to hold that the Judge might not properly make an order simply depriving the plaintiff of his costs, without stating any reasons. If that is so the whole matter would be open to review in this Court, and if any good cause was shown to exist, the order could be supported. On the whole case, therefore, I agree that *Burnside* J. made a right order, that the Supreme Court properly upheld him, and that this appeal must be dismissed.

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Appeal dismissed with costs.

Solicitors, for the appellant, *Northmore, Lukin & Hale.*
Solicitors, for the respondents, *Smith & Lavan.*

H. V. J.

[HIGH COURT OF AUSTRALIA.]

POTTER . . . . . APPELLANT;
INFORMANT,

AND

MINAHAN . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM A COURT OF PETTY SESSIONS OF VICTORIA.

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MELBOURNE *Sept.* 16, 17, 18, 21; *Oct.* 8.

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

Prohibited immigrant—"Immigrant," meaning of—Member of Australian community returning from abroad—Home—Domicil—Abandonment of home—Infant—Presumption of legitimacy—Dictation test—The Constitution (63 & 64 *Vict.* c. 12), *sec.* 51 (xxvii.)—*Immigration Restriction Act* 1901 (*No.* 17 *of* 1901), *sec.* 3—*Immigration Restriction Act* 1905 (*No.* 17 *of* 1905), *secs.* 4, 8.

A person whose permanent home is in Australia and who, therefore, is a member of the Australian community, is not, on arriving in Australia from

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abroad, an immigrant in respect of whose entry the Parliament of the Commonwealth can legislate under the power conferred by sec. 51 (xxvii.) of the Constitution to make laws with respect to immigration, and, therefore, such a person is not an immigrant within the meaning of the *Immigration Restriction Acts* 1901-1905.

Held, on the evidence (*Isaacs* and *Higgins* JJ. dissenting), that the illegitimate son of a Victorian woman who had his original home in Victoria, but at the age of 5 years was taken by his father, a Chinese, to China, where he remained for 26 years, had never abandoned that home, and, therefore, on his return to Australia was not an immigrant within the *Immigration Restriction Acts* 1901-1905.

Held also (*Higgins* J. dissenting), that no presumption of legitimacy arises in the case of a child born in Victoria in 1876 to a white woman and a Chinese who lived together as man and wife for several years.

An officer of Customs intending to put the dictation test to the defendant as provided by sec. 3 (*a*) of the *Immigration Restriction Act* 1901 (as amended by sec. 4 of the *Immigration Restriction Amendment Act* 1905), told him he would read the passage slowly and then, if the defendant said he could write it, he, the officer, would read it again slowly. The officer then read the passage slowly, the defendant said that he could not write it, the passage was not read again, and the officer told the defendant he was a prohibited immigrant.

Held by *O'Connor*, *Isaacs* and *Higgins* JJ. that the dictation test was not properly put so as to make the defendant a prohibited immigrant.

APPEAL from a Court of Petty Sessions of Victoria exercising federal jurisdiction.

Before C. A. C. Creswell, Esq., a Police Magistrate, sitting as a Court of Petty Sessions at Melbourne, an information was heard by which L. F. Potter, a constable of police, charged that James Francis Kitchen Minahan, being an immigrant who, within one year after he had entered the Commonwealth, failed to pass the dictation test within the meaning of the *Immigration Restriction Acts* 1901-1905, and, being a prohibited immigrant, was found within the Commonwealth in contravention of those Acts.

The magistrate after hearing the evidence found the following facts:—That the defendant was born in Victoria; that his mother was Winifred Minahan; that one Teung Ming, a Chinese, and Winifred Minahan lived together at Indigo and Melbourne, in Victoria, as man and wife, which presumption had not been rebutted; that the defendant was brought up by Teung Ming

and Winifred Minahan and lived with them in Victoria as their own child till he was about 5 years of age; that the defendant's father, Teung Ming, when the defendant was about 5 years old took him to China; that Teung Ming during his life, and, after his death, the defendant himself intended that he, the defendant, would return to Australia at some future time; and that in leaving Victoria for China the father in the first instance and afterwards the defendant did not intend to permanently change the domicil of the defendant from Victoria to China.

An extract from the Register of Births, which was put in evidence, was dated 10th July 1882, showed that a male child named James Francis Kitchen was born on 4th October 1876 at the Lying-in Hospital, Melbourne; that the mother's name was Winifred Minahan, aged 17 years, who was born at Emerald Hill; and that the birth was registered by a messenger of the hospital on 29th November 1876. In the column for the name of the father of the child there was no entry.

The evidence as to the administration of the dictation test was given by the officer of Customs who conducted it. He said:—

"I told the accused that I was a Customs officer appointed to deal with immigrants.

"I told him I was going to read out to him a passage of not less than fifty words in English, and I required him to write them in English. I said:—'Here is paper and pencil for that purpose. If you write them you will be allowed to land, and if you fail to write them you will not be allowed to land. I will read the passage slowly, and if you say you can write it I will read it out slowly again.'

"The passage read was (the passage was set out).

"I then asked him if he could write it, and he said he could not.

"I then informed him that he was a prohibited immigrant and could not land."

Other facts are stated in the judgments hereunder.

Upon the facts found by him the magistrate held that the defendant was not an immigrant, and he therefore dismissed the information.

An order *nisi* to review this decision was obtained by the informant on the grounds:—

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1. That on the evidence the defendant is *primâ facie* an immigrant within the meaning of the *Immigration Restriction Acts* 1901-1905, and that position is not rebutted.

2. That on the evidence the defendant is a prohibited immigrant within the meaning of the *Immigration Restriction Acts* 1901-1905 in that, being an immigrant, he failed to pass the dictation test prescribed by the said Acts.

3. That on the evidence, and notwithstanding the findings of fact by the Police Magistrate, the defendant is a prohibited immigrant within the meaning of the *Immigration Restriction Acts* 1901-1905.

4. That the findings of facts by the said Police Magistrate are against evidence and the weight of evidence.

5. That there is no evidence that Teung Ming was domiciled in Australia, and that any finding of fact that he was so domiciled is against evidence and the weight of evidence.

6. That there is no sufficient evidence that the defendant was domiciled in Australia.

Bryant, for the appellant. The conclusions of fact are not warranted by the evidence. On the evidence, the defendant was legitimate, and there is no evidence that his father, Teung Ming, was ever domiciled in Victoria, or that, if he was, he did not change his domicil to that of China. Whether the defendant was or was not legitimate, he was an immigrant within the meaning of the *Immigration Restriction Acts* 1901-1905, and, having failed to pass the dictation test, he was a prohibited immigrant. *Primâ facie*, every person who comes into the Commonwealth is an immigrant: *Chia Gee* v. *Martin* (1). The fact that a person has his domicil in Australia does not render him any the less an immigrant: *Ah Yin* v. *Christie* (2); nor has his nationality anything to do with the question whether he is an immigrant: *Attorney-General for the Commonwealth* v. *Ah Sheung* (3). The word "immigrant" involves the idea of coming from a former habitat to settle in another country: *Ah Yin* v. *Christie* (4).

(1) 3 C.L.R., 649.
(2) 4 C.L.R., 1428.
(3) 4 C.L.R., 949.
(4) 4 C.L.R., 1428, at p. 1437.

Duffy K.C. and *Ah Ket*, for the respondent. There has been no test administered in accordance with the Acts. See *Immigration Restriction Act* 1901, sec. 3 (*a*); *Immigration Restriction Amendment Act* 1905, sec. 4. The passage was not read for the purpose of dictation. The Acts are penal and must be strictly construed: *Christie* v. *Ah Foo* (1). Outside the question of the definition of "immigration" and "immigrant" the Acts were not intended to apply to Australian born British subjects, although Parliament had power to exclude those persons from the Commonwealth as well as others, and this appears from extrinsic circumstances as well as from an examination of the Acts themselves. It is in the last degree improbable that any community should pass an Act excluding members of that community unless in the most distinct terms. In the United States it has been decided that a citizen will not be excluded except in express terms: See *In re Look Tin Sing* (2); *In re Young Sing Hee* (3). The exclusion of Australian born British subjects is not necessary to effect the result aimed at by this particular legislation. There is a presumption that no alteration of the law is intended which is beyond the scope and object of the Act: *Maxwell's Interpretation of Statutes*, 2nd ed., p. 96. It is not necessary to go so far as to say that a man has an absolute right to return to the country to which he owes allegiance, but it is sufficient to say that Parliament will not be supposed to have denied a man that right except by express words or by necessary implication.

[ISAACS J. referred to *Huntly* (*Marchioness of*) v. *Gaskell* (4).]

A great difficulty here arises because there is a British nationality common to the whole Empire, and within it an independent Australian Government. As to what rights a member of the Australian community gets by virtue of being a member of that community different from those which he has as a British subject there is no authority.

[GRIFFITH C.J.—The fact that nationalization in some cases confers qualified rights only shows that the rights of a British subject may be of a limited character.]

(1) 29 V.L.R., 533; 25 A.L.T., 189.
(2) 21 Fed. Rep., 905, at p. 913.
(3) 36 Fed. Rep., 437.
(4) (1906) A.C., 56.

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As to the effect of naturalization, see *Westlake's Private International Law*, 4th ed., p. 353; *Naturalization Act* 1870 (33 & 34 Vict. c. 14), sec. 16; *Encyclopædia of the Laws of England*, vol. II., p. 261.

[ISAACS J.—Sec. 8 of the Act of 1901 seems to show that in other sections Australian born British subjects are included in immigrants.]

That section does not deal with immigration, but only deportation.

[GRIFFITH C.J.—It is questionable whether that section is within the power to legislate as to immigration.]

An examination of the Acts also shows that they were not intended to apply to Australian born British subjects. Sec. 3 (*n*) of the Act of 1901 exempted persons who should satisfy the officer that they had formerly been domiciled in the Commonwealth or in a Colony which had since become a State. So that either a person who had an Australian domicil when he sought to enter the Commonwealth was not an immigrant, or else no provision was made for him by that Act, while provision was made for a person who once had an Australian domicil but had lost it. The repeal of that sub-section cannot alter the interpretation of the language of the Act based on that sub-section: *Parker* v. *Talbot* (1). There is no decision of this Court that domicil is not sufficient to take a person out of the operation of these Acts, although there is a decision that imputed or derivative domicil will not do so, viz.: *Ah Yin* v. *Christie* (2). Sec. 4 (*a*), inserted in the Act of 1901 by sec. 8 of the Act of 1905, which provides for arrangements being made for the admission of the subjects of foreign nations without a dictation test, while no provision is made for any such exemption being made in the case of Australian born British subjects, supports the view that the latter are not immigrants.

