[HIGH COURT OF AUSTRALIA.]

THE KING

AGAINST

MACFARLANE AND OTHERS.

Ex parte O'FLANAGAN and Ex parte O'KELLY.

O'FLANAGAN AND OTHERS . . . . Plaintiffs;

AGAINST

MACFARLANE AND OTHERS . . . . Defendants.

H. C. of A. 1923.

Melbourne, *May* 29-31; *June* 1.

Sydney, *Aug.* 23.

Knox C.J., Isaacs, Higgins, Rich and Starke JJ.

Constitutional Law—Powers of Commonwealth Parliament—Immigration—Extent of power—Deportation after entering Commonwealth—British subject—Intention to settle—Visitor to Commonwealth—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 51 (xxvii.), 71—*Immigration Act* 1901-1920 (*No.* 17 *of* 1901—*No.* 51 *of* 1920), *sec.* 8A*—*Prohibition—Quo warranto—Certiorari—Board appointed to recommend as to deportation—Non-judicial tribunal—Action to restrain proceedings before Board—Injunction—Interlocutory injunction—Challenging validity of*

* Sec. 8A of the *Immigration Act* 1901-1920 provides that "(1) Where the Minister is satisfied that, within three years after the arrival in Australia of a person who was not born in Australia, that person . . . (*d*) is a person who advocates the overthrow by force or violence of the established government of the Commonwealth or of any State, or of any other civilized country, or of all forms of law, or who advocates the abolition of organized government, or who advocates the assassination of public officials or who advocates or teaches the unlawful destruction of property, or who is a member of, or affiliated with, any organization which teaches any of the doctrines and practices specified in this paragraph, he may, by notice in writing, summon

Commonwealth statute—Criminal prosecution pending—Cause of action—Apprehension of irreparable injury—Judiciary Act 1903-1920 (*No.* 6 *of* 1903—*No.* 38 *of* 1920), *secs.* 31-33, 80—*Crimes Act* 1914-1915 (*No.* 12 *of* 1914—*No.* 6 *of* 1915), *sec.* 24A [*War Precautions Act Repeal Act* 1920 (*No.* 54 *of* 1920), *sec.* 12].

Held, by *Knox* C.J., *Isaacs*, *Rich* and *Starke* JJ. (*Higgins* J. doubting), that sec. 8A of the *Immigration Act* 1901-1920 is a law with respect to immigration, and is therefore within the legislative power of the Commonwealth Parliament conferred by sec. 51 (XXVII.) of the Constitution.

Held, also, by *Knox* C.J., *Isaacs*, *Higgins*, *Rich* and *Starke* JJ., that a Board appointed pursuant to sec. 8A was not a judicial tribunal, that is, a tribunal empowered to give a decision creating or declaring an obligation; and, therefore, that prohibition would not lie to prevent the Board from proceeding with the matter of a summons issued under the section to show cause against deportation; and that neither quo warranto nor certiorari was an appropriate remedy to prevent the Board from so proceeding.

The two plaintiffs, who were British subjects born in Ireland and had recently arrived in the Commonwealth, had been arrested on a charge, under sec. 24A of the *Crimes Act* 1914-1915 (enacted by sec. 12 of the *War Precautions Act Repeal Act* 1920), of being engaged in a seditious enterprise. While that charge was pending the plaintiffs were summoned to appear before a Board appointed under sec. 8A of the *Immigration Act* to show cause why they should not be deported. The plaintiffs thereupon instituted an action in the High Court against the members of the Board claiming an injunction restraining the defendants from proceeding further with the matter of the summons. On an application by the plaintiffs for an interlocutory injunction,

Held, that the application should be refused:

By *Knox* C.J., *Isaacs*, *Rich* and *Starke* JJ., on the ground that sec. 8A of the *Immigration Act* is a valid enactment and applied to the plaintiffs;

By *Higgins* J. on the ground that there was no such irreparable injury or urgency as warranted an interlocutory injunction.

Held, by *Knox* C.J., *Isaacs* and *Rich* JJ. (*Higgins* J. dissenting, *Starke* J. doubting), that the fact that the plaintiffs would be prejudiced in their defence on the criminal charge by the continuation of proceedings before the Board would, if sec. 8A were invalid, be a ground for granting an interlocutory injunction.

the person to appear before a Board within the time and in the manner prescribed, to show cause why he should not be deported from the Commonwealth. (2) A Board appointed for the purposes of the last preceding sub-section shall consist of three members to be appointed by the Minister. (3) The Chairman shall be a person who holds or has held the office of Judge, or Police, Stipendiary or Special Magistrate. (4) (*a*) If the person fails, within the prescribed time, to show cause why he should not be deported, or (*b*) the Board recommends that he be deported from the Commonwealth, the Minister may make an order for his deportation, and he shall be deported accordingly. (5) Pending deportation the person may be kept in such custody as the Minister directs."

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ORDERS NISI and MOTION.

About 13th March 1923 Michael O'Flanagan and John Joseph O'Kelly, each of whom was a British subject born in Ireland, arrived in the Commonwealth; each of them having a passport issued by the Imperial Secretary of State for Foreign Affairs. On 30th April 1923 they were arrested on warrants charging them with being engaged in a seditious enterprise under the *Crimes Act* 1914-1915 as amended by the *War Precautions Act Repeal Act* 1920. On 8th and 15th May respectively, O'Flanagan and O'Kelly were served with summonses to appear before a Board, consisting of William Macpherson Macfarlane, Henry Edward Manning and John Stinson, appointed under sec. 8A of the *Immigration Act* 1901-1920, to show cause why they should not be deported. On 11th May, O'Flanagan and O'Kelly appeared before the Board, and objection was taken on their behalf to their being called on to show cause why they should not be deported, and on 19th May the objection was overruled. On 15th May, the criminal charges came on for hearing before a Stipendiary Magistrate of New South Wales, and on the application of the informant the hearing was adjourned until 5th June. On 22nd May, O'Flanagan and O'Kelly each obtained an order nisi calling upon the members of the Board, the Minister administering the *Immigration Act* and the Commonwealth to show cause why a writ of prohibition should not issue to prohibit further proceedings before the Board upon the summons served on him and from making any recommendation to the Minister in respect of his deportation; and, in the alternative, to show cause why leave should not be granted to exhibit an information of quo warranto, or why the applicant should not have relief of a like nature to quo warranto; or why, in the alternative, a writ of certiorari should not issue. The grounds in each case were: (a) That the Commonwealth Parliament had no power to pass sec. 8A of the *Immigration Act* 1901-1920 in its present form; (b) in the alternative that the section is invalid so far as it applies to British subjects; (c) that sec. 8A is invalid because it attempts to vest in the Board portion of the judicial power of the Commonwealth and the judicial power of the Commonwealth can only be exercised by the High Court or other Federal Courts created by Parliament or State Courts vested with Federal jurisdiction;

(d) that there is no authority in the Commonwealth to legally deport from the Commonwealth the holder of a passport issued by the Imperial Secretary of State for Foreign Affairs to a British subject until after the term of the passport expires or is cancelled.

On 22nd May, O'Flanagan and O'Kelly and John Leo Francis Clancy instituted an action in the High Court against the members of the Board by a writ claiming (1) a declaration that the defendants had no authority to proceed further as a Board in the proceedings in which the first two defendants were being called upon to show cause why they should not be deported, and (2) an injunction restraining the defendants from proceeding further in or about such matters.

Other material facts appear in the judgments hereunder.

The orders nisi now came on for hearing.

Watt K.C. and *Evatt*, for the prosecutors. The High Court has jurisdiction in this matter under sec. 75 (III.) of the Constitution; for the Commonwealth is behind the Minister in his claim to deport the prosecutors. If it has not jurisdiction under sec. 75 (III.), it has under sec. 75 (V.); for the Minister is an officer of the Commonwealth. Prohibition will lie here; for the Board, as constituted by sec. 8A of the *Immigration Act* 1901-1920, is a Court and purports to act as a Court. The recommendation of the Board against deportation is final; if it does not recommend deportation the prosecutors cannot be deported. Prohibition will go to a person who assumes, under colour of legislative authority, to act as a tribunal affecting the rights of persons (*R.* v. *Hibble*; *Ex parte Broken Hill Proprietary Co.* (1); *In re Clifford and O'Sullivan* (2); *Huddart, Parker & Co. Proprietary Ltd.* v. *Moorehead* (3); *Kimber* v. *Press Association* (4); *R.* v. *Kermond* (5)).

[ISAACS J. referred to *R.* v. *Local Government Board* (6); *R.* v. *Maguire* (7).]

The substance of a recommendation of a Board under sec. 8A is a pronouncement which directly affects the rights of the parties

(1) (1920) 28 C.L.R., 456.
(2) (1921) 2 A.C., 570, at p. 582.
(3) (1908-09) 8 C.L.R., 330.
(4) (1893) 1 Q.B., 65, at p. 73.
(5) (1898) 19 N.S.W.L.R. (L.), 392.
(6) (1902) 2 I.R., 349.
(7) (1923) 2 I.R., 58.

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summoned before it, and the fact that execution of the pronouncement is carried out by a third party does not differentiate the case from *R.* v. *Hibble*; *Ex parte Broken Hill Proprietary Co.* (1). The proceedings of the Board are judicial proceedings dealing with matters affecting the liberty of the subject. (See *Waterside Workers' Federation of Australia* v. *J. W. Alexander Ltd.* (2); *New South Wales* v. *Commonwealth* (3).)

[KNOX C.J. referred to *Newcastle Coal Co.* v. *Firemen's Union* (4).]

The meaning of prohibition had been extended in New South Wales before the Constitution was passed, and this Court is not limited to the same extent as the Courts in England are as to granting prohibition. Secs. 30-33 of the *Judiciary Act* are an extension of the power to grant prohibition, and the writ may be issued wherever a body which has no legal right assumes a power which it has not got.

[STARKE J. referred to *Tramways Case* [*No.* 1] (5).

[ISAACS J. referred to *Peck* v. *Adelaide Steamship Co.* (6).]

A recommendation of the Board affects rights just as much as does a verdict. From the moment of recommendation of deportation the person affected can be deported at the will of the Minister. The presumption is that there will be a judicial proceeding before the liberty of the subject will be interfered with.

[RICH J. referred to *R.* v. *Campbell* (7).]

If prohibition will not lie, quo warranto will. There is a wrongful assumption, under pretence of statutory authority, of part of the judicial power of the Commonwealth. The writ is appropriate, regardless of whether the Board is or is not sitting as a Court. Sec. 30 of the *Judiciary Act* enlarges the jurisdiction of the High Court, giving it jurisdiction over this subject matter, and the remedy is largely within the control of the Court. Sec. 32 gives the Court power to grant any remedy.

Lamb K.C. and *C. Gavan Duffy*, for the respondents, were not called upon as to the matters argued.

(1) (1920) 28 C.L.R., 456.
(2) (1918) 25 C.L.R., 434.
(3) (1915) 20 C.L.R., 54.
(4) (1908) 6 C.L.R., 466.
(5) (1914) 18 C.L.R., 54.
(6) (1914) 18 C.L.R., 167.
(7) (1921) 2 K.B., 473, at p. 480.

By permission of the Court, and with the consent of the defendants, counsel for the plaintiffs in the action for an injunction then moved for an interlocutory injunction pending the hearing of the action.

Watt K.C. and *Evatt*, for the plaintiffs. An injunction should go to restrain the Minister on the ground that sec. 8A of the *Immigration Act* is *ultra vires*. An injunction will lie in such a case. The matter is one which involves the interpretation of the Constitution, and under secs. 75 (v.) and 76 of the Constitution and secs. 30 to 33 and sec. 80 of the *Judiciary Act* this Court has jurisdiction to grant an injunction. Sec. 76 of the Constitution gives this Court the widest powers in order to prevent an infringement of the Constitution.

[KNOX C.J. referred to *Thomas* v. *Williams* (1).

[RICH J. referred to *Ellis* v. *Earl Grey* (2); *New South Wales* v. *Commonwealth* (3); *Richardson* v. *Methley School Board* (4).]

The plaintiffs' liberty is put in jeopardy by the proceedings before the Board, and their rights are thereby interfered with. If there is shown a reasonable apprehension of a wrong being done by the continuance of an act done by a person who claims to act under a statute which is unconstitutional, this Court may grant an injunction. There is a reasonable apprehension of an adverse decision by the Board which may have the result of what is contended to be an illegal deportation.

[KNOX C.J. referred to *London and Blackwall Railway Co.* v. *Cross* (5).

[ISAACS J. referred to *Harris* v. *Beauchamp Brothers* (6).

[HIGGINS J. referred to *In re Sawyer* (7).

[STARKE J. referred to *Attorney-General for New South Wales* v. *Brewery Employees' Union of New South Wales* (8).]

There is forced upon the plaintiffs a choice whether they will or will not defend themselves before the Board, and since the sanction behind the choice imperils their liberty they are entitled to an injunction. The facts of which the Minister was satisfied are those which constitute the charge made against the plaintiffs in the pending criminal

(1) (1880) 14 Ch. D., 864.
(2) (1833) 6 Sim., 214.
(3) (1915) 20 C.L.R., at p. 65.
(4) (1893) 3 Ch., 510, at p. 514.
(5) (1886) 31 Ch. D., 354.
(6) (1894) 1 Q.B., 801.
(7) (1887-88) 124 U.S., 220.
(8) (1908) 6 C.L.R., 469.

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prosecution. The statement that he was so satisfied was published before the Board, and was calculated to interfere with the trial of the plaintiffs on that prosecution, and interfered with the plaintiffs' right to have the trial conducted without comments. If sec. 8A of the *Immigration Act* is invalid, the action in appointing the Board amounts to a contempt of Court, which is a ground for granting an injunction (see *Halsbury's Laws of England*, vol. XVII., p. 270, par. 572; *Kitcat* v. *Sharp* (1).

[ISAACS J. referred to *R.* v. *Clement* (2).

[STARKE J. referred to *Cruickshank* v. *Bidwell* (3).]

Sec. 8A of the *Immigration Act* is invalid; for the power conferred by sec. 51 (XXVII.) of the Constitution to legislate with respect to immigration does not extend to the deportation of a British subject, who has or may become resident in the Commonwealth, for a disqualifying cause which may not have existed at the time of his entry into the Commonwealth, but may have developed at any time up to three years after his entry. The power does not authorize legislation as to a person who has properly and lawfully come within the Commonwealth. There is power to enact conditions precedent to a person entering the Commonwealth, but not conditions subsequent to the entry. [Counsel referred to *Potter* v. *Minahan* (4); *Robtelmes* v. *Brenan* (5).] The word "immigration" implies an intention to settle in the country, and the power in sec. 51 (XXVII.) of the Constitution does not extend to visitors to Australia. Sec. 8A is also invalid because it attempts to enable a Minister to exercise a portion of the executive power of the Commonwealth, whereas by sec. 61 of the Constitution that executive power is vested in and is exercisable by the Governor-General. The only authority to delegate that power is in sec. 64, which enables the Governor-General to appoint officers to administer the Departments. Deportation is obviously a matter which falls within the executive power of the Commonwealth. [Counsel referred to *Commonwealth* v. *Colonial Combing, Spinning and Weaving Co.* (6); *Inglis Clark's Australian Constitutional Law*, pp. 52, 68; *Harrison Moore's Commonwealth of Australia*, 2nd ed., pp. 162, 163.]

(1) (1882) 52 L.J. Ch., 134.
(2) (1821) 4 B. & Ald., 218.
(3) (1899-1900) 176 U.S., 73.
(4) (1908) 7 C.L.R., 277.
(5) (1906) 4 C.L.R., 395, at p. 407.
(6) (1922) 31 C.L.R., 421, at pp. 452-453.

Lamb K.C. (with him *C. Gavan Duffy*), for the defendants. The Court will not consider the validity of an Act of the Commonwealth Parliament unless it is absolutely necessary. The question whether the Board will or will not proceed with its inquiry depends upon the plaintiffs themselves. If there were no Act of Parliament behind the Minister, he would simply be asking certain persons their opinions as to whether they think that the plaintiffs should be deported. There is nothing illegal or wrong in that (*Clough* v. *Leahy* (1)). As to any prejudice that may arise from publication of the proceedings, there is an adequate remedy in the Supreme Court of New South Wales if any right of the plaintiffs in the Police Court is affected. The power conferred by the Constitution as to immigration enables the Commonwealth Parliament to prevent a person whose presence in the Commonwealth is undesirable from coming in; and the complement of that power is to expel such a person if he has come into the Commonwealth. The immigration laws of the several Colonies before Federation contained provisions similar to those of sec. 8A, and applying to British subjects and visitors (see *Immigration Restriction Act* (1898) (N.S.W.); *Immigration Restriction Act* 1897 (W.A.)), and the intention of sec. 51 (XXVII.) was to give to the Commonwealth Parliament the same power as to immigration which the Colonies had. The term "immigrate" is satisfied by coming into the Commonwealth (*Chia Gee* v. *Martin* (2); *Ah Yin* v. *Christie* (3)). [Counsel also referred to *Attorney-General for Canada* v. *Cain and Gilhula* (4); *Hazelton* v. *Potter* (5).]

