction—Immigration Restriction Act (No. 17 of 1901), secs. 3*, 9—Immigration Restriction Amendment Act (No. 17 of 1905), secs. 4†, 12.*

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SYDNEY, *May* 22, 25. MELBOURNE, *June* 29.

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

* Sec. 3 of the *Immigration Restriction Act* 1901 is as follows :—

3. The immigration into the Commonwealth of the persons described in any of the following paragraphs of this section (hereinafter called "prohibited immigrants") is prohibited, namely :—

(*a*) Any person who when asked to do so by an officer fails to write out at dictation and sign in the presence of the officer a passage of fifty words in length in an European language directed by the officer ;

. . . . . .

But the following are excepted :—

. . . . . .

(*k*) the master and crew of any other vessel landing during the stay of the vessel in any port in the Commonwealth : Provided that the master shall upon being so required by an officer, and before being permitted to clear out from or leave the port, muster the crew in the presence of an officer ; and if it is found that any person, who according to the vessel's articles was one of the crew when she arrived at the port, and who would in the opinion of the officer be a prohibited immigrant but for the exception contained in this paragraph, is not present, then such person shall not be excepted by this paragraph, and until the contrary is proved shall be deemed to be a probibited immigrant and to have entered the Commonwealth contrary to this Act ; . . . . . .

† Sec. 4 of the *Immigration Restriction Amendment Act* 1905 is as follows :—

4. Section three of the Principal Act is amended—

(*a*) by omitting the whole of paragraph (*a*) and inserting in lieu thereof the following paragraph :—

(*a*) Any person who fails to pass the dictation test : that is to say, who, when an officer dictates to him not less than fifty words in any prescribed language, fails to write them out in that language in the presence of the officer.

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*Form of information — Defects curable by amendment — Justices Act* (*N.S.W.*) (*No.* 27 *of* 1902), *secs.* 65, 115.

At a muster of a ship's crew in the presence of an officer under the *Immigration Restriction Acts* one of the members of the crew was absent, and the officer upon the evidence before him formed the opinion that the missing member of the crew would, but for the exception in sub-sec. (*k*) of sec. 3 of the Act of 1901, be a prohibited immigrant under sub-sec. (*a*) of that section as amended by sec. 4 sub-sec. (*a*) of the amending Act of 1905.

The master of the ship was charged under sec. 9 of the Act of 1901, as amended by sec. 12 of the Act of 1905, with being the master of a ship from which a prohibited immigrant had entered the Commonwealth, and was convicted and fined.

*Held*, on an application for a prohibition, that the proviso in sec. 3, sub-sec. (*k*) was intended to apply to a prosecution under sec. 9, whether it does or does not apply to a prosecution against the immigrant himself; and that, in the absence of evidence to the contrary, the magistrate was bound to find that the absent member of the crew was a prohibited immigrant who had entered the Commonwealth contrary to the Act, and the conviction was right.

The most natural grammatical construction of the language of the proviso is that the officer is to be of opinion that the person in question is one who would, if called upon, fail to pass the dictation test. In any case the words are open to that construction, and, as any other construction would defeat the manifest intention of the legislature, it ought to be adopted.

*Held*, also, that the officer having applied his mind to a relevant question, his opinion could not be questioned in a prosecution founded upon that opinion.

The information omitted to allege that the defendant was master of the ship on the day when the immigrant entered the Commonwealth, and also omitted to specify the particular class of prohibited immigrant within which the immigrant was alleged to fall.

*Held*, that even if these allegations were necessary, the omission of them was a defect which by secs. 65 and 115 of the *Justices Act* (N.S.W.) 1902 might be cured by an amendment of the conviction according to the evidence.

The provisions of sec. 9 of the *Immigration Restriction Act* 1901 are not in conflict with the Imperial *Merchant Shipping Act*.

Rule *nisi* for a prohibition: *Ex parte Gordon*, 3 C.L.R., 724, discharged.

PROHIBITION.

