[HIGH COURT OF AUSTRALIA.]

JERGER . . . . . PLAINTIFF;

AND

PEARCE . . . . . DEFENDANT.

H. C. OF A. 1920.

MELBOURNE, *May* 21.

Knox C.J., Gavan Duffy, Rich and Starke JJ.

Alien—Deportation—Naturalization—Person whose mother married naturalized British subject—"The law of the Commonwealth or of a State"—Naturalization Act 1870 (33 & 34 *Vict. c.* 14), *sec.* 10—*Naturalization Act* 1903-1917 (*No.* 11 *of* 1903—*No.* 25 *of* 1917), *sec.* 10.

Sec. 10 of the English *Naturalization Act* 1870 provides, by sub-sec. 1, that "a married woman shall be deemed to be a subject of the State of which her husband is for the time being a subject"; and, by sub-sec. 5, that "where the father, or the mother being a widow, has obtained a certificate of naturalization in the United Kingdom, every child of such father or mother who during infancy has become resident with such father or mother in any part of the United Kingdom, shall be deemed to be a naturalized British subject."

Held, that sub-sec. 5 does not apply to an infant whose mother by her subsequent marriage to a naturalized British subject has herself become a British subject under sub-sec. 1 but has not, while a widow, obtained a certificate of naturalization in the United Kingdom.

Sec. 10 of the Commonwealth *Naturalization Act* 1903-1917 provides that "A person (not being a natural-born British subject) . . . (*b*) whose mother has married . . . a person who is naturalized under the law of the Commonwealth or of a State, and who at the time . . . of such marriage of his mother was an infant, and has at any time during infancy resided in Australia with such . . . mother, shall in the Commonwealth be deemed to be naturalized."

Held, that the words "under the law of the Commonwealth" mean "under a law passed under the legislative authority of the Commonwealth," and therefore that the section does not apply to a child whose mother has married a man who was naturalized under the English *Naturalization Act* 1870.

MOTION for interim injunction.

An action was brought in the High Court by Charles Jerger against the Honourable George Foster Pearce, Minister of State for Defence of the Commonwealth, in which the plaintiff claimed a declaration that he was of British nationality and that the threatened action of the defendant, his agents or servants, or any Department controlled by the defendant, to deport the plaintiff from Australia was illegal; an injunction to restrain the defendant by himself or his agents or servants from taking any action or step interfering with the personal liberty of the plaintiff or compelling him to leave Australia, and from exercising powers conferred by any regulation of the *Aliens Restriction Order* 1915, or any amendments thereof, for the purpose of arresting the plaintiff and/or ordering his deportation from Australia; and an order to restrain the defendant or his agents, officers or servants from authorizing or permitting any naval or military authorities within the meaning of the said Regulations or any of them from arresting the plaintiff or exercising any such restraint as aforesaid.

The material facts are stated in the judgment of the Court hereunder.

The motion was referred to the Full Court by *Starke* J.

Sir Edward Mitchell K.C. (with him *Power*), for the plaintiff. The only persons who may be deported under reg. 2J of the *Aliens Restriction Order* 1915 are aliens. It being admitted that the plaintiff was born in Germany of German parents, the onus is upon him to show that he is a naturalized British subject. If he is naturalized he becomes a British subject for all purposes (*Halsbury's Laws of England*, vol. I., p. 312; *R.* v. *Manning* (1); *In re Stepney Election Petition*; *Isaacson* v. *Durant* (2). His mother having married a naturalized British subject, the plaintiff became a naturalized British subject in England by virtue of sec. 10 of the English *Naturalization Act* 1870. The words "has obtained a certificate of naturalization" in sub-sec. 5 of sec. 10 of that Act should be construed as meaning "has become naturalized," so as to include in the sub-section a child whose mother has married a naturalized British subject.

(1) 1 Den. C.C., 467, at p. 477. (2) 17 Q.B.D., 54, at p. 62.

