[HIGH COURT OF AUSTRALIA.]

ROBTELMES . . . . . APPELLANT;

AND

BRENAN . . . . . RESPONDENT.

ON APPEAL FROM THE POLICE MAGISTRATE EXERCISING FEDERAL JURISDICTION IN PETTY SESSIONS AT BRISBANE.

H. C. OF A. 1906.

BRISBANE, *Oct.* 1, 2.

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

Deportation—Extra-territoriality—Admission of aliens as residents upon conditions—International law—Right to expel alien friends—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 51 (xix.), (xxvi.), (xxix.), (xxx.)—*Pacific Islands Labourers Act* 1901, *sec.* 8.

It is an attribute of sovereignty that every State is entitled to decide what aliens shall or shall not become members of its community. The right of a nation to expel or deport foreigners from the country is as unqualified and undeniable as the right to exclude them from entering the country, whether they are alien friends or enemies.

This power could be delegated by the Imperial authority to the Commonwealth Parliament, and was properly delegated by virtue of the Constitution, sec. 51, which gave the Parliament full authority to legislate as a sovereign body on the subject of (*inter alia*) "naturalization and aliens."

Semble: In Australia such a power can be exercised by the Executive only when authorized by Statute.

Appellant was a kanaka labourer introduced into Queensland under the special conditions of the State *Pacific Island Immigration Act* (44 Vict. No. 17). Under sec. 8 of the Federal *Pacific Islands Labourers Act* 1901, a Court of summary jurisdiction, upon being satisfied that a Pacific Island labourer, found in the Commonwealth before 31st December 1906, and reasonably supposed not to be employed under agreement, is not or has not been so employed for a month past, may order his deportation from Australia. Appellant was brought before a police magistrate, who declared himself satisfied, and ordered his deportation.

Held, that the right to expel involved the right to do all things necessary to make the expulsion effective, among which was necessarily included the act of deportation, to the extent of the complete extrusion of the alien from the

H. C. OF A. 1906.

ROBTELMES v. BRENAN.

territorial borders of the State. The extra-territorial constraint necessarily consequent upon the act of expulsion was immaterial to the validity of the right of deportation.

Held further, that the right of expulsion was not limited to ordering the deportation of the alien to the place whence he came; the right was general and unlimited, and could be exercised by the deporting State in whatever manner and to whatever place was necessary for effective deportation.

Semble: A foreigner who enters a sea-girt State, deportation from which must necessarily involve extra-territorial constraint, may be assumed to consent to such constraint as a condition of his admission to the country in the event of his deportation becoming necessary.

APPEAL from an order of a police magistrate exercising federal jurisdiction under the *Pacific Islands Labourers Act* 1901, sec. 8.

Appellant was a kanaka labourer imported into Queensland under the *Pacific Island Immigration Act* (Qd.) (44 Vict., No. 17) and regulations thereunder. In 1906 he was brought before a police magistrate sitting in Petty Sessions, and charged with being a Pacific Island labourer found in Australia before 31st December 1906, and reasonably supposed not to be employed under an agreement within the meaning of the Federal *Pacific Island Labourers Act* 1901. The magistrate was satisfied that appellant had not been employed under agreement for the preceding month, and ordered his deportation. He appealed from this order to the High Court.

Stumm, for the appellant. It is not within the powers of the Commonwealth to pass an Act expelling a person who has entered Australia and become a resident. The furthest that the Privy Council's decisions have gone in this direction is in *Attorney-General for Canada* v. *Cain*; *The Same* v. *Gilhula* (1), which was based on the Dominion *Alien Labour Acts* (60 & 61 Vict. c. 11, sec. 6) as amended by 1 Edw. VII. c. 13, sec. 13, passed by the Dominion legislature, authorizing the expulsion of a person who has wrongfully entered Canada, and his deportation to the country whence he came. But a law directing the expulsion of a man who has lawfully entered, or his deportation to a vague anywhere, is unauthorized and unconstitutional. In those cases

(1) (1906) A.C., 542; 22 T.L.R., 757.

the power of expulsion was held to be a necessary adjunct to the power of exclusion. But exclusion and expulsion differ from each other and from general deportation; and there is an important difference between expulsion of alien enemies and alien friends. There is no right by Crown prerogative to expel an alien friend; that cannot be done by the executive power; it can only be authorized by Statute.

[GRIFFITH C.J.—The Crown's right to exclude an alien may have fallen into disuse in England, but it still exists there, and is actively used in foreign countries.]

In *Musgrove* v. *Chun Teeong Toy* (1) counsel for the Crown claimed only the right to exclude, not to expel; and the Privy Council refused to decide any more than that an alien could not maintain an action to assert a right to enter British dominions. In *In re Adam* (2) a French officer was expelled from Mauritius; this was under the French laws still observed in that island, and the Law Lords seem to have considered it a power peculiar to that system. He had never acquired any status but that of alien friend. The Privy Council (3) cited *Vattel* as an authority for the right to expel any alien; but *Vattel* in fact said nothing about expulsion, only exclusion: (Book I., sec. 231; Book II., sec. 125). In England it has always been necessary to pass Acts of Parliament even to authorize the handing over of fugitive criminals to foreign countries. In *The Creole* (4) several Law Lords were asked for their opinion whether England could give up slaves who had recovered their liberty by capturing the slaving ship. The opinion was that the power was not inherent in the Crown; it must be substantiated by Act of Parliament.

[GRIFFITH C.J.—That is so as regards extradition: *Brown* v. *Lizars* (5). But this was only a recognition of the power of the sovereign to exclude or expel aliens. The kanakas came in only on a conditional permission to enter and remain. What rights of residence can that give them?]

All the Queensland legislation recognizes the rights of the kanaka labourers to reside there, and only to be returned to

(1) (1891) A.C., 272.
(2) 1 Moo. P.C.C., 460.
(3) 1 Moo. P.C.C., 460, at p. 471.
(4) 64 Hansard Rep., col. 27; 317 *seq.*
(5) 2 C.L.R., 837, at p. 851.

H. C. OF A. 1906.

ROBTELMES v. BRENAN.

their own islands. The Commonwealth can only derive its power to make this law from sec. 51, sub-secs. XIX. (Aliens) and XXVI. (Special laws for people of any race), or possibly XXIX. (External affairs), or XXX. (Pacific Islands).

[GRIFFITH C.J.—Sub-sec. XIX. authorizing laws as to aliens implies that the Commonwealth may make any laws with regard to aliens that a sovereign power can make.]

