[HIGH COURT OF AUSTRALIA.]

Ex parte WALSH; In re YATES.

Ex parte JOHNSON; In re YATES.

ON REMOVAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. of A. 1925.

Sydney, Nov. 30; Dec. 1-4, 7-9, 11, 18.

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

Constitutional Law—Powers of Commonwealth Parliament—Extent of power—Immigration and emigration—Trade and commerce—Public departments and public authority—Incidental powers—Deportation by executive act—Person whose home is in Commonwealth—Immigration before Federation — Retrospective legislation — Showing cause against deportation—Notice to person affected—Sufficiency of notice—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 51, 52, 61—*Immigration Act* 1901-1925 (*No.* 17 *of* 1901—*No.* 7 *of* 1925), *sec.* 8AA.

High Court—Jurisdiction—Removal of cause from State Court to High Court—Validity of legislation—Defining and investing jurisdiction—Whether rule nisi for habeas corpus may be removed—Meaning of "cause"—The Constitution (63 & 64 *Vict. c.* 12), *secs.* 71, 75-77—*Judiciary Act* 1903-1920 (*No.* 6 *of* 1903—*No.* 38 *of* 1920), *secs.* 39, 40.

Held, by *Knox* C.J., *Isaacs*, *Higgins*, *Rich* and *Starke* JJ., that sec. 40 of the *Judiciary Act* 1903-1920 is a valid exercise of the powers conferred upon the Commonwealth Parliament by secs. 76 and 77 of the Constitution; and a rule nisi for a habeas corpus to determine the right to personal liberty is a "cause" within the meaning of sec. 40 and may be removed under its provisions.

Held, by *Knox* C.J., *Isaacs*, *Rich* and *Starke* JJ. (*Higgins* J. dissenting), that sec. 8AA of the *Immigration Act* 1901-1925 is a valid exercise of the power conferred upon the Commonwealth Parliament by sec. 51 (XXVII.) of the Constitution to legislate with respect to immigration.

Per Knox C.J., *Higgins* and *Starke* JJ. (*Isaacs* and *Rich* JJ. dissenting): Sec. 8AA cannot be supported as an exercise of any power of the Commonwealth Parliament other than that of immigration.

Per Knox C.J., *Higgins* and *Starke* JJ.: The immigration power does not authorize the Parliament to legislate with respect to persons who, having

immigrated to Australia, have made their permanent homes there and so have become members of the Australian community; and, *per Knox* C.J. and *Starke* J. (*Higgins* J. dissenting), sec. 8AA upon its proper construction does not apply to such persons.

Per Isaacs and *Rich* JJ. :—(1) The immigration power authorizes the Commonwealth Parliament to legislate with respect only to persons who have immigrated to Australia since the establishment of the Commonwealth, and sec. 8AA upon its proper construction applies to all such persons, whether they have or have not made their permanent homes in Australia, and to no others. (2) Sec. 8AA is a valid exercise of the powers conferred upon the Commonwealth Parliament by sec. 51 (I.), (XXVII.) and (XXXIX.) and sec. 52 (II.) of the Constitution, but on its proper construction does not go beyond the limits of the immigration power. (3) In order that a person may lawfully be required to show cause why he should not be deported under sec. 8AA, it is a necessary condition that he should be informed with reasonable definiteness of what particular acts the Minister is satisfied.

Per Higgins J. :—Sec. 8AA is not a law with respect to immigration, for it is intended to apply to members of the Australian community. Parliament having clearly stated the power which it intended to exercise by the Act —the power as to immigration—it cannot be treated as having exercised some other power. It is a fundamental mistake to treat the power to make laws "with respect to immigration" as if it were a power to make laws with respect to immigrants. Sec. 8AA, on its proper construction, was meant to apply to persons who had been immigrants, members of the Australian community; and it is invalid to that end. A Federal Act may be retrospective; but an Act under the Constitution as to immigration cannot deal with immigration which took place before the Constitution. Sec. 8AA is lacking in the very elements of a law as to trade and commerce with other countries.

Proceedings were instituted under sec. 8AA against A and B; notices summoning them to appear before a Board, following the words of sub-sec. 2, were served upon them. Both A and B were born outside Australia. A had immigrated to Australia in 1893 and B in 1910, and each of them had made his home there. Orders having been made for their deportation, they were detained in custody pending their deportation. On orders nisi for habeas corpus,

Held, by the whole Court, that the detention of each of them was unlawful.

RULES NISI for writs of habeas corpus.

On 24th August 1925 a proclamation under sec. 8AA of the *Immigration Act* 1901-1925 was made by the Governor-General. On 1st September 1925 notices signed by the Minister for Home and Territories were served on Thomas Walsh and Jacob Johnson which, so far as is material, were as follows: "Take notice that

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whereas I am satisfied that you were not born in Australia and that you have been concerned in Australia in acts directed towards hindering or obstructing, to the prejudice of the public, the transport of goods or the conveyance of passengers in relation to trade or commerce with other countries or among the States, or the provision of services by any department or public authority of the Commonwealth, and that your presence in Australia will be injurious to the peace, order or good government of the Commonwealth in relation to matters with respect to which the Parliament has power to make laws, you are hereby summoned to appear . . . before a Board constituted in pursuance of sec. 8AA of the above-named Act" (the *Immigration Act* 1901-1925) " . . . to show cause why you should not be deported from the Commonwealth" &c. Walsh and Johnson both appeared before the Board. On 18th November 1925 the Minister for Home and Territories made orders for the deportation of Walsh and Johnson, and in each order it was recited that the Board had recommended that Walsh and Johnson respectively should be deported. Pursuant to these orders and to directions given by the Prime Minister, Walsh and Johnson were taken into custody by Robert Walter Yates, a peace officer of the Commonwealth, pending their deportation.

On 20th November 1925 applications were made to the Full Court of the Supreme Court of New South Wales on behalf of Walsh and Johnson for the issue of writs of habeas corpus directed to Yates. Among the grounds stated in the affidavits in support of the applications was the following: "that the section of the *Immigration Act* under which the Board purported to act and the Minister purported to appoint the said Board was *ultra vires* the powers of the Commonwealth Parliament." On the same day the Full Court made rules nisi for the issue of writs of habeas corpus returnable on 23rd November 1925. Later on the above-mentioned 20th November the High Court, on the application of the Attorney-General of the Commonwealth, made orders removing the rules nisi from the Supreme Court into the High Court; and they now came on for hearing.

Other material facts appear in the judgments hereunder.

Watt K.C. and *Evatt* for the applicant Walsh, and *Evatt* for the applicant Johnson, took preliminary objections to the hearing of the applications by the High Court. Sec. 40 of the *Judiciary Act* is invalid. The only powers which can be invoked to support its validity are sec. 77 (II.) and (III.) and sec. 51 (XXXIX.) of the Constitution. But sec. 40 neither defines the extent to which the jurisdiction of a Federal Court shall be exclusive of that which belongs to or is invested in the Courts of the States, nor invests any Court of a State with Federal jurisdiction. The limit of investiture falls short of completely divesting a State Court of jurisdiction in a matter which is in the exclusive jurisdiction of the High Court. A definition of jurisdiction must be universal and certain. Sec. 77 does not give power to the Parliament to delegate to the High Court the definition of the jurisdiction of a State Court; nor does it contemplate a discretion in the High Court. Once a State Court is invested with Federal jurisdiction, the Parliament has no express power to take away the right to exercise that jurisdiction. The power to remove a cause is essentially a judicial power, and sec. 40 in that view gives to the Attorney-Generals something in the nature of judicial power. Sec. 40 is limited to matters in respect of which the High Court has original jurisdiction under sec. 76 of the Constitution, and that Court has not been given original jurisdiction in matters arising under a Federal statute. Sec. 40 is invalid to the extent that it enables the High Court to remove the whole of a cause when only part of it involves the interpretation of the Constitution. Sec. 40 cannot be supported under sec. 51 (XXXIX.), for it is not incidental to sec. 38A of the *Judiciary Act* (see *Pirrie* v. *McFarlane* (1)). If sec. 40 is valid, on its true interpretation it does not apply to the removal from State Courts of summary applications for habeas corpus to determine the right of personal liberty. The Supreme Court of New South Wales has ample power under the *Charter of Justice* and 9 Geo. IV. c. 83 to deal summarily with questions of the liberty of the subject. That jurisdiction is not taken away by sec. 39 (1) of the *Judiciary Act*. That Court has also, under its Federal jurisdiction, power to grant a writ of habeas corpus. To apply sec. 40 to habeas corpus would have the effect of destroying several of the essentials

(1) (1925) 36 C.L.R. 170, at p. 178.

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of that remedy. It would deprive an applicant of the right to go from Judge to Judge and from Court to Court until he gets a discharge or until the highest Court is reached. Certiorari never lies to remove habeas corpus from a Court which had power to grant it; and when an applicant is ordered to be discharged, that is the end of the matter and there is no appeal.

[ISAACS J. referred to *Lloyd* v. *Wallach* (1).]

Habeas corpus is in a different position from ordinary litigation (*Secretary of State for Home Affairs* v. *O'Brien* (2); *Cox* v. *Hakes* (3)). In *O'Brien's Case* it was held that the very general words of the *Appellate Jurisdiction Act* 1876 were insufficient to give a right of appeal in habeas corpus. It needs clear and precise words to take away the rights as to habeas corpus, and the word "cause" in sec. 40 should not be interpreted as including an application for habeas corpus. An application for habeas corpus is not a suit between parties.

[ISAACS J. referred to *Holmes* v. *Jennison* (4).

[RICH J. referred to *Ex parte Tom Tong* (5).]

If it were a suit between parties, how could the applicant go from Court to Court and get an independent decision from each? It is not a *lis* or a legal proceeding (*Ex parte Rowlands* (6); *R.* v. *Gee Dew* (7); *Ex parte Cuddy* (8); *In re Keller* (9); *Halsbury's Laws of England*, vol. x., par. 90).

[ISAACS J. referred to *Spencer Bower on Res Judicata*, pp. 30, 133; *Barnardo* v. *Ford* (10).]

There is no one whom the Court is bound *ex debito justitiæ* to hear. The Court inquires for itself whether the detention is justified. Sec. 40 does not apply so as to enable any of the Attorney-Generals named to obtain an order from the Court unless the Commonwealth or one of the States is a party to the cause. If sec. 40 applies to habeas corpus the order for removal should not have been made and should now be set aside—because at the most only that part of the

(1) (1915) 20 C.L.R. 299.
(2) (1923) A.C. 603, at pp. 618, 621, 627, 635.
(3) (1890) 15 App. Cas. 506, at pp. 514, 516-517.
(4) (1840) 14 Peters 540, at p. 565.
(5) (1883) 108 U.S. 556, at p. 559.
(6) (1895) 16 N.S.W.L.R. (L.) 239.
(7) (1924) 3 Dom. L.R. 153, at p. 165.
(8) (1889) 40 Fed. Rep. 62.
(9) (1887) 22 L.R. Ir. 158, at pp. 162, 184.
(10) (1892) A.C. 326.

cause involving a constitutional question should have been removed, and that is all that sec. 40 contemplates being removed; because also this Court in the exercise of its discretion should not in the circumstances of the case have made the order; and because the order was obtained by suppression of the material fact that it had been stated by counsel for the applicants that the constitutional question would not be relied on in the Supreme Court. Assuming the order for removal to have been properly made, an order should now be made under sec. 42 of the *Judiciary Act* remitting the case back to the Supreme Court on the ground that the cause does not really and substantially arise under the Constitution or involve its interpretation. For that purpose the cause as a whole must be looked at. A cause does not come within sec. 40 unless the claim or demand made is based on some provision of the Constitution and cannot be granted without applying some provision of the Constitution (see *Miller* v. *Haweis* (1); *Hogan* v. *Ochiltree* (2); *In re Drew* (3); *Attorney-General (Cth.)* v. *Balding* (4); *R.* v. *Maryborough Licensing Court*; *Ex parte Webster & Co.* (5); *R.* v. *Young* (6); *Commonwealth* v. *Cole* (7); *Weed* v. *Ward* (8); *R.* v. *Beer* (9); *Pirrie* v. *McFarlane* (10); *Southern Pacific Co.* v. *Schuyler* (11); *Howat* v. *Kansas* (12)).

[STARKE J. referred to *Gaines* v. *Fuentes* (13).]

Sir Robert Garran S.-G. and *Lamb* K.C. (with them *E. M. Mitchell* K.C. and *Bowie Wilson*), for the respondent. Sec. 40 of the *Judiciary Act* is valid and rests upon the same foundation as sec. 40A, which this Court has held to be valid (*Pirrie* v. *McFarlane* (14)), namely, secs. 77 and 51 (XXXIX.) of the Constitution. Each of those sections would by itself be sufficient to support sec. 40. In the United States it has been held that the power of removal is necessarily implied from the fact that the judicial power is vested in the Supreme Court (*Willoughby on the Constitution*

(1) (1907) 5 C.L.R. 89.
(2) (1910) 10 C.L.R. 535.
(3) (1919) V.L.R. 600; 41 A.L.T. 65.
(4) (1920) 27 C.L.R. 395.
(5) (1919) 27 C.L.R. 249, at pp. 252, 255.
(6) (1919) 27 C.L.R. 100.
(7) (1923) 32 C.L.R. 602.
(8) (1889) 40 Ch. D. 555.
(9) (1898) 62 J.P. 120.
(10) (1925) 36 C.L.R., at pp. 178, 220, 225.
(11) (1913) 227 U.S. 601, at p. 610.
(12) (1922) 258 U.S. 181, at pp. 186, 190.
(13) (1875) 92 U.S. 10.
(14) (1925) 36 C.L.R. 170.