The defendant was a natural born Australian and was domiciled here when he returned from China. There is no presumption that he was legitimate: *Udny* v. *Udny* (3). He had his mother's domicil, and on the evidence and the findings

(1) (1905) 2 Ch., 643.
(2) 4 C.L.R., 1428.
(3) L.R. 1 H.L. Sc., 441.

he never abandoned it. Power having been expressly given by the Constitution to the Commonwealth Parliament to exclude aliens, the inference is that no power was given to exclude members of the Australian community. The defendant was not an immigrant within the meaning of the Constitution or of the Immigration Restriction Acts. The idea of immigration is quite foreign to a man coming back to his own country. Immigration implies leaving an old home in one country to settle in a new home in another country: *Ah Sheung* v. *Lindberg* (1); *Aliens Act* 1905 (5 Edw. VII. c. 13). In none of the Acts of the Australian Colonies before federation dealing with immigration is there any provision purporting to exclude native born Australians, and in all of them which intend to exclude persons exceptions are made either of all British subjects or of all Australian born subjects. See *Immigrants (Chinese) Act* 1855 (Vict.); *Chinese Immigrants Statute* 1865 (Vict.); *Chinese Immigration Restriction Act* 1888 (Qd.); *Chinese Immigration Restriction Act* 1888 (Vict.); *Immigration Restriction Act* 1898 (N.S.W.); *Quick and Garran's Constitution of the Australian Commonwealth*, p. 624. Although there is no Australian nationality as distinguished from British nationality, there is an Australian species of British nationality. See *Naturalization Act* 1870 (33 & 34 Vict. c. 14); *Foote's Private International Jurisprudence*, 1st ed., p. 1. In *In re Bucksbaum* (2) it was held that a resident alien in the United States was not an immigrant.

[ISAACS J. referred to *Moy Suey* v. *United States* (3).]

[Counsel also referred to *Roberts* v. *Ahern* (4); *American and English Encyclopædia of Law*, 2nd ed., vol. VI., pp. 15, 16; *Head Money Cases* (5); *Law Quarterly Review* 1890, vol. VI., pp 388, 408.]

Bryant, in reply. There was a substantial compliance with the provisions for a dictation test, and that is sufficient. The presumption of law is in favour of legitimacy: *Yeap Cheah Neo*

(1) (1906) V.L.R., 323, at pp. 332, 334, 341; 27 A.L.T., 189.
(2) 141 Fed. Rep., 221.
(3) 147 U.S., 697, at p. 699.
(4) 1 C.L.R., 406, at p. 417.
(5) 112 U.S., 580, at p. 595.

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v. *Ong Cheng Neo* (1); *Banbury Peerage Case* (2). As to the effect of British nationality see *Dicey's Conflict of Laws*, p. 174.

[HIGGINS J. referred to *Law Quarterly Review* 1902, vol. XVIII., p. 49.]

Domicil is only important in reference to certain questions of title. If "domicil" means "home," then immediately before the defendant landed here his home was not in Australia. His domicil of origin is unimportant, and, in view of his remaining in China for 12 years after he came of age, his statements as to his intention to return to Australia are also unimportant: *Doucet* v. *Geoghagan* (3). If the word "immigrant" must be limited, then the only exception is a person who has his home in Australia.

[He also referred to *R.* v. *Æneas Macdonald* (4); *Attorney-General* v. *Kent* (5); *In re Steer* (6); *Parker* v. *Parker* (7); *Winans* v. *Attorney-General* (8); *Passenger Cases* (9).]

Cur. adv. vult.

October 8.

The following judgments were read:—

GRIFFITH C.J. This is an appeal from a decision of a magistrate dismissing a charge against the respondent that he, being an immigrant who within a year of entering the Commonwealth had failed to pass the dictation test within the meaning of the *Immigration Restriction Acts* 1901-1905, and being a prohibited immigrant, was found in the Commonwealth. The magistrate was of opinion that the respondent was not an immigrant within the meaning of the Acts. There was no doubt as to his actual entry into the Commonwealth, or that the place from which he came was China.

Sec. 3 of the Act of 1901 begins thus:—

"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:" Then follows a series of categories of persons of which the first (substituted by sec. 4 of the Act of 1905) is (*a*) "any

(1) L.R. 6 P.C., 381.
(2) 1 Sim. & St., 153.
(3) 9 Ch. D., 441, at p. 455.
(4) 18 How. St. Tr., 858.
(5) 1 H. & C., 12, at p. 27.
(6) 2 H. & N., 594, at p. 597.
(7) 5 C.L.R., 691.
(8) (1904) A.C., 287.
(9) 7 How., 283, at p. 413.

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."

No question appears to have been raised before the magistrate as to the respondent being a person who had failed to pass the dictation test, but it is now contended for him that upon the evidence the terms of the Act respecting it were not complied with. I will return to this point, which is of comparatively little importance, and will deal first with the other much more important question whether he was an immigrant.

The argument for the appellant was put as high as that every person entering the Commonwealth immigrates into it within the meaning of the term "immigration" as used in sec. 51 (xxvii.) of the Constitution, which confers upon the Parliament power to make laws for the peace, order, and good government of the Commonwealth with respect to . . . immigration and emigration.

It was contended that the word "emigration" as used in sec. 51 must include every case of departure from the Commonwealth, and that the word "immigration" should have a correspondingly wide meaning. Possibly the word "emigration" as used in that paragraph may include all cases of departure, since a State cannot control the movements of a man after he has left its territory, so that every departing person is in one sense an emigrant. But the reason for adopting such an extended construction is that any other construction would render the power nugatory. The same reason does not apply to the word "immigration."

Reference was also made to the decision of this Court in the case of *Chia Gee* v. *Martin* (1), where it was said that entry without proof of an *animus manendi* was sufficient evidence of immigration. In that case the question was whether it was necessary for the prosecutor to establish an *animus manendi*, and it was held that it was not necessary. The question whether every person entering the Commonwealth is an immigrant was not considered. Counsel for the appellant also cited the case of *Chow Quin* v. *Martin* (1), in which the Court referred to the

(1) 3 C.L.R., 649.

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effect of a proviso which then stood in the Act, conferring a conditional privilege of re-entry upon persons who had formerly been domiciled in the Commonwealth, and pointed out that the evidence did not entitle the appellant to raise the question.

In my opinion the word "immigration" as used in the Constitution does not mean mere physical entry into the Commonwealth although the fact of entry is, if no more appears, sufficient *primâ facie* evidence that the person entering is an immigrant.

The question now before us for determination was distinctly raised, and left undetermined, in the case of *Attorney-General for the Commonwealth* v. *Ah Sheung* (1), and arises upon facts which are clearly established by the evidence, if it is believed; and I see no reason to differ from the magistrate as to the veracity of the witnesses.

The respondent was born in Victoria on 4th October 1876, his mother being a young woman, herself born in Victoria, and bearing a British name. She may be assumed to have been of British race. The birth was registered on 29th November, the mother's name in the column headed "Name and maiden surname of the mother, age and birthplace" being given as "Winifred Minahan, 17, Emerald Hill." Emerald Hill is in Victoria. The column for the name of the father of the child was left blank. It appears, however, that the reputed father was a Chinese named Teung Ming, with whom the mother had lived as his wife in a small country town in Victoria. A Chinese witness who knew him at the time said that her name was Minahan and her other name was Minnie. On these facts the magistrate thought himself bound to presume a legal marriage. In my opinion no such presumption arises. Presumptions are founded upon the existence of a high degree of probability. Having regard to conditions in Victoria in 1876, and to the relations between Chinese and European women at that time, I think that there is not even a *primâ facie* probability of a legal marriage. And, when to these facts it is added that the child was registered without mention of a father, I think that, so far from there being a high degree of probability in favour of a legal marriage, there is the highest degree of probability in favour of a contrary conclusion.

(1) 4 C.L.R., 949.

In my opinion, therefore, it is established by the evidence that the respondent was not born in wedlock. It follows that at birth he acquired not only a British nationality but the domicil of his mother, which must be taken to have been in Victoria.

The boy lived with his mother and reputed father in Victoria until he was five years of age, when Teung Ming returned to China, taking the boy with him, and leaving the mother, who came to see them off by the ship in which they sailed. The reputed father had an interest in a business in Victoria, which he left in charge of a friend, who continued to make remittances to him in China until his death. This occurred about 1893 or 1894, when the respondent was about 17 or 18 years old. Teung Ming before leaving Victoria obtained a certified extract of the entry relating to the respondent in the Register of Births, which he took with him to China. Before his death he gave it to the respondent, apparently as a document establishing his right to return to Victoria under the law then in force. His own original intention appears to have been to return to Victoria, and the respondent, so far as he could while under age have a relevant intention, was of the same mind, but before returning he desired to become a graduate, with the idea of becoming a teacher of Chinese children in Australia. After Teung Ming's death the respondent continued his studies, and submitted himself for examination on three occasions, but always without success. He then made up his mind to return to Australia at once, and did so. In the meantime Teung Ming's Victorian correspondent periodically sent remittances to him as he had done to the former in his lifetime.

Upon these facts the first question to be answered is: Was the respondent an "immigrant" within the meaning of the Constitution?

Certain conclusions of law clearly follow from the facts which I have stated.

(1) The respondent is a British subject born in Victoria of a British mother:

(2) His legal domicil is in Victoria.

His mother was domiciled there, and he was born there. His domicil of origin continued until he should voluntarily choose

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another. This he never did. Teung Ming was in point of law a mere self-constituted guardian, who had no authority to change the respondent's domicil, even if he had intended to do so; and, upon the evidence accepted as true by the magistrate, he had no such intention.

The fact that the respondent's actual place of residence from the age of five up to his return to Victoria was China is relevant as an important circumstance to be taken into consideration for the purpose of ascertaining whether he intended to remain there. His rights are exactly the same as if he were a person of purely British blood who had been taken by an adoptive guardian in his infancy from Australia to France or to the United States of America with the intention of bringing him back after finishing his education, and who had himself always intended to return to his birthplace as soon as he had attained that object. The fact that the desired education could only be obtained in a particular country is also important, but that also is only a circumstance to be considered in ascertaining the actual intention.

In the region of international law it is sometimes important to determine the nationality of a person. For this purpose no distinction is recognized between different possessions of the same Sovereign power. Other questions of international law depend upon what is called domicil. For this purpose a distinction is recognized between different parts of the territory of the same Sovereign, as for instance between England and Scotland.