In *Fong Yue Ting* v. *United States* (1) it was held that the expulsion law there in question was invalid. In that judgment *Field* J., who had delivered the judgment of the Court in *Chae Chan Ping* v. *United States* (2), dissented from the Court. An alien friend, having lawfully entered the country, has an inalienable right to reside there unless such right is prohibited by Statute from accruing: *Musgrove* v. *Chun Teeong Toy* (3); *Law Quarterly Review*, vol. XIII., pp. 165, 184; vol. VI., p. 27; and *Coke* (Inst. III., 180), all hold that there is no power to expel an alien friend, apart from Statute. A law authorizing the deportation indiscriminately of all aliens, whether lawfully resident or not, and to an undetermined destination, is invalid. The appellant lawfully entered and acquired a right of a residence in the State based on the State Acts, which regulate his coming and remaining there. Those rights cannot be and are not taken away by the Commonwealth legislation.

Macgregor, for respondent. This legislation was authorized by the Constitution, sec. 51, sub-secs. XIX., XXVI., XXIX., XXX., which give the Parliament the powers of a sovereign authority on the topics there indicated: *D'Emden* v. *Pedder* (4); *Powell* v. *Apollo Candle Co.* (5); *Hodge* v. *Queen* (6); *Reg.* v. *Burah* (7); *Deakin* v. *Webb* (8); *Downes* v. *Bidwell* (9). Apart from these special powers the Commonwealth has an inherent general power to direct the deportation of undesirable people under its general power to legislate for the peace and good government of the people. Under the special powers, at any rate, the Commonwealth can exercise full sovereignty: *M'Culloch* v. *Mary-*

(1) 149 U.S., 698.
(2) 130 U.S., 581.
(3) (1891) A.C., 272, at p. 276.
(4) 1 C.L.R., 91, at pp. 109-110.
(5) 10 App. Cas,, 282, at p. 288.
(6) 9 App. Cas., 117, at p. 133.
(7) 3 App. Cas., 889, at p. 904.
(8) 1 C.L.R., 585, at p. 605.
(9) 182 U.S., 244, at p. 288.

land (1). The sole authorization for the Canadian deportation law was the power to legislate for "naturalization and aliens." The sovereign power, once it is established, enables the deportation of any person, alien friend or enemy, resident or not, at will: *Attorney-General for Canada* v. *Cain and Gilhula* (2). These kanakas never acquired any rights by virtue of their residence in the State; the Acts under which they were imported prohibited that, and always contemplated their going back soon, not permanently remaining. Under the United States Constitution the right to deport has always been recognized: *Fong Yue Ting* v. *United States* (3); *Lem Moon Sing* v. *United States* (4); *Wong Wing* v. *United States* (5); *United States* v. *Wong Kim Ark* (6); *Li Sing* v. *United States* (7); *United States* v. *Ju Toy* (8). There has been English legislation giving power to remove aliens from the realm for the preservation of the public peace: 45 & 46 Vict. c. 25, sec. 15; and in Queensland, 5 Edw. VII. No. 24, for the deportation of criminals coming in from other States. No objection can be taken to the form of the Commonwealth Statute; even if the person deported could allege that the deporting officer acted in excess of what was necessary, the law is valid.

Cur. adv. vult.

GRIFFITH C.J. The question for determination on this appeal arises under sec. 8 of the *Pacific Island Labourers Act* 1901, which provides that:—"(1) An officer authorized in that behalf may bring before a court of summary jurisdiction a Pacific Island labourer found in Australia before the thirty-first day of December, one thousand nine hundred and six, whom he reasonably supposes not to be employed under an agreement; and the Court, if satisfied that he is not and has not during the preceding month been so employed, shall order him to be deported from Australia, and he shall be deported accordingly. (2) The Minister may order a Pacific Island labourer found in Australia after the

(1) 4 Wheat., 316, at p. 406.
(2) (1906) A.C., 542; 22 T.L.R., 178.
(3) 149 U.S., 698, at p. 704.
(4) 158 U.S., 538, at p. 547.
(5) 163 U.S., 228, at p. 236.
(6) 169 U.S., 649, at p. 699.
(7) 180 U.S., 486, at p. 494.
(8) 198 U.S., 253.

H. C. OF A. 1906.

ROBTELMES v. BRENAN.

thirty-first day of December, One thousand nine hundred and six, to be deported from Australia, and thereupon he shall be deported accordingly."

The main point taken for the appellant is that the enactment that a Pacific Island labourer may be deported from Australia is beyond the constitutional powers of the Commonwealth Parliament, and that therefore this Court ought to refuse to give effect to it. Now, there can be no doubt that, to use the words of the Judicial Committee of the Privy Committee in the case of *The Attorney-General for Canada* v. *Cain and Gilhula* (1), decided on 30th July last, "one of the rights preserved by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order, or good government, or to its social or material interests." For that proposition the learned Lord who delivered the opinion of the Privy Council referred to *Vattel, Law of Nations*, book I., sec. 231; book II., sec. 125. He added later on in the judgment (2):—"The power of expulsion is, in truth, but the complement of the power of exclusion. If entry be prohibited it would seem to follow that the Government which has the power to exclude should have the power to expel the alien who enters in opposition to its laws." It also follows in my opinion equally clearly that, since the supreme power of the State may annex what conditions it pleases to the permission to enter, so it may make it one of those conditions that the residence shall only continue so long as the supreme power thinks fit; that is, that the permission to the alien to enter may be a conditional permission, so that as soon as the supreme power thinks that it is undesirable that the alien should continue to be within its boundaries, it may order his removal. That power has been rarely asserted in England. It has been legislatively asserted in the two Statutes that Mr. Macgregor cited to us, of which the latter, 45 & 46 Vict. c. 45, merely re-enacted temporarily the earlier Act, 11 & 12 Vict. It is said that the existence of the power has been denied by eminent

(1) 22 T.L.R., 757, at p. 758.