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of the United States, p. 124). The determination of the validity of the detention of the applicants in this case is part of the judicial power of the Commonwealth, because involved in the validity of the detention is the interpretation of the law of the Commonwealth, and because the question of that validity arises out of that law and in the last resort must depend on the validity of that law. Under sec. 40 removal may be ordered at any stage. That section differs from sec. 40A, under which removal takes place at the particular stage when the question necessarily arises for decision (*R.* v. *Maryborough Licensing Court*; *Ex parte Webster & Co.* (1)). Sec. 40 would be useless if the right of removal arose only when the constitutional question came up for decision. If the constitutional question forms an ingredient of the cause, that is sufficient to justify removal (*Railroad Co.* v. *Mississippi* (2); *People* v. *Sanitary District of Chicago* (3)). The American cases referred to in *Miller* v. *Haweis* (4) are based on the fact that the Supreme Court of the United States does not give decisions on State laws contrary to the decisions of the Supreme Courts of the particular States. The *Judiciary Act* makes provision for the exercise of the judicial power of the Commonwealth, and is not a procedure Act. It does what the Constitution requires to be done to complete the judicial power. It deals with the whole matter irrespective of the particular kind of cause—with all matters which come within the judicial power. In that it differs from the *Judicature Act* 1873, with which *Cox* v. *Hakes* (5) dealt. The definition of "cause" in sec. 2 of the *Judiciary Act* is inclusive; it includes "suit," which is defined as including any original proceeding between parties. That definition includes an application for habeas corpus, which is an original proceeding between parties. The respondent to such an application is a party; he is called on to show cause, he has to do what the Court orders and he may have to pay costs. [Counsel referred to *Green* v. *Lord Penzance* (6); *Common Law Procedure Act* 1899 (N.S.W.), secs. 252, 253; *Cox* v. *Hakes* (7); *Barnardo* v. *Ford* (8).]

(1) (1919) 27 C.L.R. 249.
(2) (1880) 102 U.S. 135.
(3) (1899) 98 Fed. Rep. 150.
(4) (1907) 5 C.L.R. 89.
(5) (1890) 15 App. Cas. 506.
(6) (1881) 6 App. Cas. 657.
(7) (1890) 15 App. Cas., at pp. 529, 530.
(8) (1892) A.C., at p. 337.

Evatt, in reply.

PER CURIAM. The Court overrules the objections. The reasons will be delivered later.

Watt K.C. The detention of the applicants is illegal, for sec. 8AA of the *Immigration Act* is *ultra vires*. That section is to be presumed to be enacted under the power given by sec. 51 (XXVII.) to make laws with respect to immigration, and there is no warrant for calling in aid any of the other powers conferred by sec. 51. The immigration power does not authorize the Parliament to legislate with respect to a man whose home is in Australia and who is a constituent part of the people of the Commonwealth, more especially if he has been such a constituent part since before the establishment of the Commonwealth (*Potter* v. *Minahan* (1); *R.* v. *Macfarlane*; *Ex parte O'Flanagan and O'Kelly* (2)). The section, on its proper construction, does not apply to such a person, and, if it does, it is invalid. The immigration power cannot be applied to a person by reason of the fact that he came into Australia before the institution of the Commonwealth. On the authority of *R.* v. *Electricity Commissioners*; *Ex parte London Electricity Joint Committee Co.* (3)—which was decided since *R.* v. *Macfarlane*; *Ex parte O'Flanagan and O'Kelly*—sec. 8AA is invalid as being an attempt to confer part of the judicial power of the Commonwealth upon persons who are not a Court. The Board improperly rejected certain evidence tendered on behalf of the applicants. The Board was disqualified on the ground of bias by reason of the payments made for their services. There is no evidence upon which an honest tribunal could make a recommendation of deportation.

Sir Robert Garran, S.-G. Sec. 8AA is amply supported by the power given by sec. 51 (XXVII.) of the Constitution as to immigration and emigration. But it is valid also on broader grounds, based on the whole legislative power of the Commonwealth Parliament. It is legislation with respect to all the matters as to which power is

(1) (1908) 7 C.L.R. 277, at p. 298. (2) (1923) 32 C.L.R. 518, at pp. 532, 580-583.
(3) (1924) 1 K.B. 171.

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given by secs. 51 and 52 of the Constitution or elsewhere. It is legislation incidental to the execution of the power vested in the Executive by sec. 61 of the Constitution, and to the powers vested in the Parliament, and is therefore justified by sec. 51 (xxxix.). It is also legislation in aid of the King's peace of the Commonwealth. Sec. 8AA deals with a great national emergency, the question being the protection of the Commonwealth against injury from within, which may be as great as injury from without. The principles for determining the validity of such legislation are stated in *Attorney-General for Ontario* v. *Attorney-General for Canada* (1) (cited in *Colonial Sugar Refining Co.* v. *Attorney-General for the Commonwealth* (2)) and *Lloyd* v. *Wallach* (3). The whole subject matter is one which comes within the Commonwealth sphere of legislative power (see *R.* v. *Kidman* (4)).

[ISAACS J. referred to *Farey* v. *Burvett* (5).]

A famine might be an emergency justifying the fixing of the price of bread, just as war was held to be in that case. The remedy proposed—deportation—is protective and not punitive. The end being the protection of the King's peace in the Commonwealth, all the means to that end which are not forbidden by the Constitution are legitimate (*D'Emden* v. *Pedder* (6)).

[ISAACS J. The means must be consistent with the letter and spirit of the Constitution. Is it consistent with the Constitution for the Executive to determine the matter, and award something which, though not a punishment, may have a punitive character ?]

Yes; at least where the question is appropriate for executive determination; e.g., whether a person is a danger to the Commonwealth. That deportation by executive act is within the power of the Commonwealth was decided in *R.* v. *Macfarlane*; *Ex parte O'Flanagan and O'Kelly* (7). Deportation is a fundamental power which every sovereign State must claim. There is no authority for the proposition that the Commonwealth Parliament has not the same power to deport its subjects as it has to deport aliens. The colonies before Federation had that power, and it must now be in

(1) (1912) A.C. 571, at p. 583.
(2) (1912) 15 C.L.R. 182, at p. 214.
(3) (1915) 20 C.L.R., at pp. 310-311.
(4) (1915) 20 C.L.R. 425, at pp. 440, 449-450.
(5) (1916) 21 C.L.R. 433, at p. 453.
(6) (1904) 1 C.L.R. 91, at pp. 109-110.
(7) (1923) 32 C.L.R. 518.

the Commonwealth. Deportation by executive act has been provided for in Commonwealth statutes (*Pacific Island Labourers Act* 1901-1906, sec. 8; *Unlawful Associations Act* 1916-1917, sec. 6), and has been supported by this Court in *Robtelmes* v. *Brenan* (1).

[ISAACS J. referred to *Pankhurst* v. *Kiernan* (2).]

It is essential that the Commonwealth Parliament should be able to give the Executive full powers for the protection of the country against such dangers as are indicated in sec. 8AA. As *Rich* J. pointed out in *R.* v. *Macfarlane* (3), the liberty of the individual must yield to the safety of the Commonwealth. The primary duty of the Government is to the community, and, if it is necessary for the safety of the community that certain persons should be removed from the country, the Parliament has power to enable the Executive to remove them. If the Parliament declares, or authorizes to be declared, the emergency, the extent of the emergency is a political matter. As long as deportation is enacted as for the protection of the Commonwealth, and not as a punishment for an offence, the intervention of the Judiciary is not necessary. Deportation is an appropriate remedy to prevent the obstruction of the lawful business of the country. It would not be proper to submit to a judicial tribunal the question whether the presence of a certain person in the Commonwealth was likely to be injurious to the community. None of the three departments — legislative, executive and judicial—may encroach on the powers of the others. But the Legislature may, subject to the prohibitions of the Constitution, assign various powers to the other departments. The Constitution does not say that because a matter affects property, or liberty or life, it must be assigned to the Judiciary for judicial determination. What the Parliament may not do is to vest judicial power in a non-judicial body; and here it has not done that.

[Counsel referred to *Barton* v. *Taylor* (4); *Willis and Christie* v. *Perry* (5); *Toronto Electric Commissioners* v. *Snider* (6); *Huddart Parker & Co. Pty. Ltd.* v. *Moorehead* (7); *Roche* v. *Kronheimer* (8).]

(1) (1906) 4 C.L.R. 395.
(2) (1917) 24 C.L.R. 120, at p. 132.
(3) (1923) 32 C.L.R., at p. 578.
(4) (1886) 11 App. Cas. 197.
(5) (1912) 13 C.L.R. 592.
(6) (1925) A.C. 396.
(7) (1908-1909) 8 C.L.R. 330, at p. 357.
(8) (1921) 29 C.L.R. 329.

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[ISAACS J. referred to *Fong Yue Ting* v. *United States* (1); *Ng Fung Ho* v. *White* (2); *Mahler* v. *Eby* (3); *Ferrando* v. *Pearce* (4).]

Sec. 8AA deals with disturbances which threaten the peace, order and good government of the Commonwealth; that is, it deals with cases in which the maintenance of the Constitution is in danger. The section is therefore valid under secs. 61 and 51 (XXXIX.) of the Constitution. The section is within the power as to immigration and emigration (sec. 51 (XXVII.)). Under that power the Parliament has full control over the coming into and going out of the Commonwealth of any person. The expulsion of undesirable persons falls within the ordinary meaning of the word "emigration" (see *Encyclopædia Britannica, sub* "Migration," vol. XVIII., pp. 428, 431; *sub* "Huguenots," vol. XIII., p. 865; *Encyclopædia of Laws of England*, vol. IV., p. 485; *Oxford Dictionary, sub* "Emigrate"). *R.* v. *Macfarlane*; *Ex parte O'Flanagan and O'Kelly* (5), is an authority for the validity of sec. 8AA except so far as it applies to persons who immigrated before the establishment of the Commonwealth. That section in terms applies to people who may have become members of the community. The right which a man had before Federation to remain in a colony subject to the right of the colony to expel him became, on the establishment of the Commonwealth, a right to remain in Australia subject to the right of the Commonwealth to expel him. Otherwise there would, after Federation, have been no means of dealing with a person who, being a prohibited immigrant within the law of a particular colony, had got into that colony shortly before Federation. Just as under the naturalization power the Parliament might take away naturalization which had been granted before Federation (see *Meyer* v. *Poynton* (6)), so under the immigration power the Parliament may legislate with respect to immigration which took place before Federation. Sec. 8AA, at its lowest, is a law with respect to trade and commerce with other countries and among the States (sec. 51 (I.)) and with respect to matters relating to the departments of the public service (sec. 52). At the highest, it is a law with respect to all or any of the legislative powers of the Commonwealth, and particularly with respect to immigration and emigration. The end

(1) (1893) 149 U.S. 698, at p. 730.
(2) (1922) 259 U.S. 276, at p. 284.
(3) (1924) 264 U.S. 32, at p. 39.
(4) (1918) 25 C.L.R. 241, at p. 253.
(5) (1923) 32 C.L.R. 518.
(6) (1920) 27 C.L.R. 436.

is legitimate, being the removal of an obstruction to trade and commerce and public services, and to the peace, order and good government of the Commonwealth in relation to matters in respect of which the Parliament has power to make laws. The means—deportation—are appropriate as being protective or preventive (see *R.* v. *Campbell*; *Ex parte Moussa* (1)). Those means are neither prohibited nor contrary to the letter or spirit of the Constitution. The only suggested prohibition is that against vesting judicial power in the Executive, but sec. 8AA does not vest any judicial power in the Executive. There is no judicial matter or controversy involved. The Constitution does not prohibit executive action without previous judicial inquiry. When a power is not in itself essentially judicial, the Parliament may, in the absence of any prohibition in the Constitution, exercise it itself or may vest it in the Executive. The Parliament could have ordered deportation by direct legislation or it could, in its discretion, invest a Minister with power to order deportation. The power being established, the Court is not concerned with the policy of the section. The section is, as stated on its face, an emergency law. The opinion expressed by the Privy Council in *Attorney-General for the Commonwealth* v. *Colonial Sugar Refining Co.* (2), that the Parliament cannot legislate under sec. 51 (XXXIX.) unless there is in existence a law of the Parliament upon the particular subject matter in respect of which the proposed legislation is to be ancillary, is an opinion upon an *inter se* matter, and is beyond the terms of the certificate given by the High Court (3). This Court should therefore consider that question for itself. [Counsel also referred to *R.* v. *Halliday*; *Ex parte Zadig* (4).]

Watt K.C. Sec. 8AA appears in an immigration Act, and the immigration power is the only power which can be relied on to support it. It purports to be a law with respect to persons not born in Australia and with respect to their conduct, and it attempts to regulate their conduct by imposing on them a sanction for non-compliance with the ethical opinion of a Minister of the Crown. Because it is directed to persons not born in Australia the section is not a law with respect to

(1) (1921) 2 K.B. 473, at p. 480.
(2) (1914) A.C. 237; 17 C.L.R. 644.
(3) (1912) 15 C.L.R., at p. 234.
(4) (1917) A.C. 260.