Watt K.C., in reply. The colonial Acts only applied to "immigrants," that is, persons who came with the intention of settling; but the mere landing was prima facie evidence of the intention to settle.

Cur. adv. vult.

June 1.

KNOX C.J. Each of the orders nisi will be discharged with costs. The motion for an interlocutory injunction will be refused with costs. The Court will deliver its reasons later.

(1) (1904) 2 C.L.R., 139, at p. 157.
(2) (1905) 3 C.L.R., 649.
(3) (1907) 4 C.L.R., 1428.
(4) (1906) A.C., 542.
(5) (1907) 5 C.L.R., 445

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Aug. 23.

The following written judgments were delivered :—

KNOX C.J. *The King* v. *Macfarlane*; *Ex parte O'Flanagan*.—This is an application to make absolute an order nisi for prohibition directed to William Macpherson Macfarlane, Henry Edward Manning and John Stinson, constituting a Board appointed under sec. 8A of the *Immigration Act* 1901-1920, the Minister administering that Act, and the Commonwealth, to prohibit further proceedings before the Board in respect of a summons calling upon the prosecutor to show cause why he should not be deported from the Commonwealth. In the alternative the prosecutor asks for relief in the nature of quo warranto or a writ of certiorari.

Sec. 8A of the Act is in the words following :—"(1) Where the Minister is satisfied that, within three years after the arrival in Australia of a person who was not born in Australia, that person—(*a*) has been convicted in Australia of a criminal offence punishable by imprisonment for one year or longer ; (*b*) is living on the prostitution of others ; (*c*) has become an inmate of an insane asylum or public charitable institution ; or (*d*) is a person who advocates the overthrow by force or violence of the established government of the Commonwealth or of any State, or of any other civilized country, or of all forms of law, or who advocates the abolition of organized government, or who advocates the assassination of public officials or who advocates or teaches the unlawful destruction of property, or who is a member of, or affiliated with, any organization which teaches any of the doctrines and practices specified in this paragraph, he may, by notice in writing, summon the person to appear before a Board within the time and in the manner prescribed, to show cause why he should not be deported from the Commonwealth. (2) A Board appointed for the purposes of the last preceding sub-section shall consist of three members to be appointed by the Minister. (3) The Chairman shall be a person who holds or has held the office of Judge, or Police, Stipendiary or Special Magistrate. (4) (*a*) If the person fails, within the prescribed time, to show cause why he should not be deported, or (*b*) the Board recommends that he be deported from the Commonwealth, the Minister may make an order for his deportation, and he shall be deported accordingly. (5) Pending deportation the person may be kept in such custody as the Minister directs."

The Minister has under this section summoned the prosecutor in each case to appear before a Board consisting of the respondents Macfarlane, Manning and Stinson to show cause why he should not be deported from the Commonwealth. The ground on which this application is based is that the enactment contained in sec. 8A is beyond the power of the Commonwealth Parliament, but before the validity of the section can be called in question the Court must be satisfied that either prohibition, or certiorari, or relief in the nature of quo warranto is an appropriate remedy on the assumption that the Board is acting without statutory authority. As to prohibition it is well settled that the writ will not issue except to a Court or judicial tribunal having some jurisdiction which it is attempting to exceed (per Viscount *Cave* in *In re Clifford and O'Sullivan* (1)). In *R.* v. *Local Government Board* (2) *Palles* C.B. laid down that to erect a tribunal into a Court or jurisdiction so as to make its determinations judicial, the essential element is that it should have power by its determination within jurisdiction to impose liability or affect rights. In the present case there is, in my opinion, no ground whatever for holding that the Board is acting or attempting to act as a Court or judicial tribunal. It has no power by its determination to impose any obligation on any person or to affect any person's rights. Its sole function is to recommend—i.e., to advise the Minister—whether the prosecutor should or should not be deported. Its recommendation has no binding force, imposes no obligations, and affects no rights. If it recommends deportation, the Minister is at liberty to act, or to refrain from acting, on the advice given. In my opinion, its duties are wholly ministerial, and not in any relevant sense judicial. I am therefore of opinion that the writ of prohibition is not an appropriate remedy in this case, even assuming the Board to have no statutory authority to proceed with the inquiry which it has begun.

Relief in the nature of quo warranto is no less inappropriate. An information in the nature of quo warranto will only lie in cases in which an office has been lawfully created by charter or by statute, the object being to prevent the usurpation of an office. Proceedings of this nature cannot be used to attack the legality of the creation of

(1) (1921) 2 A.C., at p. 583. (2) (1902) 2 I.R., at p. 373.

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the office. In the present case it is the legality of the power to appoint the Board and not the legality of its appointment that is challenged by the prosecutor.

No argument was addressed to the Court in support of the application for the writ of certiorari, and in my opinion that remedy is obviously inappropriate.

What I have said with regard to *Ex parte O'Flanagan* also applies to *Ex parte O'Kelly*.

The orders nisi should be discharged.

O'Flanagan v. *Macfarlane*.—This was an application for an interim injunction restraining the defendants from proceeding further as a Board in the proceedings in which the plaintiffs O'Flanagan and O'Kelly are being called on to show cause why they should not be deported.

The facts relating to the appointment of the Board and the summoning of these plaintiffs to show cause are stated in the reasons given by me on the application for prohibition made by them. The evidence shows that the plaintiffs are British subjects and that before they were summoned to show cause before the Board they were arrested on warrants charging them with being engaged in a seditious enterprise under the *Crimes Act* 1914-1915 as amended by the *War Precautions Act Repeal Act* 1920, and that they have been remanded on bail on that charge. It is admitted that the case which will be made for the prosecution on that charge is to a great extent the same as that which is to be investigated by the Board. In these circumstances it is clear that the investigation of the case before the Board, which will probably necessitate the plaintiffs tendering themselves as witnesses, the conclusion at which the Board arrives, if unfavourable to the plaintiffs, and the order of deportation which the Minister has power in that event to make, may seriously prejudice the plaintiffs in their defence to the criminal proceedings which have been launched. Apart from the stigma which will attach in the event of an adverse finding, they may and probably will be practically compelled prematurely to disclose their defence to the criminal charge. The claim to an injunction is based on the alleged invalidity

of sec. 8A of the *Immigration Act* 1901-1920 as being beyond the legislative power of the Commonwealth Parliament.

The first question to consider is whether this Court should entertain an interlocutory application for an injunction based upon the alleged invalidity of a Commonwealth enactment. The same question has been the subject of judicial decision in the United States. In *Cruickshank* v. *Bidwell* (1) *Fuller* C.J., delivering the opinion of the Court, said :—" It is settled that the mere fact that a law is unconstitutional does not entitle a party to relief by injunction against proceedings in compliance therewith, but it must appear that he has no adequate remedy by the ordinary processes of the law, or that the case falls under some recognized head of equity jurisdiction"; and the learned Chief Justice says (2) :—" Inadequacy of remedy at law exists where the case made demands preventive relief, as, for instance, the prevention of multiplicity of suits, or the prevention of irreparable injury. . . . The mere assertion that the apprehended acts will inflict irreparable injury is not enough. Facts must be alleged from which the Court can reasonably infer that such would be the result." The power of this Court to grant injunctions is at least as wide as, and probably wider than, that conferred on the Supreme Court of the United States.

The fact that the plaintiffs' rights cannot be adequately protected or vindicated, or the apprehended injury remedied or atoned for by damages, is in general sufficient to establish that the injury is irreparable for the purpose of exercising jurisdiction by way of injunction (see *Attorney-General* v. *Hallett* (3)).

On the assumption that sec. 8A of the Act is invalid, I feel no doubt that the present case is one in which the injury apprehended by the plaintiffs from the continuance of the proceedings before the Board is irreparable, in the sense in which that word is used in the opinion quoted above. The plaintiffs are put in a dilemma. They may have a good answer to the charge made against them by the Minister, but they must either refuse to show cause before the Board or show cause. In the former event, they are liable to be deported by order of the Minister; in the latter, they cannot reasonably expect to avoid

(1) (1899-1900) 176 U.S., at p. 80. (2) (1899-1900) 176 U.S., at p. 81.
(3) (1847) 16 M. & W., 569, at p. 581.

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disclosing the case which they propose to make in answer to the charge of being concerned in a seditious enterprise. In these circumstances I think the Court is justified in allowing the question whether sec. 8A of the Act is valid to be raised on this application.

In considering the question whether sec. 8A of the Act is a valid enactment, it may be assumed that the power under which the right to enact it is claimed is that contained in sec. 51 (XXVII.) of the Constitution—to make laws with respect to immigration and emigration. The enactment, which is expressed in plain and unambiguous words, applies to any person not born in Australia who arrives in Australia, and provides for the deportation of such a person if within three years after his arrival he answers to any of the descriptions specified in clauses (*a*), (*b*), (*c*) and (*d*).

The main grounds on which the objection to the validity of this provision was founded were (1) that the section purports to vest in the Board portion of the judicial power of the Commonwealth, which by sec. 71 of the Constitution can only be exercised by the High Court and other Courts therein named; (2) that the Commonwealth Parliament has no power to legislate for the exclusion or deportation of British subjects; (3) that the power to legislate with respect to immigration does not authorize legislation extending to persons coming into Australia without the intention of settling there; (4) that the power referred to does not authorize legislation providing for the deportation of persons who have come into Australia by reason of events happening after their entry into Australia; (5) that the section purports to vest in the Minister or the Board portion of the executive power of the Commonwealth.

The first ground is substantially covered by the reason given for the refusal of the writ of prohibition applied for by the plaintiffs. The functions of the Minister and the Board under the section are plainly ministerial and not judicial. The reasons given for the decision in *Huddart, Parker & Co. Proprietary Ltd.* v. *Moorehead* (1) completely cover this point (see particularly per *O'Connor* J. (2)).

The second ground is covered by the observations of *Griffith* C.J.

(1) (1908-09) 8 C.L.R., 330. (2) (1908-09) 8 C.L.R., at pp. 377-381.

and *O'Connor* J. and of my brother *Isaacs* in *Potter* v. *Minahan* (1). *Griffith* C.J. says (2): "There is no doubt that a British subject coming to the Commonwealth from another part of the British Dominions may be an immigrant within the meaning of the Constitution." And *O'Connor* J. says (3):—"Speaking generally, every person born within the British Dominions is a British subject 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." My brother *Isaacs* says (4):—"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." See also *Attorney-General for the Commonwealth* v. *Ah Sheung* (5). In my opinion this ground of objection entirely fails.

The third ground raises the question whether "immigration" in sec. 51 (XXVII.) of the Constitution connotes entry into Australia with the intention of settling or residing there, or, on the other hand, extends to any entry into Australia of a person not born in Australia or not having previously had his home there, independently of any such intention on the part of the person entering. On this point also I have the guidance of observations made in cases decided by this Court. In *Chia Gee* v. *Martin* (6) *Griffith* C.J. said:—"It was

(1) (1908) 7 C.L.R., 277.
(2) (1908) 7 C.L.R., at pp. 288-289.
(3) (1908) 7 C.L.R., at pp. 304-305.
(4) (1908) 7 C.L.R., at p. 310.
(5) (1906) 4 C.L.R., 949, at p. 951.
(6) (1905) 3 C.L.R., at p. 654.

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suggested that the term 'immigrant' in this Act means a person 'who arrives in the Commonwealth with the intention of becoming a permanent resident.' The word may have that meaning in some contexts. When you are contrasting immigrants with members of a crew, that may be a convenient distinction to take, but the purpose of this Act is clearly to prevent entry into the Commonwealth; the test is one to be applied on entry, and the question whether a man is an immigrant must be a matter capable of being determined then and there. If would be reducing the Act to a nullity if it were held that the test of whether a man were an immigrant or not was to be some intention in his mind, which intention the Commonwealth authorities might have no means of discovering." *Barton* and *O'Connor* JJ. concurred. It follows from this decision that in the opinion of the Court "immigration" in the Constitution must have been regarded as extending to mere entry into the Commonwealth; for otherwise the Act which made entry the test would have been invalid. To hold that absence of intention to settle or reside in the Commonwealth on the part of a person entering is sufficient to prevent his exclusion under a law with respect to immigration would, in my opinion, render nugatory for all practical purposes the power to exclude undesirable immigrants, which is admittedly conferred on the Commonwealth Parliament by sec. 51 (XXVII.) of the Constitution. The word "immigration" is undoubtedly capable of meaning entry with the intention of settling or becoming a resident, but it is also capable of the wider meaning which excludes the element of intention; and it was in this wider sense that it was used in the New South Wales *Immigration Restriction Act* 1898 (No. 3 of 1898) and in the West Australian Act of 1897, which were in force when the Constitution was drawn up and when it became law. I see no reason to doubt that it was used in the same sense in sec. 51 (XXVII.) of the Constitution, with the intention of conferring on the Commonwealth Parliament the full powers of exclusion of strangers theretofore exercised by the Parliaments of at least some of the States. This view is, I think, supported by reference to sec. 92 of the Constitution, which prohibits legislation directed to the prevention of inter-State migration. It can hardly have been intended to leave with a State Parliament power to prohibit the entry of strangers coming directly

from abroad and not intending to settle or reside in Australia, while depriving it of the power to exclude such persons if they entered through another State. In my opinion, the word immigration in sec. 51 (XXVII.) should not be construed in its narrower sense as connoting the idea of intended settlement or residence, but rather as including the entry into Australia of any person who in so entering is not coming home.

On the fourth ground of objection I understood counsel for the plaintiffs to concede, and I do not think it is possible to deny, that the Commonwealth Parliament had power to prohibit absolutely the entry into Australia of any person who is an "immigrant." If this be so, it seems to follow that Parliament may prescribe the conditions on which an "immigrant" may be permitted to enter. The condition imposed by sec. 8A is that if during a period of three years after his entry he shall not remain free from certain disabilities he shall be liable to be deported—that is to say, his entry is permitted on probation. If during that probationary period he proves to be unfit for certain reasons, which in the opinion of Parliament are sufficient, to become a member of the Australian community, his conditional permission to enter may be revoked and its revocation enforced by the only really effective method—deportation. The argument against the validity of the section was really founded on the hardship that might result from its enforcement, but this is irrelevant when, as here, the question is as to the extent of the power conferred on Parliament. The policy of the Act is a matter with which this Court is not concerned. In my opinion this ground of objection also fails.

The fifth ground is clearly untenable. If I understand the argument in support of it, it would, if carried to its logical conclusion, deny to Parliament the power to provide by legislation for the performance of any ministerial act by any person but the Governor-General.

For these reasons I am of opinion that the application for injunction should be dismissed.

ISAACS J. We are called upon to decide questions of law which affect the administration of an Act of Parliament touching an

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important principle of public policy as dealt with by the Legislature. In these circumstances I regard it as more than usually essential for the Court to bear in mind the attitude which every Court—and, if there be degrees in the matter, this Court in particular, charged as it is with very special constitutional functions—must preserve. I venture to quote, with respectful acquiescence, some words of a very distinguished Judge, Lord *Macnaghten*, when dealing with a statute embodying public policy. In *Vacher & Sons* v. *London Society of Compositors* (1) he said:—"A judicial tribunal has nothing to do with the policy of any Act which it may be called upon to interpret. That may be a matter for private judgment. The duty of the Court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction. It is, I apprehend, as unwise as it is unprofitable to cavil at the policy of an Act of Parliament, or to pass a covert censure on the Legislature." That great Judge rendered many signal services to the jurisprudence of the Empire, but by no means the least of these is his clear and authoritative reminder to every judicial tribunal of an essential and fundamental duty which it owes alike to itself and the community it serves. Very different considerations may sometimes come within the sphere of our judicial duty, when, for instance, the Executive itself assumes to make and act on regulations affecting individual liberty or property and claims for its own regulations the force of law. These considerations are entirely absent from this case. We have simply to consider the legality and effect of a clear and unambiguous enactment of Parliament itself and of executive action unquestionably authorized by the enactment, if only Parliament had power to make it.