(2) 22 T.L.R., 757, at p. 759.

statesmen and lawyers in Great Britain. I do not read the authorities referred to in that way. What was denied, I think, was the right or power of the Executive Government, in the absence of any legislative provision, to exercise what was called the prerogative right of the Crown for that purpose. I do not think it ever entered into the minds of any of those eminent persons to deny that it was an essential prerogative of a sovereign State to determine who shall be allowed to come within its dominions, share in its privileges, take part in its government, or even share in the products of its soil. The same doctrine is definitely established in the United States of America, to whose Courts we often in this Court have recourse to assist us in ascertaining and defining principles of law, especially such as are applicable to a federation. I will refer only to the case of *Fong Yue Ting* v. *United States* (1). It is true that the judgment of the Court in that case was not unanimous, but with the doctrine stated in the passages to which I have to refer the dissenting Judges do not disagree. The difference of opinion was as to the applicability of this doctrine to the facts of the particular case. In the earlier case of *Chae Chan Ping* v. *United States* (2) the validity of a former Act of Congress, excluding Chinese labourers from the United States, under the circumstances therein stated, had been affirmed by the Supreme Court. The following passages were read from the judgment of the Court in that case, and adopted, and I think they may be taken to lay down the accepted law of the United States of America. The first passage is (3):—"Those labourers are not citizens of the United States; they are aliens. That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy. Jurisdiction over its own territory to that extent is an incident of every independent nation. It is a part of its independence. If it could not exclude aliens, it would be to that extent subject to the control of another power." And, again, quoting from the same decision (4):—"To preserve its independence, and give security against foreign aggression and encroach-

(1) 149 U.S., 698.
(2) 130 U.S., 581.
(3) 149 U.S., 698, at p. 705.
(4) 149 U.S., 698, at p. 706.

H. C. OF A. 1906.

ROBTELMES v. BRENAN.

Griffith C.J.

ment, is the highest duty of every nation, and to attain these ends nearly all other considerations are to be subordinated. It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character, or from vast hordes of its people crowding in upon us. The government, possessing the powers which are to be exercised for protection and security, is clothed with authority to determine the occasion on which the powers shall be called forth; and its determination, so far as the subjects affected are concerned, is necessarily conclusive upon all its departments and officers. If, therefore, the government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are no actual hostilities with the nation of which the foreigners are subjects. The existence of war would render the necessity of the proceeding only more obvious and pressing. The same necessity, in a less pressing degree, may arise when war does not exist, and the same authority which adjudges the necessity in one case must also determine it in the other. In both cases, its determination is conclusive upon the judiciary. If the government of the country of which the foreigners excluded are subjects is dissatisfied with this action, it can make complaint to the executive head of our government, or resort to any other measure which, in its judgment, its interest or dignity may demand; and there lies its only remedy. The power of the government to exclude foreigners from the country, whenever, in its judgment, the public interests require such exclusion, has been asserted in repeated instances, and never denied by the executive or legislative departments." The Court then referred to a later case, *Nishimura Ekiu* v. *United States* (1), in which the Supreme Court expressed the doctrine in these words:—"It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe." The Court went on

(1) 142 U.S., 651, at p. 659.

to say (1):—"The right of a nation to expel or deport foreigners, who have not been naturalized or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country."

These doctrines may be taken to be the settled law of the British Empire as well as of the United States. How then do they apply to the present case? The question first of all arises: What is the status of Pacific Islanders? What are they? They are aliens; that is indisputable. Not only are they aliens, but by the law of Australia, so far as I know it, it is impossible for them to become anything else. If that is so, the power resides somewhere of excluding them from Australia, whenever the proper authority determines that they shall be excluded. I doubt whether the Executive authority of Australia, or of any State, could deport an alien except under the conditions authorized by some Statute, but it is not necessary to discuss that question now. It was fully considered by this Court in the case of *Brown* v. *Lizars* (2).

In the present case the Commonwealth Parliament has passed the Statute which I mentioned at the opening of my judgment. The next question, therefore, is, had the Commonwealth Parliament power to pass such a Statute? First, as to whether such a power can be delegated by the Imperial authority. On that the case I have already referred to—*The Attorney-General for Canada* v. *Cain and Gilhula* (3)—lays down the doctrine in clear and explicit terms. "The Imperial Government might delegate those powers to the governor or the Government of one of the Colonies, either by Royal Proclamation which has the force of a Statute (*Campbell* v. *Hall*) (4), or by a Statute of the Imperial Parliament, or by the Statute of a local Parliament to which the Crown has assented. If this delegation has taken place, the depositary or depositaries of the executive and legislative powers and authority of the Crown can exercise those powers and that authority to the extent delegated as effectively as the Crown could itself have exercised them." Reference was then made to

(1) 149 U.S., 698, at p. 707.
(2) 2 C.L.R., 837.
(3) 22 T.L.R., 757, at p. 758.
(4) Cowp., 204.

H. C. OF A. 1906.

ROBTELMES v. BRENAN.

Griffith C.J.

two cases which established that proposition, and the case of *Hodge* v. *The Queen* (1) was also cited, in which it was decided that a Colonial legislature has, within the limits prescribed by the Statute which creates it, an "authority as plenary and as ample . . . as the Imperial Parliament in the plenitude of its power possessed and could bestow." Has, then, the Commonwealth Parliament that power; has it been delegated to it, or conferred upon it? The Commonwealth Parliament has power to make whatever laws it may think fit "for the peace, order, and good government" of the Commonwealth with respect, among other things, to "naturalization and aliens." The power to make such laws as Parliament may think fit with respect to aliens must surely, if it includes anything, include the power to determine the conditions under which aliens may be admitted to the country, the conditions under which they may be permitted to remain in the country, and the conditions under which they may be deported from it. I cannot, therefore, doubt that the Commonwealth Parliament has under that delegation of power authority to make any laws that it may think fit for that purpose; and it is not for the judicial branch of the Government to review their actions, or to consider whether the means that they have adopted are wise or unwise. So far, therefore, the Statute appears to be *intra vires*, and one to which effect must be given.

The most serious difficulty suggested was, however, that the deportation of a person from Australia will necessarily, owing to the geographical position of the Commonwealth, result in the imprisonment of the person deported beyond the territorial jurisdiction of the Colony. That is no doubt true, and it is equally clear that the legislature of the Commonwealth cannot make any laws which have effect as laws beyond its own territorial limits, that is to say three marine miles from the coast, except so far as its laws are in force on board ships trading between different ports of the Commonwealth. That was the view presented in the case of the *Attorney-General for Canada* v. *Cain and Gilhula* (2) to the Canadian Court, and accepted by it. That Court thought that a Statute passed by the Dominion Parliament under a power conferred in similar terms dealing

(1) 9 App. Cas., 117, at p. 132. (2) 22 T.L.R., 757.