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trade and commerce; just as in *Union Colliery Co. of British Columbia* v. *Bryden* (1) a law prohibiting Chinamen from working coal mines was held not to be a law as to coal mines but to be a law as to naturalization and aliens (see also *Huddart Parker & Co. Pty. Ltd.* v. *Moorehead* (2)). The protection of trade and commerce may be the motive of the section, but its object is to prescribe a rule of conduct for persons not born in Australia. Sec. 51 (XXXIX.) cannot be relied on to justify a law of the Commonwealth Parliament unless that law is incidental to some other law of the Parliament or to some common law power which the Crown in right of the Commonwealth has (*Attorney-General for the Commonwealth* v. *Colonial Sugar Refining Co.* (3)). Under the guise of the exercise of the incidental power the Parliament cannot go beyond the necessities of the case or extend the field of any enumerated power (see *The Moorcock* (4)). The immigration power does not extend to a person who was a constituent part of the people of Australia at the time of Federation, as Walsh was; and, in order to support the validity of sec. 8AA under that power, it must be construed as not applying to such a person. It should be so construed also because the section is in an Act called the *Immigration Act*. That the section is intended to be under the immigration power is shown by the title of the Act and by sec. 3 (*gg*) of the *Immigration Act*, which provides that a person deported under the Act is a prohibited immigrant. The matter of the liberty of the subject generally has not been handed over to the Commonwealth Parliament, and can only be dealt with as incidental to some power which is in fact given. A law that a man who a Minister is of opinion has been guilty of obstructing trade and commerce shall be deported is not a law with respect to trade and commerce any more than a law that a man who a Minister is of opinion has been guilty of forging a bill of exchange shall be deported is a law with respect to bills of exchange. Sec. 8AA is not a law in regard to any matter within the legislative ambit: to be such it should prescribe a rule of conduct or provide for the conduct of any individual in regard to some matter within the legislative ambit; under the section, however, it is impossible for any individual (not

(1) (1899) A.C. 580.
(2) (1908-09) 8 C.L.R., at p. 413.
(3) (1914) A.C. 237; 17 C.L.R. 644.
(4) (1889) 14 P.D. 64, at p. 68.

born in Australia), in the event of the proclamation being made and during its continuance, to know how to regulate his conduct, acts or speech so as to avoid the punishment prescribed. Sec. 8AA is invalid because there is no connection between the recommendation of the Board and any of the objects which are specified in sub-sec. 2, such as the obstruction of trade and commerce. The words in sec. 51 (XXXIX.) "incidental to the execution of any power" presuppose that the powers referred to have been exercised. Sec. 8AA is not incidental to any power exercised by the Parliament, but is incidental to the object which the Parliament intended to effect. In order to support the validity of an Act which affects to operate on the general liberty of the subject, there must be indicated some law the execution of which needs the assistance of that restriction of liberty. The argument based on sec. 8AA being justified as emergency legislation is disposed of by *Toronto Electric Commissioners* v. *Snider* (1). The Parliament, if it intended to regulate trade and commerce so as to prevent interference with it, might have made a law prohibiting such interference and making deportation the sanction. But it would be necessary that that sanction should be imposed as a punishment so as to make it a matter for the Judiciary. The means of preventing the evil to which sec. 8AA is directed are not consistent with the letter and spirit of the Constitution. The letter of the Constitution requires that the judicial part of the means shall be exercised by the Judiciary, and the spirit of the Constitution requires that the liberty of the subject shall be dealt with only by the Judiciary. Deportation under sec. 8AA is a punishment. It is a deprivation of a right except in the case of an alien, who has no right to be in the country. The American cases as to deportation all refer to aliens; and the word "deportation" is appropriate to the expulsion of an alien and not to that of a citizen. What the Minister is required by sec. 8AA (2) to do, namely, to form an opinion on certain matters, is an exercise of judicial power, and can be conferred only upon a Court. Even if sec. 8AA is valid, since it is found in an immigration Act it must be construed so as to exclude persons who are not subject to the immigration power. The Board deprived the applicants of their

(1) (1925) A.C. 396.

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statutory right to show cause, for they refused to hear certain evidence which the applicants desired to give (see *Immigration Regulations* 1913 (Statutory Rules 1925, Nos. 146 and 147).

Evatt. It has been suggested that the two questions in this case are:—(a) Can the Parliament validly legislate to the effect that persons other than aliens or immigrants shall be deported? (b) If so, can it do so without the intervention of the judicial power? The vital issue here is not covered by these two questions. Question (a) may be answered "Yes," if the enactment in question is a part of a law with respect to any one of the placita in secs. 51 and 52. Similarly question (b) may also be answered "Yes" without the true principle in this case being determined. The absence of the intervention of the judicial power does not in itself invalidate the legislation, but it may show that an enactment is not in substance a law "with respect to" any relevant head of power. For example, an enactment that "any person who in the opinion of the executive Government is an alien shall be deported" is bad, not because of the absence of reference to the judicial organs of the Commonwealth, but because such absence points to the fact that the enactment is not a law with respect to aliens at all, but merely a law with respect to the opinion of the Government concerning certain persons. The judicial power of the Commonwealth is protected from complete subversion by the legislative power, because the shutting off of access to the Courts may be strong or conclusive evidence that Parliament has gone outside the field indicated in secs. 51 and 52 of the Constitution. This case is the corollary to the decision in *Amalgamated Society of Engineers* v. *Adelaide Steamship Co.* (1). Admitting the full scope of Commonwealth legislative power within the enumerated fields, it is impossible for Parliament to trespass outside those fields directly by itself or indirectly through the executive organs of the Government. In the first place, sec. 8AA is not a "law with respect to trade and commerce." The Austinian view is that laws are commands to which sanctions are annexed, and that every duty or obligation implies a command. This concept (*Encyclopædia Britannica*, 11th ed., article on Jurisprudence) suggests, therefore, that a "law with respect to trade

(1) (1920) 28 C.L.R. 129.

and commerce " implies (a) a command with respect to that subject, (b) a duty or obligation really connected with that subject and (c) an appropriate sanction. For the purposes of the trade and commerce power sec. 8AA says in substance: " Any person who, in the opinion of the executive Government or its agents, injures trade and commerce shall be deported." There is no command with respect to trade and commerce, there is no duty or obligation imposed with reference to that subject matter, and, although there is a sanction stated, it has no relation to any command genuinely connected with trade and commerce. It is impossible for any person to obey such a law. It may be admitted that a law which says " any person who injures trade and commerce shall be deported " is a valid law, because in that case the connection between the sanction, the command and the duty is obvious. The principle applies to every head of power in secs. 51 and 52. " Any person who forges a bill of exchange shall be deported " may be a valid law with respect to bills of exchange, but an enactment to the effect that " any person who in the opinion of the Minister has forged a bill of exchange shall be deported " is bad. This view is consistent with all the judgments in *R.* v. *Barger* (1), including those of *Isaacs* J. (2) and *Higgins* J. (3). Trade and commerce is a practical conception, and has been so regarded by this Court (*New South Wales* v. *Commonwealth* (4); *W. & A. McArthur Ltd.* v. *Queensland* (5)). Giving the widest scope to the concept, trade and commerce does not include opinions about trade and commerce, or opinions about the activity of any person in connection with trade and commerce. [Counsel referred to *Attorney-General for Ontario* v. *Reciprocal Insurers* (6).] If sec. 8AA is a valid law with respect to trade and commerce, Parliament could validly enact that a person who is in fact carrying on purely domestic trade within the State and is not engaged in inter-State trade in any way, could be punished, because in the opinion of the executive Government of the Commonwealth his trade interfered with inter-State trade. It is obvious that an enactment in these words, " any person who obstructs

(1) (1908) 6 C.L.R. 41.
(2) (1908) 6 C.L.R., at p. 99.
(3) (1908) 6 C.L.R., at pp. 119-120.
(4) (1915) 20 C.L.R. 54, at pp. 99-101.
(5) (1920) 28 C.L.R. 530, at pp. 545-549, 553.
(6) (1924) A.C. 328, at pp. 337-338.

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trade and commerce shall be deported, and the Minister shall decide whether such person is guilty of obstruction or not," is bad, because it vests judicial power in the Minister. This enactment, although it does not vest judicial power in the Minister, is similarly bad, because there is no nexus between deportation and any obligation imposed with respect to trade and commerce. The law as to trade and commerce is the same before the Act as after; no rule is prescribed either of conduct or even of thought, and therefore 8AA cannot stand as a law with respect to trade and commerce. It is also suggested that sec. 8AA is a valid law under sec. 52 of the Constitution with respect to public departments. The same reasoning, however, that prevents the enactment from being a law with respect to trade and commerce also prevents it from being a law with respect to public departments. The sanction of deportation operates, not upon obstruction to public departments, but upon the expression of the opinion of the Executive about such matters. In other words, Parliament is really giving to itself or the executive Government the power to enlarge the legislative field marked out in secs. 51 and 52. Nor is sec. 8AA a valid law under sec. 51 (XXXIX.). The argument is that sec. 51 (XXXIX.) justifies legislation with respect to matters incidental to the execution of powers vested in the executive Government, that by virtue of sec. 61 the executive Government has a duty to maintain the Constitution, and therefore that Parliament can pass this law protecting the Constitution by removing obstructive persons. In order to answer this, it is not necessary even to rely upon the decision in *Attorney-General for the Commonwealth* v. *Colonial Sugar Refining Co.* (1). Lord *Haldane's* remark as to "that general control over the liberty of the subject" (2) not having been given to the Commonwealth Parliament is, however, in point, as illustrating the limitation upon the executive power of the Commonwealth, and therefore the limitation upon Parliament's power of incidental legislation with respect to such power. Sec. 8AA is clearly not a law with respect to any matter incidental to the execution of any power vested in the executive Government by the Constitution. Sec. 61 does not provide any measure of the content of the executive power of the Commonwealth (*Commonwealth* v. *Colonial Combing, Spinning and*

(1) (1914) A.C. 237; 17 C.L.R. 644. (2) (1914) A.C., at p. 255; 17 C.L.R., at p. 654.

Weaving Co. (1)). So far as executive power is derived from valid Commonwealth legislation, it is obvious that sec. 51 (XXXIX.) does not enlarge the scope of legislative power. Apart from such executive power, there are certain direct executive powers created by the Constitution itself, for example, by secs. 64, 67, 68, 69, 70, 81, 84, 85, 119; and the decision in *R.* v. *Kidman* (2) is based upon the duty of the executive Government to protect its own organs against fraud by recourse to the judicial power. At the most, however, the executive power of the Commonwealth given by implication in the Constitution does not exceed the executive powers exercisable by the King himself by virtue of his common law prerogatives. So far as the Dominions are concerned, it may be that the prerogatives exercisable by the Governor-General are less than those exercisable by the King in England (*Musgrave* v. *Pulido* (3)), and in a Federal union, such as Australia, there has to be in addition a division of these prerogative powers between the central and local Governments (*Bonanza Creek Gold Mining Co.* v. *The King* (4))—for example, the common law right of excluding aliens apart from legislation and the common law prerogative of the King in time of war would clearly be exercisable by the Commonwealth executive Government (see *Joseph* v. *Colonial Treasurer of New South Wales* (5)). The real question is whether there is any common law or inherent right of the King, even in England, to expel or deport British subjects from his realm. There is no such power, although aliens may be in an entirely different position (*Johnstone* v. *Pedlar* (6)).

[STARKE J. referred to *Walker* v. *Baird* (7).]

If the King were to order the deportation of a British subject apart from statutory powers, an action would lie against every individual taking part in such illegality, and on an application for habeas corpus it is obvious that the King's command would be no answer. The duty of keeping the King's peace is not a special duty of the executive Government at all, but the right and duty of every subject of the King (*Dicey's Law of the Constitution*, 8th ed., App., note X., p. 538; *Maitland's Constitutional History*, pp. 489-492). Moreover, there

(1) (1922) 31 C.L.R. 421, at p. 429.
(2) (1915) 20 C.L.R. 425.
(3) (1879) 5 App. Cas. 102.
(4) (1916) 1 A.C. 566, at pp. 579-581, 585-586.
(5) (1918) 25 C.L.R. 32.
(6) (1921) 2 A.C. 262.
(7) (1892) A.C. 491.

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is no inherent power of the King to prevent actual or apprehended interference with his own public service by arresting British subjects and ejecting them from the country, let alone a power to eject on suspicion of interference. When an officer of the Government arrests a supposed thief, he is not exercising any power of the King, but is simply a citizen keeping the King's peace, which he must do or be liable for a common law misdemeanour. If he makes a mistake, he may have no defence to a civil or a criminal charge. There is no analogy whatever between the chairman of a public meeting ejecting persons obstructing its proceedings and the Government ejecting resident British subjects. One is lawful, but the other is a civil wrong. It follows, therefore, that, inasmuch as there is no executive power vested in the Commonwealth Government to deport British subjects, there can be no legislation under sec. 51 (xxxix.) to provide for such deportation by legislation. Sec. 8AA is not justified as an emergency law, but (a) the situation in time of war may be entirely different, as per *Isaacs* J. in *Farey* v. *Burvett* (1); (b) there is no reference to "emergency" in sec. 51 or sec. 52, and the Commonwealth Parliament has no emergency power except with respect to naval and military defence, and such power is not relied on here; (c) the position in Canada is different, because there the residuary power of legislation is in the central authority; (d) *Snider's Case* (2) shows that, even where emergency is relied upon, the existence of an emergency is a question of fact, and here there is no evidence of emergency in fact, but simply of an opinion of the Government. It follows that sec. 8AA can only be supported, if at all, under the power of "immigration and emigration." It is clearly not a law with respect to emigration, because the fundamental idea of emigration is voluntary departure from one's home country to another. With respect to immigration, the decisions of the High Court establish clearly that the power does not apply to any person who, at the moment when the power is sought to be applied to him, has become a part of the people of Australia, with his permanent home here. This test is in substance adopted by the five Justices in *Potter* v. *Minahan* (3) and by *Knox* C.J., *Higgins* and *Starke* JJ. in

(1) (1916) 21 C.L.R., at p. 453. (2) (1925) A.C. 396.
(3) (1908) 7 C.L.R. 277.