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[KNOX C.J. This case is *à fortiori* compared with *Jaffé* v. *Keel* (1), where a strict construction was put upon the section.]

If the plaintiff is not a naturalized subject by virtue of that section, then he is by virtue of sec. 10 of the Commonwealth *Naturalization Act* 1903-1917. The plaintiff's mother had married a person who was "naturalized under the law of the Commonwealth or of a State," for that person was naturalized under the English *Naturalization Act* 1844. That Act was in force in Australia by necessary intendment (*Colonial Laws Validity Act* 1865, secs. 1, 2), and naturalization under it applies throughout the British Empire. The Commonwealth Act is retrospective.

Latham, for the defendant. Admitting that the plaintiff's mother on her second marriage became a naturalized British subject pursuant to the *Naturalization Act* 1844, his German nationality was not affected by that Act. Nor was it affected by sec. 10 of the *Naturalization Act* 1870, as is clearly shown by *Jaffé* v. *Keel* (1). The *Naturalization Act* 1903-1917 does not help the plaintiff, for the words "the law of the Commonwealth or of a State" mean the law existing on the legislative authority of the Commonwealth or of a State. A distinction is drawn between the laws according to their source. The words do not mean the law prevailing in the Commonwealth or a State. This view is borne out by secs. 5 (*b*) and 11. [Counsel was stopped.]

The judgment of the COURT, which was delivered by KNOX C.J., was as follows :—

The plaintiff in this action was born in Germany in the year 1869 the son of one Phillip Morlock and Wilhelmina Jerger. It is admitted for the purpose of this argument that the plaintiff's father was a German subject resident in Germany. The plaintiff's father died in 1869, and his mother in 1870 or 1871 married John Jerger, who was born in 1842 in Germany. He went to England and was naturalized there in 1862 or 1863. After the marriage of the plaintiff's mother to Jerger, the plaintiff, with his step-father and his mother, went to England in 1874 or 1875. The plaintiff subsequently visited

(1) (1916) 2 K.B., 476.

Germany for a short time, and the whole family came to Australia in 1887 or 1888. They lived in New South Wales for some time, and subsequently the step-father and the mother went to Western Australia. It is contended that by reason of the naturalization of the step-father, whose naturalization certificate is said to have been burnt at Coolgardie in 1899, the plaintiff and his mother became naturalized British subjects. The plaintiff's step-father subsequently, on 21st August 1907, became naturalized in Australia and obtained naturalization papers. He died on 4th September 1911, and the plaintiff's mother died on 14th September 1919. It appears that the plaintiff joined the order of Passionist Fathers in 1892, and he has always since he came to Australia in 1887 or 1888 lived in Australia. On 15th May 1920 the plaintiff received a letter from Captain Lloyd, an officer of the Defence Forces, informing him that instructions had been received for him to prepare to leave Australia for Germany by the s.s. *Maine*, and asking him to make arrangements accordingly. The letter concluded thus : "The date of sailing has not yet been definitely fixed, but you will be fully advised when you are required to attend at this office to receive your final instructions thereto." The plaintiff then instituted this action and moved for an injunction to restrain the defendant, the Minister of State for Defence, his agents or servants, until the trial of the action from deporting the plaintiff or compelling him to leave Australia or otherwise interfering with his personal liberty, and from exercising any of the powers conferred by any regulation of the *Aliens Restriction Order* 1915, or any amendments thereof, for the purpose of arresting the plaintiff and/or ordering his deportation from the Commonwealth. The regulation under which it is said that action has been taken is reg. 2J of the *Aliens Restriction Order* 1915.

It was admitted in argument that, in order to succeed on the motion, it is necessary for the plaintiff to show that he is a British subject; and, as the plaintiff was admittedly born in Germany of German parents, it is apparent that the onus is upon him to establish the fact that he is a British subject. The contention for the plaintiff is put alternatively on the provisions of two Acts of Parliament. The first is the Imperial Act, the *Naturalization Act* 1870 (33 & 34 Vict. c.