with naturalization of aliens was invalid. That question also was dealt with in the judgment of the Privy Council, as follows (1):—"But as it is conceded that by the Law of Nations the supreme power in every State has the right to make laws for the exclusion or expulsion of aliens, and to enforce those laws, it necessarily follows that the State has the power to do those things which must be done in the very act of expulsion, if the right to expel is to be exercised effectively at all, notwithstanding the fact that constraint upon the person of the alien outside the boundaries of the State or the commission of a trespass by the State officer on the territories of its neighbour in the manner pointed out by Mr. Justice *Anglin* in his judgment should thereby result." Their Lordships then referred to the case of *In re Adam* (2), decided by the Judicial Committee of the Privy Council in 1837, in which it was held that this sovereign power was vested in the Governor of the Island of Mauritius, although, of course, a person could not be deported from that island without involving his imprisonment on board the ship that took him away. The actual question in that case was whether power had been delegated by the Sovereign to the Governor, or the Executive authority of the Island of Mauritius. According to French law, which was in force in the Colony, it had been delegated to them, and, therefore, there was no question of the absence of sufficient legislative enactment. By the French law the Governor was authorized, without further legislative enactment, to take the necessary steps for deportation, except as to the difficulty of extra-territorial restraint. The material part of the judgment is as follows (1):—"The question, therefore, for decision in this case resolves itself into this: has the Act 60 & 61 Vict. c. 11, assented to by the Crown, clothed the Dominion Government with the power the Crown itself heretofore undoubtedly possessed to expel an alien from the Dominion, or to deport him to the country whence he entered the Dominion? If it has, then the fact that extra-territorial constraint must necessarily be exercised in effecting the expulsion cannot invalidate the warrant directing expulsion issued under the

(1) 22 T.L.R., 757, at p. 759. (2) 1 Moo. P.C.C., 460.

H. C. OF A. 1906.

ROBTELMES v. BRENAN.

Griffith C.J.

provisions of the Statute which authorizes the expulsion." Applying those principles to the present case we are bound to hold that the *Pacific Island Labourers Act* 1901, assented to by the Crown, has clothed the proper authorities of the Commonwealth with the power, which the Crown itself undoubtedly possesses in its right of sovereignty, to expel this appellant from the Commonwealth. It is true that the learned Lord who delivered the judgment of the Board in *Cain and Gilhula's Case* used the expression "deport him to the country whence he entered the Dominion," but it is clear that that cannot be the limit of the power. The deporting State has no authority beyond its own borders. All it can do is to extrude the alien. What becomes of him afterwards is for him, not for them. It may be that it would be unreasonable to take him against his will to some place which is not his own home, but the remedy must be sought elsewhere. I gave an instance in the course of the argument of the case of an alien, whom, for instance, the Swiss Confederation desired to expel from Switzerland. Suppose he was a Russian, or an Englishman, or a Spaniard, it is quite clear that they would have no authority to convey him through the territories of neighbouring powers to his original home. But that they have power to expel him from Switzerland is beyond all doubt; what happens to him afterwards is a matter to be considered on other grounds. I am, therefore, of opinion, on the authority of this decision, that the Commonwealth had power to pass this Act; that the justice who gave the adjudication had power to order the appellant's deportation; and that the deportation will be lawful. What will happen afterwards, where he will be taken, and under what circumstances, are matters that must be determined by other authorities, but I think it will be found that the law of the Empire sufficiently provides for the safety of Pacific Islanders who are being carried on the waters of the Pacific Ocean.

I have only one other observation to make with regard to the point of restraint beyond the limits of the Commonwealth. It may reasonably be assumed—of course from one point of view it is a rather large assumption—that every alien who chooses to come into a sea-girt country knows that he is liable to be deported, and that he can only be deported by sea; and that he

therefore, agrees, as a term of his admission to the sea-girt country, that such restraint may be exercised upon him beyond the territorial limits of that State for the purpose of his deportation as may be necessary. Regarded from this point of view, the necessary restraint is made with his consent.

For all these reasons I am of opinion that the appeal in this case fails, and should be dismissed.

BARTON J. The *Pacific Island Labourers Act* 1901 enacts in sec. 8 : [His Honor read the section and continued]. That is the power given to an officer with respect to matters arising before 31st December 1906; the complement to it is the power given the Minister to order any Pacific Islander, found in Australia after that date, to be deported from Australia. It is for the officer to decide whether he will bring the labourer before a Court of summary jurisdiction, subject to the limits of his duty, and it is for the Minister to exercise, apparently after 31st December, his discretion as to whom he will order to be deported. A satisfactory definition of deportation is to be found in the case of *Fong Yue Ting* v. *United States* (1), where the Court, in distinguishing "deportation" from "extradition," and "extradition" from "transportation," said :—"Strictly speaking, 'transportation,' 'extradition,' and 'deportation,' although each has the effect of removing a person from the country, are different things, and serve different purposes. 'Transportation' is by way of punishment of one convicted of an offence against the laws of the country. 'Extradition' is the surrender to another country of one accused of an offence against its laws, there to be tried, and, if found guilty, punished. 'Deportation' is the removal of an alien out of the country, simply because his presence is deemed inconsistent with the public welfare, and without any punishment being imposed or contemplated, either under the laws of the country out of which he is sent, or under those of the country to which he is taken." That the right of deportation belongs to each nation as such seems to be established in the case of *In re Adam* (2), which, although it arose upon a reference from the Crown for advice and opinion, was argued before the Judicial Committee of

(1) 149 U.S., 698, at p. 709. (2) 1 Moo. P.C.C., 460.

H. C. OF A. 1906.

ROBTELMES v. BRENAN.

Barton J.

the Privy Council by counsel on each side, and has since been accepted practically as a judicial authority. There it was decided that the status of a person residing in Mauritius, then and now a British Colony or possession, that is to say, whether he is an alien or not, must be determined by the laws of England, and the rights and the liabilities incidental to such a status must be determined by the laws of the Colony. That case arose out of the fact that upon the surrender of Mauritius to the British Crown, one of the terms was that it should be allowed to retain its own laws, which were those of the French Civil Code. By the 13th Article of that Code it was provided prior to the surrender to England, that domicile could only be obtained by an alien upon the authorization of the Governor, which according to the law and practice in France was an express and formal authority of the Government, and not merely a tacit or permissive acquiesence in the residence of an alien found in the Island. That was a case of peculiar hardship, because Mr. Adam, the petitioner, had been on the Island from 1817 up to the time of his deportation in 1833 with the acquiescence of the Governor, with whom he appears to have been on most friendly terms. Before his deportation he had held various business positions—he was a trustee, and a respected inhabitant of Mauritius. The trouble of his deportation arose from his having been elected colonel of a volunteer corps that had been raised under the practical indorsement of the Governor. The Secretary of State in a letter to the Governor in effect directed the Governor in Council to decree his removal. That was done, and he was given a month to make his preparations to leave the Island. It must be remembered that had he not obeyed the direction to depart, had the deportation been carried out by force, which was within the authority given by the Secretary of State, it would probably have involved his being taken to France, and his being kept, that is, imprisoned, during the whole of that passage on board ship. This detention would have been a prolonged restraint on his individual liberty far beyond the bounds of Mauritius. The case is valuable now particularly in reference to the general question—the general right of deportation, and upon that their