R. v. *Macfarlane*; *Ex parte O'Flanagan and O'Kelly* (1). The test is a simple one: Has the person at the moment in question his permanent home in Australia (*Dicey's Conflict of Laws*, pp. 83-93)? As *Isaacs* J. pointed out in *Potter* v. *Minahan* (2), locality of birth, although an evidentiary fact, may be of little moment. The Courts will look at all the circumstances of each case: place of birth; place of residence; length of residence; intention of remaining in the country; the colour of the person in question, having regard to the policy of the Australian people; the question whether the individual is married and has had children born here and brought up here; the nationality of the individual, whether a person alien born has become naturalized or not; the public positions held by the individual; any period of probation indicated by Parliament as desirable. All these are to be looked at, but the question is not one of law but a question of fact in each case. *Potter* v. *Minahan* decides definitely that the test mentioned is the test to be applied on entry into the Commonwealth. It follows that the same test (it being a test of the power) must be applied to a person resident in the Commonwealth. It is impossible to suppose that if two persons have their permanent homes in Australia, the immigration power does not apply to one who, having visited another country, comes back here, and yet does apply to the other who has not left the country since establishing his home here. Johnson and Walsh are both Australians within the meaning of the test. Therefore, sec. 8AA either is invalid altogether as an immigration law, or, if valid, does not apply to them. In the *Irish Envoys' Case* (3) this argument was not open, because both persons in question there were casual visitors to this country. In each case the rule should be made absolute.

Sir Robert Garran S.-G., in reply. The fact that sec. 8AA is in an immigration Act does not prevent its validity being supported under other powers, and it should be read without any limitation due to its association with provisions as to immigration in the same Act. There may be provisions in an amending Act which are not within the title or scope of the original Act, and there is nothing in the

(1) (1923) 32 C.L.R., at pp. 533, 580, 583.
(2) (1908) 7 C.L.R. 277.
(3) (1923) 32 C.L.R. 518.

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words of sec. 8AA to tie it to the immigration power. One law may be referred to several powers. If one power is sufficient to support it, it does not matter that the others do not (see *Robtelmes* v. *Brenan* (1)). It is only when an Act can be supported by one power only that it will be construed so as to come within that one power (see *Colonial Sugar Refining Co.* v. *Attorney-General for the Commonwealth* (2)). [Counsel referred to *Duncan* v. *State of Queensland* (3); *Waterside Workers' Federation of Australia* v. *Gilchrist, Watt & Sanderson Ltd.* (4).] The summons is a sufficient one. *Welsbach Light Co. of Australasia* v. *Commonwealth* (5) is absolutely in point. A summons which stated no more than that under the powers conferred on him the Minister summons the particular person to appear before a Board &c. would be sufficient. Before the Board it is necessary, in accordance with natural justice, to inform the person summoned what acts he is alleged to have been concerned in; and that was done. Any question of natural justice depends on what was done before the Board, and the question is one of fact and not of form (*R.* v. *Duff* (6)). Sec. 8AA is a law with respect to trade and commerce notwithstanding that it is only the opinion of the Minister about trade and commerce which brings trade and commerce into the section. [Counsel referred to *United States* v. *Ju Toy* (7); *Tang Tun* v. *Edsell* (8).]

[ISAACS J. referred to *Reetz* v. *Michigan* (9).]

The section may be read as applying where there is in fact an obstruction of trade and commerce. If that is its proper construction, then, if anything is done under the section which has no relation to trade and commerce, it would not be lawfully done. If it were established that the acts as to which the Minister had formed an opinion were in relation to purely intra-State ships, the Court on an application for habeas corpus or other proceedings could say that the section did not apply. If sec. 8AA is valid only under the immigration and emigration power, it applies to immigration or emigration as well before as after Federation. Those words were

(1) (1906) 4 C.L.R., at pp. 415, 417.
(2) (1912) 15 C.L.R., at pp. 195, 211.
(3) (1916) 22 C.L.R. 556, at pp. 604-605.
(4) (1924) 34 C.L.R. 482, at pp. 521-522.
(5) (1916) 22 C.L.R. 268.
(6) (1921) 41 N.S.W.W.N. 23.
(7) (1905) 198 U.S. 253, at pp. 262-263.
(8) (1912) 223 U.S. 673, at p. 675.
(9) (1903) 188 U.S. 505.

used at a time when it was known that after Federation the States would have no effective powers of legislation with regard to immigration or emigration, and it could not have been intended to limit their meaning to immigration or emigration after Federation.

Evatt, in further reply. It is now suggested that sec. 8AA may be read as follows: "In cases where there is *in fact* an obstruction to trade and commerce the executive Government may deport certain persons suspected of being connected with such obstruction." There are three answers to this view:—(a) The section cannot be so read. (b) Even if so read, the section is not a valid law with respect to trade and commerce. There may be obstruction in fact to trade and commerce, but no person can be punished under a law with respect to trade and commerce unless he is in fact connected with the actual obstruction. (c) Even if the section can be so read and is a valid law with respect to trade and commerce, the onus is on the respondent on an application for habeas corpus to prove all the facts necessary to justify such detention and arrest. Here there is no evidence of obstruction in fact, and therefore the rule should be made absolute.

Cur. adv. vult.

Dec. 18.

KNOX C.J. The applicant in each case is detained in custody pending deportation in pursuance of an order made under sec. 8AA of the *Immigration Act* 1901-1925, and the question for decision is whether such detention is lawful.

Each applicant having obtained in the Supreme Court of New South Wales a rule nisi calling on the respondent Robert Walter Yates, the person in whose custody he was detained, to show cause why a writ of habeas corpus should not issue, an order was made in each case by this Court, on the application of the Attorney-General of the Commonwealth, removing the cause into this Court in pursuance of sec. 40 of the *Judiciary Act*. On the motions to make absolute the rules nisi coming on in this Court, counsel for the applicants submitted that this Court had no jurisdiction to entertain the matter and, in the alternative, that the order for removal ought to

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be rescinded. I have had the advantage of considering the opinion about to be expressed by my brother *Starke* on the questions so raised, and agree with him both in his conclusions and in the reasons by which they are supported. It is therefore unnecessary for me to deal further with them.

The preliminary questions being disposed of, it remains to consider whether the rules nisi should be made absolute.

The legality of the detention of the applicants was challenged in this Court on a number of grounds, some of which imputed bias, mala fides and improper conduct to the members of the Board in connection with the proceedings before it. Ultimately these grounds were abandoned by counsel for the applicants; but, the charges having been made, I think it right to say that in my opinion there was no shadow of justification for making the imputations referred to, and they should never have been made. I desire to say further that, having had the opportunity of reading the transcript of the proceedings before the Board, I have come to the conclusion that the members of the Board showed admirable patience and self-restraint, having regard to the conduct of counsel before them, which fell lamentably short of the standard which ought to, and generally does, regulate the conduct of members of the Bar. Apart from these matters counsel for the applicants rested their case mainly on the contention that sec. 8AA of the Act was beyond the powers of the Parliament. It was pointed out by Viscount *Haldane*, in delivering the opinion of the Judicial Committee in *Attorney-General for the Commonwealth* v. *Colonial Sugar Refining Co.* (1), that the necessity for considering this question arose from the Federal nature of the Constitution and from the express provisions of secs. 51 and 107 of that instrument. In this case, as in that (2), "the burden rests on those who affirm that the capacity to pass" this law "was put within the powers of the Commonwealth Parliament to show that this was done." Sec. 8AA is in the words following:—"(1) If at any time the Governor-General is of opinion that there exists in Australia a serious industrial disturbance prejudicing or threatening the peace, order or good government of the Commonwealth, he

(1) (1914) A.C. 237; 17 C.L.R. 644.
(2) (1914) A.C., at p. 255; 17 C.L.R., at p. 653.

may make a proclamation to that effect, which proclamation shall be and remain in force for the purposes of this section until it is revoked by the Governor-General. (2) When any such proclamation is in force, the Minister, if he is satisfied that any person not born in Australia has been concerned in Australia in acts directed towards hindering or obstructing, to the prejudice of the public, the transport of goods or the conveyance of passengers in relation to trade or commerce with other countries or among the States, or the provision of services by any department or public authority of the Commonwealth, and that the presence of that person in Australia will be injurious to the peace, order or good government of the Commonwealth in relation to matters with respect to which the Parliament has power to make laws, may, by notice in writing, summon the person to appear before a Board, at the time specified in the summons and in the manner prescribed, to show cause why he should not be deported from the Commonwealth. (3) Sub-sections 2, 3 and 4 of section eight A of this Act shall apply in relation to the Board mentioned in the last preceding sub-section." Sub-secs. 2, 3 and 4 of sec. 8A of the Act are in the words following:—"(2) A Board appointed for the purpose 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 to appear at the time specified in the summons 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."

Sub-sec. 1 of sec. 8AA may be excluded from consideration, no question having been raised as to its validity. The first step towards determining whether the law contained in sub-sec. 2 is valid is to ascertain the meaning of the words in which it is expressed and the object or effect of the enactment. Read according to ordinary rules of grammar, sub-sec. 2 applies only to persons not born in Australia, and provides that, if the Minister is satisfied (a) that any such person has been concerned in certain acts, and (b) that such acts were directed towards hindering or obstructing certain operations, and (c) that such hindrance or obstruction was to the prejudice of the

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public, and (d) that the operation to the hindrance or obstruction of which the acts were directed consisted of either (1) the transport of goods or the conveyance of passengers in relation to trade and commerce with other countries or among the States, or (2) the provision of services by any department or public authority of the Commonwealth, and (e) that the presence of that person in Australia will be injurious to the peace, order and good government of Australia in respect to some matter and (f) that Parliament has power to make laws as to that matter, he may summon the person to appear before a Board to show cause why he should not be deported. Shortly stated, sub-sec. 2 purports to authorize the Minister, if he is satisfied that the specified conditions exist and that the presence in Australia of any person not born in Australia will be injurious to the peace, order and good government of the Commonwealth in relation to any matter with respect to which the Parliament has, in the opinion of the Minister, power to make laws, to call on such person to show cause why he should not be deported from the Commonwealth. Sub-sec. 3 provides by reference for the constitution of a non-judicial tribunal before which cause may be shown, and for the deportation of the person called on if he fails to appear before the tribunal or if the tribunal recommends that he be deported. The object aimed at—the effect which would be produced by the exercise of the authority conferred—is the removal from Australia of any person not born in Australia whose continued presence in Australia is, in the opinion of the Minister, likely to be injurious in the manner specified; and the remedy provided—deportation—is, in my opinion, clearly preventive and not punitive in its nature. It is true that the operation of the enactment is made conditional on the Minister being satisfied that the person proposed to be dealt with has been concerned in acts which may be supposed to be detrimental to the welfare of the Commonwealth; but those acts are not, either by this section or, so far as I am aware, by any other law of the Commonwealth, prohibited or declared to be unlawful, nor is any punishment provided by law for persons concerned in committing them. The section provides, not that a person who has been concerned in acts of the kind specified shall be punished by being deported, but that, if the Minister is satisfied that he has

been concerned in such acts, he may be removed from Australia in order to prevent an apprehended injury to the peace, order or good government of the Commonwealth in relation to matters not necessarily connected in any way with the class of acts in which he is found to have been concerned. A law containing no provisions other than those contained expressly or by reference in sec. 8AA would, I think, be correctly described as an Act to authorize the deportation of persons not born in Australia whose presence in Australia will in the opinion of the Minister be injurious to the peace, order or good government of the Commonwealth in relation to any matter with respect to which the Parliament has power, in his opinion, to make laws.

The Solicitor-General contended that this enactment was a valid exercise of one or more of the following powers of the Parliament: (1) The power to make laws with respect to immigration and emigration (sec. 51 (XXVII.)); (2) the power to make laws with respect to trade and commerce with other countries or among the States (sec. 51 (I.)); (3) the power to make laws with respect to matters relating to the public service (sec. 52 read with sec. 61); (4) the power to make laws with respect to matters incidental to the execution of any power vested by the Constitution in the Parliament or in the Government of the Commonwealth or in any department or officer of the Commonwealth (sec. 51 (XXXIX.) read with sec. 61); (5) the power to make laws with respect to all the matters with respect to which the Parliament is empowered by the Constitution to make laws. It will be convenient to consider the several powers invoked in the order in which I have stated them.

(1) Immigration and Emigration.—In my opinion, the validity of the law as an exercise of this power is established by the decision in the Irish Envoys' Case (*R.* v. *Macfarlane*; *Ex parte O'Flanagan and O'Kelly* (1)). In that case it was held that sec. 8A of the Act was a valid exercise of the power. Sec. 8A purports, as does sec. 8AA, to confer on the Minister authority, if he be satisfied of the existence of certain specified facts, to deport from the Commonwealth persons not born in Australia. I agree with the opinion expressed by my brother *Starke* in that case, that sec. 8A is aimed at and hits immigrants

(1) (1923) 32 C.L.R. 518.

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and not members of the Australian community, and that it should not be construed as extending to persons who had made their homes in Australia and become part of its people, and that its validity as a law with respect to immigration depends on this conclusion. No reason exists for attributing to the expression "person not born in Australia" used in sec. 8AA a meaning different from that given in the case under notice to the expression "person who was not born in Australia" in sec. 8A of the same Act; and it follows that, sec. 8A having been held to be a valid exercise of the power to make laws with respect to immigration because its operation is limited to persons coming into or already in Australia who have not become members of the Australian community, sec. 8AA, the operation of which is limited to the same class of persons by words indistinguishable from those used in sec. 8A, is also a valid exercise of that power. But the constitutional validity of the enactment depends on its operation being so limited, and it thus becomes necessary to consider whether either of the applicants is a person within the scope of the power to make laws with respect to immigration.