Many definitions of domicil have been given, but they all embody the idea which is expressed in English by the word "home," *i.e.* permanent home (see *per* Lord *Cranworth* in *Whicker* v. *Hume* (1)). And, as persons of the same nationality may have different homes, so they may have different domicils.

The doctrines of nationality and domicil are applied for specific purposes, and certain rights and consequences depend upon and follow from them.

But I do not think that the present case can be determined by the mere application of the rules either of nationality or of domicil. There is no doubt that a British subject coming to the

(1) 7 H.L.C., 124, at pp. 159-160.

Commonwealth from another part of the British Dominions may be an immigrant within the meaning of the Constitution.

But anterior, both in order of thought and in order of time, to the concepts of nationality and domicil is another, upon which both are founded, and which is, I think, an elementary part of the concept of human society, namely, the division of human beings into communities. From this it follows that every person becomes at birth a member of the community into which he is born, and is entitled to remain in it until excluded by some competent authority. It follows also that every human being (unless outlawed) is a member of some community, and is entitled to regard the part of the earth occupied by that community as a place to which he may resort when he thinks fit. In the case of *Musgrove* v. *Chun Teeong Toy* (1) it was held that an alien (though an alien friend) has no legal right to enter a country of which he is not a national. Yet, unless he is outlawed from human society, he must be entitled to enter some community. So, by process of exclusion, we ascertain at least one part of the world to which every human being, not an outlaw, can claim the right of entry when he thinks fit.

At birth he is, in general, entitled to remain in the place where he is born. (There may be some exceptions based upon artificial rules of territoriality.) If his parents are then domiciled in some other place, he perhaps acquires a right to go to and remain in that place. But, until the right to remain in or return to his place of birth is lost, it must continue, and he is entitled to regard himself as a member of the community which occupies that place. These principles are self-evident, and do not need the support of authority.

It is not necessary in the present case to inquire whether the right to regard a particular part of the earth as "home" can be acquired otherwise than by birth; or whether it can be lost by a change of residence; or whether if lost it can be re-acquired; and in any of those cases, by what means; or whether the right of entry *primâ facie* extends to all the dominions of the State of which he is a national.

The return of such a person to his native land after temporary

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

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absence has never, so far as I have any acquaintance with the English language, been described as "immigration." That word is not a technical term of art, and when used in sec. 51 (xxvii.) of the Constitution must receive its ordinary signification unless the context requires some other meaning to be adopted.

In the United States of America it has been held that an alien who has settled in the United States and then absents himself for a short time with the intention of returning is, although an alien, not "an alien immigrant" within the meaning of the laws dealing with alien immigrants: *In re Buchsbaum* (1). This view is in accordance with that which I have just expressed as to the meaning of the word "immigration."

The respondent is a person who, upon the evidence, was entitled by the circumstances of his birth to regard Victoria as his home. Upon the facts as found by the magistrate he has not himself, nor has anyone by whose acts he is bound, done anything to deprive him of that right, or to confer on him a right to enter or remain in any other part of the world, except so far as his British nationality may confer any such right.

It follows, in my judgment, that, although entry into another part of the British Dominions might and probably would have been immigration, his return to the Commonwealth was not immigration within the meaning of sec. 51 (xxvii.) of the Constitution.

It is suggested, however, that the power of the Commonwealth to keep out of its borders undesirable persons is not limited to the express power to control immigration. I will assume, without deciding, that this is so. It is also suggested that in the Immigration Restriction Acts the word "immigration" is used in a wider sense than that in which it is used in the Constitution. I do not think so. On the contrary, I think that the Act shows on its face that it was used in a sense which would not include persons who are returning to an Australian home. As passed in 1901 sec. 3 contained an exception in favour of persons who could prove that they had "formerly" been domiciled in the Commonwealth. I accept Mr. *Duffy's* inference that the Act was not intended to apply at all to persons who were presently

(1) 141 Fed. Rep., 221.

domiciled in the Commonwealth, and this, whether the word "'domicil" was used in its technical sense, or in the inartificial sense of "permanently resident." The repeal of this proviso cannot alter the meaning of sec. 3 as originally enacted.

We know that the first pattern of this Act was a Statute passed in Natal in 1887. It would have been a singular thing if under that Act a Zulu who had gone to Johannesburg to work in the mines should have been regarded on his return to Natal as an immigrant.

For these reasons I am of opinion that the Acts have no application to the respondent.

With regard to the objection that the dictation test was not properly applied, it is not necessary to express a definite opinion. The inclination of my mind is rather against the objection, but it is very desirable that the officers entrusted with the administration of the law should follow its provisions strictly, and so avoid the necessity of the determination of such questions, which have nothing to do with the merits of any particular case.

BARTON J. The respondent was charged by the appellant for that—being an immigrant who within one year after he had entered the Commonwealth failed to pass the dictation test within the meaning of the *Immigration Restriction Acts* 1901-1905, and being a prohibited immigrant—he was found within the Commonwealth in violation of the said Acts.

There are two essential elements in this charge: first, that the respondent was an "immigrant," and next, that he failed to pass the dictation test. If he was an immigrant, failure to pass the test made him a prohibited immigrant, and therefore guilty. If he was not an immigrant the whole charge fails *in limine*. As I hold the latter opinion on the case as it stands I shall not express a final opinion as to the other element of the charge. But, if it became necessary to determine it, I should have some difficulty in saying that the test had been administered by the officer according to the requirement of the Act. A person fails to pass the dictation test (see sec. 3 (*a*)) "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." It is

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plain on the evidence that the test was fully explained to the respondent. A passage of fifty words in English was first read to him slowly, by way of information, the officer having previously said: "I will read the passage slowly, and if you say you can write it I will read it out slowly again." Then, the respondent having paper and pencil, the officer, instead of reading the passage again to the respondent for the latter to write it if he could, asked the respondent whether he could write it. The respondent said that he could not do so, and the test was not persevered with. This conversation took place through an interpreter, for the respondent could not speak English. Though it was plain he could not have written in English any of the passage tendered for the purpose, it was never in the literal sense dictated to him, and as dictation is the necessary antecedent to success or failure in writing the words, and as waiver, it is urged, is no answer so as to relieve the officer from the necessity of completely applying the test, Mr. *Duffy* claimed for the respondent that he could not, even if an immigrant, be found to be a prohibited one. I must say that I am not sorry that the point, as it happens, does not call for determination in the present case, as, if it recurs, it must be fully and closely argued. But it ought not to recur, and officers should see to it that when they do decide to apply the test they do it strictly and to the letter, however certain it may appear that the immigrant will fail to pass it. But the test is only to be applied to immigrants, and has the respondent been shown to be one? I think not.

Except as to the presumptions which he founds on the cohabitation of Teung Ming and Winifred Minahan and the birth of the respondent in consequence, I feel bound to accept the findings of the Police Magistrate on the evidence, and even if I hesitated to agree with them, I must reflect that he had the opportunity of observing the demeanour of the witnesses, even although the services of an interpreter were employed. A Police Magistrate in this city acquires an experience in weighing the evidence of Chinese which is denied to those who merely read their written or printed depositions. Mr. *Cresswell* after reserving his judgment has followed the evidence of the respondent and his witnesses, which on the question of immigrant or no immigrant

is all one way and uncontradicted. He has evidently not been able to detect in it a tissue of fabrications woven by conspiracy; he believes its truth, and says so. I cannot say that he is wrong. But the most important elements of the case are those on which he founds a legal presumption that Teung Ming and Winifred Minahan were married, and the respondent their legitimate son. I do not see that any such presumption can be founded on the cohabitation of the parents. They are said to have lived "as man and wife," but there is no evidence that they were so. It is said that the woman was called "Mrs. Teung Ming." That is of no value, for in such connections we know that the woman goes by the man's surname. There is nothing to show that their relations differed from those which have been so common between Chinese and European women. The case of *Yeap Cheah Neo* v. *Ong Cheng Neo* (1), cited by Mr. *Bryant*, is no authority for the alleged presumption, as was pointed out during the argument. For all that appears in the case the respondent is the illegitimate son of Winifred Minahan, and we must base our conclusions on that. First, however, as to James Francis Kitchen's nationality. He is a natural-born British subject by virtue of his birth within the British Dominions. That fact is independent of the question of his legitimacy, and is as much a fact as if his father had been, say, a citizen of the United States, and had duly married Winifred Minahan in Australia. *Dicey's Conflict of Laws*, Rule 22, p. 175, and exceptions 1 and 2, pp. 176 and 177. There is not a tittle of evidence of the respondent's having endeavoured or even intended to divest himself of that nationality.

Now, in a unitary or undivided State, every subject of it has the right of egress and ingress and of remaining in any part of that State to the extent to which his freedom in that regard is not controlled by express law. So when self-government is granted to any part of that State, while the parent State may include in the grant, or reserve to itself, a power of restricting this right of ingress, egress, and sojourn, yet unless the Sovereign State grants the subsidiary State the right to apply such restrictions to those subjects of the former who are born within the

(1) L.R. 6 P.C., 381, at p. 386.

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latter, I very much doubt whether there is any right to impose them on those who may be termed in one sense its own nationals, who at birth were part of its self-governing community, and whose liberty in the regard mentioned is a birthright. Hence, where a charter of self-government, such as ours, grants the right to deal with immigration, which includes the right wholly to prohibit the landing of an immigrant, it is open to doubt whether the grant includes the right to prohibit the entry of those who are subjects of the Crown born within our bounds, and who, to adapt a phrase of Lord *Watson's*, may be called Australian-born subjects of the King. But, for reasons which will appear, this case may be decided without laying down so broad a doctrine. The question remains, how much is conveyed in the grant of the power to legislate as to immigration, and whether the term itself includes a person such as the respondent.