Lordships said (1):—"The questions, therefore, left for the consideration of their Lordships were, first, whether an alien friend could, by the law of the Island, be removed by the Executive Government at its pleasure, without conviction for any offence. And, secondly, whether the circumstances attending Mr. Adam's settlement and residence in the Island entitled him to any exemption." On the next page the judgment proceeds:—"That the supreme power of every State has a right to make laws for the exclusion or expulsion of a foreigner was not questioned. This *Vattel* admits as a universal principle, book II. c. 8, sec. 100; he says, 'Since the lord of the territory may, whenever he thinks proper, forbid its being entered (sec. 94), he has, no doubt, the power to annex what condition he pleases to the permission to enter; this, as we have already said, is a consequence of the right of domain.'" This authority is supported by a quotation from another international writer, *Merlin*, in his *Repertoire de Jurisprudence*, and a long passage of that author is stated in English on page 473 in these words:—"That is to say, that though the tacit acquiescence of the Government, in the continued residence of a foreigner within the French dominions, would not deprive the Government, of its inherent prerogative to order him to quit the country, at a moment's notice; yet, nevertheless, that the stranger might, by such unauthorized residence, acquire a domicile for all judicial purposes, taking it as a proposition too clear even for discussion, that a stranger domiciled in France, without express authority of the Government, might be ordered out of the country whenever the Government though fit to interfere." And their Lordships reported to Her Majesty their opinion:—"First, that the status of Mr. Adam was that of an alien friend. Secondly, that the legal right incidental to such status, had not been infringed by Mr. Adam's removal from the Mauritius." So, notwithstanding the very clear hardship of the case, it was necessary for their Lordships, and it will be necessary for us here, to assert the law upon the subject. Now reference was made—I am sorry I must allude to it again—to an important case lately decided in the Judicial Committee of the Privy Council—*The Attorney-General for Canada* v. *Cain and Gilhula* (2). That decision was delivered as late as 30th

(1) 1 Moo. P.C.C., 460, at p. 470.

(2) 22 T.L.R., 757.

H. C. OF A. 1906.

ROBTELMES v. BRENAN.

Barton J.

July last. There had been a contravention of the *Alien Labour Act* of Canada, which contained a section making it unlawful "for any person, company, partnership, or corporation, in any manner to prepay the transportation, or in any way to assist or encourage the importation or immigration of any alien or foreigner into Canada, under contract or agreement, parole or special, express or implied, made previous to the importation or immigration of such alien or foreigner, to perform labour or service of any kind in Canada." And in the case of an immigrant being allowed to land in Canada contrary to the provisions of the Act, it is enacted:—"The Attorney-General of Canada, in case he shall be satisfied that an immigrant has been allowed to land in Canada contrary to the prohibition of this Act, may cause such immigrant, within the period of one year after landing or entry, to be taken into custody and returned to the country whence he came, at the expense of the owner of the importing vessel, or, if he entered from an adjoining country, at the expense of the person, partnership, company, or corporation violating section I. of this Act." There was a limitation of the Act to the case of countries adopting similar provisions against the immigration of Canadian subjects. Under that law two persons, whose rights were in question, were arrested for contravention of the Act, having come into Canada contrary to its prohibition. They sued out a *habeas corpus* and they were afterwards released by order of *Anglin* J., one of the Judges of the Supreme Court of the Province of Ontario. Among his reasons is this rather striking passage. His Honor said (1): "Again, counsel suggests that the officer may select such a point as Windsor for the deportation, and may discharge his duty by placing his alien prisoner upon a ferry boat crossing the river to Detroit. Here the alien is upon Canadian territory until the middle of the stream is reached. If the custody ceases when the alien is placed on the ferry boat it cannot be said that he is returned to the United States by the officer charged with the execution of the warrant. If the custody continues until the ferry boat reaches mid-stream—apart from the difficulty of determining the precise moment at which the boat crosses the imaginary line beyond which any constraint by Canadian authority is

(1) 22 T.L.R., 757, at p. 758.

admittedly unwarranted and the danger of an involuntary violation of United States territory—it is impossible to say that the deported subject is not under actual constraint imposed by Canadian authority until the boat reaches the Detroit docks. He is upon the ferry boat not of his own volition, but because Canadian power has placed and kept him there. In theory his imprisonment may cease at the instant his body is carried over the border; in fact, he is carried, not to the border, but to the City of Detroit in United States territory by compulsion of Canadian law." That is the strongest and most extreme illustration given in the judgment. At the same time, it brings the question completely to the test. The Privy Council reversed that judgment, and allowed the appeal of the Attorney-General of Canada, practically on the ground that, once it is established that there is a right to legislate for deportation, that right confers everything, without which, its exercise would become nugatory, and consequently if extra-territorial restraint is necessary, the degree of restraint absolutely necessary for the purpose of making the deportation of effect is justifiable. In the judgment of Lord *Atkinson*, I find one or two passages that I wish to read (1). "It was conceded," said his Lordship, "in argument before their Lordships, on the principle of law laid down by this Board in the case of *MacLeod* v. *Attorney-General for New South Wales* (2) that the Statute must, if possible, be construed as merely intending to authorize the deportation of the alien across the seas to the country whence he came if he was imported into Canada by sea, or if he entered from an adjoining country, to authorize his expulsion from Canada across the Canadian frontier into that adjoining country. The judgment of the learned Judge was, in effect, based upon the practical impossibility of expelling an alien from Canada into an adjoining country without such an exercise of extra-territorial constraint of his person by the Canadian officer as the Dominion Parliament could not authorize. No special significance was attached to the word 'return.' The reasoning of the judgment would apply with equal force if the word used had been 'expel' or 'deport' instead of 'return.'" Further on in the same judgment his Lordship said:—"One of

(1) 22 T.L.R., 757, at p. 758. (2) (1891) A.C., 455, at 459.

H. C. OF A. 1906.

ROBTELMES v. BRENAN.