In these cases motion was made to make absolute rules *nisi* for a prohibition directed to a magistrate. The rules were granted on 29th March by the High Court sitting at Melbourne: *Ex parte Gordon* (1). The facts of the two cases were practically indistinguishable, and they were in the argument on the motion treated

(1) 3 C.L.R., 724.

as one case. The applicants, C. F. Preston and E. Gordon, were masters of the steamships *Mongolia* and *Moldavia* respectively, mail steamers belonging to the Peninsular and Oriental Steam Navigation Company, and had each been convicted and fined in a Police Court at Sydney, on a charge of being the master of a vessel from which a prohibited immigrant entered the Commonwealth contrary to the Immigration Restriction Acts.

The facts are set out in the judgment.

*Reid* K.C. and *Pollock*, for the applicants. The information is bad. It does not state that the defendant was master of the ship when the immigrant entered the Commonwealth; the date of entry is not stated. No offence is disclosed. If the facts alleged are equally consistent with the innocence of the accused as with his guilt he should be discharged: *Seth Turner's case* (1). All the essential ingredients of the offence should appear in the information. There is no provision in the *Justices Act* 1902 which makes it sufficient to set out the offence in the exact words of the Statute which creates it. The omission of any essential ingredient in the offence cannot be cured after conviction: *Ex parte Price* (2).

[GRIFFITH C.J.—Is it not enough to follow the words of the Statute?]

The conviction was quashed in *Smith* v. *Moody* (3), though the words of the Statute were followed. The word "then" should have been inserted; offences cannot be fixed by implication or conjecture. If there are two possible constructions for the information, one being consistent with innocence, the magistrate should hold that the information is bad.

The information should have stated under which class of prohibited immigrant the man in question was alleged to fall.

[GRIFFITH C.J.—Do not secs. 65 and 115 of the *Justices Act* 1902 provide for curing such defects as these?]

Granting that to be so, the information has not been amended, and the conviction, as it comes before this Court, is defective. This Court cannot make the amendment: *Ex parte Price* (2); *Smith* v. *Moody* (3); *Ex parte Ah Sun* (4).

(1) 9 Q.B., 80.
(2) 20 N.S.W. L.R., 343.
(3) (1903) 1 K.B., 56.
(4) 8 N.S.W. W.N., 5.

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[GRIFFITH C.J.—The objection might have some weight if the defendants had been prejudiced: *Rex* v. *Payne* (1).]

The defendants were entitled to know the ground on which the immigrant was alleged to be prohibited. On the evidence the officer did not properly form an opinion. He gives no sufficient grounds for his opinion.

[GRIFFITH C.J.—In the absence of evidence to the contrary the Court must assume that the officer exercised his discretion properly: *Bew* v *Bew* (2).]

A mandamus will lie where the officer's discretion is wrongly exercised and non-legal reasons are taken into account. [They referred to *The Queen* v. *Sykes* (3).] The evidence before the officer here was equally consistent with the missing men not being prohibited immigrants. A member of a crew is not a prohibited immigrant until he has been brought within the proviso in sub-sec. (*k*) of sec. 3. The mere fact that the officer had formed an opinion that the man was a prohibited immigrant is not sufficient. His opinion should be stated in the information, in detail, not its legal effect: *Cotterill* v. *Lempriere* (4).

The penalty imposed by sec. 9 does not apply to sec. 3, sub-sec. (*k*) so as to render the master liable. The entry into the Commonwealth is the act of the immigrant not of the master. The Act should not be construed so as to render the master liable for an offence which he cannot prevent. His responsibility extends only to the landing of persons who are prohibited immigrants when they leave the ship, *i.e.*, persons who are actually within the prohibited classes at that time. These men landed lawfully, and if by subsequent desertion they became prohibited immigrants the master cannot be held liable. Sec. 10 clearly refers to persons who are prohibited immigrants when they land, and this section refers to the same class. There was, therefore, no *mens rea* in the defendants. Unless the Statute clearly points to the conclusion that the offence may be committed without a *mens rea*, such a conclusion should be avoided: *Sherras* v. *De Rutzen* (5). If the Court were to adopt that construction it might happen that a

(1) (1906) 1 K.B., 97.
(2) (1899) 2 Ch., 467.
(3) 1 Q.B.D., 52.
(4) 24 Q.B.D., 634.
(5) (1895) 1 Q.B., 918.

master would be punished in respect of a man who subsequently turned out not to be a prohibited immigrant. Sub-sec. (*k*) merely alters the rule of evidence as far as the immigrant is concerned, and, being a penal section, should not be strained so as to cover the case of the master. It applies only in a prosecution of the immigrant, not in a prosecution of the master under sec. 9. The term "prohibited immigrant" should be construed strictly, not so as to include persons who subsequently become prohibited immigrants.