The power undoubtedly extends to every person who is, at the relevant time, an immigrant, that is to say, a person coming into Australia who is not at the time of entry a member of the Australian community. If the question be whether he is entitled to enter Australia, the question for decision is whether at that time he is not a member of the Australian community and is therefore subject to the immigration power. If the question be whether he is entitled to remain in Australia, or, stated otherwise, whether he may be lawfully expelled from Australia under a law made under the authority of this power, and of this power only, the question for decision is whether he is, at the time when it is sought to expel him, a person who is not a member of the Australian community and who is therefore subject to the immigration power. On any given day any person either is or is not a member of the Australian community. If on a given day a person seeking to enter Australia be exempt from the operation of a law made under this power purporting to prohibit his admission, he cannot, in my opinion, be on that day subject to the operation of a law made under the same power purporting to authorize his expulsion. The liability of any person to inclusion

within the ambit of this power so that he may be subject to the operation of a law made under it, must, in my opinion, be determined on the same considerations whether the law made under the power be directed to restricting his right to enter the Commonwealth or to destroying his right to remain there. The decision in *Potter* v. *Minahan* (1) clearly establishes, as the head-note states, that a person whose permanent home is in Australia and who therefore is a member of the Australian community is not, on arriving in Australia from abroad, an immigrant in respect of whose entry the Parliament can legislate under the power conferred by sec. 51 (xxvii.) of the Constitution to make laws with respect to immigration. It is true that in that case the person in question was born in Australia and lived in Victoria for a few years before the institution of the Commonwealth in 1901, but none of the Justices who took part in the decision treated these facts as of themselves decisive of the question whether he was within the scope of the immigration power. There is nothing in the reasons given by any member of the Court which suggests that the decision would have been the other way if the respondent in that case had, by birth or residence in Australia, acquired a home there after the institution of the Commonwealth instead of before that event. *Griffith* C.J. relied principally on the fact that the respondent was born in Victoria and was entitled to regard Victoria as his home, and that his return to the Commonwealth was not immigration within the meaning of the Constitution. *Barton* J. in effect held that the respondent was not an immigrant, nor was his coming to Australia immigration, because he was returning to his home. *O'Connor* J. said that to describe as an immigrant a person who is coming back to the country which is his home is a contradiction in terms. He said further (2):—"The foundation in law of the respondent's case is the unimpeachable proposition that a person cannot be an immigrant into the country which is his home. Whether at the time of his landing Australia was the respondent's home is a question of fact on which this case will turn." He thought that in arriving at a conclusion on this question the fact that respondent was born in Australia had not conclusive effect and was no more than prima facie evidence that his home in infancy

(1) (1908) 7 C.L.R. 277.

(2) (1908) 7 C.L.R., at p. 306.

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was in Australia. My brother *Isaacs*, dealing with sec. 51 (XXVII.) of the Constitution, said (1):—"Immigration connotes two facts; the first, that there is an entry into Commonwealth territory, and the second, that the person entering is not in fact at the moment he enters one of the people of the Commonwealth. The ultimate fact to be reached as a test whether a given person is an immigrant or not is whether he is or is not at that time a constituent part of the community known as the Australian people." And he says (2): "There is not, in my opinion, any proper test but this practical one, namely, whether the whole of the facts show that at the moment of entry the person desiring to be admitted is fairly to be considered as one of the people of the Commonwealth, and whether, notwithstanding any personal absence from Australia, he can justly and in substance claim to regard this country as a place of habitation or general residence which he had never abandoned." On the facts of that case he thought that the respondent was not in truth and in fact a portion of the people of the Commonwealth as an ordinary reasonable person would understand the matter, and that therefore he was subject to the immigration power. My brother *Higgins* thought the test of whether the respondent was an immigrant was: Where was the respondent's home during the twenty-five years preceding his return to Australia? It seems to me to follow from the opinions expressed in that case, that a person who has originally entered Australia as an immigrant may, in course of time and by force of circumstances, cease to be an immigrant and becomes a member of the Australian community. He may, so to speak, grow out of the condition of being an immigrant and thus become exempt from the operation of the immigration power. The power to make laws with respect to immigration would, no doubt, extend to enable Parliament either to prohibit absolutely or to regulate as it might think fit immigration into Australia, but, in my opinion, it does not extend to enable Parliament to prohibit or regulate anything which is not immigration, and the decision in *Potter* v. *Minahan* (3) shows that, when the person seeking to enter the Commonwealth is a member of the Australian community, his entry is not within the

(1) (1908) 7 C.L.R., at p. 308. (2) (1908) 7 C.L.R., at p. 309.
(3) (1908) 7 C.L.R. 277.

power to make laws with respect to immigration. I agree with the opinion expressed by my brother *Starke* in *R.* v. *Macfarlane* (1) that Parliament has authority under this power to expel or deport from the Commonwealth any person who does not belong to the people of Australia, but I can find no reason for extending that authority so as to include within the scope of this power persons who have become members of the Australian community.

The relevant circumstances in relation to the question whether either of the applicants is an immigrant—or, more properly, a person within the operation of a law validly made under this power—are as follows:—The applicant Walsh was born in Ireland in 1871, and in the year 1893 he became a resident of and domiciled in the State (then Colony) of New South Wales, where he has ever since had, and still has, his permanent home, except for a period during which his home was in the State of Victoria. Since 1893 he has never had a home outside Australia. The applicant Johnson was born in Holland in 1885, and in the year 1910 came to reside in the State of New South Wales. In the year 1913 he became naturalized under the law of the Commonwealth. Ever since 1910 he has had, and still has, his permanent home in New South Wales, and, so far as appears, he has never been out of Australia since his arrival in the year 1910. With regard to both applicants I think it is impossible to maintain, consistently with the reasoning in *Potter* v. *Minahan* (2), that he is an immigrant and not a member of the Australian community. It seems to me to follow from that decision that, if either applicant were now seeking to enter the Commonwealth on his return from a visit abroad, a law relating to immigration and depending on the immigration power alone could not be held to apply to him. If this be so, I am unable to see how a law made under the same power can be held to apply to him so as to authorize his expulsion from the Commonwealth. In this view the provisions of sec. 8AA, if that section be regarded as a valid exercise of the power to make laws with respect to immigration and of that power only, do not operate in respect of either applicant.

It was suggested, somewhat faintly, that the section was an exercise of the power to make laws with respect to emigration.

(1) (1923) 32 C.L.R., at p. 581.

(2) (1908) 7 C.L.R. 277.

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"Emigration," it was said, included the involuntary removal of persons from the Commonwealth, and therefore the power to make laws with respect to emigration covered laws providing for deportation. In my opinion, the compulsory deportation of a citizen from the community to which he belongs cannot, consistently with the ordinary use of language, be described as emigration.

It follows from what I have said that, if the detention or deportation of either applicant is to be justified under sec. 8AA, the validity of that section must be supported by reference to some legislative power other than the power to make laws with respect to immigration and emigration, and it is therefore necessary to consider whether the enactment can be sustained as a valid exercise of any of the other powers of legislation conferred on the Parliament by the Constitution.

(2) The next question is whether the section can be supported as a valid exercise of the power to make laws with respect to trade and commerce with other countries and among the States (sec. 51 (I.)). The argument of the Solicitor-General on this point, as I understood it, was founded on the provision which requires, as one of the alternative conditions on which the section may be brought into operation, that the Minister shall be satisfied that the person sought to be dealt with under it has been concerned in acts directed towards hindering or obstructing the transport of goods or conveyance of passengers in relation to trade or commerce with other countries or among the States. It was argued that this provision should be construed as meaning that, while the opinion of the Minister was conclusive on the question whether the person proposed to be deported had been concerned in acts directed towards hindering or obstructing to the prejudice of the public the transport of goods or conveyance of passengers, it was necessary, in order to bring the section into operation, that such transport or conveyance should be in law and in fact, and not merely in the opinion of the Minister, "in relation to trade or commerce with other countries or among the States." It was contended that, so construed, the enactment was a law with respect to trade and commerce with other countries and among the States. In my opinion, neither proposition can be sustained. It was not, and, in my opinion, could not reasonably

be, denied that the intention expressed was that the opinion of the Minister should be conclusive on the question whether the person to whom it was sought to apply the provisions of the section had been "concerned in" certain acts, and upon the question whether those acts were directed towards hindering or obstructing the transport of goods or conveyance of passengers or the provision of services by any department or public authority of the Commonwealth, and upon the question whether such hindrance or obstruction was or would be to the prejudice of the public, and upon the question whether the presence of the person in Australia would be injurious to the peace, order and good government of the Commonwealth in relation to the matters specified; and I can find no justification for removing from the category of matters as to which the Minister is to be satisfied the matter covered by the intervening words "in relation to trade or commerce with other countries or among the States." Consequently, in considering the question of validity, I treat the section as requiring, not that the transport or conveyance shall in fact and in law be in relation to foreign or inter-State trade or commerce, but that it shall be so in the opinion of the Minister. When the operation of a law is made conditional upon the opinion, as to certain matters, of some person named or described, or on proof of certain matters to his satisfaction, the question whether his opinion is justified, or whether he should have been satisfied on the materials before him, is not examinable by the Courts. The only question which can be examined is whether, acting bona fide, he formed the opinion or was satisfied with the proof. It follows, in my opinion, that this section is not a valid law with respect to trade and commerce with other countries or among the States within the meaning of the Constitution. The function of interpreting the Constitution is assigned by the Constitution to the judicial power of the Commonwealth, the question whether the subject of a law is within the ambit of one or more of the powers of legislation conferred by the Constitution on the Parliament being in every case a question depending on and involving the interpretation of the Constitution. Parliament itself has no power to define the ambit of any of those powers, nor can it confer such power on any person or tribunal except some competent organ of the judicial power. To

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hold otherwise would be to empower Parliament to disregard at will the limitations imposed by the Constitution on its power to make laws. If authority be needed for this proposition, it will be found in the opinion of the Judicial Committee in *Attorney-General for the Commonwealth* v. *Colonial Sugar Refining Co.* (1), where Viscount *Haldane* said :—" Their Lordships are called on to interpret the legislative compact made between the Commonwealth and the States, and they have to determine on the language of the statute what rights of legislation the federating colonies declared to be reserved to themselves. It is clear that any change in the existing distribution of powers has been safeguarded in such a fashion that on a point such as that before the Board the Commonwealth Parliament could not legislate so as to alter that distribution merely of its own motion." For these reasons I think the law under discussion cannot be said in any proper sense of the words to be a law with respect to trade and commerce with other countries and among the States. The most that can be claimed for it is that one of the alternative conditions on which it may come into operation is that the Minister is satisfied that some acts have been done with the intention of hindering or obstructing operations which, in his opinion, are within the ambit of that power.

But, even if the sub-section be construed in the manner suggested by the Solicitor-General, it is not, in my opinion, a valid exercise of the trade and commerce power. Omitting, for the sake of clearness, words not relevant in considering this question, the sub-section reads as follows :—" The Minister, if he is satisfied that any person has been concerned in Australia in acts directed towards hindering the transport of goods (provided such transport is in relation to trade or commerce with other countries or among the States) and that the presence of such person in Australia will be injurious to the peace, order or good government of the Commonwealth in relation to any matter in respect of which the Parliament has power to make laws, may order such person to be deported from the Commonwealth." The question to be determined is: Is this a law with respect to trade and commerce with other countries or among the States ? I agree with the Solicitor-General that the

(1) (1914) A.C., at p. 256 ; 17 C.L.R., at p. 655.

nature of the law is preventive and not punitive. It is aimed at preventing injury which might result from the presence in Australia of the person indicated, not at punishing that person for having been concerned in acts of the kind specified. The only connection between this law and the trade and commerce power is, on this construction of it, that the law may come into operation if the Minister is satisfied that the person sought to be affected by it has at some time been concerned in acts directed towards hindering or obstructing transactions which are part of inter-State or foreign trade or commerce. But, although participation in such acts may be the matter as to which the Minister is satisfied in accordance with the earlier provisions of the sub-section, the person concerned in those acts is liable to deportation, if the Minister is satisfied that his presence in Australia will be injurious to the peace, order or good government of the Commonwealth in relation to (for example) divorce and matrimonial causes or invalid and old-age pensions. The reference to acts directed towards hindering trade or commerce is introduced into the enactment, not for the purpose of prohibiting such acts, or of enabling persons committing or attempting to commit them to be punished for, or prevented from, doing so, but merely for the purpose of furnishing a condition precedent to the exercise by the Minister of the power of deportation. So far as foreign or inter-State trade or commerce is concerned, the enactment prohibits no act, enjoins no duty, creates no offence, imposes no sanction for disobedience to any command, prescribes no standard or rule of conduct. It purports to do no more than arm the Minister with power to prevent an injury, the nature of which is not defined, to the peace, order or good government of the Commonwealth in relation to any matter in respect of which the Parliament has power to make laws. And that power may be exercised although the person dealt with has never been concerned in any transaction of inter-State or foreign commerce, or in hindering or attempting to hinder any such transaction, if the Minister is satisfied of the existence of an alternative condition precedent. The enactment does not purport in any respect to authorize, prohibit, regulate, or affect any transaction which is included in the subject matter described as "trade and commerce with other countries, and among

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the States," or to prescribe any rule of conduct for any person engaged in such trade and commerce. The real aim and object of the enactment is to authorize the Minister to deport from the Commonwealth any person whose presence in Australia will, in his opinion, be injurious to the peace, order or good government of the Commonwealth in relation to any matter with respect to which the Parliament has power to make laws. An Act with this as its only real aim and object, having no connection with foreign or inter-State trade or commerce beyond that which I have indicated, cannot, in my opinion, consistently with the use of words in their ordinary meaning, be described as an Act with respect to trade and commerce with other countries and among the States. It follows that it is not a valid exercise of the power conferred by sec. 51 (I.) taken by itself and apart from other powers of legislation conferred by the Constitution.