Barton J.

the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, to annex what conditions it pleases to the permission to enter it, and, to expel or deport from the State, at pleasure, even a friendly alien, especially if it considers his presence in the State opposed to its peace, order, or good government, or its social or material interests (*Vattel*, '*Law of Nations*,' book I., sec. 231; book II., sec. 125). The Imperial Government might delegate those powers to the Governor or the Government of one of the Colonies, either by Royal Proclamation which has the force of a Statute (*Campbell* v. *Hall* (1), or by a Statute of the Imperial Parliament, or by the Statute of a local Parliament to which the Crown has assented. If this delegation has taken place, the depositary or depositaries of the executive and legislative powers and authority of the Crown can exercise those powers and that authority to the extent delegated as effectively as the Crown could itself have exercised them." Then there is the further passage:—"The question, therefore, for decision in this case resolves itself into this: has the Act 60 and 61 Vict. c. 11, assented to by the Crown, clothed the Dominion Government with the power the Crown itself heretofore undoubtedly possessed to expel an alien from the Dominion, or to deport him to the country whence he entered the Dominion? If it has, then the fact that extra-territorial constraint must necessarily be exercised in effecting the expulsion cannot invalidate the warrant directing expulsion under the provisions of the Statute which authorizes the expulsion." This is what we are entitled to regard as the law in England with reference to the powers exercised by a self-governing part of the Empire, upon its passage of a Statute for purposes within its legislative powers, and although I have drawn attention to the reasoning of *Anglin* J. as to the degree of restraint which in his judgment was necessary for the exercise of the power beyond the Canadian border, which degree of restraint he held to be without extra-territorial validity, the judgment of the Privy Council seems to me to have decided that the degree of restraint necessary to render the deportation effective is permissible and justifiable for

(1) Cowp., 204.

the purpose of carrying it out. Otherwise it would not be deportation. The question before us here is whether an enactment authorizing deportation is within the powers of the Commonwealth. It can scarcely be doubted from the authority of *In re Adam* (1), on the general law and the specific authority of the case of *The Attorney-General for Canada* v. *Cain and Gilhula* (2), that once a Statute authorizing deportation is passed by a self-governing authority within the Empire, and receives the Crown's assent, then, premising that the law is within the powers given by the Constitution, the right of the Executive power of the self-governing authority—in this case the Commonwealth—to deport upon such statutory provision is complete. Let us turn, however, with a view of further looking into the general law, to one of the United States cases—*Fong Yue Ting* v. *United States* (3). The head note correctly reproduces from the judgment two passages most material to this case. The first and third paragraphs read :—"The right to exclude or to expel aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, is an inherent and inalienable right of every sovereign and independent nation." . . . "The power of Congress to expel, like the power to exclude, aliens, or any specified class of aliens, from the country, may be exercised entirely through the executive officers; or Congress may call in the aid of the judiciary to ascertain any contested facts on which an alien's right to remain in the country has been made by Congress to depend." In the judgment in that case there is another striking passage (4) :—"The right of a nation to expel or deport foreigners, who have not been naturalized or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country"—which recalls the statement of the Judicial Committee of the Privy Council, that the right to deport is the complement of the right to exclude. "This is clearly affirmed in despatches referred to by the Court in *Chae Chan Ping's Case*. In 1856 *Mr. Marcy* wrote : 'Every society possesses the undoubted right to determine who shall compose its members, and it is exercised by all

(1) 1 Moo. P.C.C., 460.
(2) 22 T.L.R., 757.
(3) 149 U.S., 698.
(4) 149 U.S., 698, at p. 707.

H. C. OF A. 1906.

ROBTELMES v. BRENAN.

Barton J.

nations, both in peace and war. A memorable example of the exercise of this power in times of peace was the passage of the alien law of the United States in the year 1798.' In 1869 *Mr. Fish* wrote: 'The control of the people within its limits, and the right to expel from its territory persons who are dangerous to the peace of the State, are too clearly within the essential attributes of sovereignty to be seriously contested.' *Wharton's International Law*: Digest, sec. 206 (1). The statements of leading commentators on the law of nations are to the same effect. *Vattel* says: 'Every nation has the right to refuse to admit a foreigner into the country, when he cannot enter without putting the nation in evident danger, or doing it a manifest injury. What it owes to itself, the care of its own safety, gives it this right; and in virtue of its natural liberty, it belongs to the nation to judge whether its circumstances will or will not justify the admission of the foreigner.' 'Thus, also, it has a right to send them elsewhere, if it has just cause to fear that they will corrupt the manners of the citizens; that they will create religious disturbances, or occasion any other disorder, contrary to the public safety. In a word, it has a right, and is even obliged, in this respect, to follow the rules which prudence dictates.'" That is equivalent to a general rule irrespective of the question of express Statute. Whether expulsion in Great Britain or in one of her self-governing Colonies or States, requires statutory authority has, no doubt, been the subject of some hesitation on the part of eminent lawyers, but it is not necessary for us to decide that question. It does not arise. The question here is, first, whether the statutory authority exists, and next, whether it has been properly exercised? Now, in the *Encyclopædia of the Laws of England*, vol. 5, p. 268, there are a few lines that state that question very clearly:—"There are dicta of *Blackstone* (1 Com. 366) and *Chitty* (*Pleas of Crown* ed. 1820 p. 49) to the effect that the Crown, by its prerogative, can expel even alien friends; but there does not seem to have been any attempt since the Revolution to exercise such prerogative, and the extrusion of alien friends has since then always been effected by statutory

(1) 130 U.S., 607.

authority." The question to-day is one of statutory authority. Has the Commonwealth power to legislate in this connection? It is not necessary, I think, to determine that question upon any notion of absolutely inherent right in the Commonwealth, because there are powers given under the Constitution, which have been referred to in argument, and which seem to me sufficient to cover the matter. Those are the powers—particularly with reference to aliens—in the 19th sub-section of sec. 51, and also possibly the power in sub-sec. 26, and I think much more clearly the powers as to immigration and external affairs in paragraphs 27 and 29. As to three of those powers I am of opinion that they may be well exercised by legislation of this kind and that as, under the decision of the Privy Council in *Hodge* v. *The Queen* (1), the powers given are plenary within their ambit, it is within these powers to pass legislation, however harsh and restrictive it may seem, and as to that it is not the province of a Court of Justice to inquire, where the law is clear. This legislation, I think, is perfectly competent within the meaning of three at least of those four powers. The right to deport is the complement of the right to exclude; the right to exclude is involved in the right to regulate immigration. The right to prescribe the conditions upon which persons may remain and reside within this Commonwealth is included in that power to regulate immigration by Statute. Equally undeniable is the right to legislate with respect to aliens, and as to the power of external affairs, just like the others, the authority to legislate, as I think, also exists, and it is possible to legislate effectively under that power with respect to the exclusion or deportation of subjects of other powers, always premising that the legislation for the purpose is assented to by the Crown, and becomes the proper exercise of delegated authority. I think that, if the power to legislate exists with respect to the conditions of entry or residence of the subjects of civilised powers, it would be idle to attempt to deny that it is also included with respect to Pacific Islanders. I am of opinion, therefore, that the Commonwealth has power to legislate in this connection.