The *Immigration Restriction Act* is repugnant to the Imperial *Merchant Shipping Act*, secs. 221, 223, 231. The latter Act provides one penalty for desertion and the former provides another inconsistent with it. The Commonwealth Statute must therefore give way. [They referred to *Parry* v. *Croydon Commercial Gas and Coke Co.* (1); *Peninsular and Oriental Steam Navigation Co.* v. *Kington* (2).]

[GRIFFITH C.J. referred to *Chia Gee* v. *Martin* (3).]

*Gordon* K.C. (*Blacket* with him), for the respondent. By sec. 3, sub-sec. (*k*) the officer is entitled to form the opinion that, but for the exception contained in that sub-section, the absent person is a prohibited immigrant within the meaning of class (*a*) in sec. 3 of the Principal Act, as amended by sec. 4 of the Amending Act. On the appellants' construction none of the lascar crew, unless they were in one of the classes other than (*a*), could be prohibited immigrants at all. The opinion has to be formed before the vessel leaves the port, and the only opinion that the officer could form as to class (*a*) would be whether or not the absent man would come within that class if the dictation test were applied; that is, the natural meaning of the sentence, and the only one that gives any effect to the restriction in class (*a*) under such circumstances as the present.

If it appears that the officer applied his mind to the proper question, this Court will not consider whether he was right or wrong in his opinion. The actual test could not be applied by reason of the absence of the immigrant. He could not have

(1) 15 C.B.N.S., 568.
(2) (1903) A.C., 471.
(3) 3 C.L.R., 649.

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entered contrary to law unless he was then a prohibited immigrant, so that "deemed to be a prohibited immigrant" and "to have entered the Commonwealth contrary to law" must refer to the same moment of time. Sec. 9 must be read with sec. 3, sub-sec. (*k*).

There is no repugnancy between the Immigration Restriction Acts and the Imperial *Merchant Shipping Act*. A man may be a deserter under the one and also a prohibited immigrant under the other, and punishment may be inflicted concurrently upon the persons responsible in respect of each breach. A conviction or acquittal under one Act could not be pleaded in answer to a charge under the other. The evidence necessary to support the two charges is altogether different.

The suggested defects in the information are such as could be cured by amendment of the conviction if necessary, but there is no defect in substance. The reasonable construction of the information is that on the date mentioned the defendant was master, and the immigrant, being then within the prohibited classes, had entered the Commonwealth. The omission to specify the particular class under which the immigrant was alleged to fall might be a ground for asking for particulars, but it did not prejudice the defendant, and the evidence supplied the defect. *Smith* v. *Moody* (1) might be in point if the name of the immigrant had been omitted. Here all the essential ingredients of the offence are stated. Even if that were not so, the verdict was based upon a finding of the full averment, and cured the imperfection in the information: *Reg.* v. *Goldsmith* (2). [As to the power of the justice to amend, he referred to *Ex parte Salmon* (3).]

[BARTON J. referred to *Reg.* v. *Stroulger* (4).]

*Reid* K.C. in reply. The objection here is taken after verdict, not before it, as in the cases cited for the respondent. It is an objection to the jurisdiction, and the Court of Appeal cannot by amendment give the justices jurisdiction: *Reg.* v. *Ingall* (5).

*Cur. adv. vult*

(1) (1903) 1 K.B., 56.
(2) L.R. 2 C.C.R., 74.
(3) 5 S.C.R. (N.S.W.), 397.
(4) 17 Q.B.D., 327.
(5) 42 L.T., 533; 29 W.R., 288.