In order to succeed, it is necessary for the applicants to make good two propositions: (1) that sec. 8A of the *Immigration Act* 1901-1920 is invalid; and (2) that, assuming such invalidity, a writ of prohibition or quo warranto or certiorari or an injunction is a permissible remedy to protect them against the proceedings before the Board. The second proposition is a consideration that affects the jurisdiction of this Court. It must always be remembered that we are Judges, not legislators. In enforcing the law we must be

(1) (1913) A.C., 107, at p. 118.

the first to obey it. If it were necessary, we have as to this the direction of the Privy Council. In *R.* v. *Hughes* (1) Lord *Chelmsford* for the Judicial Committee said: "that the question of the power of a Court to proceed in a particular course of administering justice, was one of substance and not merely of form. And that, however convenient or necessary a mode of proceeding for the redress of certain wrongs might be, that consideration alone would not confer jurisdiction on the Court to sanction its introduction." We are therefore compelled to consider the second proposition first. The applicants are at once in a dilemma. If the section is not invalid, the application admittedly must be refused, because the basic contention fails. On the other hand, as the Board depends for its very existence on the section, it is plain that if the section is invalid there is in law no Board, but merely three gentlemen purporting to be a Board but whose conclusions have no legal force. In the latter case, is it permissible to grant prohibition or quo warranto or certiorari, or do the circumstances justify an injunction?

1. *Prohibition.*—Taking prohibition first, which was the main remedy relied on, the principles of law are deeply rooted in precedents and authorities; and these have recently, to an extent largely relevant to this case, been confirmed, restated and applied by the House of Lords in the case of *Clifford and O'Sullivan* (2) and by the King's Bench Division of the Irish Free State in *R.* v. *Maguire* (3). It is now beyond question that the writ of prohibition has its well-established limits. Only one of these limits need be referred to now. It is contained in the celebrated answer to the third objection found in the *Articuli Cleri* in these words: "Prohibitions by law are to be granted at any time to restrain *a Court* to intermeddle with or execute anything which by law they ought not to hold plea of, and they are much mistaken that maintain the contrary." In the case of *Clifford and O'Sullivan* (4) the present Lord Chancellor, Viscount *Cave*, says: "The writ" of prohibition "should only issue to a Court having some jurisdiction which it is attempting to exceed." He adopts (5) the passage in *Short and Mellor's Crown Practice*, 2nd

(1) (1866) L.R. 1 P.C., 81, at p. 91.
(2) (1921) 2 A.C., 570.
(3) (1923) 2 I.R., 58.
(4) (1921) 2 A.C., at pp. 582-583.
(5) (1921) 2 A.C., at p. 582.

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ed., p. 252, as to the definition of the writ of prohibition: "It is a judicial writ, issuing out of a Court of superior jurisdiction and directed to an inferior Court for the purpose of preventing the inferior from usurping a jurisdiction with which it was not legally vested, or, in other words, to *compel Courts entrusted with judicial duties to keep within the limits of their jurisdiction.*"

One of the essentials of this application then is, that it must be "*a Court*" *which is exceeding its jurisdiction*; for the purpose of prohibition is to restrain the usurpation of the King's judicial power by inferior Courts. Is the Board a Court? Clearly not. It is an adjunct of the executive power. Parliament, while providing that in certain circumstances the Minister may make an order for deportation, has taken great care to safeguard the individual from any arbitrary exercise of that power, and secures him absolutely against a mere political use of it. This it does by interposing a Board—presumably non-political, and, as to the chief member, necessarily non-political—between the opinion of the Minister when it is first formed and any action by him on that opinion, and by requiring the Chairman of the Board to be a Judge or a Police, Stipendiary or Special Magistrate, and, therefore, free from any influence of the Minister. The individual is thus afforded the opportunity of satisfying the independent Board that the Minister's prima facie view is wrong. If the individual, by absenting himself (personally or by counsel), indicates that he has no reason to offer, the Minister has the power to make the order. If the individual appears, he has the opportunity to place the facts before the Board. If the Board does not recommend deportation, the Minister has no power to deport. If, however, the Board recommends deportation, then, and then only, the Minister may, if he thinks right, make the order, not as a judicial but as an executive, act. He is, however, not bound to accept any recommendation. Reasons may still appear sufficient to cause him to refrain from making the order. But it is he, and he alone, who can make any order which, on the construction of the section, imposes the obligation on an individual of departing from the Commonwealth. The Board's recommendation has no legal force whatever, beyond being a necessary safeguard against either the undue use of ministerial power or even a mistaken opinion of a Minister when all the

facts are known. It is a guarantee provided by Parliament to the individual that he has a non-political and unprejudiced opinion on the merits before an adverse decision by the Executive is possible. The opinion of the Board is *not a decision*; the persons who are the subject of inquiry are not charged with any offence with a view to conviction; and the Board's recommendation, whether favourable or unfavourable to them, has not the character of a judicial determination. Tested by the considerations I set out fully in *Huddart, Parker & Co.'s Case* (1), the Board is not a Court and is not intended to be a Court. Prohibition is therefore quite inapplicable.

2. *Quo Warranto.*—This remedy is stated by *Blackstone* (3 Comm., p. 262) to be in the nature of a writ of right for the King against him who claims or usurps any office, franchise or liberty, to inquire by what authority he supports his claim in order to determine the right. But it is well settled that this proceeding cannot be resorted to for the purpose of challenging the validity of the office itself. This is established by the case of *R.* v. *Taylor* (2). The law is stated very distinctly in *Halsbury's Laws of England*, vol. x., par. 270, and in *High on Extraordinary Remedies*, par. 670.

3. *Certiorari.*—Then as to certiorari, the judgment of *Fletcher-Moulton* L.J. in *R.* v. *Woodhouse* (3) is clear that, though this remedy is not restricted to Courts, as is prohibition, but extends to judicial acts in a wider sense, yet there is always this limitation that the body to which a writ of certiorari is directed must have "some right or duty to decide." As I have stated, the Board have no right or duty to "decide" anything. They may or may not recommend deportation, but, such a recommendation, not being a decision, certiorari is inapplicable.

4. *Injunction.*—By consent, the claim for an injunction in the action *O'Flanagan* v. *Macfarlane* was proceeded with, so that, whatever possible remedy exists for any assumed invalid action or threatened action of the Board, relief might be granted. This is in accord with the very wide terms of sec. 32 of the *Judiciary Act*, which I regard as the dominant section in this connection. But even that section, wide as it is, limits the possible remedies to such "as any of the

(1) (1908-09) 8 C.L.R., at pp. 382-384.
(2) (1840) 11 A. & E., 949.
(3) (1906) 2 K.B., 501.

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parties . . . are entitled to in respect of any legal or equitable claim properly brought forward." The claim here is legal, not equitable. It includes the right to personal liberty. No higher claim can be asserted short of that to life itself. I am disposed to give the largest scope to the section, consistent with its express terms, that I can in favour not only of liberty but of all rights invaded. But the law is clear that, to obtain an injunction to restrain an act alleged to infringe upon a right, it must be shown either that the act has infringed, or that, if persevered in, it is calculated to infringe, upon the right; that is, that the act if pursued to completion will be an invasion of the right relied on. It is not pretended that liberty or any other right has so far been interfered with. The nature of the application is, as Mr. *Watt* very properly admitted, *quia timet*; that is, it is apprehended by the plaintiffs, in the first place, that their liberty will be interfered with. "But," said Lord *Dunedin* for the Privy Council in *Attorney-General for Canada* v. *Ritchie Contracting and Supply Co.* (1), "no one can obtain a *quia timet* order by merely saying '*Timeo*'; he must aver and *prove* that what is going on is calculated to infringe his rights." In *Attorney-General* v. *Manchester Corporation* (2) *Chitty* J. said: "The principle which I think may be properly and safely extracted from the *quia timet* authorities is, that the plaintiff must show a strong case of probability that the apprehended mischief will, in fact, arise."

I assume on the part both of the Minister and the Board the utmost good faith and a conscientious desire to do their respective duties impartially. They have an unquestionable right to that assumption. On that basis the Board has to proceed in order to consider whether it ought or ought not to make a recommendation for deportation. In order to arrive at a conclusion on that point, it has to consider (*inter alia*) whether in fact the persons who are summoned before it are persons such as are described in par. (*d*) of sub-sec. 1 of sec. 8A. It has to be guided, of course, by the evidence as to that. If the Board recommends against deportation, there is no suggestion of any risk to liberty; for then the Minister is powerless. But there is, in my opinion, a real danger of an adverse recommendation unless the plaintiffs submit to what, on the assumption of

(1) (1919) A.C., 999, at p. 1005. (2) (1893) 2 Ch., 87, at p. 92.

illegality of the enactment, they are not bound to submit to, namely, examination and cross-examination. I shall elaborate this further a little later on. The alternative is: "Either attend under compulsion, or tacitly confirm by absence whatever evidence is adduced against you." I think, therefore, there is a technical case of attempted wrong made out, once we regard the Board as unauthorized. But still I do not think a case is established for interposition by injunction. The Court is not entitled to apply the obstacle of injunction to the contemplated action of a co-ordinate branch of the Government unless not only a case of clear illegality, proved to be calculated to result in a clear injury, is established, but also it is shown that by no other means can injury be averted or sufficiently compensated for. Where that is shown, then, by principles of both British jurisprudence (see *Rogers* v. *Rajendro Dutt* (1) and *Eastern Trust Co.* v. *McKenzie, Mann & Co.* (2)) and of American jurisprudence (see *Western Union Telegraph Co.* v. *Andrews* (3)), injunction is a well-recognized remedy against the individuals purporting to act as agents of the Government.

So far, all that is sought by the Executive is the advice or opinion of the Board, not any effective action: effective action may or may not be possible; even if possible, it may or may not occur. If no other consideration presented itself than the apprehended danger of deportation, to intervene now by injunction would, on legal principles and on principles of constitutional right, be unjustifiable. But another consideration does present itself, namely, that there is pending a criminal prosecution against the plaintiffs instituted at the instance of the State of New South Wales under the *Crimes Act* 1914-1915 as amended by the *War Precautions Act Repeal Act* 1920. That prosecution is for alleged sedition. It was mutually admitted at the Bar that substantially the same facts are common to both the criminal proceeding and the deportation proceeding. Thus an entirely new factor is introduced into the case. Now, although the Commonwealth, in any lawful proceeding it thinks fit by its appropriate organ to pursue, cannot be obstructed by any State proceeding, it may be necessary, when

(1) (1859-60) 13 Moo. P.C.C., 209, at p. 236.

(2) (1915) A.C., 750, at p. 760.

(3) (1909-10) 216 U.S., 165.

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the legality of the Commonwealth proceeding is challenged as prejudicial to an individual, to consider his actual position, even though created by a State proceeding, in order to determine whether he is in fact prejudiced or not by the Commonwealth proceeding. I am of opinion that though, apart from the criminal proceedings now pending, no sufficient case is proved for the intervention of this Court by injunction, yet sufficient is proved, once the element of criminal prosecution is introduced, provided the deportation proceedings are shown to be unwarranted by law. While the plaintiffs, so far as any order of deportation itself is concerned, could be adequately protected if needful by habeas corpus, no remedy—not even habeas corpus—could adequately compensate them for the practical compulsion either to disclose their case before the Board or to risk, as an alternative, an order for deportation which, even if set aside for illegality, would represent a finding of facts or admission of facts seriously pertinent to the criminal charge. This practical compulsion in so weighty a matter is in itself, in my opinion, an abridgment of the common law right of accused persons. On this ground only I think that, assuming sec. 8A to be illegal (as I have up to the present assumed) and, therefore, not a justification for the course proposed, there would be a proper case for an injunction.

5. *Power to grant Injunction.*—It is very desirable in the circumstances to state with some degree of explicitness why, in my opinion, the remedy of injunction would be properly granted on the assumption always that the enactment now challenged was found to be invalid. There are several important features in this case; but I consider that the clear assertion of the power of a Court to protect individual rights of liberty from unauthorized violation, and especially from such violation when attempted by illegal executive action with all the administrative force of the nation behind it, is by far the most important. The concrete question raised by this phase of the matter may be very tersely stated thus: "Has a competent Court power to prevent by prohibitory injunction unauthorized persons from committing an illegal act calculated to imperil in advance the liberty of an accused person, namely, the holding of a public inquiry with a view to a public pronouncement as to his committing the very act with which he stands charged before the

King's Courts?" The power seems to me self-evident. If the act were consummated, no one could, in the face of the numerous authorities criminal and civil, doubt that punishment and repression would follow if the offenders were subject to the jurisdiction of the Supreme Court of New South Wales. It would be a contempt of the King's Courts, and an offence against public justice. Nor could it be controverted that in a pending action a party can obtain from the Court seised of the cause an injunction to restrain the publication of matter calculated to prejudice the trial. Has an accused person whose liberty or life is at stake in a pending prosecution no means of preventing what might well be an irreparable injury by invoking the interposition of a competent Court? Is it the law that the wrong must first be done, the fountain of justice poisoned, the accused convicted, and then, as it is conceded, that the law gives a remedy by process of contempt or indictment or habeas corpus? A remedy for what? For an irreparable injury that can never be undone or compensated for—the loss of liberty, of reputation, perhaps of life itself. Unless constrained by the most explicit and commanding authority I could not accept that as the law. Even beyond these considerations it must be remembered that a Board may not sit in New South Wales or do anything there which would give the State Courts jurisdiction for contempt or in any other way. What possible remedy, then, either before or after publication or before or after trial, could an accused person have, if not by action in the Federal Court or in some other Court having jurisdiction over the persons offending or threatening to offend, as for a wrong threatened or done? This, however, only emphasizes the appropriateness of the remedy if there be a right invaded or threatened, as I am of opinion there is on the assumption that the enactment is invalid.

There would on the facts before us be a clear invasion of the elementary right of every accused person to a fair and impartial trial. That such a right exists as a personal right seems to me so deeply rooted in our system of law and so elementary as to need no authority to support it. It is a right which inheres in every system of law that makes any pretension to civilization. It is only a variant of the maxim that every man is entitled to his personal liberty

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except so far as that is abridged by a due administration of the law. Every conviction set aside, every new criminal trial ordered, are mere exemplifications of this fundamental principle. And if the right be admitted, it would be an empty thing, unless the law adequately protected it. It seems necessary, however, to adduce authority. Fortunately it is clear and weighty.

That an invasion of personal liberty or personal reputation unjustified by law is a tort for which, when accomplished, an action for damages, or in proper cases an injunction, is a remedy will be readily conceded. What constitutes such a tort? It may be that the precise form of attempted violation that has occurred in the present case—on the assumption made—has not previously arisen. But that is no answer. As was observed by *Pratt* C.J. in a classical passage in *Chapman* v. *Pickersgill* (1), "this action is for a tort: torts are infinitely various, not limited or confined, for there is nothing in nature but may be made an instrument of mischief." A modern confirmation is found in the words of Lord *Herschell* in *Allen* v. *Flood* (2):—"I should be the last to suggest that the fact that there was no precedent was in all cases conclusive against the right to maintain an action. It is the function of the Courts to apply established legal principles to the changing circumstances and conditions of human life." The novel conditions of our Constitution, leaving diverse and concurrent powers in Commonwealth and State in respect of the same facts, have led to the present situation. And so it is our duty to see how far deeply-rooted principles apply to maintain the first essentials of justice.