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14), and the section of that Act on which the plaintiff's claim is rested is sec. 10, sub-secs. 1 and 5. Sub-sec. 1 provides that "A married woman shall be deemed to be a subject of the State of which her husband is for the time being a subject." That section is used to establish that the plaintiff's mother on her second marriage to John Jerger became a subject of Great Britain. Sub-sec. 5 provides that "Where the father, or the mother being a widow, has obtained a certificate of naturalization in the United Kingdom, every child of such father or mother who during infancy has become resident with such father or mother in any part of the United Kingdom, shall be deemed to be a naturalized British subject." With regard to that sub-section it is plain, in our opinion, that the plaintiff cannot avail himself of its provisions, because they do not apply to him. It is quite clear that his father had never obtained a certificate of naturalization in the United Kingdom. It is equally clear that his mother, when a widow, never obtained a certificate of naturalization in the United Kingdom. Therefore, the conditions under which that sub-section comes into force do not apply to the plaintiff. I may add that the decision in *Jaffé* v. *Keel* (1), with which we agree, appears to be substantially in point on the facts of the present case.

Failing under that Act, the plaintiff then contends that he is a British subject by virtue of the Commonwealth *Naturalization Act* 1903-1917, and the section of that Act on which he relies is sec. 10. That section, as far as is relevant, provides that "A person (not being a natural-born British subject) . . . (*b*) whose mother has married . . . a person who is naturalized under the law of the Commonwealth or of a State, and who at the time . . . of such marriage of his mother was an infant, and has at any time during infancy resided in Australia with such . . . mother, shall in the Commonwealth be deemed to be naturalized, and have the same rights, powers, and privileges, and be subject to the same obligations, as a person who has obtained a certificate of naturalization." There is a proviso to that section that it shall not come into force with regard to enemy subjects until a day is fixed by Proclamation, but it is unnecessary to consider the effect of that proviso, because a Proclamation has been issued fixing the day on which

(1) (1916) 2 K.B., 476.

the section is to come into operation as the 19th of April of the present year. It therefore becomes necessary to consider whether the plaintiff can bring himself under sec. 10. In order that he may do so, it is necessary for him to prove that his mother married a person who was naturalized under the law of the Commonwealth or of a State, and that the plaintiff was at the time of such marriage an infant and has at some time during infancy resided in Australia with his mother. It is alleged that the step-father of the plaintiff was naturalized at the necessary time under the law of the Commonwealth or of a State because he had been naturalized under the Act in force in the United Kingdom. It was admitted that the plaintiff cannot rely on the Commonwealth naturalization of his step-father in the year 1907, because the plaintiff had at that time ceased to be an infant and to reside with his mother. The question, then, is whether it can be predicated of the plaintiff's step-father that he was a person who, before his naturalization under the Commonwealth law in 1907, was naturalized under the law of the Commonwealth or of a State. We are of opinion that it cannot. We think that the words "under the law of the Commonwealth," used as they are in that section in antithesis to the words "of a State," mean "under a law passed under the legislative authority of the Commonwealth." Whether the *Naturalization Act* 1870 is in force in Australia or not is a matter which, on this view of the meaning of sec. 10 of the Commonwealth Act, it is unnecessary for us to consider. Assuming it to be in force, it was not, in our opinion, a law of the Commonwealth within the meaning of sec. 10 of the Commonwealth *Naturalization Act* 1903-1917. This being so, the plaintiff fails to establish his British nationality whether he relies on the Imperial Act of 1870 or on the Commonwealth Act of 1903-1917. It is therefore clear that on the facts placed before us and the arguments submitted to us the plaintiff is not a British subject, and the application must fail.

Application dismissed with costs.

Solicitor for the plaintiff, *T. P. Nolan.*

Solicitor for the defendant, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

B. L.