The judgment of the Court was read by

GRIFFITH C.J. The appellant, who is the master of the s.s. *Mongolia*, was convicted on a charge that on 28th February 1906, he was master of a ship from which one Mahomet Mithoo, being a prohibited immigrant, had entered the Commonwealth. The charge was founded upon sec. 9 of the *Immigration Restriction Act* 1901, which, as amended by sec. 12 of the *Immigration Restriction Amendment Act* 1905, provides that—"The master . . . of any vessel from which any prohibited immigrant enters the Commonwealth contrary to this Act shall be . . . liable on summary conviction to a penalty of One hundred pounds." To show that Mahomet Mithoo was a prohibited immigrant, reliance was placed upon par. (*k*) of sec. 3 of the Act of 1901. That section enumerates seven classes of persons, called in the Act "prohibited immigrants," whose immigration into the Commonwealth is prohibited. The first class is—(*a*) "Any person who when asked to do so by an officer fails to write out at dictation and sign in the presence of the officer a passage of fifty words in length in an European language directed by the officer." The section proceeds —"But the following are excepted . . . (*k*) The master and crew of any other vessel landing during the stay of the vessel in any port in the Commonwealth:—Provided that the master shall upon being so required by an officer, and before being permitted to clear out from or leave the port, muster the crew in the presence of an officer; and if it is found that any person, who according to the vessel's articles was one of the crew when she arrived at the port, and who would in the opinion of the officer be a prohibited immigrant but for the exception contained in this paragraph, is not present, then such person shall not be excepted by this paragraph, and until the contrary is proved shall be deemed to be a prohibited immigrant and to have entered the Commonwealth contrary to this Act." This paragraph lays down an artificial rule of evidence, a rule which, in our judgment, is to be applied in any case in which the question arises whether a member of the crew of a ship who is not present at a muster was a prohibited immigrant, or has entered the Commonwealth in contravention of the Act.

Evidence was given that Mahomet Mithoo was a fireman of the

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*Mongolia*; that at a muster of the crew in the presence of an officer on the day named in the information he was absent, and that the officer, having regard to his name and occupation, to the fact that he had signed the ship's articles as a marksman, and to his own general knowledge of Asiatic firemen, formed the opinion that Mahomet Mithoo would be a prohibited immigrant but for his being a member of the crew.

Various objections were taken to the conviction, some of which may be shortly disposed of. The first was that it was not alleged by the information that the appellant was the master of the ship on the day when Mahomet Mithoo entered the Commonwealth. It would have been better if the word "then" had been used in the information, but the defect, assuming that the information ought not to be read after conviction as if the word had been inserted, is cured by secs. 65 and 115 of the *Justices Act* 1902, which authorize the Court, on an appeal brought in the mode adopted in the present case, to amend the conviction according to the evidence. The next objection was that the particular class of prohibited immigrant within which Mahomet Mithoo was alleged to fall was not specified in the information. It may be convenient, but we doubt whether it is necessary, that this should be stated in the information. Assuming that it is strictly speaking necessary, which we do not decide, this objection also is cured by the sections of the *Justices Act* 1902 already mentioned.

The next objection was that the officer did not apply his mind to the proper question, and that his opinion, therefore, had no legal effect. It appears, however, from the evidence that he directed his attention to the question whether Mahomet Mithoo fell within class (*a*) of sec. 3. We think that it was necessary to show that the officer had applied his mind to a relevant question: *The Queen* v. *Vestry of St. Pancras* (1); but when he has done so, the opinion which he has formed has the effect which is given to it by the Act, and cannot, in our judgment, be questioned in a prosecution founded upon his opinion.

The substantial objection, however, is that sec. 9 does not apply to such a case as the present. It is contended that a person does not fall within class (*a*) unless the dictation test has actually been

(1) 24 Q.B.D., 371, at p. 375.