If, therefore, in principle, the plaintiffs have a legal right, and if without legal warrant, that right is invaded, then it matters not that the method of invasion is novel, a legal wrong is done (*Rogers* v. *Rajendro Dutt* (3)). If that be so, if the plaintiff have a legal right, then, to borrow the words of Lord *Holt* in *Ashby* v. *White* (4), "he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal." Perhaps the

(1) (1762) 2 Wils. K.B., 145.
(2) (1898) A.C., 1, at pp. 127-128.
(3) (1859-60) 13 Moo. P.C.C., at p. 241.
(4) (1703) 2 Ld. Raym., 938, at p. 953.

most apposite reference to begin with is *Duncan* v. *Thwaites* (1). That was an action for libel, but the declaration alleged (*inter alia*) that at the time of publication the plaintiff was under a pending charge of indecent assault and not yet indicted, and that the defendant published the libel to hinder and obstruct the course of justice and to prevent the plaintiff having a fair and impartial trial. The libel alleged consisted of the preliminary proceedings before the justice on the criminal charge. Modern circumstances, no doubt, as pointed out in *Usill* v. *Hales* (2), materially affect the right to publish such lawful preliminary examinations. But that is beside the point now at issue. We have to assume for present purposes that the publication is unlawful. And, as that is the assumption made by Lord *Tenterden* (then *Abbott* L.C.J.) in *Duncan* v. *Thwaites*, in the passage I am about to quote, the opinion is of high authority. The Lord Chief Justice said (3): "I take it to be a general rule that a party who sustains a special and particular injury by an act, which is unlawful on the ground of public injury, may maintain an action for his own special injury; *and if publications like the present tend to prevent or impede the due administration of justice towards persons accused of offences*, it is impossible to say that the individual whose trial *may* be affected by them, does not sustain *a special and peculiar injury even in that view.*" That generalization is, as will be observed, entirely independent of the question whether the publication complained of is a libel or not. In *Lewis* v. *Levy* (4) it was pointed out by Lord *Campbell* C.J., referring to *Duncan* v. *Thwaites* that "the actual pendency of a prosecution was a main ingredient in that decision." The two cases were distinguished by Lord *Campbell*, who expressed no dissent from the general proposition enunciated by Lord *Tenterden* or its application to the particular case. The recent case of *Neville* v. *London "Express" Newspaper Ltd.* (5), though dealing with "maintenance," appears to me to involve the correctness of the general proposition of Lord *Tenterden*. The learned Lords differed on two points; but all of them agreed, as I understand the judgments on this, that whatever was unlawful "maintenance" was an offence, and, if it caused

(1) (1824) 3 B. & C., 556, at p. 953.
(2) (1878) 3 C.P.D., 319, at p. 325.
(3) (1824) 3 B. & C., at p. 584.
(4) (1858) E. B. & E., 537, at p. 562.
(5) (1919) A.C., 368.

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damage, was actionable at common law. Lord *Finlay* L.C. said (1): "It is an action in respect of an offence which causes damage to the plaintiff." Lord *Atkinson* said (2): "Every subject has a legal right not to be harried in Courts of Justice by actions such as I have mentioned." Though his Lordship thought damage was imported by law, the statement quoted is valuable on the point in hand. Lord *Shaw* said (3): "What in short is to be accomplished is the impartial administration to poor and rich alike." His Lordship also says (4):—"*This is a civil suit.* I am of opinion, my Lords, that in any civil action in respect of maintenance it is necessary to establish these two things—namely, (1) that the maintenance was *unlawful* in the sense above described both in statutes and in text-books; that is to say, that it was to the hindrance or disturbance of common right, to *the delay or distortion or withholding of justice*; and (2) that the plaintiff in an action of maintenance shall have suffered *actual injury* by reason thereof, for which injury alone and to the extent of it is the maintenance answerable." Here, if the act threatened be tortious, there is, of course, no need of special damage. Again Lord *Shaw* says (5):—"What was it that had been done unlawfully, what was it that was in contempt of the Queen? It was that an action of debt had been maintained with these two essential qualities: (1) 'to the manifest retardation and disturbance of justice; and (2) to the serious loss of the foresaid' plaintiff." Lord *Phillimore* (6) referred to the fact that in the early days "the ordinary subject of the King found great difficulty in procuring a fair trial when his adversary was in some privileged position." He also says: "Embracery and subornation of perjury were some of the means used" to defeat justice. He adds (7): "Maintenance is on a par with champerty, conspiracy and embracery. *The doctrine was established to prevent injustice.*" I may here observe that the common law gave a civil action for maintenance and also for embracery (see *Hawkins' Pleas of the Crown*, vol. I., p. 467). It would seem strange that the doctrine of civil action for maintenance and embracery, which, as Lord *Phillimore* says,

(1) (1919) A.C., at p. 380.
(2) (1919) A.C., at p. 405.
(3) (1919) A.C., at p. 410.
(4) (1919) A.C., at p. 415.
(5) (1919) A.C., at pp. 416-417.
(6) (1919) A.C., at p. 427.
(7) (1919) A.C., at p. 433.

was "established to prevent injustice," fails where injustice needs most of all to be prevented. Even so early as Charles I.'s time two Judges of the King's Bench thought an action on the case lay against a stranger who was not one of the jury but caused himself to be sworn in as a juryman and gave a verdict adverse to the party complaining (*Sir Edward Powell's Case* (1)). The case of a witness disobeying a subpœna is much in point. By a number of cases it has been well settled (1) that the breach of duty in that case arises, not out of any contract with the party causing the subpœna to be issued, but for disobeying the order of a competent authority (*Couling* v. *Coxe* (2) ; *Collins* v. *Godefroy* (3)) ; (2) that this gives rise to an obligation to the Court to be present at each particular moment the Court is sitting, and an obligation to the party to be there when he is wanted and is called upon *ad testificandum* (*Lamont* v. *Crook* (4)) ; (3) that failure to attend is a contempt (*Mullett* v. *Hunt* (5)) for which he could be attached (*Mullett* v. *Hunt* (6) and *R.* v. *Sloman* (7)) ; (4) that failure to attend was actionable if injury be shown (*Mullett* v. *Hunt* and *Horne* v. *Smith* (8)) ; (5) that the plaintiff in such an action need not show that the witness was indispensable, but only *material* (*Mullett* v. *Hunt*). That class of cases rests, as it seems to me, on an acknowledged basis that the law, for the advancement and preservation of justice, recognizes the legal right of every litigant to have the litigation proceed in due course of law, and recognizes, as a means to that end, a corresponding duty on every other person not to do anything the law forbids, or to fail to do anything the law commands him to do; and, further, that, besides whatever public sanction exists for his breach of duty, an action for damages lies where actual special prejudice is shown. There is one other high authority to which I ought to refer now. It is *R.* v. *Fisher* (9). Again we have to bear in mind the modern tendency as to privileged publications; but again I have to observe that the principle of the statement to be quoted is unaffected. The defendants were indicted for libel on

(1) (1642) Mar., 80.
(2) (1848) 6 C.B., 703, at p. 719.
(3) (1831) 1 B. & Ad., 950.
(4) (1840) 6 M. & W., 615.
(5) (1833) 1 Cr. & M., 752, at p. 758.
(6) (1833) 1 Cr. & M., at p. 764.
(7) (1832) 1 Dowl. P.C., 618.
(8) (1815) 6 Taunt., 9.
(9) (1811) 2 Camp., 563.

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a man standing charged with assaulting a female, and Lord *Ellenborough* said (1):—" The necessary tendency of the libel was, in the language of the indictment, to traduce and defame the prosecutor, and to prejudice him in the minds of his countrymen, and to cause it to be believed that he was guilty of the assault laid to his charge, *and to deprive him of the benefit of an impartial trial.* If so, the law infers that such was the intention of the defendants in publishing it, and they must answer for the *injury they have there done to the prosecutor individually*, and to the community of which he is a member." The case was a criminal case, but the point is that it recognizes an *individual injury* to the prosecutor for which the law exacts punishment. The ground on which the individual in a case like this is entitled to civil redress is that he has been put in danger to lose his life or liberty. That is brought out in several cases. The case of *Chapman* v. *Pickersgill* (2) was a case of maliciously instituting bankruptcy proceedings. It was in 1762, and was novel then. Even down to the year 1883 the true principle of the tort was not fully developed. In that year a very eminent Court of Appeal decided the case of *Quartz Hill Consolidated Gold Mining Co.* v. *Eyre* (3), where a petition to wind up a company had been presented and an action was brought for doing so maliciously and without probable cause. An objection was taken that no such action would lie under any circumstances. As to this point, *Brett* M.R. and *Bowen* L.J., founding themselves on the basic principles enunciated by *Holt* C.J. in *Savile* v. *Roberts* (4), held that such an action would lie in certain circumstances. Lord *Holt* had laid down three positions where the law would support an action for malicious prosecution, namely: (1) " The damage to a man's fame, as if the matter whereof he is accused be scandalous "; (2) " where a man is put in danger to lose his life, or limb, or liberty "; (3) " damage to a man's property." The Court of Appeal held that, as in the case before them damage to reputation was from the nature of the petition involved, the action would lie without proof of special damage, because the law imported damage. The case is instructive. An action for malicious prosecution or maliciously presenting a petition

(1) (1811) 2 Camp., at p. 572.
(2) (1762) 2 Wils. K.B., 145.
(3) (1883) 11 Q.B.D., 674.
(4) (1698) 1 Ld. Raym., 374.

of bankruptcy or to wind up are proceedings before a duly constituted Court. Prima facie, therefore, they are competent and justifiable proceedings, which will meet in that Court with their just determination. But, if "malicious and without reasonable and probable cause," the protection of the law is taken away and the act is reduced to one which has to be judged of as tortious or not on ordinary grounds. So judging by the petition in the case cited, the Court said that the necessary proceedings before the hearing involved publication to the world of the allegations of the petitioner, and that those allegations involved an injury to reputation, just as any ordinary libel does, before the person attacked had the opportunity to meet and disprove it in open Court. *Bowen* L.J. said (1): "I do not see how a petition to wind up a company can be presented and advertised in the newspapers without striking a blow at its" (the company's) "credit." *Brett* M.R. said (2): "The very touchstone of this point is that the petition to wind up is by force of law made public before the company can defend itself against the imputations made against it." The principle of that decision was sustained, but on account of the varying circumstances a converse decision was arrived at, by an equally eminent Court, in *Wiffen* v. *Bailey and Romford Urban Council* (3). *Buckley* L.J. (as he then was) held that the proceedings in that case, a complaint under the *Health Act*, involved neither (1) damage to fame, (2) danger of imprisonment nor (3) damage to property. After quoting Lord *Holt's* test, and adopting Lord Justice *Bowen's* words, the learned Lord Justice said (4): "So the exception of civil proceedings" (that is, from being actionable), "so far as they are excepted, depends, not upon any essential difference between civil and criminal proceedings, but upon the fact that *in civil proceedings the poison and the antidote are presented simultaneously.*" *Phillimore* L.J. and *Pickford* L.J. agreed.

The principle I extract from those cases is that any unjustifiable publication attacking a man's reputation or endangering his liberty is an actionable tort without proof of special damage. It may be said of the threatened action of the Board, as appears from the

(1) (1883) 11 Q.B.D., at p. 693.
(2) (1883) 11 Q.B.D., at p. 685.
(3) (1915) 1 K.B., 600.
(4) (1915) 1 K.B., at p. 607.

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notification of the Minister, practically what *Bowen* L.J. and *Brett* M.R. said of the publication of the petitioner in the passages above quoted. Assuming the invalidity of the enactment, it is not contested that if an unauthorized body of persons set up by the Administration were prior to the trial to summon persons accused of crime, whether murder or sedition or any other crime you please, and were to insist on investigating the facts and publishing their conclusions, even though inviting the accused to offer what explanation they pleased, it would be a contempt of Court if done within the jurisdiction of the Court and would be sternly punished.

But is the remedy confined to proceedings for contempt; and only *after* the damage has been done? The damage would be irreparable. No punishment of the offender, no money compensation, would repair the damage done by prejudicially affecting the result of the trial on which the liberty, and perhaps the life, of the accused depended. Has he no personal rights to prevent this danger? In my opinion he has, as I have said. I think the cases already cited necessarily involve it. But there is further authority. In *R.* v. *Editor of Daily Mail*; *Ex parte Farnsworth* (1), the King's Bench Division made absolute a writ of attachment against the editor of a newspaper for publishing the sentence of a Court Martial before it was duly confirmed and promulgated. The central point of the case is that it was recognized that the accused had a right to have the confirming officer's decision—which had yet to be given—uninfluenced by the publication of the determination of the Court Martial. Lord *Coleridge* J. said (2): "To make public that which should be secret may be seriously to interfere with the free action of that officer." As to one portion of the publication, namely, defamatory statements, Lord *Coleridge* J. said: "Here the published statements which are defamatory of the accused, unconnected in some instances with the crime alleged, unproved and possibly false, might easily *tend to prejudice his case*, and would be calculated seriously to thwart and interfere with the due administration of justice." *Avory* J. quotes *Bowen* L.J.'s reference to "a fair and impartial trial"; and *Salter* J. says the Act does not, in his opinion, "take away the

(1) (1921) 2 K.B., 733. (2) (1921) 2 K.B., at p. 749.

right of an accused person, who fears that his fair trial may be prejudiced, of applying to this Court by way of a rule nisi."

It is true the order nisi is for an attachment for possible injury already done, but the point is that there is recognized a personal right to a remedy of the accused who "fears that his fair trial may be prejudiced." That seems to me to connote such a legal right to a fair trial as is entitled to whatever protection the Court in the circumstances finds necessary. Lord *Hardwicke* in *Anon.* (1) said his reason for committing for publishing an advertisement as to pending proceedings was "*not only for the sake of the party injured* by such advertisement, but for sake of the public proceedings in this Court."

The final and paramount consideration in all cases is that emphasized in *Scott* v. *Scott* (2), namely, "to do justice" (Viscount *Haldane* L.C.). All other considerations are means to that end. They are ancillary principles and rules. Some of them are so deeply embedded in our law as to be elementary and axiomatic, others closely approach that position. Of the latter class is publicity, which can only be disregarded where necessity compels departure, for otherwise justice would be denied to those whom Earl *Loreburn* (3) termed "the parties entitled to justice." Lord *Atkinson* (4) spoke of contempts "prejudicing the case of any litigant in any pending suit." The same learned Lord (5) contemplated the possibility of a given contempt as capable of being viewed in either of two aspects "the one criminal and the other simply tortious." Lord *Shaw* (6) referred to "the elementary principle that an accused person is not bound to incriminate himself." His Lordship said (7) that the order of *Bargrave Deane* J., ordering a cause to be heard in camera, was "an exercise of judicial power violating the freedom of Mrs. Scott in the exercise of those *elementary and constitutional rights* which she possessed, and in suppression of *the security* which by our Constitution has been found to be best guaranteed by the open administration of justice." "The elementary principle that an accused

(1) (1754) 2 Ves., 520.
(2) (1913) A.C., 417, at p. 437.
(3) (1913) A.C., at p. 446.
(4) (1913) A.C., at p. 455.
(5) (1913) A.C., at p. 464.
(6) (1913) A.C., at p. 469.
(7) (1913) A.C., at p. 484.

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person is not bound to incriminate himself " is of the highest importance. For, while it is true that the summons to attend the Board's inquiry would give the persons summoned an opportunity to contest the allegations against them, it would only afford that opportunity at the cost of surrendering the elementary right just adverted to. The alternative presented amounts to practical coercion (see *Maskell* v. *Horner* (1), and per *Hawkins* J. in *Allen* v. *Flood* (2)). Absence or silence preserved would go a considerable way in strengthening any affirmative evidence before the Board against the plaintiffs, while any statement on their part would be a forced abandonment of their right of maintaining silence on the subject of the prosecution. If that alternative be not justified by law, it is, in my opinion, a violation of the right of liberty. I understand by all these references to " rights," real active rights, legal rights, which find appropriate remedies in the Courts, according to the stage and the circumstances in which redress is sought. In some circumstances habeas corpus may be the appropriate remedy, in others committal or attachment, in others damages ; but wherever damages are possible as compensatory, injunction is possible as preventive. The right to injunction does not and never did depend on property (*Prince Albert* v. *Strange* (3) ; *Pollard* v. *Photographic Co.* (4)). There were at one time reasons why from one cause or another the English Courts had a more or less limited power of granting injunctions, reasons which have now disappeared, as explained by an unusually powerful Court of Appeal in *Bonnard* v. *Perryman* (5). All this aggregation of power, and perhaps more, is concentrated in sec. 32 of the *Judiciary Act* already cited. On principle, as Lord *Watson* said in *White* v. *Mellin* (6), " damages and injunction are merely two different forms of remedy against the same wrong." If damage is irreparable in the sense that pecuniary compensation would be inadequate protection, injunction may, and in the absence of countervailing circumstances will, be granted to protect a legal right (*Stollmeyer* v. *Trinidad Lake Petroleum Co.* (7)), affirming Lord *Kingsdown* in *Imperial Gas Light and Coke*

(1) (1915) 3 K.B., 106.
(2) (1898) A.C., at pp. 17-18.
(3) (1849) 1 Mac. & G., 25.
(4) (1888) 40 Ch. D., 345, at p. 354.
(5) (1891) 2 Ch., 269, at pp. 282 *et seqq.*
(6) (1895) A.C., 154, at p. 167.
(7) (1918) A.C., 485, at p. 499.

Co. v. *Broadbent* (1)). It need hardly be said that an interlocutory injunction may be refused where finally an injunction might be granted at the hearing (*Bonnard* v. *Perryman* (2)). That is really beside the real question here, though cases on interlocutory injunctions sometimes obscure a point like the present.