In respect of domicil we may well call to mind that the law of England attributes to each person at his birth a domicil which is called that of origin—the native domicil; *Westlake*, sec. 244; that the original domicil of a child born out of wedlock is the domicil of its mother at the time of its birth; *Ib.*, sec. 246; *Udny* v. *Udny* (1), per Lord *Westbury*; and that, while the domicil of a legitimate or legitimated unmarried minor follows that of his or her father, the domicil of an unmarried minor born out of wedlock and not legitimated follows that of his or her mother, through all the changes of such respective domicil: *Ib.* sec. 249. Winifred Minahan was domiciled in Australia at the birth of the respondent. There is no evidence of her having changed it, and there is no evidence of the time of her death: if her death is even proved. When therefore the respondent at the age of five was taken away to China, he was, involuntarily, the possessor of a domicil of origin in Victoria. Up to 1896, when Teung Ming died at the village of Shek Huey Lee, the respondent was not able to exercise any volition as to the retention or the abandonment of his domicil of origin; and, as we have no evidence to point to a different conclusion, he was not able to exercise any such volition until 1898, when he attained 21 years of age. It was then that he became competent to abandon his domicil of origin and change

(1) L.R. 1 H.L. Sc., 441, at p. 457.

it for a domicil of choice. His residence up to 1896 had been that of his putative father, who had no rights over him, unless it may be inferred from the evidence that Winifred Minahan had given him a certain right of custody of the child, sufficient to avail against others than herself. This did not change his domicil of origin, nor can anything he did himself up to 1898 be held to have done so. Now as to the period following 1898, I will first quote passages from the judgments of the House of Lords in the case of *Moorhouse* v. *Lord* (1). Lord *Cranworth* said:—"In order to acquire a new domicil, according to an expression which I believe I used on a former occasion, . . . a man 'must intend *quatenus in illo exuere patriam*': *Whicker* v. *Hume* (2). It is not enough that you merely mean to take another house in some other place, and that on account of your health, or for some other reason, you think it tolerably certain that you had better remain there all the days of your life. That does not signify." Lord *Kingsdown* said (3):—"change of residence alone, however long and continued, does not affect a change of domicil, as regulating the testamentary acts of the individual. It may be, and it is, a necessary ingredient; it may be, and it is, strong evidence of an intention to change the domicil,—in my opinion no change of domicil is made. . . . A man must *intend* to become a Frenchman instead of an Englishman." Lord *Chelmsford* in his judgment adopted what was said by Lord *Wensleydale* in *Aikman* v. *Aikman* (4), as a clear statement of the rule on this subject:—"Every man's domicil of origin must be presumed to continue until he has acquired another *sole* domicil by actual residence, with the intention of abandoning his domicil of origin. This change must be *animo et facto*, and the burden of proof unquestionably lies upon the party who asserts that change." In *Udny* v. *Udny* (5), Lord *Westbury*, after pointing out that it is a settled principle that no man shall be without a domicil, and to secure this result "the law attributes to every individual as soon as he is born the domicil of his father, if the child be legitimate, and the domicil of the mother if

(1) 10 H.L.C., 272, at p. 283.
(2) 7 H.L.C., 159.
(3) 10 H.L.C., 272, at p. 291,
(4) 3 Macq., 877.
(5) L.R. 1 H.L. Sc., 441, at p. 457.

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illegitimate"; and that "this has been called the domicil of origin, and is involuntary," goes on to say:—"Other domicils, including domicil by operation of law, as on marriage, are domicils of choice. For as soon as an individual is *sui juris* it is competent to him to elect and assume another domicil, the continuance of which depends upon his will and act. When another domicil is put on, the domicil of origin is for that purpose relinquished, and remains in abeyance during the continuance of the domicil of choice; but as the domicil of origin is the creature of law, and independent of the will of the party, it would be inconsistent with the principles on which it is by law created and ascribed, to suppose that it is capable of being by the act of the party entirely obliterated and extinguished. It revives and exists whenever there is no other domicil, and it does not require to be regained or reconstituted *animo et facto*, in the manner which is necessary for the acquisition of a domicil of choice." "It cannot be destroyed," he says, "by the will and act of the party." And he quotes from *Story's Conflict of Laws* as the just conclusion from several decided cases as well as from the principles of the law of domicil, the statement—now universally recognized as law, that "the moment the foreign domicil (that is the domicil of choice) is abandoned, the native domicil or domicil of origin is re-acquired."

As these statements of the law cannot have been made for this case, one is struck by the closeness with which the present circumstances seem to apply themselves to the law.

The respondent, then, being for the first time competent in 1898 to abandon as far as was possible his domicil of origin, remains in China ten years longer. Repeatedly he asserts his intention to return to Australia—to Victoria. Teung Ming, by some arrangement, appears to have retained a half-interest in the old storekeeping business at Indigo. From time to time, as several witnesses prove, money was sent to him on that account. After his death the respondent appears to have received several such sums of money at annual intervals. His father puts him to school in China. He remains at school after the father's death, but later he passes on to a University. Here there is an examination every three years. He declares his intention of obtaining

a degree, and makes three attempts at these triennial examinations. He does not succeed. According to the evidence he has expressed his intention to return when he has got his degree. On one occasion he says he will return whether he fails or not. That would be a likely thing for him to say after two reverses. He states that he desires to teach Chinese to the children of Chinese in Australia, and also that he desires to see after the store business in Victoria. How can he be said to have "renounced his birthright in the place of his original domicil," to use the words of Lord *Halsbury* in *Huntly* (*Marchioness*) v. *Gaskell* (1)? A certified extract from a birth register is produced. It describes "James Francis Kitchen" as having been born on the 4th October 1876 at a lying-in hospital in Melbourne. No name or particulars of paternity are given. His mother is described as Winifred Minahan (that is given as the maiden surname), and the birth is registered at Carlton on 29th November 1876. Now, Teung Ming is sworn by the respondent to have given him this paper about 15 or 16 years ago, which would be four or five years before Teung Ming's death, and the respondent says it has been kept in a box ever since. It appears to have been taken from the respondent when the vessel called at Sydney, and forwarded to the Customs Department here. The interpreter says that certain Chinese characters on the back mean "English name James Francis Kitchen. Also Chinese date. This is a duplicate copy, the original has been lost." The date on the face of the copy is 10th July 1882, which is about the time Teung Ming embarked for China with the respondent, who says that before Teung Ming died he told him (respondent) that he had a business in Australia, and told him to keep the certificate so that he might return to Australia, as it was a certificate of birth. So that even then a return to Australia on the part of the youth seems to have been at least in contemplation by Teung Ming: as by himself when he became *sui juris*.

But I will not take up more time in the examination of the facts. The story, as I have said, may be a concoction. There is nothing that justifies us in pronouncing it to be one, especially after the findings of the Police Magistrate. It is strenuously

(1) (1906) A.C., 56, at 66.

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contended that the respondent's declarations, even if made as alleged, avail nothing. I do not think they are of great consequence. The labouring oar is with the prosecution to prove this man an immigrant. For that purpose it essays to prove a change of domicil. Even if such a change had been proved—and I am distinctly of opinion that the onus in that respect has not been discharged nor the burden seriously undertaken (see *Winans* v. *The Attorney-General* (1)) — still the respondent resumed his domicil of origin by returning to Australia. If that is not so there is little value in the most solemn pronouncements of the law.

I am of opinion, then, on the question of domicil, so far as it may be material,

1. That respondent's domicil of origin was that of his mother, in Victoria, he being illegitimate.

2. That his conduct since his ability to choose a new domicil does not afford any evidence of such a choice.

3. That if the appellant had discharged the burthen of proof in the last mentioned respect, the domicil of origin must still have reverted on the respondent's return to Victoria, independently of any volition of the respondent.

There is, however, another light in which we may consider the question whether the respondent is an immigrant. Where is his home? Has he ever, since he became *sui juris*, made China his permanent home, and has he abandoned Australia, his first home, in order to make that change? All the evidence is the other way. Here the declarations as well as his conduct may be of more weight. There is nothing to show that he ever abandoned the intention, expressed during his father's life and adhered to after 1898, of returning to the country of his nativity as his proper home. It is enough if on the whole it can be seen that he had any other idea than that of living and dying in China; that he had in mind any contingency on which his residence in China would cease. Let me quote Lord *Chelmsford* again, from the report of *Moorhouse* v. *Lord* (2):—"The present intention of making a place a person's permanent home can exist only where he has *no other idea* than to continue there, without looking

(1) (1904) A.C., 287.

(2) 10 H.L.C., 272, at p. 285.

forward to any event, certain or uncertain, which might induce him to change his residence. If he has in his contemplation some event upon the happening of which his residence will cease, it is not correct to call this even a present intention of making it a permanent home. It is rather a present intention of making it a temporary home, though for a period indefinite and contingent. And even if such residence should continue for years, the same intention to terminate it being continually present to the mind, there is no moment of time at which it can be predicated that there has been the deliberate choice of a permanent home."

The facts as sworn and as found are precisely within that declaration of the law. He had not made China his home. Victoria was his old home. His return to it was the fulfilment of an oft-expressed desire and intention. Was his return a home-coming? I cannot refuse to say that it was. When he was taken away in 1882 he was a member of this community, and here lay his home. He did not make himself a fresh one in another community. He is entitled to this one. My opinion is that the sense attached to the word "immigration," to denote the legislative power conferred on the Commonwealth, was the ordinary sense. No one describes a man returning home to his own country as an immigrant. He is coming into a country which was a former habitat and which he has not abandoned. Immigration has various but kindred meanings. They all imply that the country which the immigrant seeks to enter is not his home, by any criterion, natural or artificial. He has not migrated thither. He has not come as a new settler. He has not sought admission as a foreigner. I think then that the act of the respondent was not an immigration, actual or attempted, as that word is used in the Constitution and must be read; that the words "immigrant" and "immigration" are used in no larger sense in the Federal Acts of 1901 and 1905, so that they are constitutional; and that whether measured by the Constitution or the Statute law, the one word does not include the respondent, nor the other his return here.

The appeal, in my opinion, fails.

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have been raised in this case; but whatever view may be taken of them we are bound, in my opinion, to uphold the magistrate's decision on the ground first taken in this Court, namely, that the offence of failing to pass the dictation test was not proved. The prosecution was under sec. 3 (*a*) of the *Immigration Restriction Act* 1901 as altered by the amending Act of 1905; the material words are as follows:—"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."

Two things are necessary to constitute the offence. The officer must dictate the words and the immigrant must fail to write them out when the officer dictates them. "Dictate" means something more than reading over. It involves the idea of reading with the object of having the words taken down by the immigrant as they are being read. It is now made a requirement of the sub-section that the officer should "dictate" the passage, and it is the failure of the immigrant to write it out on that dictation that constitutes the offence. A comparison of the sub-section as amended with the original sub-section is, as Mr. *Duffy* pointed out, significant in this connection. On this part of the case the material evidence is that of the Customs officer who, after informing the defendant of the nature of the test and the consequence of failure to pass it, said:—"I will read the passage slowly, and if you say you can write it I will read it out slowly again." He quotes the passage read in full and proceeds: "I then asked him if he could write it, and he said he could not. I then informed him that he was a prohibited immigrant and could not land." The passage was, it was true, read over, but not for the purpose of its being then written down. The immigrant was told, in effect, that he need not write down on the first reading, but that there was to be a second reading for the purpose of his writing down the passage as read. But the second reading, the reading for the purpose of dictation, never took place. No doubt the officer thought it was unnecessary to go on after the defendant had informed him that he could not write the passage, and therefore considered himself at liberty to dispense with what would have been a merely formal reading for the purpose of dictation.