applied to him and he has failed to pass it, and that, as Mahomet Mithoo had admittedly not been subjected to this test, the officer could not have formed the opinion that he fell within that class. The words of par. (*k*) are—"If it is found that any person, who according to the vessel's articles was one of the crew when she arrived at the port, and who would in the opinion of the officer be a prohibited immigrant but for the exception contained in this paragraph," &c. Under the circumstances supposed, the actual fact cannot be ascertained by personal examination of the suspected person, who has landed under the exception in favour of the crew. The enactment is, therefore, dealing with a case in which the actual fact is not known, but the officer is required to form an opinion as to what would be ascertained to be the truth if circumstances admitted of its ascertainment. The meaning evidently is that the officer should form his opinion that the person in question would, under these circumstances, fall within one of the seven classes. Par. (*k*) must, therefore, be read as meaning "would, but for his having landed as a member of the crew, have been found" to fall within one of those classes. We are here only concerned with class (*a*). Par. (*k*) may, therefore, for the purposes of the present case, be read as if it said—"A person who in the opinion of the officer would have been found to fall within class (*a*)." What is the meaning of the reference to class (*a*) in such a connection? Does it mean only persons who have already failed to pass the dictation test, or does it include persons who, if the opportunity had existed, would have failed to pass it? The question whether a named person has failed to pass the test is a question of existing fact, presumably within the knowledge of the officer. The phrase is, however, conditional, and refers to a fact not ascertained, but as to which an opinion may be formed. In our opinion, the words of par. (*k*) must be read as equivalent to "would upon proper steps being taken for the purpose be proved to be within one of the specified classes." This view is confirmed by a consideration of the words used in defining the other six classes of prohibited immigrants, none of whom, it may be remarked, are persons *primâ facie* likely to be members of the crew of a ship. In the case of class (*b*) the prohibition depends on an opinion to be formed by the

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Minister—an event which has probably not happened when the member of the crew is absent from the muster. Inclusion in the other classes depends upon questions of existing fact. But, while the whole object of the proviso in par. (*k*) is to deal with absent persons as to whom the actual truth is not certainly known, the result of the construction contended for by the appellant would be that it would fail in its operation, except as to the very limited classes of persons specified in paragraphs (*c*) to (*g*). It is, however, evident that par. (*k*) is intended to meet the case of every member of the crew of a ship who is absent from muster. Moreover, if the construction contended for is adopted, the provisions of par. (*k*) would be to a great extent nugatory. For if the member of the crew were found, the necessity for the opinion of the officer would cease to exist, since the dictation test could be applied to him, unless the time for applying it had gone by. It was contended that the rule of evidence laid down by this paragraph applies only to a prosecution against the prohibited immigrant himself, but for the reasons just given they would, if applied for that purpose only, be almost, if not entirely, superfluous. It is, in our opinion, clear that the rule is laid down for the purpose of sec. 9, and not merely for the purposes of a prosecution against the man himself. It is plain, therefore, that the main object of the provisions in par. (*k*), which is to prevent members of a ship's crew from entering the Commonwealth as immigrants without an opportunity of discovering whether they are or are not prohibited immigrants, would be defeated if it were construed as not extending to persons who are in fact unable to pass the dictation test if it could be applied to them. Having regard to the conditional form of the phrase incorporating the reference to class (*a*), and to the form of the definition of that class, the most natural grammatical construction of the language of the legislature is that the officer is to be of opinion that the person in question is one who would, if called upon, fail to pass the dictation test. In any case, the words are open to that construction, and, as any other construction would defeat the manifest intention of the legislature, it ought, in our judgment, to be adopted.

It follows that in this case, in the absence of evidence to the contrary, the magistrate was bound to find that Mahomet Mithoo

was a prohibited immigrant, and had entered the Commonwealth contrary to the Act. The time of his entry must, we think, be deemed to have been the time when he was absent from the muster, since his landing before that time fell within the exception in sec. 3. And, as the appellant was then the master of the ship, all the elements of the offence were established, and the conviction was right. We think that there is nothing in the objection that the *Immigration Restriction Act* is in conflict with the Imperial *Merchant Shipping Act.*

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The facts of this case are not distinguishable from those in *Preston* v. *Donohoe.* The same result must, therefore, follow.

*Appeals dismissed.*

Solicitors, for the appellants, *Bradley & Son.*

Solicitor, for the respondent, *The Crown Solicitor of the Commonwealth.*

C. A. W.



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[HIGH COURT OF AUSTRALIA.]

CARROLL AND OTHERS . . . . APPELLANTS;
DEFENDANTS,

AND

SHILLINGLAW . . . . . RESPONDENT.
INFORMANT,



ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

MELBOURNE, *June* 14, 15, 18, 25.

*Medical Act* 1890 (*Vict.*) (*No.* 1118), *secs.* 93, 97—*Friendly Societies Act* 1890 (*Vict.*) (*No.* 1094), *secs.* 5, 11, 13—*Unlawfully carrying on business as chemist and druggist—Friendly society—Rules—Effect of registration—Ultrâ vires—"Purchasing members"—Sale of medicines to public.*

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