The real consideration which a Court would have regard to when once a position like the present is established is the substantial imminence of irreparable damage, regard being had to the seriousness of the consequences should that damage occur. Lord *Brougham* L.C., in *Earl of Ripon* v. *Hobart* (3), used language equally appropriate to a case like the present. He said :—" For, in matters of this description, the law cannot make over-nice distinctions, and refuse the relief merely because there is a bare possibility that the evil may be avoided. Proceeding upon practical views of human affairs, the law will guard against *risks which are so imminent that no prudent person would incur them, although they do not amount to absolute certainty of damage.* Nay, it will go further, according to the same practical and rational view, and, balancing the magnitude of the evil against the chances of its occurrence, *it will even provide against a somewhat less imminent probability in cases where the mischief, should it be done, would be vast and overwhelming.*" That there may be other remedies for other aspects of what is complained of is no reason for refusing personal remedies for the personal wrong (see Lord *Brougham* in *Ferguson* v. *Kinnoull* (4)).

I have elaborated this part of my opinion because I consider that the clear assertion of the power of a Court to protect individual rights of liberty from unauthorized violation, particularly when asserted in the name of the law, is, even among the many important features of this case, by far the most important. The serious effect that, in my opinion, the action of the Board would most assuredly have had upon any subsequent trial of the plaintiffs would have been sufficient to have called for the restraining hand of this Court, if it could have been shown that the Board's action was not supported by a valid enactment of the Commonwealth Parliament.

6. *Validity of Sec.* 8A.—The final question then is whether sec. 8A

(1) (1859) 7 H.L.C., 600, at p. 612.
(2) (1891) 2 Ch., 269.
(3) (1834) 3 Myl. & K., 169, at p. 176.
(4) (1842) 9 Cl. & Fin., 251, at p. 297.

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is valid or not. This is a necessary question, because there can be no controversy that the section includes in its terms the plaintiffs, since they are persons "not born in Australia." Validity was challenged on various grounds, which are substantially reducible to three. The relevant power in the Constitution to support the legislation is par. XXVII. of sec. 51. By that enactment it is provided that "the Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth, with respect to (XXVII.) immigration and emigration." The provisions of sec. 8A of the Act, it was said, assuming them on proper construction to apply to British subjects (not Australian born)—and the contrary was only so faintly suggested, that it does not call for further attention—were unwarranted by the Constitution, first because the power did not extend to British subjects, next because the power did not in any case extend beyond the very act of immigrating into or emigrating from the Commonwealth, and lastly because the power did not extend to persons who did not enter the Commonwealth for the purpose of "settling" there either permanently or for some period vaguely suggested but apparently of prolonged and indefinite duration—in other words, to persons euphemistically termed "visitors."

There is nothing in either the words of the specific power or any immediate context, or in any other part of the Constitution, to except British subjects who are not Australians from the operation of the power construed in its primary sense. Australia is a distinct constituent unit of the Empire, and the natural law of self-preservation requires that the primary and unqualified sense of the power shall not be cut down.

The second objection suggests that the Constitution was looking, not to the nature of the persons who might immigrate and how they if admitted might affect the community, but to the mere mode or time of their arrival. Obviously, if the "act" of immigrating were the sole subject matter of legislation, nothing happening before or after that "act" could be dealt with by Parliament. An attempt to enter upon false credentials, if unsuccessful, could not be legislated for, since there would be no actual "immigration." And on that hypothesis also, no legislative condition imposed, even before arrival

and to operate afterwards by force of the Act, could be insisted on. Even if a bond were exacted, whatever remedy or right might subsequently arise would rest on the contract created, and not on the provisions of the law which required it. If, however, it be once admitted that the law independently could impose subsequently arising obligations, then the method of creating them is entirely within the discretion of the Legislature, and its choice of means cannot be questioned unless contrary to some provision in the Constitution. The dictionary was appealed to for the meaning of the word "immigration." Like many other words in our language, it is more or less flexible. But what I regard as a very valuable as well as authoritative declaration as to the interpretation of statutes, is contained in a judgment of the Privy Council in the case of *The Lion* (1). There Lord *Romilly* said: "The meaning of particular words in an Act of Parliament, to use the words of *Abbott* C.J. in *R.* v. *Hall* (2), 'is to be found not so much in a strict etymological propriety of language, nor even in popular use, as in the subject or occasion, on which they are used.'" That statement is extremely apposite here. The word "immigration" was not inserted in reliance on some lexicographer's opinion of what that word conveyed in the various collocations in which it might be found. It was adopted on the occasion when (*inter alia*) governmental powers which experience had shown were not exercisable with full advantage to the whole of Australia were transferred either exclusively or supremely to the Commonwealth. It had come to be seen that the piecemeal and not wholly identical treatment of the subject of "immigration," as it came to be called, by the separate Colonies was far from satisfactory or effective; either from an Australian or an Imperial standpoint. It was an urgent question awaiting early treatment by the single hand of a united people by the light of experience. The history of that experience is enlightening, but, it will be seen, is confirmatory only of the meaning properly and normally attachable to the words as they stand in a national grant of legislative power. "Immigration and emigration" is the simple but unqualified subject of power, and no words could be wider to enable a Parliament to deal territorially with all that is comprised within the operations connoted

(1) (1869) L.R. 2 P.C., 525, at p. 530. (2) (1882) 1 B. & C., 123, at p. 136.

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by the words. Immigration, for instance, connotes the persons who immigrate and their movements, including departures, travel, arrival, entry, and presence after arrival. Legislation with reference to immigration means legislation to control the matter; and it includes legislation, if Parliament so desires, for the encouragement as well as the restriction of immigration. It could hardly be contended that the Federal Parliament, if it were minded to encourage a particular form of immigration, could not lawfully include in its scheme a method of settling the immigrants after they arrived and providing for their wants. Such a provision could not be impeached on the ground that on the moment of arrival the immigrants had ceased to be immigrants, had passed beyond the ambit of the Commonwealth power and must look elsewhere for any means of assistance, however willing the Commonwealth Parliament might be to continue its scheme of national development. But if the argument of the "instant of entry," and that alone, be fallacious when applied to the encouragement of immigration, how can it be correct when applied to restriction? It is perforce conceded that there is power of absolute exclusion, as well as of absolute admission. But the suggestion is that there is no *via media*. The Commonwealth has, it is conceded, unlimited power over immigration, but—so runs the argument—it has not power to admit immigrants conditionally. I put to Mr. *Watt* the question "Could the Commonwealth Parliament validly enact that a foreigner might be admitted for a limited period only?" The answer was not a direct "No"; nor was it a direct "Yes." But, unless a direct negative can be maintained, the plaintiff's contention is hopeless. If one condition can be imposed, then the whole matter of conditional entry is open to the Parliament. I am at a loss to understand how any solid foundation can exist for the contention. Where there is power to prohibit absolutely, there must be power to relax that prohibition without entirely surrendering it. Relaxation means condition; the opposite contention demands, as an alternative, absolute surrender. How is that a working possibility for a self-governing people? Look at the matter practically. Parliament, let us suppose, is willing and anxious that eligible immigrants shall be admitted, but determined that dangerous persons shall be excluded. Definitions can be framed, but cannot

always be immediately fitted to specific cases. Say, for instance, insane persons or tuberculous persons are prohibited. A man arrives and, to all appearance and so far as examination can discover, he is neither insane nor tuberculous. Nevertheless, after admission he may manifest symptoms which show that he had at the instant of arrival one or other of those afflictions latent in his system and on the point of manifestation. What is the Commonwealth to do? Is it definitely to refuse what may be a valuable citizen, or definitely and irrevocably to receive what may be a dangerous element into its midst? Why, within the ample scope of the immigration power, can it not say:—"We will admit you conditionally; if within three months or three years you manifest insanity or tuberculosis, then we shall regard you as having been a lurking danger when you entered, and you must leave. If, however, that time passes, and you appear still free from insanity or tubercle, then we definitely receive you as an inhabitant of Australia"? I cannot understand why a Legislature, having the extensive power as formulated in *R.* v. *Burah* (1), cannot, in the absence of limiting words at least, take the middle course as I have indicated it. It must not by any means be taken that I am suggesting that as the limit of the power. Far from it. Except in the case of a person Australian born, who having abandoned this country as his home is readmitted and so restored to his original status, an "immigrant"—that is, a person whose original home was elsewhere and who comes to this country for any purpose—remains an "immigrant" as long as he is in Australia. As to him, while in Australia, the rule holds "Once an immigrant always an immigrant," and the Parliamentary power is never abandoned and cannot be abandoned. It seems to me a needless and improper restriction of language to alter the word "immigration," normally denoting the broad social movement of persons from abroad and passing into this country, to the microscopic verbal expression "immigration" denoting merely the momentary and isolated act of entering the country. That meaning is not, so far as I know, supported even by the most conservative lexicographer.

The third objection is scarcely consistent with the second. It is that "visitors,"—however criminal, immoral, or diseased, or

(1) (1878) 3 App. Cas., 889, at p. 904.

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degraded, or of whatsoever race or colour—are entirely outside the true notion of "immigration," and beyond the power of the Commonwealth Parliament to exclude. Let me give some striking examples of what this means. "Prohibited immigrants," as defined, include (among others) the following: idiots, persons suffering from a serious transmissible disease, or pulmonary tuberculosis, or any loathsome or dangerous communicable disease, or any defect liable to render them a charge on a public or charitable institution, persons convicted of crime and imprisoned within five years, prostitutes, and persons living on prostitution, and persons who advocate the overthrow by force or violence of the established government of the Commonwealth or of any State. The argument unadorned is simply that such persons if they come as "visitors"—no limit being suggested to the period of time or the object of their visit—are free to enter the Commonwealth, bring their dangers with them and mingle with the general population, with such results as may be expected to follow. Is our Constitution so grotesque as is represented? Unless the Commonwealth Parliament is utterly devoid of all power to exclude "visitors" of the type mentioned, the argument is useless, because to say that any specific power is insufficient is *nihil ad rem* if a statute is sustainable under any other power. It is contended that there is no power but as to "immigration" or possibly "aliens." But the power as to "aliens" leaves a huge gap, sufficient in itself to paralyse the Commonwealth unless "immigration" covers it. Why are "visitors" not within the immigration power? It is said that "immigration" connotes "settlement," or at least "some continuance" in the country. "Settlement" probably means a permanent adoption as a home. But, short of that, where can any line be drawn? And when is it to be drawn? If the first objection is good, then the intention to "settle" or "to have some continuance" of stay must exist and must be capable of being predicated at the moment of the "act" of entering—or otherwise the second objection is unfounded. But in that event, if a person arrives and genuinely has formed no intention as to his future stay or departure, leaving that to be determined after inquiry so that he may leave in a week or remain for life, then, according to the extraordinary suggestion, he is a "visitor," and so he cannot be excluded.

Onus of proof is immaterial; the important thing is the fact to be established. But once admitted, he is admitted, it is said, with all his imperfections and cannot be removed, though the next week he determines to remain a component part of the Australian people. It is a most fantastic result of the vaunted power of a great people to control its own destiny, that it cannot even preserve its immunity from all the evils that afflict humanity, physical, moral or anarchistic, provided only they come to us in the embodiment of a "visitor." A power to legislate "with respect to" immigration, even assuming that word has the limitation of meaning suggested, necessarily includes the power of preventing it by any means and to any extent desired, and therefore of excluding any specified class of persons irrespective of their present intention. But, in truth, such a fantastic result as would ensue from the contention referred to has never, as might well be supposed, been the accepted thesis of the people of Australia, or indeed of any part of the Empire. The history of this country and its development has been, and must inevitably be, largely the story of its policy with respect to population from abroad. That naturally involves the perfect control of the subject of immigration, both as to encouragement and restriction with all their incidents. This control, I hold, the Commonwealth Parliament possesses in amplitude.

Before Federation the governmental power of controlling immigration had been very extensively exercised by the various Colonies for many years. At the time the Constitution was framed it was obviously one of immense importance to the present and future well-being of the continent. From various aspects it was essential to place it on a proper footing. Those aspects had taken on variations as circumstances altered, and they must ever continue to do so, and, unless the recited power is sufficiently broad to meet, not only possible, but very probable, movements of population from other parts of the world towards Australia, we have but a crippled Constitution wherewith to meet the necessities of the future. That it is ample, in relation to this power, to protect the people of Australia physically, racially, industrially and socially, is, to my mind, perfectly clear, not only from the inherent meaning of its terms as already construed, but also when we consider how the word "immigration"

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was understood in Australia in 1900 from a Parliamentary point of view. Immigration had been dealt with in several forms before Federation. Assisted immigration had been the legislative policy of all the Colonies in one way or another for many years. At last it prejudicially affected the remuneration and other conditions of labour, and was gradually, in the then existing circumstances, abolished. Among the methods that had been adopted in part of Australia was the introduction of colored labour, and the subject eventually excited keen opposition and did much to arouse a sentiment that is of paramount national significance, a determination to preserve a White Australia. How that sentiment is possible of effectuation, consistently with the notion that colored "visitors" (if not aliens) have an unchallengeable right of entry into Australia, passes my comprehension. If coolies or others (not being aliens) can enter Australia without challenge as "visitors," and can afterwards at will become "inhabitants" irremovable by the Commonwealth, what guarantee do all the industrial laws and arbitration awards afford in the face of such a mass of unskilled labour as would be thrown on the market—to say nothing of the social consequences? But, besides the encouragement of immigration, the subject, even before Federation, took on another phase, that of restriction. The story may be easily gathered from Sir Timothy Coghlan's book, *Labour and Industry in Australia*, partly from the Parliamentary *Votes and Proceedings*, especially such as are hereinafter mentioned, partly from public Acts of Parliament, and partly from the *New South Wales Law Reports*. I need not, as to this, go further back for specific legislation than 1888. The Chinese, for some ten years, had immigrated in considerable number to Australia, and a shipping strike had occurred by reason of the employment of Chinese on steamers. An Intercolonial Conference in 1880 had considered the advisability of concerted action of all the Colonies both in representation to the Imperial Government and in local legislation. Disputes between Colonies took place on the subject of introducing Chinese labour, and representations were made to the Home Authorities by New Zealand and all the Australian Colonies except Western Australia. In the joint representation in January 1881, made by the then five Australian Parliamentary Colonies and New Zealand to the Secretary

of State in connection with Chinese immigration, will be found much valuable information on the subject now in hand (see New South Wales *Votes and Proceedings* for 1880-1881, vol. III., pp. 325-327). Legislation was enacted, but Australia was then under separate Governments, and some Chinese entered in the Northern Territory and found their way to other parts of the continent. In March 1888 a ship called the *Afghan* arrived in Melbourne with Chinese passengers for various parts—Victoria, New South Wales and New Zealand. It is sufficient to say that a severe political crisis ensued, and the Courts were called upon to determine the rights of the Chinese to land. The legal proceedings can be read in the cases of *Ex parte Leong Kum* (1), *Ex parte Woo Tin* (2), *Ex parte Lo Pak* (3) and *Ex parte Lau You Fat* (4). An Intercolonial Conference was held, and is thus recited in the Queensland Act of 1888 :—" Whereas at a meeting of representatives of Australasian Governments, held at Sydney in the month of June one thousand eight hundred and eighty-eight, it was amongst other things resolved that it is desirable that uniform Australasian legislation should be adopted for the restriction of Chinese *immigration* : And whereas the provisions of this Act were approved of by such representatives as the basis of such uniform legislation," &c. The Act (which in more or less similar terms became common in Australia) begins the later type of " Immigration Restriction Acts." Its essential features were :—(1) Exception from its operation of (a) persons accredited by a Government ; (b) persons born in the Colony ; (c) exempted persons. (2) It affects every person described as affected irrespective of his intention to remain in the Colony for any definite or indefinite time or purpose. (3) Entry into the Colony by any Chinese passenger by water was forbidden, except in accordance with the Act, under pecuniary penalty and liability to imprisonment. (4) Entry by a Chinese by land, which was of course through another Colony, without a permit rendered him liable to like penalties and also deportation to the Colony whence he came. Corresponding Acts were the following: New South Wales, 1888, No. 4 ; Victoria, 1888, No. 1005 ; South Australia, 1888, No. 439 ; and Western Australia, 53 Vict. No.

(1) (1888) 9 N.S.W.L.R. (L.), 250.
(2) (1888) 9 N.S.W.L.R. (L.), 493.
(3) (1888) 9 N.S.W.L.R. (L.), 221.
(4) (1888) 9 N.S.W.L.R.(L.), 269.