(3) By a similar line of reasoning to that which I have applied in considering the question whether the section is a valid exercise of the trade and commerce power, I arrive at the conclusion that it is not a valid exercise of the power of the Parliament to make laws with respect to public service conferred by sec. 52 of the Constitution, whether that section be looked at alone or in conjunction with sec. 61.

(4) and (5) The question whether the section is a valid exercise of all the legislative powers of the Commonwealth may conveniently be considered with the question whether it is a valid exercise of the power conferred by sec. 51 (XXXIX.) of the Constitution read in conjunction with sec. 61. In my opinion, both these questions are covered by the opinion of the Judicial Committee in *Attorney-General for the Commonwealth* v. *Colonial Sugar Refining Co.* (1). It is clear, from the words of sec. 8AA, that the power which it purports to confer on the Minister extends to cases in which he may apprehend injurious results in relation to matters in respect of which the Parliament has not yet made and perhaps never will make any law whatever, and as to which the Executive has not and never may have any duties to perform, and that it is not restricted to matters in respect of which laws have been made. That is to say, the power to deport is given where the injury apprehended relates to a merely possible

(1) (1914) A.C. 237; 17 C.L.R. 644.

exercise of the legislative powers of the Parliament, or to a possible, but not actual, duty of the Executive to execute and maintain the laws, and is not confined to cases in which Parliament has exercised its power to make laws. The argument is, as I understand it, that this law is valid as being either a law in respect of every power of legislation which Parliament has, or a law ancillary or incidental to the execution of all those powers or to the execution of the powers vested in the Executive by sec. 61 of the Constitution. In my opinion, the decision to which I have referred establishes authoritatively that a possible exercise by Parliament of its legislative powers in respect of any or all of the matters in respect of which Parliament has power to make laws is not sufficient subject matter to support a law as a valid exercise of the power of legislation conferred by sec. 51 (XXXIX.), or of that power read in conjunction with sec. 61 of the Constitution or with any other legislative power of the Parliament. The opinion of the Judicial Committee delivered by Viscount *Haldane* shows clearly that, in the opinion of their Lordships, it was not sufficient, to render an Act *intra vires* the Parliament, that it should be "ancillary to possible subjects of present legislative capacity, as distinguished from being incidents in actual legislation about such subjects" (1). I add that, if the true view of the meaning of sec. 8AA be, as I think it is, that the opinion of the Minister is intended to be conclusive on the question whether the matter, in relation to which injury is apprehended, is a matter with respect to which Parliament has power to make laws, the enactment, regarded as an exercise of the power to make laws on all subjects with respect to which legislative power is conferred on the Parliament, is open to the further objection which I have indicated in the observations I have made on the trade and commerce power, namely, that it is not within the power of Parliament to confer on the Minister power to determine whether any matter is within the ambit of the subject matter with respect to which Parliament is empowered to make laws.

For these reasons I am of opinion that sec. 8AA is a valid exercise of the power to make laws with respect to immigration, but that it is not a valid exercise of any other power to make laws conferred on the Parliament by the Constitution. As the applicants are, in my opinion, persons to whom the operation of the section, construed

(1) (1914) A.C., at p. 251; 17 C.L.R., at p. 650.

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as a valid exercise of the immigration power, does not extend, it follows that, in my opinion, no lawful cause is shown for the detention of either of them, and the rule nisi in each case should be made absolute.

ISAACS J. These cases, both in their preliminary and in their later stages, are of the highest constitutional importance. I feel bound to acknowledge the great assistance I have received from learned counsel on both sides. Opposing views were presented with marked ability. If it is permissible to particularize, without in the least detracting from the valuable efforts and co-operation of other learned counsel, I would like to refer specially to the arguments, profound, lucid and illuminating, and, what is always desirable, urged with utter candour, by the learned Solicitor-General on one side and Dr. *Evatt* on the other, upon difficult and involved constitutional principles. The responsibility of interpreting the Constitution, always great, was materially lightened for me by their expositions, the indebtedness I feel being by no means measured by the ultimate conclusions at which I have arrived.

(1) *Preliminary Objections.*—The orders for removal of the applications for habeas corpus from the Supreme Court to this Court were made *ex parte* on behalf of the Attorney-General of the Commonwealth. On the return of the orders, Dr. *Evatt*, for Thomas Walsh, one of the applicants, raised several objections against the removal, and asked that the *ex parte* orders be set aside. These objections, being reasons why the Court should not enter upon the consideration of the applications themselves, had to be dealt with first. The Court overruled them, leaving its reasons to be stated later. The objections taken were important, some of them of an *inter se* nature. Though unable to yield to any of them, I am reminded of Lord *Selborne's* observation in *Green* v. *Lord Penzance* (1), that the zeal and ingenuity of counsel are never misplaced when exerted for the defence of personal liberty.

It was first contended that sec. 40 is invalid, because it neither defined nor invested jurisdiction. In my opinion, it does both. Sec. 39, after primarily excluding by sub-sec. 1 all remaining

(1) (1881) 6 App. Cas., at p. 663.

jurisdiction of State Courts where the High Court has jurisdiction—a process which takes away under sec. 77 (II.) of the Constitution the jurisdiction which *belonged* to the State Courts—proceeds by sub-sec. 2 to invest State Courts under sec. 77 (III.) with Federal jurisdiction, subject to appeal to this Court. But it is part of the public history of Australia that in order to ensure the determination of constitutional questions by this Court so far as possible, Parliament, as a matter of national policy, strengthened the exclusion and removal provisions. Sec. 40, as it now stands, provides for removal of causes or parts of causes "arising under the Constitution or involving its interpretation at any stage of the proceedings before final judgment." If a party applies, he must show sufficient cause, and must submit to terms if the Court thinks fit. But an Attorney-General—of the Commonwealth, if he thinks Commonwealth interests involved, or of a State, if he thinks State interests involved—may obtain the order as of course. Parliament recognizing that, if the Commonwealth or a State desires the removal, that is in itself sufficient guarantee of materiality in the first instance. The applicant must, however, establish that the cause or part of the cause is in fact and in law one "arising under the Constitution or involving its interpretation." That requirement will be considered presently. What is the effect of the order for removal so made? Remembering that up to the moment of the order the State Court was exercising Federal jurisdiction and *Federal jurisdiction only*—the Parliament by sec. 40 qualified its previous grant of that jurisdiction by directing it to cease on the making of the order. By sec. 30 of the *Judiciary Act*, the High Court had, in such a case, been given original jurisdiction which, in the absence of further direction, had to be exercised in manner directed by the ordinary methods of originating process. In this specific event, however, original jurisdiction was given on a special basis, sufficient in itself when read with sec. 41 to form originating process and link that up for subsequent proceedings with the ordinary course and practice of the Court. What defect of power is there to do this? First, let it be observed that Part VI. is headed "Exclusive and Invested Jurisdiction." Secs. 38 and 38A make the High Court jurisdiction unconditionally exclusive in certain matters. Sec. 39 makes it exclusive with

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qualifications in other matters. Then Part VII., headed "Removal of Causes," further deals with the subject of Federal jurisdiction. Sec. 40 is as already stated. Sec. 40A is self-executory, and removes *ipso facto* causes in which *inter se* questions arise. This is to prevent sec. 74 of the Constitution from becoming either a nullity or a source of conflict. Sec. 42 is a means of practical adjustment. A cause removed, either under sec. 40 or sec. 40A, because at the relevant moment it technically answers the description of causes in those respective sections, retains that character until it is determined. But, though it technically possesses and continues to possess that character, this Court may find during its progress, particularly if between private parties, that for some reason it does not "really and substantially" arise under the Constitution or involve its interpretation. It is then to be remitted to the State Court, since in the circumstances the Federal jurisdiction of that tribunal may be fully exercised without risk of constitutional questions passing from the guardianship of this Court. This is nothing more than a method adopted by the Parliament by way of distribution of such part of the judicial power of the Commonwealth as the Constitution itself does not specifically and inalienably allot. The dominant idea is to make sec. 74 of the Constitution a real and effective provision to secure that all Australian constitutional questions of *inter se* nature shall be determined in this Court in any event, and to enable a party or Commonwealth or States to have any other constitutional question arising in a cause determined by this Court. The method is by limiting the jurisdictional power of State Courts in constitutional questions in the way described. That is the result when the legislation under consideration is read as a whole; as it must be. Secs. 76 and 77 of the Constitution are, to my mind, too clear to admit of serious doubt as to the power of the Parliament of Australia to pass that legislation.

The third objection (I take it before the second) is that the Attorney-General was not a party to the proceedings for habeas corpus. Sec. 40 does not require him to be a party. The construction and application of the Constitution in a particular case, even between private litigants may seriously affect the interests of the Commonwealth, the States in general, or a particular State.

If the appropriate Attorney-General thinks so, and can satisfy this Court of the nature of the case, *as it appears at the moment he applies*, this Court makes an order, which is an event on the happening of which Parliament terminates, at all events until revived under sec. 42, the jurisdiction of the State Court to exercise the Federal judicial power.

The second objection is of a different nature. It is that sec. 40 was not intended to remove, under the designation of a "cause," a proceeding by way of habeas corpus. This objection, which was pressed with much force and in one aspect with originality, is conveniently subdivided: first, with relation to the content of the word "cause," and next, assuming the normal sufficiency of the word, whether it should be so held in relation to a habeas corpus ad subjiciendum. The word "cause" is inherently of very wide import. Lord *Selborne* in *Green* v. *Lord Penzance* (1) makes that authoritatively clear. The statutory definition (sec. 2 of the *Judiciary Act*) is that "cause" includes any suit and also includes criminal proceedings. "Suit" includes any action or original proceeding between parties. A writ of habeas corpus is unquestionably an original proceeding. It was contended, however, that it is not "between parties." Frequently when reference is made to a habeas corpus we find the word "party" used, as in the *Common Law Procedure Act* 1899 of New South Wales (secs. 252 and 253). But the root of the matter is this:—"A party imprisoned," says *Littledale* J. in *Leonard Watson's Case* (2), "has two modes of proceeding, either by action for false imprisonment, or by application for a habeas corpus." In *Wood's Case* (3) Lord Chief Justice *de Grey* describes the purpose of a habeas corpus as "for protecting the liberty of one subject against another." He quotes *Coke*, in 2 Inst. 55a, as asking: "If a man be taken or committed to prison against the law of the land, what remedy hath the party grieved?" He then quotes *Coke's* answer: "He may have an action, or he may cause the party to be indicted at the King's suit; or he may have an habeas corpus out of the King's Bench or Chancery, though there be no privilege . . . and if it appears upon the return of the

(1) (1881) 6 App. Cas., at p. 671. (2) (1839) 9 A. & E. 731, at p. 795.
(3) (1771) 3 Wils. K.B. 172.

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writ, that his imprisonment be just and lawful, he shall be remanded; but if it shall appear to the Court that he was imprisoned against the law of the land, they ought by the force of this statute to deliver him." "This statute" means *Magna Charta*. At p. 176 the Chief Justice repeats: "This is a matter between subject and subject." *Gould*, *Blackstone* and *Nares* JJ. agreed with the Chief Justice. In *Bacon's Abridgment, Habeas Corpus ad Subjiciendum* (B) 3, it is said: "A habeas corpus is a writ of right, which the subject may demand, and is the most usual remedy by which a man is restored to his liberty, if he hath been against law deprived of it." It is therefore the recognized remedy upon a complaint by or on behalf of one person against another person that the former is unlawfully imprisoned by the latter and demands his liberty. If he requires damages another remedy is provided. But for the specific relief of immediate liberation the appropriate form of proceeding is by writ of habeas corpus directed to the person complained against, who is thereby brought before the Court to defend the imprisonment if he can. The person complaining and the person complained against are parties. The proceeding therefore is within the literal import of the word "cause." I have so far based my conclusion on the nature of the writ of habeas corpus ad subjiciendum as affirmatively recognized in various authorities. It is worth while, however, observing the probable source of the writ. In the notes to chap. 16 in *Forsyth's Cases and Opinions on Constitutional Law* (at p. 439) it is stated that the writ of habeas corpus seems to have been adopted from the writ *de homine replegiando*. That was the old common law remedy where a person was improperly restrained of his liberty under no legal process. When the writ was granted, which required an affidavit disclosing the foundation on which it was prayed, an action was brought to determine the right of detention. The writ was directed to the Sheriff, commanding him to replevy the plaintiff; and then, says the text (referring to *Fitzherbert's Natura Brevium de Hom. Repleg.*): "The question *between him and the person who had restrained his liberty* was tried in the same way as in the case of a distress of chattels." The writ of habeas corpus ad subjiciendum was evolved from this more ancient proceeding,

as a more extensive (see *Seldon's* argument in *Darnel's Case* (1)) and also a more "swift and imperative remedy in all cases of illegal restraint or confinement" (Lord *Birkenhead* in *O'Brien's Case* (2)), and as a means to "the immediate determination of the right to the applicant's freedom" (Lord *Shaw*, quoting Lord *Halsbury* (3)) and as affording "promptitude" (Lord *Shaw* (4)). So too the preamble to the Act 56 Geo. III. c. 100. The further development of the modern rule nisi is merely form, leaving the substance unaltered. The original principle is thus seen to survive from earliest times to the present day. But, assuming so much, Dr. *Evatt* contended that there is a fundamental principle of our Constitution which operates to exclude this process from the generality of sec. 40. The principle relied on is that by the common law the liberty of the subject is so favoured and so protected by habeas corpus, that a person seeking liberation may go from Court to Court and probably from Judge to Judge until he either exhausts all opportunities or finds one who liberates him. To remove the cause from the Supreme Court to this Court is, so it is argued, the deprivation of one opportunity, the Supreme Court. To do this, it is urged, needs very express words, and the general terms of sec. 40 are insufficient for the purpose. In support of the argument the cases of *Cox* v. *Hakes* (5) and *Secretary of State* v. *O'Brien* (6) were cited. I am unable to accede to the view presented. As I understand the relevant decisions—looking only for this purpose at decisions of the House of Lords—the position under English law may be thus summarized :—(a) Where a Court has made a rule absolute for a habeas corpus in circumstances not amounting to a decision that a person is entitled to his liberty, general words in a statute allowing appeals are sufficient to include such a case (*Barnardo* v. *Ford* (7)). (b) But the decision of a competent Court that a person is entitled to his liberty is, in the absence of distinct statutory enactment to the contrary, final and conclusive and not subject to appeal, whether the decision is that he be forthwith discharged (*Cox* v. *Hakes*), or that a rule nisi for a habeas be made absolute on the ground that

(1) (1672) 3 St. Tr., at p 95.
(2) (1923) A.C., at p. 609.
(3) (1923) A.C., at p. 641.
(4) (1923) A.C., at p. 645.
(5) (1890) 15 App. Cas. 506.
(6) (1923) A.C. 603.
(7) (1892) A.C. 326.