Now, as to the section which has been brought in question here, I will refer to the judgment in the case of *Li Sing* v. *United*

(1) 9 App. Cas., 117.

H. C. OF A. 1906.

ROBTELMES v. BRENAN.

Barton J.

States (1), where after quoting and adopting the judgment in the case of *Fong Yue Ting* v. *United States* (2) the Court says:— "The order of deportation is not a punishment for a crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority, and through the proper departments, has determined that his continuing to reside here shall depend." Now, looking again at sec. 8 of the *Pacific Island Labourers Act* 1901, power is given there to bring before the Court for a finding of fact a person whom the officer reasonably supposes not to be employed under an agreement; and when the Court is satisfied that he is not so employed, authority to deport is given. That seems to me a section describing, in the sense of the passage which I have just quoted, which I think one must adopt as a matter of reason, the conditions on which continued residence, at any rate up to the end of 1906 when different conditions arise, is to depend. It is clear that the ultimate return of the islander to his own country in the manner in which it has been contemplated by this Act, has been equally in view in the legislation of Queensland before federation. If one looks to the *Pacific Islanders Act* 1880, to which I have referred during the argument, or to the Act of 1892, one sees that the return is a matter that the legislature of Queensland has provided for in unchallenged laws, which have been the foundation of the Commonwealth legislation. I say that that is a matter on which the Parliament of Queensland has properly legislated, and in the 5th section of the Act of 1892 we find that, on the expiration of the engagement of a labourer, his employer shall be bound to maintain him until he has an opportunity of returning to his native land, or enters into a fresh agreement with the same or some other employer to serve in tropical or semi-tropical agriculture. So there seems to be permission to enter into an engagement, but failing an engagement he is required to return. That is the spirit of the legislation of Queensland, and that

(1) 180 U.S., 486, at p. 494. (2) 149 U.S., 698.

spirit has been observed in the Act of the Commonwealth, and it would seem to me to be entirely within the principle of prescribing the conditions, upon which continued residence will be permitted at any rate up to the end of 1906. The prescribing of those conditions appears, on the authorities I have quoted, and for the reasons I have given, to be undoubtedly within the powers of the Commonwealth. I am therefore of opinion that this appeal must be dismissed.

O'CONNOR J. Many years before the establishment of the Commonwealth several of the Australian Colonies had passed Acts for regulating the admission of aliens into their several territories. In relation to the immigration of Chinese they enacted not only conditions of admission but also those under which they should be absolutely excluded. That legislation was an assertion of one of the most important attributes of self-government—the right to determine who shall and who shall not become members of the community. The application of the principle to the different Colonies of Australia—the exercise of their self-governing powers—was never questioned until the case of *Musgrove* v. *Chun Teeong Toy* (1), which came before the Privy Council in 1891. There for the first time was raised the question whether it was in the power of the Australian Colonies to make a law excluding aliens. It was decided in that case that the Colony of Victoria had the power to make the law, and although in the particular case the judgment was based on the narrower ground that the alien had no right to force his way into Victoria, and could not bring an action because he was not allowed to do so, still beyond all question the case affirmed the principle that Victoria had a right to exercise that attribute of self-government, which enables a State to say what aliens shall, and what aliens shall not, become members of its community. On the establishment of the Commonwealth the powers of dealing with aliens, the naturalization of aliens, and emigration and immigration, passed to the Commonwealth, and is amongst the powers with which the Commonwealth legislature was invested under sec. 51. Now, in the exercise of the powers that I have mentioned Queensland

(1) (1891) A.C., 272.

H. C. OF A. 1906.

ROBTELMES v. BRENAN.

O'Connor J.

had before federation established a code of laws regulating the introduction of Pacific Island labourers. Their introduction into Queensland was allowed under those laws only and under a set form of licence. They were allowed to be engaged only for a special kind of labour. Special provision was made with regard to their employment, and enabling them, if they wished, to take their passages back to their own islands at the end of their engagements. That Act contained no power of compulsorily deporting them from Queensland. Those Acts in the different States dealing with aliens remained in force under the State Constitutions until the Parliament of the Commonwealth entered the same field of legislation, and in regard to Pacific Islanders the Commonwealth legislated by the Act which is now under consideration. The only section which it is necessary for us to interpret is sec. 8. Now that section went beyond previous legislation of the Australian Colonies, in this respect only, it gave power to deport Pacific Islanders from Australia under the circumstances which are there set out. It provided that before 31st December 1906 an officer of the Government might invoke the decision of a Court of summary jurisdiction with regard to the question whether the islander was or was not employed under an agreement, and, if the Court decided that he was not so employed, it might make an order to deport him, and he was to be deported accordingly. It further provided that after that date the Minister of his own motion might order a Pacific Islander then found in Australia to be deported, and thereupon he should be deported accordingly. Both of those powers rest exactly upon the same foundation. The power in the Minister is precisely the same as that of the Minister under the Canadian *Labourers Act* which was the subject of the decision in the case of the *Attorney-General for Canada* v. *Cain and Gilhula* (1), but in this case we have only to deal with the power of the magistrate to order deportation. The question for our consideration is whether the power to legislate with regard to aliens and to immigration, given to the Commonwealth Parliament under the Constitution, includes the power to deport an alien under such circumstances as the Commonwealth Parliament may think fit to enact? Now, as to the main body of the con-

(1) 22 T.L.R., 757.