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3 (1889). The preamble to the New South Wales Act recites that "Whereas it is expedient to provide for the protection of the Colony of New South Wales from the disturbances and national dangers which may arise from the *influx* of Chinese under restrictions hitherto existing, and also to provide for the regulation of Chinese resident within the said Colony," &c. It is evident that immigration was a burning question in Australia in that year, and that it was dealt with by excluding—except so far as expressly permitting—all Chinese persons *arriving* irrespective of the time or purpose of their intended stay.

The full force of these enactments and of the events that led to them, and, therefore, of the meaning the word "immigration" bore to Australian minds as a subject of legislation, cannot be adequately perceived without a brief reference to the resolutions themselves and some of the communications that passed between the colonial representatives and the Imperial Government. The conference of 1888 was held in June at Sydney, and the six Colonies were represented. Its resolutions were :—1. That in the opinion of this Conference the further restriction of Chinese *immigration* is essential to the welfare of the people of Australia. 2. That in the opinion of this Conference the necessary restrictions can best be secured through the diplomatic action of the Imperial Government and by *uniform Australasian legislation*. 3. That this Conference resolves to consider a joint representation to the Imperial Government for the desired diplomatic action. 4. That this Conference is of opinion that the desired Australasian legislation should contain the following provisions: (1) that it shall apply to *all Chinese* with specified exceptions; (2) that the restrictions should be by limitation of the number of Chinese which any vessel may bring into any Australian port to one passenger to every 500 tons of the ship's burthen; (3) that the *passage* of Chinese from one colony to another without consent of the Colony which they enter be made a misdemeanour. In the cablegram which Sir Henry Parkes as President of the Conference signed, and which Lord Carrington sent to the Secretary on 14th June 1888, announcing those resolutions, it was said :—"The first and fourth resolutions were endorsed by all the Colonies except Tasmania, who dissented, and Western Australia, who did not vote; while the

second and third were carried unanimously. *As a whole, therefore, they faithfully represent the opinion of the Parliaments and peoples of Australia*" (New South Wales *Votes and Proceedings* 1887-1888, vol. II., pp. 177-178). This is direct evidence of the Australian meaning of the word "immigration" in a legislative collocation.

Another phase or type of legislation soon appeared. In 1891, by statute No. 519, South Australia passed an Act called the *Immigration Limitation Act*. It provided that on arrival of any ship an officer was to go on board and, if he found among the "passengers" *any person* who (1) was convicted of felony elsewhere or (2) was indigent as well as lunatic, idiot, deaf, dumb, blind, &c., and likely to become a public charge, a bond should be required for five years to pay any expenses of maintenance; and, by sec. 3, if during the five years the passenger should be convicted of felony or misdemeanour or should be publicly maintained, his cost of maintenance should be recouped to the State or institution incurring it. Again there is no limitation to persons intending to settle permanently or for any continuance of time. In 1896 the question of coloured immigration became somewhat acute. South Australia, by Act 672, passed an Act extending the Immigration Restriction Acts to coloured immigrants. Assent was reserved, but never given. There were political difficulties in the way of an Imperial or international character that were fully recognized by the Colonies. In 1897 the Federal Convention met, and resulted in entrusting this great national power to Australia as a whole. It is demonstrably plain that the Australian Colonies were, under the name of "immigration restriction," endeavouring to deal with the arrival of persons from abroad who, if they came into Australia at all, might, from their personal attributes or characteristics, in some way, according to national standards, operate against the welfare of the people of Australia. No limitation or test in point of purpose or time was thought of: it was *the presence* here of the immigrants described that was deemed undesirable—except on the terms and conditions expressed. And unauthorized arrival in some cases was met by deportation from one Colony to another. It was not the "act" of crossing that was thought detrimental to the Colony: it was the class of "persons"

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who were objectionable. It was the simple and solid fact of transference of such persons from abroad into Australia—styled "immigration"—that was provided against. The practical meaning thus attached to the word "immigration" in connection with political self-government in Australia was in consonance with what I have regarded as its primary signification in an instrument of Government. Who could imagine that, when "immigration" was entrusted to the Commonwealth Parliament, Chinese visitors were to be henceforth free from interference? Such a contention puts back the clock of Australian history a quarter of a century.

But there is the strongest confirmation of the fact that Australian Parliaments were not singular in their terminology. In New Zealand, in Canada, in South Africa, the same expansive connotation of the word "immigration," when used legislatively, exists. It was a fact of international life and intercourse that nations for their own existence' sake were recognizing and coping with. In 1899, by Act No. 33, the New Zealand Parliament passed the *Immigration Restriction Act*. By sec. 3 "prohibited immigrant" was defined. There was nothing in the Act to affirm or deny expressly that "visitor" was included in "immigrant." In 1908, by Act No. 78, the law was consolidated, but not, I think, altered. Up to this time, as far as I can ascertain, the various countries which had legislated on the subject had—except the United Kingdom in relation to aliens in 1905—contented themselves with enacting what they considered suitable prohibitions on entry, with corresponding sanctions. But, apparently, all available precautions beforehand were found to be insufficient to guard against undesirable persons gaining a foothold in the community. Persons might, without any attempt at concealment, pass through and, though without the manifestations of the perils sought to be excluded, they might be dangerous carriers, and the evils they brought, as I have said, might very soon afterwards become openly visible. On the other hand, a man might successfully conceal his disqualification. But how could the authorities go abroad to the immigrant's own country and obtain proof; and at what trouble and expense? Or how could anyone, in the case of disease manifesting itself subsequently, prove the actual condition of the immigrant on arrival? These considerations led to a practical

method of provisional admission exemplified by sec. 8A. In 1910 and 1911 (Acts 1910, Chap. 27, and 1911, Chap. 12) the Canadian Dominion Parliament enacted provisions of a very drastic nature (see sec. 40 and following sections), which are directed to protect the country against the subsequently manifested evil propensities of persons who were mistakenly admitted as desirable citizens. These provisions were apparently adapted from the English *Aliens Act* 1905, secs. 3 and 4, and applied to immigration. In South Africa, by Act No. 22 of 1913, a consolidation and amendment Act—and called "*Immigrants Regulation*"—provision was made in sec. 22 for the removal from the Union of "any person (not being a person born in any part of South Africa which has been included in the Union) who, whether before or after the commencement of this Act, has been sentenced to imprisonment" (for certain offences) "and who, by reason of the circumstances connected with the offence, is deemed by the Minister to be an *undesirable inhabitant* of the Union, may be removed from the Union by warrant, and pending removal, may be detained in such custody as may be prescribed by regulation." The South African Act is also very interesting from its testimony on the subject of "visitors." I have quoted a section referring to the undesirability of an immigrant as an "inhabitant," a term indicating permanency. But sec. 4 of the Act, under the heading "Prohibited Immigration," includes among "prohibited immigrants" (*d*) any person who from information received from any Government (whether British or Foreign) through official or diplomatic channels is deemed by the Minister to be an *undesirable inhabitant of or visitor* to the Union; and also (*f*) "Any person who has been convicted in any country of" (certain offences), and "by reason of the circumstances connected with the offence, is deemed by the Minister or by an immigration officer acting pursuant to directions from the Minister, to be an *undesirable inhabitant of or visitor to the Union*." That is to say, in the first case, the person arriving might be considered by the Minister undesirable only as an inhabitant, or even as a visitor; and in either case he is a "prohibited immigrant." And, in the second case, the Minister or immigration officer may think the person arriving undesirable as an inhabitant only—or even as a visitor—and in like manner he is a "prohibited immigrant."

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This is a clear indication of opinion in an English-speaking community that " visitors " equally with intending " inhabitants " are equally within the scope of a law dealing with " immigration." Sec. 25 enables the Minister to issue a temporary permit to any prohibited immigrant to enter and reside in the Union or any particular Province upon such conditions as may be lawfully imposed by regulation. He can, if he chooses, deal with the circumstances of the case. It is not unimportant also, as evidencing what may be termed the general understanding throughout the self-governing Dominions of the word " immigration," that at the sitting of the Imperial Conference held on 13th June 1911, when British, Canadian, Australian, New Zealand and South African Ministers were present, Mr. Winston Churchill in the course of a speech on Nationalization said: " Nothing in the proposal we put forward to-day is intended to touch or affect the local law as regards *immigration*, that is to say, *the exclusion of aliens or even natural-born British subjects, which the colonies strongly hold to* in some cases and I think very reasonably in some cases." This has clear reference to the Immigration Restriction Acts passed up to that date. There is no trace of any exception of " visitors " ; and such an exception, if it had been suggested, would, it need scarcely be said, have been strongly resented by the Dominion representatives present. (See *English Parliamentary Papers*, Cd. 5745, July 1911, p. 257.) Finally, in the New Zealand Act of 1920, No. 23, an amending Immigration Restriction Act, the following provisions are made :—The Act is made part of the *Immigration Restriction Act* 1908. By sec. 5, as an addition to the immigration restrictions in the Principal Act, permits are required from persons other than persons of British birth or parentage to enter New Zealand. But by sec. 8 a " visitor " may obtain a temporary permit, provided he intends to leave New Zealand within six months. By Part II. of the Act the oath of allegiance may be required in certain cases, and sec. 20 provides that in cases of contravention of the oath the person shall be deemed a " prohibited immigrant."

These enactments show very plainly the extended scope attributed to the subject of immigration, dictated of course by the enormous public danger arising from persons arriving from abroad, and the

necessity—a necessity becoming constantly more peremptory—of a nation guarding itself against dangers all the more serious because not immediately detectable. It is true that New Zealand, Canada and South Africa have Constitutions differing from our own. But when, in the case of a legislature having the choice of classification of its enactments, such provisions as I have quoted are placed under the head of "Immigration," it is cogent evidence that they are regarded, by the representatives of the millions they are intended to protect, as properly incidental to that subject.

I have thought it right in the circumstances to examine these objections as if the matter were *res nova*, though it is not. The conclusions at which I have arrived by an independent examination of the subject are precisely those declared by this Court several years ago (*Chia Gee* v. *Martin* (1), *Ah Yin* v. *Christie* (2) and *Potter* v. *Minahan* (3)).

The injunction sought, therefore, must be refused.

HIGGINS J. *Two Rules Nisi for Prohibition.*—Each applicant seeks to have a Board, constituted under sec. 8A of the *Immigration Act* 1901-1920, prohibited from proceeding with a summons issued by the Minister calling on the applicant to show cause why he should not be deported from the Commonwealth. It is urged by counsel for the applicants that the section is unconstitutional and invalid. But before entering on the question of validity, we are invited by the Board to say that prohibition does not lie—that even if the section is invalid, prohibition is not an allowable remedy because the Board is not a judicial tribunal. Prohibition is not an appropriate remedy except for judicial proceedings (*In re Clifford and O'Sullivan* (4)).

So far as material for this case, the section 8A provides that "where the Minister is satisfied that, within three years after the arrival in Australia of a person who was not born in Australia, that person . . . is a person who advocates the overthrow by force or violence of the established government . . . of any other civilised country . . . or who is a member of, or affiliated with, any organization which teaches any of the doctrines and practices

(1) (1905) 3 C.L.R., 649.
(2) (1907) 4 C.L.R., 1428.
(3) (1908) 7 C.L.R., 277.
(4) (1921) 2 A.C., 570.

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specified in this paragraph, he may, by notice in writing, summon the person to appear before a Board . . . to show cause why he should not be deported from the Commonwealth." The Board is to consist of three members to be appointed—selected—by the Minister himself, and the chairman must be or *have been* a Judge or Stipendiary, &c., Magistrate. Then if the person fail to show cause why he should not be deported, or if the Board recommend that he be deported, the Minister may make an order for his deportation, and he shall be deported accordingly, and "pending deportation the person may be kept in such custody as the Minister directs."

The question then is: Is this Board a judicial tribunal? We must face the fact that if it is not, a person may be found guilty of one of the offences mentioned in the section, may be put in custody and then deported from the Commonwealth, without having been tried for the offence, without any judicial proceedings of any kind. It is our duty to assume that such a violent departure from the first principles of British liberty was not the intention of Parliament, "out of respect to" Parliament, as Chancellor *Kent* put it (*Maxwell on Statutes*, 6th ed., 383); but if the words used by Parliament are quite clear, to the effect that the men are to be in custody and deported without any trial of any kind, we must accept the will of Parliament. There is immeasurable danger if the section be considered in its relation to the particular men accused in this case only—men accused of advocating the overthrow of the Irish Free State; for even if most people would say "serve them right," the same construction will have to be applied in the cases of other persons accused. We have to consider the possible—the probable—reactions of our decision, in the long years to come. In the very recent case of *R.* v. *Home Secretary*; *Ex parte O'Brien* (1), *Scrutton* L.J. said, speaking of the anxious care of the British Courts with regard to liberty of the subject:—"This care is not to be exercised less vigilantly because the subject whose liberty is in question may not be particularly meritorious. It is indeed one test of belief in principles if you apply them to cases with which you have no sympathy at all. You really believe in freedom of speech if you are willing to allow it to men whose opinions seem to you wrong and even dangerous."

(1) (1923) 39 T.L.R., 487, at p. 491.

Unless this Board is a judicial tribunal, these men have not even the semblance of a trial. In the first place, the Minister has to be "satisfied"; but he need not hear the accused. There is nothing in the law to prevent him from satisfying himself in any way that he may choose—by anonymous letters, newspapers, informers, political or other enemies. As for the Board itself, I do not find that the Board is under any duty to decide whether the accused is guilty of the offence or not. It has merely to recommend, or refuse to recommend, that the accused be deported; and the burden of showing that they ought not to be deported lies on the accused. I presume that if the accused could show that he is too ill to be moved, or too ill for propaganda, such a fact might be treated as reasonable cause against deportation.

According to *Maxwell* (*Interpretation of Statutes*, 6th ed., p. 501), "statutes which encroach on the rights of the subject, whether as regards person or property," are subject to a strict construction: "it is a recognized rule that they should be interpreted, if possible, so as to respect such rights." At p. 356 the learned author says: "Whenever the language of the Legislature admits of two constructions, and if construed in one way would lead to obvious injustice, the Courts act upon the view that such a result could not have been intended, unless the intention has been manifested in express words." It is no light matter to treat this sec. 8A as, in effect, repealing *pro tanto* the Great Charter of John—"No freeman shall be seized or imprisoned or dispossessed or outlawed or exiled" (*exuletur*—banished, forced to abjure the realm against one's consent) "or in any way destroyed; nor will we condemn him, nor will we commit him to prison except by the legal judgment of his peers or by the law of the land." The delicacy of the position with which we have to deal can be better appreciated, perhaps, when one reflects that if such a statute as this were on the British Statute Book in the middle years of last century, Kossuth might be deported from England, and Mazzini and Garibaldi. Moreover, it appears from the affidavits that the Minister made his order at a time (7th May 1923) when these men were actually under a charge of "seditious enterprise"—a charge which involved substantially the facts of which the Minister was "satisfied" (see *Crimes Act* 1914-1915, sec. 24c). O'Flanagan

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had been arrested on this charge on 30th April, and was remanded, at the instance of the police, to 15th May. On that day the solicitor for the informant applied for a further remand "on the ground that the proceedings under the *Immigration Act*" (these proceedings under sec. 8A) "were shortly to be heard." The solicitor for the accused objected, insisting on the prisoner's right to trial at the earliest possible moment; but the remand was granted. The Chief Justice, in his judgment, has indicated the peculiar position in which the Minister's action taken under sec. 8A, during the pendency of the prosecution for seditious enterprise, has placed the accused; but as the prosecution was instituted and conducted by State authorities who are not before us, and as the questions of law in this case cannot be affected by the position, I think it best to abstain from comment.

There are many cases that could be cited as showing the lengths to which Courts have gone in their endeavours to construe Acts in such a way as will make them consistent with the first principles of justice, and as will leave fundamental, time-honoured, practices standing; but I shall refer to one case only. In *Cox* v. *Hakes* (1) the *Judicature Act* 1873 had provided that the Court of Appeal might entertain an appeal "from *any* judgment or order" of the Queen's Bench. There had existed, however, for centuries a principle that if the Queen's Bench had once discharged a prisoner from custody under a habeas corpus there could be no appeal; and it was held in the House of Lords that the unqualified words of the *Judicature Act* must be read with a qualified meaning, must be treated as confined to *appealable* cases. There is the highest authority, therefore, for approaching this case with the prepossession that our Parliament did not intend to violate constitutional liberties, and must have intended that the Board should be a judicial tribunal. As *Marshall* C.J. said in *United States* v. *Fisher* (2), "where rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness to induce a Court of justice to suppose a design to effect such objects"; and see *Western Counties Railway Co.* v. *Windsor and Annapolis Railway Co.* (3);

(1) (1890) 15 App. Cas., 506. (2) (1804) 2 Cranch, 358, at p. 390.
(3) (1882) 7 App. Cas., 178, at p. 188.