But in that he took an erroneous view. Where a criminal offence is created by Statute each fact or circumstance constituting the offence must be strictly proved. The defendant's admission, by words or conduct, may be evidence against him of any fact or circumstance. But even the defendant cannot dispense with the observance by the officer of some preliminary which the Act makes a condition precedent to the arising of the offence. The present application might, therefore, be dismissed solely on the ground that the offence charged had not been proved.

But it is improbable that the dismissal of this application on that ground will finally dispose of the matter. And, having regard to the general importance of the questions so fully and so ably argued on both sides, I think it right to express my opinion on the case as originally submitted for our consideration.

The magistrate dismissed the information because in his view of the law and the facts the defendant was not an "immigrant" within the meaning of sec. 3 of the Act of 1901. The applicant has shaped his objections in several forms, but they may be all included in the one ground—that the magistrate, on the law and on the facts, ought to have come to the contrary conclusion. The matter in controversy therefore involves two questions. First, what is the proper interpretation of the word "immigrant" in sec. 3? Secondly, has the evidence established that the defendant was an "immigrant" within the meaning of the term as so interpreted. "Immigrate" is not a word with any acquired or technical meaning. It must therefore be taken to have been used in its ordinary signification unless it is apparent on an examination of the Act that the legislature has applied it in some different or modified sense. As to the meaning of the word, four dictionaries of high authority were referred to in the course of the argument: they are in substantial agreement, and their general purport may well be described in the words of Mr. Justice *Cussen* in the case of *Ah Sheung* v. *Lindberg* (1):—"In its ordinary meaning immigration implies leaving an old home in one country to settle in a new home in another country, with a more or less defined intention of staying there permanently, or for a considerable time." To describe as an "immigrant" a

(1) (1906) V.L.R., 323, at p. 332; 27 A.L.T., 189.

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person who is coming back to the country which is his home is a contradiction in terms.

"The word 'home,'" as *Dicey* points out, "is not a term of art, but a word of ordinary discourse, and is usually employed without technical precision." (*Conflict of Laws*, 1st ed., p. 80). But the existence of the tie which under the general description of home attaches a person to one country rather than to any other has always been recognized by international law. "The domicil of any person is, in general, the place or country which is in fact his permanent home, but is in some cases the place or country which, whether it be in fact his home or not, is determined to be his home by a rule of law." (*Ib.* page 79). Under the legal doctrines which regulate domicil in the latter sense, the law by a fiction may ascribe domicil to a person in a country in which he has never resided since infancy merely because he was born there. Domicil of that kind has no relation to the facts and circumstances which constitute home, and has no bearing on the interpretation of the Act now under consideration. But domicil in the former sense is a question of fact depending upon the same circumstances which must obtain in determining the country which is a person's home. In that sense of the word domicil and home are convertible terms, and some observations of Lord *Wensleydale* in *Whicker* v. *Hume* (1), in this connection are worthy of consideration. "There are several definitions of 'domicil,' which appear to me to pretty nearly approach correctness. One very good definition is this: Habitation in a place with the intention of remaining there for ever, unless some circumstance should occur to alter his intention; I also take the definition from the Code, which is epigrammatically stated, and which I think will be found perfectly correct." Lord *Wensleydale* read the passage from the Code, which was translated by my learned brother the Chief Justice in *Davies* v. *The State of Western Australia* (2) as follows:—"It is not in doubt that every man has his domicil in the place where he sets up his household shrine and his principal establishment, whence he has no intention of again departing, unless something should call him

(1) 7 H.L.C., 123, at p. 164.

(2) 2 C.L.R., 29, at p. 41.

away, so that when he goes thence he regards himself as a wanderer, whereas when he returns his wandering is ended."

In my opinion the legal doctrines of domicil have no relation to the question which country is a person's home in fact, but the principles, which the Courts thus follow in determining the country which is a person's actual home for purposes of domicil, may well be applied in considering the relation in which he stands to the land he is leaving and to the land he is entering for the purpose of determining whether he is or is not an immigrant. Having once established that a country is a man's home in the sense which I have explained, absence, no matter how prolonged, will render it none the less his home if there be always present to his mind the intention to return. A boy, for instance, Australian-born and residing with his parents in Australia, goes to England for purposes of education or the acquirement of business knowledge or a profession, and resides there for many years. He does not thereby change his home provided that he has always persevered in his intention to return to Australia. To describe his return as an "immigration" to Australia would obviously be a misuse of the word "immigrant" in its ordinary sense.

Accepting then Mr. Justice *Cussen's* definition of the meaning with which the word "immigrant" is ordinarily used, and bearing in mind these illustrations of the application of the word "home" which is part of the definition, I shall now inquire to what extent, if any, has that meaning been modified in the Act under consideration. Mr. *Bryant* on behalf of the appellant boldly contended that the legislature had used the word "immigrant" in a sense much wider than its ordinary meaning; that, in order to give full effect to the enactment, "immigrating" into Australia must be taken to mean "entering" Australia, and that every person entering Australia is *primâ facie* an immigrant. There is nothing in the Act to justify the interpretation of the word in a sense so different from its ordinary meaning. To do so would lead to the consequence that an Australian-born, whose actual permanent residence was in Australia, might be made subject to the dictation test on his return home after a month's stay in New Zealand. It is hardly necessary to say that an

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interpretation which would impute to the legislature an intention to bring about that result stands condemned on the face of it. So far from extending the operation of the Act beyond the ordinary meaning of the words which the legislature has used, it is always necessary, in cases such as this where a Statute affects civil rights, to keep in view the principle of construction stated in *Maxwell on Statutes*, 4th ed., p. 121:—"There are certain objects which the legislature is presumed not to intend; and a construction which would lead to any of them is therefore to be avoided." After dealing with other matters not material to the aspect of the rule now under consideration the learned author continues (at page 122):—"One of these presumptions is that the legislature does not intend to make any alteration in the law beyond what it explicitly declares (*per Trevor* J. in *Arthur* v. *Bokenham* (1): See also *Harbert's Case* (2)), either in express terms or by implication; or, in other words, beyond the immediate scope and object of the Statute. In all general matters beyond, the law remains undisturbed. It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness (3); and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used."

Mr. *Duffy* relied strongly on this principle, and urged that there was one right which it would not be assumed the legislature intended to take away except by express words or necessary implication. That is the right of every British subject born in Australia, and whose home is in Australia, to remain in, depart from, or re-enter Australia as and when he thought fit, unless there was in force in Australia a positive law to the contrary. The existence of that right is, to my mind, beyond serious controversy. It follows as a matter of reason from one of the fundamental principles of international law. Speaking generally, every person born within the British Dominions is a British sub-

(1) 11 Mod., 150.

(2) 3 Rep., 12*a*, at p. 13*b*.

(3) 2 Cranch., 390.

ject and owes allegiance to the British Empire and obedience to its laws. Correlatively he is entitled to the benefit and protection of those laws, and is entitled, among other things, to entry and residence in any part of the King's Dominions except in so far as that right has been modified or abolished by positive law. But the British Empire is subdivided into many communities, some of them endowed by Imperial Statute with wide powers of self government, including the power to make laws which, when duly passed and assented to by the Crown, will operate to exclude from their territories British subjects of other communities of the Empire. To this extent the British subject's right to enter freely into any part of the King's Dominions may be modified by Statute law. The right is founded on the obligations of national allegiance. International law recognizes for purposes of allegiance only sovereign nationalities—not sub-divisions of a nation —and in questions between the British Empire and other nations Australian nationality cannot be recognized. But in questions between the Australian community and its members it would seem to follow that the principle which regulates rights as between the British Empire and its subjects must be applied in determining the relations of the Australian community to its members. A person born in Australia, and by reason of that fact a British subject owing allegiance to the Empire, becomes by reason of the same fact a member of the Australian community under obligation to obey its laws, and correlatively entitled to all the rights and benefits which membership of the community involves, amongst which is a right to depart from and re-enter Australia as he pleases without let or hindrance unless some law of the Australian community has in that respect decreed the contrary. It cannot be denied that, subject to the Constitution, the Commonwealth may make such laws as it may deem necessary affecting the going and coming of members of the Australian community. But in the interpretation of those laws it must, I think, be assumed that the legislature did not intend to deprive any Australian-born member of the Australian community of the right after absence to re-enter Australia unless it has so enacted by express terms or necessary implication. In the Act under consideration the legislature has plainly enacted, and in doing

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so is within its constitutional powers, that all immigrants into Australia shall be subject to certain conditions and restrictions. If a person, once a member of the Australian community, seeks to re-enter Australia under circumstances which constitute him an immigrant, the law must be held to restrict his re-entry as it does that of any other immigrant. But in construing the Act the principle relied on by Mr. *Duffy* must be borne in mind, and the meaning of the word "immigrant" must not be extended beyond its ordinary signification if such interpretation would affect rights of Australian-born subjects to a greater extent than the scope and purpose of the Act require.

What is the scope and purpose of the Act? To prevent the entry into Australia of persons from other countries whom the legislature has determined ought not, for various reasons, to be permitted to become members of the Australian community. It has defined the class of persons to whom these prohibitory provisions are to be applied as "immigrants," and it has used that word in its ordinary sense, modified in one respect only which is necessary for effective administration. To constitute an "immigrant" within the meaning of the Act it is not necessary that the person seeking entry should have an intention of permanently settling in Australia. An intention to land is all that is required. With this modification, therefore, the word has been used in the Act with the meaning explained in Mr. Justice *Cussen's* definition already quoted. That being so, the foundation in law of the respondent's case is the unimpeachable proposition that a person cannot be an immigrant into the country which is his home. Whether at the time of his landing Australia was the respondent's home is a question of fact on which this case will turn. In arriving at a conclusion on that question the fact of his birth in Australia has no conclusive effect as it would seem in cases of domicil. It is *primâ facie* evidence that his home in infancy was in Australia; it is nothing more; and it may be shown that the home of infancy has been abandoned and exchanged for a home in China. I now come to the facts.

