H. C. OF A. 1913.

TOOTH v. KITTO.

Isaacs J.

an alleged error in fact on the part of the Judge, into which any one might fall, it is a very difficult thing, indeed, to take exception to it after the jury have given their verdict. There is also another consideration. The sum in question, £93 1s. 2d., was a sum in dispute as to which the onus of proving the right lay upon the defendant, as part of his affirmative case upon his set-off. When found, it would be deductible from the damages on the plaintiff's case, but up to the moment of finding it the onus lay on the defendant to establish it. Looking carefully at the evidence, I do not see any statement there which could be regarded as evidence fit to be submitted to a jury to overcome the ordinary presumption of law that work done by one person for another at the request of that other is to be paid for. Therefore, if it came to that particular point, I should still be in favour of the plaintiff. There are the other considerations I have mentioned, and, looking at the case on the whole, I agree that the appeal should be allowed.

GAVAN DUFFY J. I also think that the appeal should be allowed.

POWERS J. concurred.

RICH J. I agree that the construction placed upon the contract by *Street* J. is the correct construction.

It is a canon of construction that where a phrase recurs in any instrument the same meaning should be given to it unless the contrary intention appears. It is clear from the context that where the phrase "harvesting season" first occurs in the agreement in question, it means harvesting season on the farm the subject of the agreement. There is nothing in the agreement to show that any different meaning should be given to the expression where it appears at the end of the agreement. It is significant that this meaning was given to the contract by the letter of the respondent's agent dated 31st January 1912.

With regard to the item of £93 1s. 2d. for fallowing, for which the respondent gave the appellant credit in the statement of account dated 27th May 1912, I also agree that the onus of

proving that this sum should be allowed him rested on the respondent, and he has not discharged that onus. H. C. OF A. 1913. TOOTH v. KITTO.

Appeal allowed. Order appealed from discharged with costs. Respondent to pay costs of appeal.

Solicitor, for the appellant, *P. F. Meagher*, Temora, by *T. J. Purcell.*

Solicitor, for the respondent, *M. T. Farrell*, Temora, by *F. R. Cowper.*

B. L.

[HIGH COURT OF AUSTRALIA.]

BAIN . . . . . APPELLANT;
INFORMANT,

AND

AH KEE . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM A COURT OF PETTY SESSIONS OF TASMANIA.

Prohibited immigrant—Evidence—Prior conviction for being a prohibited immigrant—Immigration Restriction Act 1901-1912 (*No.* 17 *of* 1901—*No.* 38 *of* 1912), *secs.* 3, 4, 5, 7. H. C. OF A. 1914. HOBART, *Feb.* 16. Griffith C.J., Barton and Gavan Duffy JJ.

The fact that a person has been convicted under the *Immigration Restriction Act* 1901-1912 of being a prohibited immigrant is not, on a subsequent prosecution of the same person for being a prohibited immigrant found on a subsequent occasion within the Commonwealth, evidence that he is then a prohibited immigrant.

APPEAL from a Police Magistrate.

H. C. OF A. 1914.

BAIN v. AH KEE.

At the Court of Petty Sessions at Launceston, before E. L. Hall, Esq., Police Magistrate, on 28th November 1913, an information was heard by which William John Bain charged that Ah Kee, otherwise Ah Yip, was a prohibited immigrant within the meaning of the *Immigration Restriction Act* 1901-1912 and, being such, was on 23rd November 1913 found within the Commonwealth, namely, at Hobart, in evasion of that Act.

The magistrate having dismissed the information, on the application of the informant he stated a case for the opinion of the High Court by way of appeal. The following is the material portion of the special case :—

"Upon the hearing of the said information it was proved on the part of the appellant and found as a fact that the respondent was found at Hobart in the State of Tasmania on 23rd November 1913, and was arrested and charged as aforesaid; that one Chung Ah Chow, with whom the defendant was alleged by the appellant to be identical, had landed at Launceston in Tasmania in the year 1909, and had been convicted of being a prohibited immigrant and sentenced to six months' imprisonment on 9th July 1909; that the said Chung Ah Chow had been liberated on entering into a bond to leave the Commonwealth within one month, and in pursuance of such bond had been placed on board a steamer at Launceston aforesaid, which steamer was going to Melbourne. It was not proved that a deportation order had been made. It was further found as a fact that the respondent had on 3rd August 1909 obtained from the Collector of Customs for Tasmania a certificate of exemption from the dictation test, and that he had departed from the Commonwealth on 14th August 1909, and that he had returned to the Commonwealth and landed at Brisbane in the State of Queensland in the year 1910.