Commissioner of Public Works (Cape Colony) v. *Logan* (1); *Union of South Africa* v. *Simmer and Jack Proprietary Mines Ltd.* (2).

It is not for those who exercise the judicial power of the Commonwealth to condemn what is done by those who exercise the legislative power. That is not our business. But it is my right, and my duty, to act on this presumption, and to state it where expedient. The presumption itself is based on respect for Parliament, and to ignore it would be disrespectful to Parliament.

I have therefore anxiously sought to find in these provisions of sec. 8A, or in the rest of the Act, something which would justify me in holding that this Board of inquiry has the essential qualities of a judicial tribunal, and that these men cannot be ejected from Australia without a trial of some sort. The test, however, put by *Brett* L.J. of a judicial tribunal is, has it "the power of imposing an obligation upon individuals" (*R.* v. *Local Government Board* (3)); and this test was adopted by *Palles* C.B. (*In re Local Government Board*; *Ex parte Kingstown Commissioners* (4)). The mere facts that there is an inquiry upon which evidence can be taken to which witnesses can be summoned, and that the decision involves certain discretion, are not enough (per *Palles* C.B.); nor the facts that there is a meeting, a summons or notice, a complaint depending, a right to be heard; nor the fact that the Board says "We wish to hear you before we do that which will be to your prejudice" (*Ex parte Death* (5)). There must be some exercise of the prerogative of the King to establish or enforce rights judicially. Here, the Board merely recommends or refuses to recommend; and if it recommends deportation the Minister may refuse to act on the recommendation. Proceedings which can end in a mere recommendation are not judicial proceedings (see *Newcastle Coal Co.* v. *Firemen's Union* (6); and, as to Royal Commissions, *Clough* v. *Leahy* (7)). This is a mere inquiry with a view to executive action, as the case before *Palles* C.B. was with a view to legislative action. In principle, I am unable to distinguish an inquiry made by this Board from an inquiry made by police under Government orders. Under such rulings, I am compelled to say that this

(1) (1903) A.C., 355, at p. 363.
(2) (1918) A.C., 591, at p. 603.
(3) (1882) 10 Q.B.D., 309, at p. 321.
(4) (1885) 16 L.R. Ir., 150.
(5) (1852) 18 Q.B., 647, at p. 660.
(6) (1908) 6 C.L.R., 466.
(7) (1904) 2 C.L.R., 139.

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Board is not a judicial tribunal to try these men in any sense for the offence: and in my opinion, therefore, the rules nisi for prohibition must be discharged.

The alternative remedies suggested by the rules are obviously inappropriate (quo warranto, relief in the nature of quo warranto, certiorari).

As to Injunction.—But at the conclusion of the arguments as to the rules nisi, counsel for the two accused moved in an action, No. 24 of 1923—with the consent of counsel for the Board—for an injunction restraining the members of the Board from proceeding further with the inquiry under sec. 8A. The question is, assuming the section to be invalid, should an injunction be granted on this motion.

The only relief sought in this action is (1) a declaration that the members of the Board have no authority to proceed further as a Board, and (2) an injunction restraining them from doing so. There is no claim for damages.

In the first place I see no cause of action, legal or equitable, against the Board. There is no actionable wrong done to the plaintiffs by the Board. It is admitted that there would be no ground for injunction unless the prosecution under the *Crimes Act* in the New South Wales Court were pending: but it is said that the plaintiffs are put in a dilemma, inasmuch as this inquiry compels them either to disclose their case before the Board, or to risk a *de facto* order for deportation, which would injure them on the criminal prosecution. But to be put in such a dilemma is not to have a cause of action (see per *Bowen* L.J., *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (1)). In *North London Railway Co.* v. *Great Northern Railway Co.* (2) the defendant, as in pursuance of an agreement to refer differences with the plaintiff to arbitration, appointed an arbitrator, and gave notice to the plaintiff to do likewise. The plaintiff was in a dilemma. Its contention was that the agreement for arbitration did not apply to the matter; but if the plaintiff should fail to appoint, the award might be made by the defendant's arbitrator alone. The plaintiff applied by motion for an injunction restraining the defendant from proceeding with the arbitration as it would be futile and vexatious; but the Court of Appeal discharged the injunction granted by a Divisional

(1) (1889) 23 Q.B.D., 598, at p. 613. (2) (1883) 11 Q.B.D., 30.

Court, saying that there was no wrong, legal or equitable, done by the defendant. "Of course," said *Cotton*, L.J. (1), "it is very inconvenient to any one to be brought before a tribunal which has no jurisdiction, but does that give a right to the High Court to interfere?" It is what is called a case of *damnum absque injuria*—loss without an actionable wrong done by the defendant to the plaintiff. To found a valid action, there must be injury as well as damage (*Day* v. *Brownrigg* (2)). A's property may be lessened in value by B's building a wall in front of it; but it does not follow that A has a cause of action against B. A tradesman often suffers in credit by an action brought against him, or by an application to adjudicate him bankrupt; but he has no cause of action unless the action has been brought, or the application made, maliciously and without reasonable and probable cause. No action lies against a person for bringing an action or proceeding unless there be malice and no reasonable or probable cause. It is not here alleged or pretended that the members of the Board are acting on such a motive; they are merely carrying out the words of sec. 8A on the natural assumption that the section is valid. The argument of dilemma is rather a reflection on the Sydney bench of magistrates in postponing the trial until the inquiry should be over—a reflection which I have sought to avoid. But the Board has done nothing censurable; the members have no control over the prosecution. It is said that the Court has power to protect rights of liberty from unauthorized violation. No doubt it has; but the Board is not violating any such rights. It is merely making an inquiry, leaving it to the law to say whether the recommendation will be effective or not. Of course, the existence of a cause of action against the defendants must be tested on the facts as they stood on 22nd May last, the date of the action; we must ignore anything that has since happened.

But, even if there were a cause of action against the members of the Board, there is certainly nothing here to justify an interlocutory injunction. There is no such irreparable injury or urgency as justifies a Court in interfering by interlocutory order before the action has been tried. If, as has to be assumed for the present purpose, sec. 8A is invalid, the plaintiffs' rights to liberty are not being violated

(1) (1883) 11 Q.B.D., at p. 38. (2) (1878) 10 Ch. D., 294.

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by the inquiry; the inquiry will be futile. If the inquiry end in a recommendation against deportation, no harm is done—the Minister cannot deport. If the inquiry end in a recommendation to deport, and if the Minister choose to make an order for deportation, and, pending deportation, keep these men in custody, there is ample and speedy remedy by writ of habeas corpus. There is a further remedy by an action for false imprisonment. What is done cannot be undone—the Minister already on 7th May made his orders reciting that he is satisfied that the plaintiffs were guilty of the offence charged, and referring it to the Board to inquire whether they should not be deported. The plaintiffs have only to wait until the Minister make an order for deportation; meantime, a futile Board is (on the assumption) making a futile inquiry. Nor is it the practice of the Court to grant an interlocutory injunction when the damage done pending the trial of the action would be nominal; such an injunction is a substitute for damages between the writ and the trial (*Read* v. *Wotton* (1)), and it is significant that in this proceeding no damages at all are claimed. The object of an interlocutory injunction is to keep matters *in statu quo* till the trial of the action, when what the defendant is doing will defeat the very object of the action; but there can be no such defeating here. It is a mistake to treat an interlocutory injunction as a matter of course, even where the plaintiff seems to have merits. In England, under sec. 25 (8) of the *Judicature Act* 1873, the Court can grant an interlocutory injunction "in all cases in which it shall appear to the Court to be just or convenient"; but, notwithstanding the amplitude of this discretion, the Courts will discharge an order for an injunction if made on insufficient grounds (cf. *Bonnard* v. *Perryman* (2)).

For these reasons, I concurred in the refusal of the application made; but I hope that I shall not be understood as implying that there is a power to grant even at the hearing an injunction in such a case as this. Unless the power is conferred by sec. 31, 32 or 80 of our *Judiciary Act*, under the general words of those sections, I should say that there is no such power; but, as the effect of those sections has not been fully considered in argument, I withhold my final opinion on this point.

(1) (1893) 2 Ch., 171.

(2) (1891) 2 Ch., at pp. 284-285.

The old doctrine was that injunctions must be based on property—some infringement of rights of property (*Macaulay* v. *Shackell* (1); *Saxby* v. *Easterbrook* (2)). In modern practice, however, the power to grant an injunction has been applied to injury to the plaintiff's trade, to breach of contract or of confidence, to cases which come under some distinctive head of equitable jurisdiction—such as an action to set aside an agreement (*Prince Albert* v. *Strange* (3); *Pollard* v. *Photographic Co.* (4); *Kitts* v. *Moore* (5)). Certain Judges have said that an injunction may be issued for a merely personal libel. The late *Jessel* M.R., in particular, took a very wide conception of his powers; but he explains his reasons clearly in *Beddow* v. *Beddow* (6). He said (7): "Having regard to these two Acts of Parliament" (the *Common Law Procedure Act* 1854 and the *Judicature Act* 1873, sec. 25 (8)), "I have unlimited power to grant an injunction in any case where it would be right or just to do so." The Master of the Rolls reasons that if, under the English *Judicature Act*, sub-sec. 8 of sec. 25, an injunction can be granted on interlocutory application if "it shall appear to the Court to be just or convenient," it can be done at the trial of the action on the principle of *omne majus continet in se minus*—the greater includes the less. But, whatever be the force of this reasoning, the Court of Appeal in England, in a later case, held that sec. 25 (8) of the *Judicature Act* 1873 does not enlarge jurisdiction, it only affects procedure (*North London Railway Co.* v. *Great Northern Railway Co.* (8)).

I shall not labour this point further; but I may point out that in the United States it is well settled that the mere fact that an Act is unconstitutional does not entitle a party to relief by injunction against proceeding under the Act (*Cruickshank* v. *Bidwell* (9); *Boisé Artesian Hot and Cold Water Co.* v. *Boisé City* (10)). See also *Attorney-General* v. *Birmingham, Tame, and Rea District Drainage Board* (11)).

Validity of Sec. 8A.—In my opinion, therefore, the injunction sought ought to be refused even if the section is invalid; and, under

(1) (1827) 1 Bli. (N.S.), 96, at p. 127.
(2) (1878) 3 C.P.D., 339.
(3) (1849) 1 Mac. & G., 25.
(4) (1888) 40 Ch. D., 345.
(5) (1895) 1 Q.B., 253.
(6) (1878) 9 Ch. D., 89.
(7) (1878) 9 Ch. D., at p. 93.
(8) (1883) 11 Q.B.D., 30.
(9) (1899-1900) 176 U.S., 73.
(10) (1909) 213 U.S., 276.
(11) (1910) 1 Ch., 48.

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ordinary circumstances, it would not be fitting that I should pronounce as to the validity or invalidity of the section. The practice of the Court is to assume that Acts of Parliament are valid until we find that justice cannot be done in a case before us without deciding that the Act in question is valid or invalid. But as I understand that my learned colleagues take the contrary view as to the right to an injunction, it is my duty to say, out of respect for them and in the public interest, that I am by no means satisfied as to the validity of the section under the power to make laws "with respect to . . . immigration." The section would be more fitly called "a law for the exportation of undesirable persons"; although it is applied to such persons only as have not have been born in Australia, and as have offended in Australia within three years after arrival. If the limit of three years is valid, a limit of seventy years would be valid: and a man who sixty-nine years before became a member of the Carbonari in Italy, and had not ceased to be a member of that society, or is affiliated to it (whatever "affiliated" means), and has for all the long years lived in Australia as a reputable citizen, is liable to be deported by the Minister without trial, with the sanction as to deportation of a Board selected and appointed by the Minister himself. The power to make laws is not to make laws with respect to persons who *have been* immigrants, or even with respect to "immigrants"; it is a power to make laws with respect to "immigration"—the act of immigrating (it has that meaning in the dictionaries)—power to regulate that act of immigration, perhaps preventing some persons, encouraging or assisting others, imposing any conditions on the act of immigrating. I take the same view as I expressed fully in *Huddart, Parker & Co. Proprietary* v. *Moorehead* (1), that the power to make laws "with respect to . . . immigration" is a power to legislate *on the subject of immigration*, that we have to find what is the primary matter dealt with, "the true nature and character of the legislation in the particular instance under discussion" (*Russell* v. *The Queen* (2)); and that the various subjects of legislation are not mere pegs on which the Federal Parliament may hang legislation on any other subject that it likes. What is the true nature and character

(1) (1908-09) 8 C.L.R., at p. 408.
(2) (1882) 7 App. Cas., 829, at pp. 839-840.

of this legislation? How does it differ in essence from legislation for the deportation of undesirable persons, though limited to persons not born in Australia who have not been three (hereafter it may be thirty) years here? This section does not bear on the act of immigrating at all; the immigrating is over and past. It is to be noticed that the section 8A of the Act does not use the words "immigration" or "immigrant," or any of their congeners. That fact, of course, is not conclusive of the matter, but it strongly tends to the same conclusion, that the Federal Parliament was not really dealing with immigration at all, but with something else. It is suggested that these men were admitted on probation. Probably the Federal Parliament could, in pursuance of this power, provide some system of probation for immigrants; but the simple answer here is that the Act contains no provision for such a system. These men—subjects of the King, not aliens—entered Australia in pursuance of passports; there was no condition put upon their entry; and they are to be driven out, not because of anything relating to their entry; but because, being (as alleged) advocates of revolution in Ireland, they were not born in Australia. Moreover, it is very difficult to see how these men can be called immigrants, or their visit to Australia "immigration" into Australia. All the dictionaries, I think, concur in treating the words as connoting entry into a country for the purpose of settling there; and these men certainly had no such purpose. The power is not to make laws with respect to entering or being in Australia for a visit. It has been held by the Judge of a District Court in the United States that the immigration laws of the United States apply only to such aliens as enter the States with the intention that they shall become residents thereof—that the laws do not apply to (e.g.) seamen coming with their ship (*United States* v. *Burke* (1)). This was held, not because of any distinctive words in the Act, but because of the meaning of the word "immigration." As for the so-called "Immigration Acts," enacted by the Colonial Legislatures before Federation, it would surely be fallacious to attach much importance to the fact that these Acts contain sections which include provisions not comprehended under the word "immigration" in its strict sense. The Colonies had then full power to legislate on all subjects;

(1) (1899) 99 Fed. Rep., 895.

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and if the Legislatures chose to call the Acts which contained such provisions "Immigration Acts," for a short title, that is no indication that the word had changed its meaning, or that in Australian usage "immigration" has any other than its ordinary meaning in the English language. If indeed, without evidence on the subject, we are to say what immigration means in ordinary Australian parlance, I should have no doubt that the "man in the street" would not treat a mere visitor to Australia as an immigrant. So in South Africa and in New Zealand, the Parliaments are not restricted, as the Australian Parliament is, to specific powers; and in Canada the Dominion Parliament has all the powers not specifically granted to the Provincial Legislatures. It is worthy of notice, also, that in the Canadian *Immigration Act* of 1910, "immigrant" is defined as meaning a person who enters Canada *with the intention of acquiring Canadian domicile* (sec. 2 (*g*)); and Canadian domicile is acquired for the purposes of the Act by a person having his domicile for at least three years in Canada after being landed there (sec. 2 (*d*)). The case of *Chia Gee* v. *Martin* (1), on which reliance has been placed by the defendants, was merely a case on the interpretation of the *Immigration Act* itself—not of our Constitution. The Court did not deal with the question whether in this respect the Act was beyond the powers of the Commonwealth Parliament; though it certainly held that on the true construction of the Act, as distinguished from the Constitution, the word "immigrant" included those who entered the Commonwealth in fact—whether with the intention of settling or not. The difficulty, sometimes occurring, of proving that a certain person is intending to settle in Australia does not affect the question of construction of the Constitution. Parliament has power, if it think fit, to follow the Canadian Act by putting upon every person who enters Australia the burden of proving that he does not intend to settle in Australia. The cases of *Attorney-General for the Commonwealth* v. *Ah Sheung* (2) and *Potter* v. *Minahan* (3) show, of course, that British subjects may be prohibited immigrants; but *Minahan's Case* recognizes that all the King's subjects, being bound by the one tie of allegiance to the one sovereign, are free to

(1) (1905) 3 C.L.R., 649. (2) (1906) 4 C.L.R., 949.
(3) (1908) 7 C.L.R., 277.

move at will throughout the Empire unless some law forbid them. The subject has this right by virtue of his natural liberty—and *libertas naturalis est facultas ejus quod cuique facere libet nisi quod jure prohibetur* (*Bracton*). The position is different with regard to aliens, who have no enforceable right to enter British territory (*Musgrave* v. *Chun Teeong Toy* (1)); and I have no doubt that under pl. XIX. of sec. 51 of our Constitution the Parliament could pass a law for the expulsion and deportation of aliens (*Attorney-General for Canada* v. *Cain and Gilhula* (2)). But these plaintiffs are subjects of the King.