In one respect I differ from the magistrate's finding. He seems to regard the legitimacy of the respondent as established by what amounted to an inference of law. In that he erred. The question

was entirely one of fact, and, in my opinion, the proper inference to be drawn from the whole of the facts was that the respondent was illegitimate, born in Australia, and of a mother who was a British subject. He lived with her in Australia until he was five years of age. Up to that point his home was clearly in Australia, and it is upon the applicant to show that the proper inference to be drawn from the evidence is that he abandoned his Australian home and made a new home in China. The defendant's version of the facts, if believed by the magistrate, was sufficient to justify the inference that the respondent, under the circumstances, never gave up his home in Australia, and never made a permanent home in China. Whether that version was true or not true depends largely upon the credibility of the witnesses. The magistrate had the advantage, of great importance in a case where so much evidence had to be interpreted, of seeing and hearing the witnesses giving their testimony. He believed the respondent's version and found accordingly. I see no reason to differ from his finding, and I therefore agree in the conclusion on the facts that the respondent never did establish his permanent home in China, and that in returning to Australia he was coming back to the home which he had never abandoned. Taking that view of the facts, it follows that in my opinion the respondent was not an "immigrant" within the meaning of the *Immigration Restriction Act*, that the section under which he was convicted had no application to him, and that the application to review must be dismissed.

ISAACS J. The question does not arise whether the Constitution contains some power independently of sec. 51 (xxvii.) to exclude from re-entry into the Commonwealth persons ordinarily resident in Australia, but who, by leaving its territory however temporarily and for any purpose, have in fact withdrawn themselves personally from its jurisdiction and protection.

The *Immigration Restriction Acts* 1901-1905 are clearly not more extensive in their terms than the power in respect of "emigration and immigration."

The first and most important matter for determination is therefore the extent of that specific power. "Immigrate" is a

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word of varying import. Among its accepted significations it includes, according to the Standard Dictionary, "to come into a country from a former habitat especially a native land," and according to the Oxford Dictionary, "to pass into a new habitat or place of residence."

All the powers in sec. 51 are granted to the Parliament "for the peace, order and good government of the Commonwealth," that is, of the people of the Commonwealth; and immigration connotes two facts; the first, that there is an entry into Commonwealth territory, and the second, that the person entering is not in fact at the moment he enters one of the people of the Commonwealth.

The ultimate fact to be reached as a test whether a given person is an immigrant or not is whether he is or is not at that time a constituent part of the community known as the Australian people.

Nationality and domicil are not the tests; they are evidentiary facts of more or less weight in the circumstances, but they are not the ultimate or decisive considerations.

The fact that a person was born in Australia, constitutes him a British subject, but as allegiance is only the tie which binds him to the King, (see *In re Stepney Election Petition*; *Isaacson* v. *Durant* (1),) birth in Australia creates precisely the same tie of allegiance and confers the same common law right of entry to all parts of the King's Dominions, no more and no less, as birth in any other part of the Empire. If a travelling foreigner had one son born to him in Hong Kong, another in India, and a third in Australia, and he ultimately settled down with all of them in Russia, there is no legal difference in the British nationality of his children, and no claim to exemption from the Commonwealth power of legislation in respect of immigration could arise by reason of the mere fact of birth on Australian soil.

Domicil may be actual domicil, in which case, though itself immaterial as a test, the circumstances which constitute it may also prove the only important and ultimate fact, namely, that the person claiming entry has still his real home in Australia, and is therefore one of its people. He may have been absent for a

(1) 17 Q.B.D., 54.

month or ten years—that is inconclusive. A month's absence in some circumstances may be enough to demonstrate the entire severance of his relations with Australia as his home; ten years may be overcome by other circumstances.

Domicil may, on the other hand, be merely technical. Of this *Ah Yin* v. *Christie* (1), was a plain instance, because the appellant had never been in Australia. But it is equally theoretical when a person, who leaves his domicil of choice, is deemed for certain purposes (*Udny* v. *Udny* (2)), to have renewed or revived his domicil of origin before his return is accomplished.

If immediately before quitting his foreign home of choice an individual is not a member of the Australian community, I cannot conceive it possible he becomes so by mere force of leaving his residence abroad, and before he sets foot again in Australia.

A man, though owing national allegiance to a foreign Sovereign, or though for certain purposes the law would attribute to him a technical domicil abroad by reason of some eventual intention to return to his native land, may still be a member of the Australian community, if in fact he makes a home and dwells among the people of this country. But as neither foreign nationality nor technical foreign domicil would in itself constitute him an immigrant, so on the other hand the mere circumstance of British nationality springing from nativity in any part of the Empire cannot, nor can a purely ideal Australian domicil, suffice to admit him, by outweighing distinct proof that he had discontinued his practical identification with the inhabitants of the Commonwealth.

There is not, in my opinion, any proper test but this practical one, viz., whether the whole of the facts show that at the moment of entry the person desiring to be admitted is fairly to be considered as one of the people of the Commonwealth, and whether, notwithstanding any personal absence from Australia, he can justly and in substance claim to regard this country as a place of habitation or general residence which he had never abandoned.

The next question is how far the field of power is covered by the Statute. It is contended that on a proper construction of the Act it does not apply to natives of Australia at all, nor to a

(1) 4 C.L.R., 1428. (2) L.R. 1 H.L. Sc., 441.

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person whatever his nationality, who *de facto* or *de jure* establishes a local domicil.

No argument has been advanced to support the view that a person born in Australia is impliedly outside the operation of the Act, except the recognized rule that Statutes will not in the absence of clear words be construed in prejudice of existing rights. But it is difficult to see what application that rule has to the present case. The words of the Statute taken literally are the broadest and most comprehensive that could be used in the exercise of the specific power relating to immigration and emigration. Sec. 3 of the Act of 1901 in its amended form provides that :—"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 fails to pass the dictation test," &c.

Parliament has therefore said that the expression "any person who fails to pass the dictation test" is one description of a prohibited immigrant. The Court has no authority to vary or qualify that description. The person must, of course, in order to come within the express words of the section, be an immigrant as above defined, but that one fact established, he is forbidden to immigrate into the Commonwealth if he answers to the statutory description. The Act does not say "any alien person," or "any person not born in Australia," but "any person." It is not, and cannot be, disputed that the right unrestricted at common law of all British subjects wherever born outside Australia to enter the Commonwealth is made subject to the provisions of the Act. Where their physical or moral conditions would constitute them a public peril they are excluded, no allowance being made for their common nationality ; and I can see no indication that Parliament intended to relax its care for the general safety, where the sole difference consisted in the fact that natural allegiance originated in Australian territory. Similar considerations apply to the case of a person whose claim to an Australian domicil rests only upon a theoretical reversion of his domicil of origin. That theory has no more application to such a case as this than under the recognized rules of domicil for belligerent purposes it would have to make a person necessarily responsible for domicil in an

enemy's country in time of war. The right to enter the Commonwealth and mingle with its inhabitants is of an entirely different character from the right to invoke, or the liability to submit to, local jurisprudence or authority in relation to such subjects as marriage, testacy and succession.

It was sought to introduce by implication into the prohibition part of sec. 3 a limitation in favour of persons domiciled in Australia at the time of arrival, because of the original inclusion in the exception (*n*) exempting persons formerly domiciled in the Commonwealth or a Colony. But that has been repealed, and though the repeal would not alter the meaning of the main portion of the clause, it may be regarded as evidencing the view of Parliament, either that "domiciled" meant actually domiciled in the sense of being in fact a member of the community, which it probably did, or else that it was considered an anomalous provision and was accordingly excised, leaving to the original clauses their full primary natural operation, without that particular exemption.

I am therefore of opinion, if the facts show that the respondent on arrival in Australia was not in truth and fact a portion of the people of the Commonwealth, as an ordinary reasonable person would understand the matter, he was an immigrant, and if he failed in the dictation test he was a prohibited immigrant.

The respondent arrived from abroad, and as his right to enter the Commonwealth is challenged by the Executive Government, the burden rests upon him of justifying his insistence upon entering.

The first fact that he relies on is that he was born in Australia. As regards nationality it is as if he were a native of Hong Kong or had first seen the light on some passing foreign vessel temporarily anchored in Hobson's Bay. Then he claims that according to strict law as laid down in *Udny* v. *Udny* (1), he has at any rate an Australian domicil because, even if he ever lost it, it has reverted. But strict law equally conferred an Australian domicil on the appellant in *Ah Yin* v. *Christie* (2), whose father was actually domiciled and resident here, and who therefore as an infant followed his father's domicil and desired to share his home.

(1) L.R. 1 H.L. Sc., 441. (2) 4 C.L.R., 1428.

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Acceptance of the respondent on the mere ground of attributive domicil would be inconsistent with denial to Ah Yin.

Putting aside then nationality and theoretical domicil, how do the facts support the respondent's claim to be regarded as a unit of the great mass of the inhabitants of Australia?

He was born in Victoria in 1876 of unmarried parents, his mother being of European race. His father Teung Ming apparently never abandoned his Chinese domicil, returning there in 1882 with the respondent then a boy of a little over 5. The mother accompanied them to the boat and then parted with them for ever, all communication henceforth ceasing as it seems between her and them.

It is clear that Teung Ming never intended personally to return to Australia, but went back to his native village, to spend the rest of his life. He died there about the year 1894 or 1896. The Police Magistrate has found that the father always, and after 1894 or 1896 the son, both intended that the son should return to Australia at some future time. Possibly so, but how does that affect the matter? From 1882 until 1908, a period of 26 years, where was the respondent's home? A very brief statement will exhibit the position clearly. In 1882 the respondent arrived in China, lived with his father in the village, bore the Chinese name of Ying Coon, and received a purely Chinese education, and it is an irresistible inference from the whole of the circumstances appearing that he intended to remain with his father certainly as long as they both lived.

In 1896 at latest his father died, the boy being then about 19 or 20. He continued at school till he was 22; that is about 1898. In 1899 he went up for examination for his Chinese degree, equivalent to B.A., and failed. He waited another three years, continued his studies, and went up again and failed. He waited still another three years, and presented himself once more, and failed again. By this time the year 1906 had come, and he became disheartened. He gave up his examinations and then determined to come to Australia. He wrote to Ching Sing, to whom his father had given a share of the Indigo business, and asked for money to come to Australia. He says he had long intended to return. Perhaps he did intend to return in some

indefinite future. But the important point is, what did he do in the meantime? Many an early emigrant from the British Isles came to Australia to settle and form a home, with a latent intention some day in the remote future to return to his native spot. But he nevertheless broke with his own home in the interval, and became an Australian. When he returned, if ever he did, he simply renewed his British home. And if Ying Coon after his father's death ever intended to revisit Australia, it was not an intention to *retain* Australia as his home. He remained constant to his early associations, recollecting, as he says, nothing of Australia; although his father was dead, he continued his Chinese residence and education, not learning a word of English, not preparing himself in the smallest degree for life in the country, he now would have us believe, he unceasingly treasured in his heart for 26 years as his real and unabandoned home.

The case shows that during this extended period a considerable amount of correspondence passed between him and various persons which would, if produced, have materially assisted to show his real situation in China. Not a line has been put in evidence.