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his detention was illegal (*O'Brien's Case* (1)). (c) It is a condition of the second proposition that the Court be competent. This is shown in the judgments in *O'Brien's Case* (2). See also *United States of America* v. *Gaynor* (3). In that case a Judge had wrongly interposed and discharged a person who had been by another Judge remanded upon habeas as extraditable upon a charge of theft. Special leave to appeal had been granted, and on the hearing it was held by the Judicial Committee that the second Judge had interfered with the due course of justice by an unauthorized interposition. In effect I read the decision as treating the second Judge as acting incompetently. The case arose under Canadian law, and their Lordships allowed an appeal from the order of discharge, and did so notwithstanding the respondent had been set at liberty. It is this essential condition of a competent Court, and not the discharge by an admittedly competent Court, with which we are here concerned. Sec. 40 of the *Judiciary Act*, as has been shown, is directed to enacting which Court is in certain circumstances to be the competent tribunal. Besides this broad distinction there is also the obvious gulf between a mere procedural statute providing for appeals—as in the English cases cited— and the fundamental provisions either of the Constitution itself (*Lloyd* v. *Wallach* (4)) or of secs. 40 to 42 of the *Judiciary Act*, apportioning for high purposes of Australian self-government the judicial power of the Commonwealth. *Attorney-General for Canada* v. *Cain and Gilhula* (5) were Canadian appeals after discharge on habeas corpus. The suggestion of learned counsel, when carefully examined, is not sustained.

The remaining objections may be speedily disposed of. It was urged that that part only of the cause which is affected by the constitutional question could or should have been removed. The answer is that the whole cause is affected by the point, and it would be impracticable to make any severance with the assurance of freedom from constitutional considerations. The last reason relied on was that material facts were suppressed. It is only necessary to say this was not in any way proved.

(1) (1923) A.C. 603.
(2) (1923) A.C., at pp. 609-643.
(3) (1905) A.C. 128.
(4) (1915) 20 C.L.R. 299.
(5) (1906) A.C. 542.

(2) *The Main Case.*—On the main case many questions of outstanding significance have been raised. It is essential, however, even at this advanced stage of our political development, and perhaps none the less because of that development, to bear constantly in mind certain fundamental principles which form the base of the social structure of every British community. Those fundamental principles and their working corollaries I have accepted and endeavoured to follow as unerring guides in reaching my conclusions on the matters directly in controversy. The principles themselves cannot be found in express terms in any written Constitution of Australia, but they are inscribed in that great confirmatory instrument, seven hundred years old, which is the groundwork of all our Constitutions—*Magna Charta.* Chap. 29 (sometimes cited as Chap. 39) contains them all. Its words, rendered into English, and so far as immediately material here, are: "No free man shall be taken or imprisoned . . . or exiled . . . but . . . by the law of the land." The chapter, as a whole, refers to other rights as well, and recognizes three basic principles, namely, (1) primarily every free man has an inherent individual right to his life, liberty, property and citizenship; (2) his individual rights must always yield to the necessities of the general welfare at the will of the State; (3) the law of the land is the only mode by which the State can so declare its will. These principles taken together form one united conception for the necessary adjustment of the individual and social rights and duties of the members of the State. For their effective preservation and enforcement the Courts have evolved two great working corollaries in harmony with the main principles, and without which these would soon pass into merely pious aspirations. *The first corollary* is that there is always an initial presumption in favour of liberty, so that whoever claims to imprison or deport another has cast upon him the obligation of justifying his claim by reference to the law. *The second corollary* is that the Courts themselves see that this obligation is strictly and completely fulfilled before they hold that liberty is lawfully restrained. The second is often in actual practice and concrete result the more important of the two to keep steadily in view. In the course of considering the questions here in conflict between the parties, it will be seen that the

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principles themselves and the corollaries are of far more than mere academic interest. They materially help to solve disputed points, and perhaps I may say this specially of the second corollary, which is in my view a distinct test on one portion of the case which, in my opinion, is eventually decisive as to one of the applicants. In the view I have taken of two aspects of the matter, the result can be reached by direct reference to those alone. Nevertheless, in the circumstances, I feel bound to express my opinion in respect of some other questions that have been raised and that mean so much to the people of the Commonwealth. One suggestion at the Bar—I can hardly call it a definite contention—was made during the argument. As it stands apart from all else, I refer to it at once. It was with respect to the bona fides of the Board. It is not necessary to say more than emphatically to state there is not the smallest reason in any direction whatever for attributing or even suspecting want of good faith with respect to any of the members of the Board. Nor is there any substance in the contention connected with the suggestion mentioned that by accepting remuneration for performing a public duty they became disqualified to perform it. I should like to express my great satisfaction at the withdrawal by Mr. *Watt*, however late, of the objection founded upon those considerations. I pass to the other objections to the deportation order.

In the forefront stands the challenge to the validity of sec. 8AA.

(3) *Validity of Sec.* 8AA.—The validity of this enactment, so far as it rests on the immigration power, was contested on two distinct grounds which need to be carefully distinguished. The first ground was that the section purports to subject to the immigration and emigration power (sec. 51 (XXVII.)) persons in Australia who immigrated here and became component parts of the Australian community before the establishment of the Commonwealth. The second was that it purports to subject to that power persons in Australia who, having immigrated here, even since the establishment of the Commonwealth, have in fact so settled in Australia as to become component parts of its people. These contentions involve two distinct conceptions, namely, that the constitutional power of legislation does not extend to the limits stated, and the second is that the legislation attacked, when

properly construed, assumes to go so far. With regard to the constitutional power, I agree with the first contention. The powers of the Parliament conferred by sec. 51 are "to make laws for the peace, order, and good government of the Commonwealth," with respect to the various subject matters enumerated. So as to sec. 52. Whatever the Parliament enacts with respect to any of the named subject matters for any period or point of time subsequent to the establishment of the Commonwealth is, subject to any prohibition or qualification in the Constitution itself or in any controlling Imperial law, binding throughout the Commonwealth and on certain British ships beyond the Commonwealth (secs. 51 and 52 and covering sec. V). *Such laws may be made prospectively or retrospectively*, the Commonwealth Parliament having in this respect the power of the Imperial Parliament (*Hodge* v. *The Queen* (1)). If the subject matter exists at any time in the life of the Commonwealth, it matters not how or when it first came into existence. "Banking," for instance, may be regulated irrespective of whether a bank arose before or after 1901. But it is the operations of banking subsequent to, and not the operations of banking prior to, the establishment of the Commonwealth, which are within the domain of Federal legislation. Those subsequent to the proclamation of the Commonwealth (see covering sec. IV.) may be controlled prospectively or, at the will of Parliament, retrospectively by Commonwealth law. Those prior to that moment were, and remain, outside the sphere of the constitutional power of the Parliament. The Parliament, for instance, could not retrospectively declare all the prior operations of the banks illegal *ab initio*. Apply that train of thought to the present case. The subject matter of the power is "immigration and emigration." It is true, and I have expressed my own view emphatically in the *O'Flanagan Case* (2), that once a person immigrates into Australia he is always subject to the power of the Parliament under construction. I endeavoured to crystallize my view into the maxim "Once an immigrant always an immigrant." A person arriving as an immigrant into the Commonwealth comes *subject to all the constitutional powers of the Parliament of Australia.* Its permission to him to enter may be either conditional or

(1) (1883) 9 App. Cas. 117.

(2) (1923) 32 C.L.R. 518.

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unconditional. He has no right to enter Australia against the will of its people. He can enter only in pursuance of their will, and subject to their constitutional right to qualify or withdraw that permission at any time or under any circumstances they think proper. No Parliament—for Parliament is only the legislative instrument of the people—can either by action or inaction surrender or weaken or forfeit that national power. Immigration, as I have explained in the *O'Flanagan Case* (1), is not obliterated for ever by the mere passage across the frontier, nor by the momentary leap over a barrier which magically and instantaneously transforms a Hindoo or a Kanaka, for example, into an Australian. If such were its meaning, the cherished national policy of Australia would indeed be in peril. And it would only nominally lessen the peril if the Hindoo or the Kanaka by immediately adopting Australia as his "home," as it is said, could, so to speak, dig himself into this Commonwealth, so as to be irrevocably, so far as the Commonwealth power is concerned, a member of the people of the Commonwealth—a true Australian—and thereby escape the immigration power for ever. He could afterwards, as it is said, irrespective of nationality, of sentiment, of customs, of everything except his resolve to stay in Australia indefinitely as his "home," remain here or travel back and forwards, leave when he pleased, enter as he chose, and claim all the rights of a native-born Australian who had never abandoned his country. For this Court to so hold would, in my opinion, be a tragedy. The immigration power would practically be a dead letter once the frontier was passed, whatever shred of theory remained.

The true conception is, to my mind, transparently clear. Let me say at the threshold that no expressions of Judges, expressions perhaps of variable and debatable import, which have in any case been adopted merely in order to illustrate or describe with sufficient present precision the application of the law to a particular and different set of circumstances, should be permitted to replace the words of the Constitution. Commentary must never be regarded as incorporated into the text and then made the starting-point either for enlarging or restricting the Constitution itself. I thought the *Engineers' Case* (2) had determined that for ever. The true

(1) (1923) 32 C.L.R. 518.

(2) (1920) 28 C.L.R. 129.

conception does not, in my opinion, admit of any serious doubt or difficulty. The permission of the people of Australia to a person, say an Italian-born, to enter and mingle with themselves, may be upon expressed conditions or free from expressed conditions. But whether one or the other, and whatever be the conditions, there is also and always one great and fundamental principle—call it a basic condition, if you will—that is, there resides in the Parliament, and subject only to the provisions of the Constitution itself, a power which it can never surrender or abridge or by its action or inaction abandon, namely, to declare at any moment the legislative will of the people of Australia respecting the various matters entrusted to it by the Constitution *as from the birth of the Commonwealth.* It may express that will regarding the present, the past or the future, and therefore any person immigrating to the Commonwealth is always subject to be regarded as an immigrant, if Parliament in its absolute discretion so wills. In *Robtelmes* v. *Brenan* (1) *Barton* J. hits the point exactly. He says in the words which now deserve the most special attention: "*The right to prescribe the conditions upon which persons may remain and reside within this Commonwealth is included in that power to regulate immigration by statute.*" But all that necessarily has reference to, and flows from, the subject matter, "immigration and emigration" in the Constitution, and the permission thereunder given expressly or tacitly to any one to enter the Commonwealth. We do not find as a specific subject matter the word "immigrants." If we did, that might possibly be considered to mean all such persons as could be classified as "immigrants" by reason of their having come to Australia to settle at any time under any permission of any Parliament. I say "possibly" only. The words "immigration and emigration," however, are distinct. They connote some *entry into* or *departure from* the *Commonwealth, that is, after its Constitution,* as the initial fact or step by which the power is attracted. No person can be properly styled an immigrant or an emigrant for the purposes of that power unless his immigration or his emigration takes place after the Commonwealth comes into being. He must be one or the other relatively to the Commonwealth by reason only of immigration or emigration, which is such relatively to

(1) (1906) 4 C.L.R., at p. 415.

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the Commonwealth. It follows therefore that for the purposes of Commonwealth legislative power no one can be regarded as an immigrant who has not become so since the establishment of the Commonwealth. A perusal of my judgment in the *O'Flanagan Case* (1) will show that the fundamental assumption is that Commonwealth jurisdiction begins on the arrival of the immigrant in Australia. To this I adhere. If then sec. 8AA of the *Immigration Act* 1901-1925, properly read, extends to include persons who cannot be brought within that category, it is, *pro tanto* at all events, invalid, and unless its provisions are separable, it is invalid *in toto*.