"I reserved the right to call expert evidence as to the identity of the hand-prints put in in evidence if such expert evidence should become necessary.

"I, however, being of opinion that the respondent (if identical with the said Chung Ah Chow), having been already convicted of being a prohibited immigrant and sentenced to six months' imprisonment, could not, merely on proof of that conviction and

of his being found thereafter within the Commonwealth, be again sentenced to a further term of imprisonment, gave my determination against the appellant in manner before stated."

The question asked by the special case was: Whether the fact that the respondent had been previously convicted of being a prohibited immigrant coupled with his presence thereafter in the Commonwealth, whether he had since the conviction departed from the Commonwealth and returned thereto under a certificate of exemption or not, was sufficient to justify his conviction on the charge against him and the imposition of a further term of imprisonment.

L. L. Dobson, for the appellant. The prior conviction was evidence that at the time of the present prosecution the respondent was a prohibited immigrant. By that prior conviction the respondent acquired the status of a prohibited immigrant, and he retains that status until he shows that by some subsequent occurrence he has ceased to be a prohibited immigrant. The conviction is a judgment *in rem*. It is analogous to an adjudication of the settlement of a pauper under the English Poor Law Acts. See *R.* v. *Inhabitants of Kenilworth* (1); *R.* v. *Inhabitants of Fillongley* (2); *Everest and Strode on Estoppel*, 2nd ed., p. 121. The *Immigration Restriction Act* contemplates the continuance of the condition of being a prohibited immigrant. Under sec. 7 a prohibited immigrant is liable at any time after his conviction to be deported.

Ewing, for the respondent, was not called on.

GRIFFITH C.J. The respondent was charged before a magistrate that he, being a prohibited immigrant, was on 23rd November 1913 found within the Commonwealth. In support of the charge evidence was offered which proved that in July 1909 he was convicted in Launceston upon a charge of being a prohibited immigrant, and sentenced to six months' imprisonment, that he was afterwards liberated on giving a bond to leave the Commonwealth, that then, under another name, he obtained a

(1) 2 T.R., 598. (2) 2 T.R., 709.

H. C. OF A. 1914.

BAIN v. AH KEE.

Griffith C.J.

certificate of exemption, and left the Commonwealth, and that he re-entered it in the year 1910. On these facts the magistrate declined to convict, and stated this case, asking the question whether the fact that the respondent had been previously convicted of being a prohibited immigrant, coupled with his subsequent presence in the Commonwealth, whether he had or had not since his conviction departed from and returned to the Commonwealth, was sufficient to justify his conviction on the charge against him. I will take these elements separately. The point mainly relied upon by the appellant is the previous conviction. That conviction adjudged—and I will assume conclusively adjudged—that at that date, that is to say, in July 1909, the respondent was a prohibited immigrant. I will assume further, that the conviction is conclusive evidence of all that it was necessary to prove in order to obtain the conviction. I turn then to the Statute, and find that all that was necessary to be proved was that the person charged fell within one of several categories which are enumerated in sec. 3 of the Act. Some are of a temporary nature. For instance, the one of which we most commonly hear, namely, failure to pass the dictation test. Another is having been recently convicted of an offence and sentenced to imprisonment for a certain period and not having received a pardon. The conviction cannot be proof of anything more than the facts necessary to be proved in order to obtain it, and, if it does not appear what the actual facts were, the benefit of the doubt must be given to the accused person. It is quite consistent with the facts proved in this case that the respondent was a prohibited immigrant in 1909 because he had then failed to pass the dictation test or was then suffering from an infectious disease. But how are those facts relevant to the question whether in November 1913, which is the relevant time, he fell within any of the categories of the Act? Obviously they are quite irrelevant to that question. Mr. *Dobson* contended—as he was bound to do in order to sustain his position—that a conviction for being a prohibited immigrant is in the nature of an adjudication of status. That might be so if the facts to be proved under the Act were continuing facts affecting the status of the person charged. But when many of the categories are considered, it is