The story he tells, that he went through an elaborate course of Chinese instruction for several years, that he persevered with the Chinese B.A. examination for ten years more, all with the idea of better teaching Chinese to Australian boys of Chinese origin, is too difficult for me to accept. All the probabilities show, to my mind, that his father destined him for a Chinese career if possible, that had his father lived he would have still remained in China; when his father died he continued his examination course triennium after triennium, and at last, deterred by ill success, resolved to come to Australia, and his uncles Ah Dow and Ah Yuey, merchants here, brought him out, as he informed the officer.

I entertain not the least doubt his return to Australia was to *renew* his inhabitancy of this country, and that there was no unbroken intention to *retain* Australia as his home.

There is some evidence that at various and spasmodic intervals he verbally mentioned his intention to return to Australia. But, if that meant anything more than an indefinite mental purpose

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to renew his connection with this country, his actions down to 1908 tell much more powerfully in the opposite direction. His conduct is, to my mind, inconsistent with his words. Even treating the respondent's absence isolated from all else as equivocal, the nature of his life in the interior of China, added to that absence, raises a strong presumption against him.

In *Chapman* v. *Morton* (1) Lord *Abinger* C.B., speaking of a certain act of the defendant, said :—" The utmost that could be said was, that it was an equivocal act, and we must therefore look to the whole of his conduct for an explanation of it. We must judge of men's intentions by their acts, and not by expressions in letters, which are contrary to their acts."

And in such a case as the present, the words of *Martin* B. in *Caine* v. *Coulton* (2) are much to the point :—" It is a rule of common law, as well as of common sense, to look at what is done, not at what is said."

The length of time considered with the other circumstances adverted to appear to me to render his continued Australian character a moral impossibility.

Lord *Macnaghten* says in *Winans* v. *Attorney-General* (3):—" Length of time is of course a very important element in questions of domicil. An unconscious change may come over a man's mind. If the man goes about and mixes in society that is not an improbable result." In that particular case, however, he said (4) :—" When he came to this country he was a sojourner and a stranger, and he was, I think, a sojourner and a stranger in it when he died." But was the respondent in this case a sojourner and a stranger in China for 26 years ?

The importance of time in this relation is forcibly expressed by Lord *Stowell* in *The Hormony* (5). His Lordship said:—"Of the few principles that can be laid down generally, I may venture to hold, that time is the grand ingredient in constituting domicil. I think that hardly enough is attributed to its effects; in most cases it is unavoidably conclusive; it is not unfrequently said, that if a person comes only for a special purpose, *that* shall not

(1) 11 M. & W., 534, at p. 539.
(2) 1 H. & C., 764, at p. 768.
(3) (1904) A.C., 287, at p. 297.
(4) (1904) A.C., 287, at p. 298.
(5) 2 Rob. A., 322, at p. 324.

fix a domicil. This is not to be taken in an unqualified latitude, and without some respect had to the time which such a purpose may or shall occupy; for if the purpose be of a nature that *may, probably*, or *does actually* detain the person for a great length of time, I cannot but think that a general residence might grow upon the special purpose. A special purpose may lead a man to a country, where it shall detain him the whole of his life. A man comes here to follow a law suit; it may happen, and indeed is often used as a ground of vulgar and unfounded reproach, (unfounded as matter of just reproach though the fact may be true), on the laws of this country, that it may last as long as himself: Some suits are famous in our juridical history for having even outlived generations of suitors. I cannot but think that against such a long residence, the plea of an original special purpose could not be averred; it must be inferred in such a case, that other purposes forced themselves upon him and mixed themselves with his original design, and impressed upon him the character of the country where he resided."

This is particularly so when the person who is the subject of the inquiry is peculiarly susceptible to the impression of the locality in which he dwells and its surroundings. There may, of course, be other counterbalancing circumstances, but they must in such a case be very weighty to oust the presumption arising from the lapse of so considerable a period of time, and the presence of such favouring environment.

The European descent of his mother was but a slight circumstance in the eyes of the respondent. He never even took her name on returning, but gave his English name as James Francis Kitchen. The name by which he went in China, as already mentioned, was Ying Coon. He was in language, education, ideas, and probably religious faith, entirely at one with the people around him; every day found him closer to them, and farther from the people of Australia, and although in point of law no difference exists for this purpose between a native of China, or France, or America, the practical differences are enormous, and the weight of the circumstance that the propositus lived his life in one or other of these countries is vastly different. This consideration has received judicial recognition in *In re*

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Tootal's Trusts (1), and the reasoning was approved by the Privy Council in *Abd-ul-Messih* v. *Farra* (2). *Chitty* J., speaking of a suggested domicil of choice by an Englishman in China, said (3):—"The difference between the religion, laws, manners, and customs of the Chinese and of Englishmen is so great as to raise every presumption as against such a domicil, and brings the case within the principles laid down by Lord *Stowell* in his celebrated judgment in *The Indian Chief* (4) and by Dr. *Lushington* in *Maltass* v. *Maltass* (5)." Dr. *Lushington* in the last-mentioned case said (6):—"I give no opinion, therefore, whether a British subject can or cannot acquire a Turkish domicil; but this I must say,—I think every presumption is against the intention of British Christian subjects voluntarily becoming domiciled in the dominions of the Porte. As to British subjects, originally Mussulmen, as in the East Indies, or becoming Mussulmen, the same reasoning does not apply to them as Lord *Stowell* has said does apply in cases of a total and entire difference of religion, customs, and habits."

These cases, and particularly the concluding words of the passage quoted from Lord *Stowell's* judgment, seem to me to have close application to the present case, and to show the necessity of extremely strong facts to overcome the presumption created by the combination of the conditions tending to the practical absorption of the respondent in the mass of the Chinese people. Lord *Lindley* in *Winans* v. *Attorney-General* observed (7):—"Intention may be inferred from conduct, and there are cases in which domicil has been changed, notwithstanding a clear statement that no change of domicil was intended: see *Re Steer* (8), and *per Wickens* V.-C. in 12 Eq., 644. An expressed intention to return for a temporary purpose, or in some possible event which never happens, will not prevail over a clear inference from other circumstances of an intention to remain: see *Attorney-General* v. *Pottinger* (9), *per Bramwell* B., and *Doucet* v. *Geoghegan* (10).

Asking myself then the plain and practical question whether

(1) 23 Ch. D., 532.
(2) 13 App. Cas., 431.
(3) 23 Ch. D., 532, at p. 534.
(4) 3 Rob. A., 29.
(5) 1 Rob. E., 67.
(6) 1 Rob. E., 67, at p. 80.
(7) (1904) A.C., 287, at p. 299.
(8) 3 H. & N., 599.
(9) 6 H. & N., 747.
(10) 9 Ch. D., 441.

the respondent during the whole 26 years of his absence from this country, and especially during the 12 years that elapsed since attaining his majority, *retained* Australia as his permanent home, or became identified with the people of China and the locality in which he lived so long, I feel constrained to answer in favour of the latter alternative. I therefore think he was an immigrant. I have examined the facts for myself as in my opinion I am bound to do. The House of Lords did so in *Winans* v. *Attorney-General* (1), and by a majority of two to one—and one of the majority proceeding on the ground of his inability to form any definite conclusion,—their Lordships reversed the united findings of fact by the primary Court and the Court of Appeal. In this case little hesitation need be felt in the performance of this duty, because the demeanour of the respondent and other witnesses must have formed a very insignificant feature in determining the facts, as in the course of a double translation of question and answer it is next to impossible to ground any trustworthy opinion on the tone of a witness, or his methods of expression or manner of giving his evidence.

But, though I feel no doubt he was an immigrant, there remains this further question, was he a prohibited immigrant; in other words, was the test properly applied?

In my opinion it was not. Dictating a passage means reading for the purpose of having the passage written. All the officer did was preparatory to dictation. He read the passage once, for the declared purpose of the respondent listening to it, and judging if he could write it. But he never read the passage for the purpose of the respondent actually writing it. There was therefore no dictation within the meaning of the Act, and consequently no dictation test, and the prosecution should fail, on this ground, but, in my opinion, on this ground only.

HIGGINS J. I concur in the view that this appeal ought to be dismissed; but on the sole ground that the dictation test was not applied.

At the opening of the appeal the respondent's counsel intimated an objection which was not taken before the Police Magistrate—

(1) (1904) A.C., 287.

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that, even if the respondent was an immigrant, he is not prohibited, because the dictation test was not applied. I am bound to say that, in my opinion, this objection is clearly valid, and fatal to the prosecution. The officer, in place of dictating the words for the respondent to write them down as he dictated, told the respondent that he need not write them down, but listen to them; and then, if respondent said he could write them, the officer would read them slowly again. The respondent said (through an interpreter) that he could not write the words; and so they were not dictated. The procedure adopted by the officer may have been highly reasonable in itself; but it is not the procedure which, under sec. 3 (*a*) of the Act, makes an immigrant "prohibited" or liable to a penalty or imprisonment. There is no ambiguity about the word "dictate" in this context. It means to utter words for another to take down in writing from that utterance, as in dictation at school, and as in the phrase of Seneca—*dictare epistolam*; and there has been no such dictation. On the contrary, the respondent was told that he need not write down the words as uttered; and the officer thus failed to apply the test.

This would be sufficient to dispose of this particular prosecution. But the other question, as to the respondent being an immigrant at all, has been argued at great length; and as it is possible that the dictation test may yet be properly applied, my learned colleagues think it well that we should express our opinions on the meaning of "immigrant." There is no definition in the Act; and, *primâ facie*, Parliament intended to use the word "immigration" in its ordinary sense, in saying:—"The immigration into the Commonwealth of the persons described . . . is prohibited" (sec. 3). According to the *Standard Dictionary* "immigration" is the entrance of settlers from a foreign country; and "immigrate" means to come into a country or region from a former habitat. So that, if the respondent had in fact his habitat in China before he came to Australia, that is enough to make his entry into Australia immigration—at all events where (as in this case) he came to reside here. Looked at in this light the question is merely one of fact—was the respondent's residence or habitat in China before he left China to

come to Australia? What constitutes a man's residence may sometimes be difficult to determine; all the circumstances have to be considered; and from the nature of the case no rigid rule can be laid down.