tention that the power to exclude aliens does not include the power to deport them, the matter has been placed beyond controversy by the decision in the case of the *Attorney-General for Canada* v. *Cain and Gilhula* (1), already so fully quoted by my learned brothers. It is impossible after that decision to question the right to deport, at least in so far as deportation consists in sending back the alien to the place from where he came. Mr. Stumm's first point in his able argument was that, although there was a power to exclude aliens or impose the conditions under which they might be admitted, and although there was a power to deport to the State from where they came, there was no power to deport them generally. Now, whether or not there is a power to deport generally depends upon the application of a few very simple principles. It is beyond question that when a legislative power is once given to a self-governing community, that power, within its limits, exists to the amplest extent necessary for the purpose of making it effective. That was decided in several cases referred to by Mr. Macgregor—particularly in *Powell* v. *Apollo Candle Co.* (2), and also in *Hodge* v. *The Queen* (3). In the latter case a question arose as to the powers of provincial legislation under the *British North America Act*—whether the exercise of that power, to the extent exercised, was justified, and in regard to that the Privy Council made these observations (4):—"When the *British North America Act* enacted that there should be a legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the Province and for provincial purposes in relation to the matters enumerated in sec. 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by sec. 92 as the Imperial Parliament in the plentitude of its power possessed and could bestow. Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament." In the case of *D'Emden* v. *Pedder* (5), the same

(1) 22 T.L.R., 757.
(2) 10 App. Cas., 282.
(3) 9 App. Cas., 117.
(4) 9 App. Cas., 117, at p. 132.
(5) 1 C.L.R., 91, at p. 109.

H. C. OF A. 1906.

ROBTELMES v. BRENAN.

O'Connor J.

principle was laid down, and I think it is well to re-state it. In that case the Court said :—"In considering the respective powers of the Commonwealth and of the States it is essential to bear in mind that each is, within the ambit of its authority, a sovereign State, subject only to the restrictions imposed by the Imperial connection and to the provisions of the Constitution, either expressed or necessarily implied. That this is so as regards the Commonwealth, apart altogether from the express provisions of the Constitution, appears too plain to need elaborate argument. It is only necessary to mention the maxim, *quando lex aliquid concedit, concedere videtur et illud sine quo res ipsa valere non potest.* In other words, where any power or control is expressly granted, there is included in the grant, to the full extent of the capacity of the grantor, and without special mention, every power and every control the denial of which would render the grant itself ineffective. This is, in truth, not a doctrine of any special system of law, but a statement of a necessary rule of construction of all grants of power, whether by unwritten constitution, formal written instrument, or other delegation of authority, and applies from the necessity of the case, to all to whom is committed the exercise of powers of government."

It is apparent, therefore, that when in the division of powers between the States and the Commonwealth, this power of making laws for the peace, order, and good government of Australia, in regard to aliens and to immigration and emigration, was conferred on the Parliament of the Commonwealth, it was intended to confer the power in the fullest extent that was necessary for its effective exercise. Now let us examine the grounds upon which the judgment of the Privy Council placed the right of deportation as the necessary complement of the right of exclusion. It is put by the judgment of Lord *Atkinson* in this way (1):—"The enforcement of the provisions of this section no doubt would not involve extra-territorial constraint, but it would involve the exercise of sovereign powers closely allied to the power of expulsion, and based on the same principles. The power of expulsion is, in truth, but the complement of the power of exclusion. If entry be prohibited it would seem to follow that the Government which

(1) 22 T.L.R., 757, at p. 759.

has the power to exclude should have the power to expel the alien who enters in opposition to its laws. In *Hodge* v. *The Queen* (1), it was decided that a Colonial legislature has, within the limits prescribed by the Statute which created it, an 'authority as plenary and as ample . . . . as the Imperial Parliament in the plentitude of its power possessed and could bestow.' If, therefore, power to expel aliens who had entered Canada against the laws of the Dominion was by this Statute given to the Government of the Dominion, as their Lordships think it was, it necessarily follows that the Statute has also given them power to impose that extra-territorial constraint which is necessary to enable them to expel those aliens from their borders to the same extent as the Imperial Government could itself have imposed the constraint for a similar purpose had the Statute never been passed." In the case of the Canadian Act it was deemed sufficient to provide that the alien should be deported to the place from where he came, but it must be obvious that, if the power of expulsion involves the power of deportation, it must also involve the right in the Parliament of the Commonwealth to decide what is necessary for effective deportation. But, if the right of deportation is to be limited, as contended by Mr. Stumm, to deportation to the place from where the alien came, the exercise of that right would be at once defeated by the alien refusing to disclose the place whence he came, or it might be defeated by the arising of some circumstance which rendered it impossible at that particular time to deport him to the particular place. Again let me give an illustration. In the case of America and Canada, the form of deportation must necessarily be in the discretion of the authority which has the right to deport. Take the case of two countries whose common boundary is merely a geographical line; it may be easy to put out an alien, but how can that be effectually done by simply putting him across the border where that border consists of thousands of miles of unoccupied country? It may be in a case of that sort that the only effective method of exclusion would be to put the alien on board ship and convey him to some place from which it would be difficult to return. In view of some such contingency no doubt the Commonwealth

(1) 9 App. Cas., 117, at p. 132.

H. C. OF A. 1906.

ROBTELMES v. BRENAN.

O'Connor J.

Parliament left it perfectly open whether the deportation of the islander was to be to the island whence he came, or to some other place. However that may be, we have only to determine whether the power to deport does not in itself include the power of choosing the place of deportation and the means of deportation in order that the exercise of the power shall be effectual. Applying the principles that I have alluded to, it is clear to my mind that, the power to exclude and the power to deport being in the Commonwealth Parliament, the power of deciding what shall be an effective form of deportation must rest with them. They have the right, if they wish, to leave the question of the mode or place of deportation to the discretion of the government. For these reasons I am of opinion that the magistrate was right in his conclusion, and was justified in making the order that he made, and that it was within the power of the Commonwealth to pass the Act under which he adjudicated.

Appeal dismissed.

Solicitor, for the appellant, *A. W. Bale.*

Solicitors, for the respondent, *Chambers & McNab.*

N. G. P.

Appl *Holly v Director of Public Works* 16 ALD 43

Foll *Kaye v Attorney-General (Tas)* (1956) 94 CLR 193

[HIGH COURT OF AUSTRALIA.]

RYDER . . . . . APPELLANT;
(NOMINAL DEFENDANT),

AND

FOLEY . . . . . RESPONDENT.
PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1906.

BRISBANE, *Oct.* 3, 4, 6.

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

Police officer—Tenure of office—Who may dismiss—"Government," meaning of—Wrongful dismissal.

By sec. 6 of the *Police Act* 1863 it is provided that the Commissioner of Police "shall appoint fit and proper persons to fill such vacancies as may hereafter occur among the sergeants and constables of the police force, and upon