

[HIGH COURT OF AUSTRALIA.]

THE ATTORNEY-GENERAL FOR THE } APPELLANT;
COMMONWEALTH . . . }

AND

AH SHEUNG RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF
VICTORIA.

Immigration Restriction Act 1901 (No. 17 of 1901)—Prohibited immigrant— H. C. OF A.
Application of Act to Australian citizen—The Constitution (63 & 64 Vict. c. 12), 1906.
sec. 51—Habeas corpus—Jurisdiction of High Court.

MELBOURNE,

The High Court has jurisdiction to entertain an appeal from the Supreme Court of a State in a case of *habeas corpus*. June 26, 27, 29.

Semble, there is no Australian nationality as distinguished from British nationality, so as to limit the power of the Commonwealth under sec. 51 of the Constitution to exclude persons from Australia.

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

Quære, whether the power of the Parliament under sec. 51 of the Constitution to deal with "immigration" extends to the case of Australians absent from Australia on a visit *animo revertendi*.

APPEAL from the Supreme Court of Victoria.

On 30th March 1906, a writ of *habeas corpus* issued out of the Supreme Court of Victoria, commanding Charles Lindberg, captain of the ship *Tsinan*, then in the River Yarra, in the State of Victoria, to have the body of Ah Sheung, a Chinese, before a Judge of that Court, together with the cause of his being taken and detained by the said Charles Lindberg. To this writ Charles Lindberg made the return that Ah Sheung was a prohibited immi-

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grant within the meaning of the *Immigration Restriction Acts* 1901-1905, inasmuch as he was a person who, on 28th March 1906, failed to pass the dictation test, within the meaning of, and as required by, such Acts, and, that, as master of the ship *Tsinan* he (Lindberg) was liable to a penalty of £100 if Ah Sheung, being a prohibited immigrant, entered the Commonwealth contrary to such Acts, and was authorized and required by such Acts to prevent, and did prevent Ah Sheung, as such prohibited immigrant, from entering the Commonwealth from such ship; that, after the issue and service upon him (Lindberg) of the writ, namely on 30th March 1906, he did, by arrangement with the solicitor acting for Ah Sheung, and with the concurrence of the Commonwealth authorities, because his ship was about to clear for China ports, allow Ah Sheung to land from the ship, and that Ah Sheung was immediately thereafter arrested by an officer of Customs and charged with being a prohibited immigrant offending against such Acts, and that such charge was at the time of the return still pending, Ah Sheung having been released and being on bail.

Affidavits were filed on behalf of Ah Sheung in which it was stated that Ah Sheung came to Victoria about 1881, that in May 1883 he obtained letters of naturalization under the *Aliens Act* 1865, that prior to 1901 he had made two visits to China, always returning and being admitted into Victoria without objection, that in 1901 he again went to China, remained there about five years, and returned in the *Tsinan*, when the detention complained of took place.

On the return of the writ before *Cussen J.*, the learned Judge found that from 1883 onwards, Ah Sheung was a domiciled Victorian subject of the reigning Sovereign, and that, except during his visits to China, he was also resident in Victoria. The learned Judge therefore held that the *Immigration Restriction Acts* did not apply to Ah Sheung, and ordered his release: *Ah Sheung v. Lindberg* (1).

Subsequently Ah Sheung was prosecuted before a police magistrate, on the information of John Mitchell Christie, charging that he was a prohibited immigrant found within the Commonwealth on 30th March 1906, and the information was dismissed.

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

Appeals were brought to the High Court both from the dismissal of the information and from the judgment of *Cussen J.* In the former case the appeal was allowed and the case was remitted to the magistrate for a re-hearing: *Christie v. Ah Sheung* (1).

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In the appeal from the judgment of *Cussen J.*, leave was granted to the Attorney-General for the Commonwealth to intervene as appellant.

Bryant for the appellant.

H. Barrett and *Arthur* for the respondent.

Cur. adv. vult.

The judgment of the Court was read by

GRIFFITH C.J. We have no doubt as to the jurisdiction of the High Court to entertain this appeal. The jurisdiction conferred by the Constitution extends to all decisions of the Supreme Courts of the States with such exceptions as may be made by Parliament, and no exception is made by the *Judiciary Act* in cases of *habeas corpus*.

We are not disposed to give any countenance to the novel doctrine that there is an Australian nationality as distinguished from a British nationality, so that, while the term "immigration" as used in sec. 51 of the Constitution admittedly includes the power of exclusion of British subjects in general, it would not extend to persons of Australian nationality, whatever that may mean.

But we think that there is much force in the view which commended itself to *Cussen J.*, although not argued before us, that the term "immigration" does not extend to the case of Australians—to use for the moment a neutral word—who are merely absent from Australia on a visit *animo revertendi*. Who in this view should be considered Australians, so as not to be "immigrants" on their return; whether the right to admission should depend on domicile in the ordinary legal acceptance of that term, or on *bonâ fide* residence; whether the Commonwealth

(1) 3 C.L.R., 998.

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Parliament has power, as an incident of its power to regulate immigration, to prescribe tests for determining whether a person seeking to enter the Commonwealth falls in fact within the suggested exception, and incidentally to appoint a special tribunal to determine the question; whether it did so by the Act of 1901, and, if so, whether the provisions of that Act are applicable to the present case, are all matters deserving serious consideration. The question of the respondent's identity, upon which his actual liability to be deported depends, even in the most favourable view of the law, is still undetermined. If it should become necessary, we shall desire further argument on all these points. The case will therefore remain on the paper for further consideration.

On the further hearing of the information above referred to, the identity between Ah Sheung, the defendant, and Ah Sheung, a naturalized subject of the King in Victoria, was established. The appeal from the decision of *Cussen J.* was then abandoned.

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

Solicitor, for respondent, *Sabelberg*, Melbourne.

B. L.