The question of residence (as distinguished from domicil) has often been discussed under the English Poor Laws. An intention to return to, to resume, residence at one's original or previous place of abode does not exclude the idea of residence elsewhere in the meantime. Intention to *resume* residence is not a retaining of residence. In *Churchwardens &c. of Wellington* v. *Churchwardens &c. of Whitchurch* (1) a miner, resident with his family at Whitchurch, contracted to work in Cuba for three years. He meant to return, and arranged that his wife should be paid a certain proportion of his wages. He came back before the three years to the same home; and the question arose whether there had been such a break of his residence in Whitchurch as to render him removable from that parish. It was held that he had "resided" in Cuba, and that his absence amounted to a break of his residence at Whitchurch. *Blackburn* J. adopted the words used in *R.* v. *Stapleton* (2), that "an intention to return at a remote period, after a permanent absence, is not sufficient to prevent the absence from being a break" of residence. So, in *West Ham Union* v. *Cardiff Union* (3) a seaman was held to be not resident at the abode which his wife took, although he joined her after his voyage. It may be that if one has a definite home in Australia, say, with parents or relations, and leaves it for a definite purpose, say, to study at a European University, he cannot be treated as an immigrant (*In re Buchsbaum* (4)); or it may be that the legislature contemplated that in the administration of the Act no Government would think of applying the dictation test in such a case. But there surely can be no difficulty here. A child, illegitimate, born in Victoria of a Chinese and a British girl, is taken away, about 1882, at five years of age, by his father to the father's village in China, for an indefinite time, for indefinite purposes, except that the father naturally desired the child's society. The mother sees them off

(1) 32 L.J.M.C., 189.
(2) 1 El. & B., 766.
(3) (1895) 1 Q.B., 766.
(4) 141 Fed. Rep., 221.

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at the wharf, and is heard of no more. There is no evidence that she had any home after her child was taken. The father and son live together; and the father earns his living by teaching. The father dies about 1894. The son stays on in his father's house, preparing for Chinese University examinations; and having failed three times, he comes out to Australia, where his father had some interest in a business. The father does not take the trouble of teaching the boy, or of having him taught any English; and the respondent now can speak Chinese only, and did not know that his name was Minahan. The magistrate, however, has found —and I accept his finding as there was some evidence to support it (though I probably should have found the other way) that neither father nor son intended to "permanently change the domicil from Victoria to China." But this refers to the legal, technical, artificial, domicil—that domicil which, for purposes of succession to moveables, marriage, &c., is so useful as a legal fiction in international law. This fictional domicil is not the criterion for the purpose of determining who is an immigrant: *Ah Yin* v. *Christie* (1). Nor is nationality the criterion. This man is a British subject, for he was born in British territory; but British subjects may be prohibited immigrants (*Attorney-General for the Commonwealth* v. *Ah Sheung* (2)). The test is, where was the son's actual habitat, where was the son's actual home, during the 25 years? If the respondent went to sea, and were wrecked at Samoa or on the Barrier Reef in 1893 or in 1900, and if the ship's captain were compelled by law to restore each seaman to his home or habitat, it is obvious that he would not satisfy the law by sending the respondent to Victoria.

If then we take up the modest rôle of interpreting the Act as it stands, giving to the words their ordinary meaning, their sense in common parlance, there can be no doubt that the respondent is an immigrant within sec. 3, for he has changed his residence in China for a residence in Australia. But we have been invited by counsel for the respondent to consider certain novel theories based on the mere fact that respondent was born on Australian soil. It is urged that there is an Australian species of British nationality; that a man born in Australia is an

(1) 4 C.L.R., 1,428. (2) 4 C.L.R., 949.

"appendage to the soil"; that when a man goes back to the land of his birth he is not "immigrating," &c. I cannot find any foundation for these contentions. Throughout the British Empire there is one King, one allegiance, one citizenship. I use this last word, not in the Roman or in the American sense, but only because there is no suitable abstract noun corresponding to the word "subject" (natural-born or naturalized). Even when England and Scotland were distinct kingdoms under one King, from 1603 to 1707, there was no distinction recognized between English and Scottish citizenship. There was not one local allegiance for the subjects of England, and another local allegiance for the subjects of Scotland. All the King's subjects are members of one great society, bound by the one tie of allegiance to the one Sovereign, even as children hanging on to the ropes of a New Zealand swing. The top of the pole is the point of union: *Calvin's Case* (1). The fact of birth on British soil made the respondent a British subject, owing allegiance and entitled to protection; but that is all. I know of no principle of British law to the effect that a man has some peculiar right to resort to one particular part of the Empire as distinguished from other parts. He is free to move at will throughout the Empire, unless some law forbid him; and this right he has by virtue of his natural liberty: *libertas naturalis est facultas ejus quod cuique facere libet nisi quod jure prohibetur* (*Bracton*). It is a fundamental characteristic of British law that British subjects are free to act except so far as they are forbidden; they are not forbidden to act except so far as they are allowed. If the argument of the respondent's counsel were urged against the exclusion of any British subjects from Australia, I could understand it. It might be urged that Parliament cannot be supposed to have meant to interfere with the right of all British subjects to go and come within the Empire. But the Court has already decided that the Act does apply so as to exclude even British subjects: *Attorney-General for the Commonwealth* v. *Ah Sheung* (2); and sec. 8 of the Act shows that when Parliament does not mean to affect British subjects it says so expressly. If the respondent's theory is to be deduced from the nature of

(1) 2 St. Tr., 559.

(2) 4 C.L.R., 949.

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human society, there would be equally strong ground for deducing also a right to subsistence, and a right to share in the land of the country; but such rights are unknown to British law. Indeed, if such a right as alleged did exist, it might mean merely a right to enter the country and walk along its roads. The returned wanderer would be treated as a trespasser if he walked on the private lands, and could be compelled to "move on" if he lay down to rest on the highways. In England, nearly every person has a permanent indestructible right to take the benefit of the Poor Laws in a particular parish or place; but this right is conferred by Act of Parliament, is not a common law right or universal: *per Bayley* J. in *Rex* v. *Inhabitants of St. Nicholas* (1). Why should the application of the respondent's theory stop at the shores of Australia? Why should there not be a peculiar right to enter one's county, one's village, one's first nursery? The only semblance of support that the respondent's counsel can show is that derived from certain American cases which they cited. But these cases are based on the special nature of the United States Constitution. Long before the 14th amendment it was settled law that Congress could not exclude American citizens. All white persons, at least, born on American soil were American citizens; and the 14th amendment extended the privilege even to negroes. The Chinese Exclusion Acts did not —and could not constitutionally—apply to persons born on American soil: *United States* v. *Wong Kim Ark* (2); *In re Look Tin Sing* (3); *In re Yung Sing Hin* (4).

But we come back, finally, to the question, where was the respondent's residence, his home, in the ordinary sense, during his 25 years in the Chinese village, in his putative father's house? Unless we introduce into the Act, as by necessary implication, an exception in favour of those who happen to have been born in Australia, the respondent is an immigrant; for he has been changing his residence in China for a residence in Australia. I have on other occasions deprecated the substitution of conjecture for construction, and the introduction of qualifications and exceptions which the legislature has not expressed or necessarily

(1) 2 B. & C., 889, at p. 891.
(2) 169 U.S., 649.
(3) 21 Fed. Rep., 905.
(4) 36 Fed. Rep., 437.

implied. Now, there is not one hint, from first to last, in this Act, that Parliament, in providing against undesirable immigration, meant to make any distinction between those born and those not born in Australia. The object of Parliament was simple and intelligible, and irrespective of considerations of birth. It was to keep persons from making their home in Australia who suffer from loathsome diseases, who are economically helpless, who are unfitted to blend with our civilization, &c., just as the object of quarantine laws is to keep persons from mixing with the people if they have or may have some infectious disease or the germs thereof. Why should Parliament allow a leper in who comes from a 50 years' residence in China for the mere reason that he first drew his breath on Thursday Island? If this respondent is not an immigrant, then if A is a Malay half-caste, born near a pearl fishing station in Western Australia, goes at six months old to Saigon, lives there to the age of 50, developes leprosy, he cannot be kept out. If the respondent is not an immigrant, then if B is born of Japanese parents in Sydney Harbour during a stay of a vessel there, goes forthwith to Singapore, becomes at maturity a prostitute, she cannot be kept out. If this respondent is not an immigrant, then if C is born of British parents in Australia, goes to South Africa and settles there for 20 years, and afterwards wants to come back, he cannot be aided out of funds appropriated for the encouragement of immigration. If the respondent is right, the people who went to Paraguay, to what was called "New Australia," could not have been helped to come back as immigrants. If the respondent is right, then if D. is born in Canada, goes forthwith to the United States, lives there till 35, then goes to Victoria, lives there for 10 years, then goes to settle on land which he takes up in West Canada, Australia cannot treat him as an emigrant, or Canada as an immigrant. If the respondent is right, then if he were penniless, and likely to become a charge on the State, he could not be kept out of Australia, even if sent here by Chinese officials. For my part, I can see no more reason for implying an exception in favour of persons who happen to have been born in Australia from the provisions of Acts as to immigration than for implying an exception

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in favour of such persons from the provisions of Acts as to quarantine.

I concur in the view that the Police Magistrate ought to have found that the respondent is not legitimate. I rely on the birth certificate, the difference of race of the parents, and all the circumstances. But I should not like to be taken as saying that the presumption of marriage which arises from living together has no application to the case of a Chinese and a white woman. I merely say that in such a case very slight evidence is sufficient to rebut the presumption.

Appeal dismissed with costs.

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

Solicitors, for the respondent, *Croft & Rhoden.*

B. L.

Dist *Stamp Duties, Chief Commissioner of* v *Buckle* (1998) 37 ATR 393

Dist *Stamp Duties, Chief Commissioner of* v *Buckle* (1998) 72 ALJR 243

Disap *Stamp Duties, Commissioner of (Qld)* v *Hopkins* (1945) 71 CLR 351

Dist *Wedge* v *Acting Comptroller of Stamps (Vic)* (1941) 64 CLR 75

Dist *CSD (NSW)* v *Buckle* (1998) 192 CLR 226

Dist *Lam & Kym Pty Ltd* v *Comr of State Revenue* (2003) 52 ATR 742

[HIGH COURT OF AUSTRALIA.]

DAVIDSON (COLLECTOR OF IMPOSTS) . . . APPELLANT;

AND

CHIRNSIDE . . . . . RESPONDENT.

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ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

MELBOURNE, *Sept.* 25, 28, 29, 30; *Oct.* 1, 9.

Stamp duty—"Deed of settlement"—Settlement in pursuance of power in will—Appointment of new trustee—New beneficial interest—Exemption—Special appointment—Stamps Act 1892 (*Vict.*), (*No.* 1274), *secs.* 27, 28, *Schedule, Division VIII.*

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

The question whether an instrument is or is not taxable under the *Stamps Act* 1892 (Vict.) must be determined by an examination of the instrument itself and not upon extrinsic evidence.