In my opinion, the motion for an injunction was rightly dismissed, not on the ground that sec. 8A is valid, but on the ground that the plaintiffs were not entitled to an injunction under the circumstances.

RICH J. In the circumstances, were it not for a position which was taken late in the argument and which I will deal with further on, it would not be right for the Court to determine the validity or invalidity of sec. 8A of the *Immigration Act* 1901-1920. Apart from that position, there exist objections at the threshold which decide the result of the application before we reach the constitutional question. A writ of prohibition is a process which can only be issued to restrain within the limits of its legal jurisdiction some inferior Court. It follows that, unless the Board constituted under sec. 8A is in the eye of the law a Court, prohibition does not lie to it. Its only power, which is conferred in terms really too plain for argument, is to hear what the person called before it has to say and then, not to decide anything, but merely to "recommend" or not to "recommend" deportation to the Minister. That is not a decision, and the whole process is utterly unlike the well-known judicial functions of a Court. The Board is in the nature of an advisory body, and its function is merely ancillary to the executive power. Prohibition is, therefore, out of the question.

As there is no decision, certiorari is inapplicable. With respect to quo warranto, the application in this case is directed in effect rather against the office than the officer under the guise of questioning the title of the officers to hold the office. It questions the existence

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

(2) (1906) A.C., at p. 546.

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of the office. That is not the function of quo warranto. The application so far fails.

Before going to the last position I wish to add a few words in view of the course the argument took. A good deal was said about the liberty of the subject, very little about the safety of the Commonwealth; stress was laid on the harshness of holding in custody pending deportation a person coming from abroad who, after due opportunity for explanation, has been considered both by an impartial Board and a responsible Minister to be so dangerous as a citizen that his deportation is necessary. The policy and expediency of such provisions are not for the Court to consider, but I would say that the detention for the purpose mentioned has been recognized by an English Court (*R.* v. *Campbell* (1)) as being, not imprisonment in the strict sense, but as mere detention in custody for the purpose of seeing that deportation is not evaded.

The last position arose on the application for injunction, which by consent was put forward to restrain the Board from proceeding on the ground of the alleged illegality of sec. 8A. It appeared that the plaintiffs are being charged at the instance of the Government of New South Wales with sedition, and criminal proceedings are pending. On the ground that, if the Board's proceedings are not justified by some law (and if sec. 8A is bad it is not a law), there would, I think, be a good case made out for injunction, because of the prejudicial effect on the criminal charge.

I am bound, therefore, to consider whether sec. 8A is authorized or not by the Constitution. That depends on the proper scope to be given to the word " immigration " in sec. 51 (XXVII.) of the Constitution. Dictionary definitions are frequently very helpful, but they are not coercive. Everything depends upon the particular document in which a word is found; for, as Lord *Blackburn* said in *River Wear Commissioners* v. *Adamson* (2), " the meaning of words varies according to the circumstances with respect to which they were used."

I have had the opportunity of reading the judgment of my brother *Isaacs*, and agree with what he had said on this subject with reference to the word " immigration " as it is found in the Constitution, and also with regard to the subject of injunction.

(1) (1921) 2 K.B., 473.

(2) (1877) 2 App. Cas., 743, at p. 763.

On all the points raised I agree that the applications should be refused.

STARKE J. On 7th May 1923 the Minister of State administering the *Immigration Act* 1901-1920 issued a summons to the applicants Kelly and O'Flanagan to appear before a Board consisting of the respondents Macfarlane, Manning and Stinson, which he had on the same day appointed pursuant to sec. 8A of the Act, to show cause why the applicants should not be deported from the Commonwealth. On 22nd May 1923 the applicants obtained orders nisi from this Court calling on the members of the Board and the Minister to show cause why a writ of prohibition should not issue, directed to the members of the Board and the Minister, prohibiting them from further proceeding in respect of the said summons, and from further proceeding in any respect before the Board, and in the alternative to show cause why leave should not be granted to either exhibit an information of quo warranto or obtain relief of a like nature to quo warranto, or why, in the alternative, a writ of certiorari should not issue. The applicants also, on 22nd May 1923, issued a writ of summons out of this Court against the members of the Board, claiming a declaration that the Board had no authority to proceed further, as a Board, in the proceedings in which the applicants were being called upon to show cause why they should not be deported, and also an injunction restraining the defendants from proceeding further in or about the said matters. Towards the close of the arguments on the orders nisi the Court, with the consent of the members of the Board, allowed the applicants—the plaintiffs in the action—to move for an interim injunction in the action in the terms claimed by the writ of summons.

I may postpone, for the moment, the consideration of all questions relating to the procedure adopted by the applicants for the purpose of testing the power of the Commonwealth under the *Immigration Act*, and come at once to the question of substance, namely, whether the power conferred upon the Parliament of the Commonwealth to make laws for the peace, order and good government of the Commonwealth with respect to immigration and emigration (Constitution,

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sec. 51, pl. XXVII.) warrants the enactment of sec. 8A of the *Immigration Act*. Immigration and emigration in the Constitution connote the movement of human beings into and out of the Commonwealth. And a law with respect to these subjects may not only encourage that movement but also restrict it. The power to deal with this movement is not founded upon the intent of the person entering into or departing from the Commonwealth, but upon the fact of entry or of departure (*Chia Gee* v. *Martin* (1)). But the Constitution unites into a Federal Commonwealth the people of Australia. The entry into the Commonwealth of a person who at the moment of entering is already one of the people of Australia could hardly be described as an immigration into the Commonwealth : it would in truth be the return of an Australian to his homeland. And so this Court has decided (*Potter* v. *Minahan* (2) ; and see also *Ah Sheung* v. *Lindberg* (3)). Whether any given person is one of the people of Australia is necessarily a question of fact. I agree, however, with the observation of my brother *Isaacs* in *Potter's Case* (4), and am of opinion that neither locality of birth nor nationality nor domicile is a decisive test, but simply an evidentiary fact, of more or less weight according to the circumstances of the particular case. But with this limitation—which is implied in the Constitution and controls the authority of Parliament—the legislative power with respect to immigration extends to every person entering the Commonwealth, whether a British subject or an alien. The history of the immigration laws of the Empire tends to confirm this conclusion (*Keith's Responsible Government in the Dominions*, Vol. II., Part V., Ch. 4, pp. 1075-1100), but it would be unsafe to lay much stress upon it, for those laws were largely made by legislative bodies having plenary power within their territorial limits, and not by bodies restricted to specified powers, as in the case of the Parliament of the Commonwealth.

This great constitutional power with respect to immigration was conferred upon the Commonwealth for the peace, order and good government of Australia, for the maintenance of its social and

(1) (1905) 3 C.L.R., 649.
(2) (1908) 7 C.L.R., 277.
(3) (1906) V.L.R., 323 ; 27 A.L.T., 189.
(4) (1908) 7 C.L.R., at p. 308.

material interests and for its protection. "It is not made a statutory condition that the exercise of such power shall be, in the opinion of a Court of law, discreet. In so far" as the Parliament possesses "legislative power, the discretion committed" to it "is unfettered. It is the proper function of a Court of law to determine what are the limits of the jurisdiction committed" to the Parliament; "but, when that point of law has been settled, Courts of law have no right whatever to inquire whether" the "jurisdiction has been exercised wisely or not" (*Union Colliery Co. of British Columbia* v. *Bryden* (1)). A rhetorical appeal was made during the argument to the Charter of John and to the principles of British justice and liberty; but I was myself unable to appreciate the precise bearing of these observations upon the matter which calls for decision by this Court, namely, what is the true interpretation of the power conferred upon the Parliament with respect to immigration. Within the limits prescribed by the Constitution, Parliament has an "authority as plenary and as ample . . . as the Imperial Parliament in the plenitude of its power possessed and could bestow" (*Hodge* v. *The Queen* (2); *Attorney-General for Canada* v. *Cain and Gilhula* (3); *Lloyd* v. *Wallach* (4)). Clearly, as it seems to me, a restrictive power is involved in the authority to make laws with respect to immigration. But restriction must operate upon persons; and if it is to be effective, the Parliament must have authority to refuse, to a person who does not belong to the people of Australia, permission to enter the Commonwealth, or "to annex what conditions it pleases to the permission to enter," and further, to expel or deport from the Commonwealth at pleasure, any such person, if the Parliament considers his presence in Australia "opposed to its peace, order, and good government, or to its social or material interests" or to the welfare of its people (see *Attorney-General for Canada* v. *Cain and Gilhula* (5); *Union Colliery Co. of British Columbia* v. *Bryden*). The learned counsel who appeared for the applicants suggested, however, that the authority to make laws with respect to immigration involved no more than a power to regulate the act of immigrating (whatever

(1) (1899) A.C., 580, at p. 585.
(2) (1883) 9 App. Cas., 117, at p. 132.
(3) (1906) A.C., at p. 547.
(4) (1915) 20 C.L.R., 299.
(5) (1906) A.C., at p. 546.

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that may mean). The phrase is loose and ill-defined. The argument seemed to concede that the Parliament might attach any condition it thought proper to the permission to enter the Commonwealth, but insisted that legislation is invalid which does not attach those conditions at the moment of entry, and to the act of entry. Once a person has entered Australia, and his entry was subject to no condition, then, according to this view, his immigration is over, and presumably he becomes permanently incorporated in the people of Australia. This argument is more remarkable for its refinement than for its persuasiveness. Once concede that the constitutional power involves the right to exclude certain persons from the Commonwealth and to attach conditions to their entry, then it is apparent that the Parliament may deal, not only with the privilege of entering the Commonwealth, but also with the privilege of remaining within it.

Consequently, the argument for the applicants in the present case reduces itself to an emphasis of the form rather than the substance of the legislation. But I cannot subscribe to the view that a law with respect to immigration either ends when the person immigrating has entered Australia, or, for the matter of that, begins when he sets out on his voyage to Australia. On the contrary, many laws could, I should think, be supported under the power, which have no direct concern with the act of immigrating. Thus Acts for the purpose of encouraging immigration might make provision for the suitable housing or settlement of immigrants in advance of the act of immigrating, or for the assistance, in various forms, of persons who had completed the act of immigrating. The view I take of the constitutional power does not, as the case of *Cunningham* v. *Tomey Homma* (1) suggests, enable the Parliament to legislate with respect to the ordinary civil rights and duties within the States of persons who fall under the category of immigrants, but it does affirm the power of the Parliament to regulate the right of those persons to enter and remain within the Commonwealth.

If these propositions be true, then the validity of sec. 8A of the *Immigration Act* can, in my opinion, be satisfactorily demonstrated. The section deals with arrivals within the Commonwealth who were

(1) (1903) A.C., 151.

not born in Australia. Prima facie, at all events, such arrivals are immigrants. It was argued, however, that the section covered as well immigrants as persons who had arrived in Australia from abroad, even before the passing of the Constitution, and had made their homes in Australia and become part of its people. But a construction which would destroy the constitutional validity of an enactment is opposed to the well-settled rule of this Court, unless the words are incapable of an interpretation within the ambit of the power assigned to the Parliament. Now, as I have said, the enactment prima facie deals with immigrants, and its title is "an Act to place certain restrictions on immigration and to provide for the removal from the Commonwealth of prohibited immigrants." With these aids to interpretation before us, it is impossible, in my opinion, to misunderstand the Act. It is aimed at and hits immigrants, and not members of the Australian community. The specific cases provided for in sec. 8A are clearly within the discretion of Parliament (*Hodge* v. *The Queen* (1); *Baxter* v. *Ah Way* (2)); and, as the Judicial Committee has so well observed, it would be not only unseemly, but distinctly wrong, for the Court to inquire whether that discretion has been exercised wisely or not.

Consequently, the provisions of the section are within the immigration power conferred upon Parliament by the Constitution. It is unnecessary to consider whether the section could be supported either wholly or in part under other constitutional powers, e.g., those with respect to aliens.

Coming now to the procedure adopted by the applicants for the purpose of testing the validity of sec. 8A of the *Immigration Act*. Even if that section were invalid, still prohibition would not be an appropriate remedy. The Board's authority allows it simply to make a recommendation: it has no judicial function. And it is well settled that prohibition only goes to restrain proceedings of a judicial nature, and not proceedings of an administrative or advisory nature (see *In re Clifford and O'Sullivan* (3)). Again, quo warranto proceedings do not enable the legality of a statute or of a charter to

(1) (1883) 9 App. Cas., 117.
(2) (1909) 8 C.L.R., 626.
(3) (1921) 2 A.C., 570.

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be attacked, but are rather directed against the individual title of a person holding or purporting to hold office under the statute or charter (*Short and Mellor's Crown Practice*, p. 284; and see *R.* v. *Taylor* (1)). And certiorari, wide as is its scope, lies in respect of proceedings in their nature judicial as opposed to proceedings in their nature administrative or advisory (*R.* v. *Manchester Justices* (2); *R.* v. *Johnson* (3); *R.* v. *Woodhouse* (4), overruled in the House of Lords (5) but without consideration of this point). As to injunction, the basis of the jurisdiction to grant that remedy is the violation of some right: the mere fact that a law was unconstitutional would not warrant the issue of an injunction. Some injury to the applicants must be shown, some violation of their rights. Now, the evidence wholly fails, in my opinion, to establish either the infringement by the Board of any right in the plaintiff, of property, personal liberty, or reputation, or any act which, if carried into effect, will necessarily result in the violation of any of those rights. What, then, is the suggested right in this case? All we can say is that unauthorized proceedings before the Board might possibly prejudice the applicants in connection with a charge in the nature of sedition before the State Courts, and upon the hearing of that charge, if it ever comes to trial. And this, it is said, is calculated to infringe what is called the applicants' right to a fair trial. But interference with the administration of the King's justice is rather an offence against the King himself than a violation of any right in the subject. The King's Courts in the States are, as it seems to me, armed with ample powers to secure fair trials and the proper administration of justice in proceedings pending in the States, and to deal with persons within their territorial limits who, without any lawful authority, interfere with or obstruct those proceedings (see *Packer* v. *Peacock* (6)). Consequently, but for the opinions of the Chief Justice and of my brothers *Isaacs* and *Rich*, I should have hesitated to conclude that an injunction was an appropriate remedy in this case, even if sec. 8A of the *Immigration Act* had been unconstitutional; but, in the face of their opinions, I shall content myself with

(1) (1840) 11 A. & E., 949.
(2) (1899) 1 Q.B., 571.
(3) (1905) 2 K.B., 59.
(4) (1906) 2 K.B., 501.
(5) (1907) A.C., 420.
(6) (1912) 13 C.L.R., 577.

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expressing a doubt upon the subject, and avoid deciding the matter in a sense contrary to the view they have formed.

Orders nisi discharged with costs. Motion for interlocutory injunction dismissed with costs.

Solicitors for the prosecutors and plaintiffs, *R. D. Meagher, Hogarth & Co.*; *Collins & Mulholland.*

Solicitor for the respondents and defendants, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

B. L.

[HIGH COURT OF AUSTRALIA.]

TROWER . . . . . PLAINTIFF;

AGAINST

THE COMMONWEALTH . . . . . DEFENDANT.

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BRISBANE, *June* 14.

SYDNEY, *Aug.* 2.

Knox C.J., Isaacs and Gavan Duffy JJ.

Public Service (Commonwealth)—Transferred officers—Officer in Public Service of State—Transfer to Public Service of Commonwealth—Break in service of State between establishment of Commonwealth and time of transfer—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 84—*Commonwealth Public Service Act* 1902-1918 (*No.* 5 *of* 1902—*No.* 46 *of* 1918), *sec.* 60.

Sec. 84 of the Constitution deals in the first three paragraphs with the rights of officers of Departments of the Public Service of a State transferred to the Commonwealth, and provides that "any such officer who is retained in the service of the Commonwealth shall preserve all his existing and accruing rights, and shall be entitled to retire from office at the time, and on the pension or retiring allowance, which would be permitted by the law of the State if his service with the Commonwealth were a continuation of his service with the State." The fourth paragraph of the section enacts that "any officer who is, at the establishment of the Commonwealth, in the Public Service of a State,