Dr. *Evatt* urged, however, in support of the second objection, that, once an immigrant becomes *in fact* incorporated into the mass of the community, he escapes from the reach of the constitutional power. Before analyzing that contention I may premise that such incorporation could hardly be asserted if in violation of a law existing at the time it occurred. For instance, if a surreptitious entry were made, and concealed until actual settlement took place, it would probably be conceded to be ineffectual. But if entry were permitted on stated terms and before settlement was completed, which might not occur for years, suppose a law was passed extending the term of probation, would the settlement *in fact*, contrary to the extending law, be effective to annul the constitutional power as to that individual? I am not sure what the contention would be in that case. I answer the question decidedly in the negative. But supposing the settlement takes place before the alteration of the law, the contention then is that never afterwards can the constitutional power of the Australian people apply even retrospectively to the individual in question. And now let me analyze the contention. It is and must be simply this: Until an immigrant, *whenever he arrives* in Australia, has settled down so as in fact to have his "home" in Australia as a home which he finally adopts without intention of ever leaving Australia, he is still an immigrant, whose "movement" of immigration is uncompleted. That is to say, his "immigration" is still a presently existing fact on which the Commonwealth power can operate. Let me at once point out one most startling and serious, but unavoidable, consequence of this curious doctrine.

(1) (1923) 32 C.L.R. 518.

Neither the word "movement" nor the word "home" is found in the Constitution. But if continued "movement" is the test of continuing immigration, and if the indefinite word "home" is the test whether the immigration is still in progress, then *many persons who immigrated into Australia before the establishment of the Commonwealth were, even after its establishment and for many years, and may be still, in "movement" and so within the immigration power of the Commonwealth Parliament.* It would as to them be always a fighting question of fact whether they have even now definitely adopted Australia as their "home" and escaped the immigration power. To me that is wholly inconsistent with the clear-cut view of the Constitution that I have adopted, namely, that where there was entry by any person into the Commonwealth prior to the birth of the Commonwealth, then, if that person still remains here, he is entirely outside the immigration power of the Commonwealth.

But in truth there lurks in the contention in support of the second objection a basic fallacy which, if not eliminated, leads to disastrous results. It ignores the fundamental principle that it is the original entry, the "immigration," that attracts the power; that all that takes place afterwards takes place by virtue of and flowing from the original permission, and must be based on that permission; that that permission was originally and always remains a matter of law, that *the law is an essential element in determining whether or not a man is originally or has become and remains an Australian, having a right to be here* (the very argument assumes it), and, lastly, that the law may be altered retrospectively so as to remove from the relevant circumstances that essential element of legal right to be present on Australian territory. Let me give a concrete illustration. For example, an Italian (to take a member of a great foreign European country) or a Hindoo (in order to include British subjects as well as aliens) arrives at the Port of Sydney in 1925, and desires to enter the Commonwealth. He is, of course, subject there and then to the immigration power. There may be no immigration law made under that power, or the law may say nothing as to him. He enters. He settles and perhaps marries, and so acts that he becomes domiciled within a year, and is so satisfied with his surroundings that he abandons all intention of leaving Australia. If of foreign nationality

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he becomes naturalized so as to enjoy certain advantages which an alien cannot have. Australia is his " home " as far as *he* can make it so. It is said he is incorporated into the Australian community. Then he begins activities designed to establish anarchical and terroristic or treasonable societies. Parliament retrospectively enacts that all persons immigrating as from 1924 shall be deportable as prohibited immigrants, if they are found engaging in such practices. Is it the law of the Constitution that he is immune? Cannot Parliament, acting for the people of the Commonwealth, alter or even revoke the permission which was given tacitly to immigrate into Australia? Or, phrasing it differently, cannot Parliament, by virtue of the legislative authority, said to be as wide for local purposes as that of the Imperial Parliament, regulate *ab initio* its permission to him to enter and reside in Australia? Can he say in opposition to such an enactment: " I have made my home here in fact, and that fact which has taken place and has legal force only by permission of the Parliament has obliterated the fact that I immigrated; that my immigration is annulled for all legal purposes, and now it is beyond the power of the Commonwealth to remove me "? By what authority and on what principle, I would ask, can this Court refuse to acknowledge the binding force of a Commonwealth Act retrospectively declaring the law as to the original immigration of the man into Australia—a subject it could have controlled at its inception? I believe this is the first time in the history of British jurisprudence that such a doctrine has ever been pressed upon a Court. If Parliament's powers, that is, the constitutional powers of the people of Australia acting through their Parliament, are to be so limited, I respectfully say I am unable to subscribe to the ruling. It would be a ruling which would write a new chapter on constitutional law, entirely foreign to the whole theory and practice of the British constitution (see *The Ironsides* (1)), quite contrary to the law laid down by Lord *Selborne* in *R.* v. *Burah* (2), and contrary to the view of Lord *Macnaghten* in *Colonial Sugar Refining Co.* v. *Irving* (3), contrary to the decision of this Court in *R.* v. *Kidman* (4), and not supported by any restriction or limitation

(1) (1862) 31 L.J. P. M. & A. 129, at p. 131.
(2) (1878) 3 App. Cas. 889, at p. 904.
(3) (1905) A.C. 369.
(4) (1915) 20 C.L.R. 425.

found in our written Constitution. I repeat as to the immigration supposed: "Once an immigrant always an immigrant." Suppose further, while enjoying the full permission to remain in Australia, after making his home here he leaves for Italy or India on a visit merely. So long as the *statute law* remains unaltered, he is, in law, on his return not immigrating, and he may enter unchallenged. But if in his absence the law is altered, so as to declare him a prohibited immigrant by a retrospective alteration, express or implied, of the former permissive law, as at the date of his original entry, has he the right to force his way in? Again I apply "Once an immigrant always an immigrant." We must, of course, carefully discriminate between the constitutional power and the statute. *I apply the aphorism only to the power, not to the statute.* He may not be always an immigrant, taking the *statute* as the test; or rather he may not always, according to that test, be a prohibited immigrant. But, for the purposes of the *power*, the aphorism holds without exception. No fact contrary to the law as it presently exists can ever have legal effect or override the law itself. Whatever the Federal Parliament can do or permit, it can undo or recall. If recent precedent be needed, it is found in the case of *Meyer* v. *Poynton* (1). That case arose under the power as to "naturalization and aliens" (sec. 51 (XIX.)). The material circumstances are strikingly apposite. Meyer, an alien, became naturalized in 1909. At that time the *Naturalization Act* 1903 was in force. By sec. 11 the only power to revoke a certificate of naturalization was if it had been obtained by any untrue statement of fact or intention. An applicant must, by sec. 6, declare, *inter alia*, that he intends to settle in the Commonwealth. He must also take the oath of allegiance in the form in the Schedule to the Constitution. He then receives a certificate of naturalization. Then, says sec. 8, he "shall in the Commonwealth be entitled to all political and other rights powers and privileges and be subject to all obligations to which a natural-born British subject is entitled or subject in the Commonwealth"—certain reservations are mentioned which are immaterial. That process transmuted Meyer from an alien to a British subject, and, if anything could remove him from the alien power of the Constitution, that did

(1) (1920) 27 C.L.R. 436.

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unless the certificate were revoked for the only reason stated. That was the only condition. The certificate, of course, is only machinery to enable him to cross the frontier of nationality. But in 1917, after Meyer's incorporation into Australian citizenship, Parliament passed an Act (No. 25 of 1917) by which (sec. 7) a new reason for revocation was enacted, namely, if "the Governor-General is satisfied that it is desirable for any reason that a certificate of naturalization should be revoked." Under this Meyer's naturalization was revoked. He was not an alien before revocation. He had entered into the Australian community and as a fellow-subject of the King, that is much more intimately than others who were not naturalized however they had settled down. Did the power attach? My brother *Starke* held it did, in a judgment in which I entirely concur. He said (1):—"It is said that depriving a person of citizenship so acquired is not a law relating to naturalization. I am quite unable to agree with the contention, or to consider that the point is susceptible of reasonable argument. It seems to me that if the power given by the *Naturalization Act* to admit to Australian citizenship is within the power to make laws with respect to naturalization, so must authority to withdraw that citizenship on specified conditions be also within that power." For naturalization — which is the passing from a state of alienage across the dividing frontier to a state of British nationality — substitute immigration — which is passing across the frontier of Australia from another country to this country. Substitute for the distinct and clear-cut process of attaining the status of subject of the King, the indistinct and indefinite process of settling in Australia as a member of its people; and substitute for the fact of voluntary acceptance of that status of the King's subject, the voluntary acceptance of Australian membership; and then the power of naturalization and that of immigration stand for this purpose on an even footing. If the express permission to cease, and the voluntary cesser of, the status of alien still left it within the parliamentary power to revoke the grant of citizenship and to restore the former status of alienage; so must the merely implied permission to settle be equally capable of revocation so as to restore the *status quo ante*. If there exists any

(1) (1920) 27 C.L.R., at p. 441.

line of demarcation in principle which in this respect differentiates the alien power from the immigration power, it is too fine for my perception, except by means of a legal microscope more powerful than any I am able to command. One illustration alone will, I think, bring this position into relief. The applicant, Johnson, was a native of Holland and immigrated to Australia in 1910. From that time, according to the evidence before us, he was domiciled and made his permanent home in New South Wales, and thus, it is said, became a component part of the Australian community. In 1913 he became naturalized and thereby became a British subject. According to Commonwealth statute law, therefore, he was no longer an immigrant and no longer an alien. But, while it is conceded that the Commonwealth Parliament can by retroactive legislation retrospectively recall its control over him as an alien and expel him summarily, if it pleases, as an alien, it cannot do so as an immigrant. That is, it is true in the sense I have indicated to say " Once an alien always an alien " notwithstanding permitted naturalization in the meantime, but it is not true to say " Once an immigrant always an immigrant " notwithstanding permitted residence in the meantime. I have to confess my inability to accept this view, and therefore reject the second contention.

I may sum up the whole of this branch of the case in a few words: —Immigration into Australia must be either before or after the birth of the Commonwealth. As to the first, the Commonwealth Parliament has no legislative power whatever. As to the second, it is supreme, and may legislate as could the Imperial Parliament, that is, prospectively or retrospectively.

It may not be out of place, and indeed may usefully illustrate this very important question, to apply what I have said to the trade and commerce power. Assume that before the Commonwealth period goods were imported from abroad and had entered Australia. The Commonwealth Parliament could not, by any retrospective law relating to foreign commerce, affect those goods. That is not because the " goods " would be outside the power—because " goods " as such are not within it. The power relates to " acts " not " things " (per *Knox* C.J., *Isaacs* and *Starke* JJ. in *W. & A. McArthur Ltd.* v.

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Queensland (1)). The prior acts would be outside the sphere of Commonwealth legislation. But if inter-State transactions took place afterwards with regard to those very goods, those subsequent transactions would come within the power: again, not by virtue of the goods but by virtue of the nature of the transactions. Now, suppose after 1901 certain goods come into Australia, quite lawfully as far as any then existing Commonwealth legislation is concerned, and even pass into retail hands. But suddenly the Commonwealth Parliament, learning of their intended dangerous use, retrospectively declares them prohibited imports. Are those goods then, in the eye of a Court of law, lawfully in this country? I unhesitatingly say they are not, into whosesoever hands they have come. Those goods stand in relation to the trade and commerce power precisely as a man who has settled down in Australia in fact stands in relation to the immigration power. Not "things" or "persons" but "acts" in both cases are the subject of the power. Legislative power, prospective or retrospective, may be exerted in respect of all those "acts," and alike in both a Court must, if it is so declared by the law-making authority, accept its pronouncement as the law of Australia. If an inter-State transaction is completed, and the goods have gone into intra-State trade, the intra-State transactions themselves are of course entirely outside the sphere of Commonwealth legislation. But the Commonwealth Parliament having control of inter-State transactions, if those are annulled *ab initio*, then from the time of their annulment, as that time is declared by Commonwealth law, they can form no legal basis on which to found any claim of right. Whatever can stand notwithstanding their illegality can stand; whatever is henceforth forced to rest upon them for justification must fall. As lawful "acts" they are and must be deemed to be non-existent.

4. *Construction of Sec.* 8AA.—The crucial words for this purpose are the words "any person not born in Australia." They are found in the phrase "the Minister, if he is satisfied that any person not born in Australia has been concerned in Australia in acts directed" &c. No doubt the words in question, if considered merely in relation

(1) (1920) 28 C.L.R., at p. 550.

to the phrase quoted, that is, without regard to any other connected context, must receive their primary unabridged meaning. They would, for instance, include a State Governor if English-born. Disavowal of such an inclusion is inevitable. But why? Simply because the words are capable of receiving, and must receive, at least that limitation by reason of their context. Apart from their context in the phrase quoted, even an English-born State Governor would not be excluded, because he certainly is a "person not born in Australia." But once concede the tractability of a phrase, then the extent of tractability depends entirely on its surroundings, including extraneous circumstances. That has been most fully recognized and with special appositeness in relation to the primarily very wide words "person," "every person," &c.

Lord *Loreburn* in *Drummond* v. *Collins* said (1): "Courts of law have cut down or even contradicted the language of the Legislature when on a full view of the Act, considering its scheme and its machinery and the manifest purpose of it, they have thought that a particular case or class of cases was not intended to fall within the taxing clause relied upon by the Crown." If that is so with taxation, how much more with loss of liberty or status. For this purpose Lord *Herschell* in *Cox* v. *Hakes* said (2): "It cannot, I think, be denied that, for the purpose of construing any enactment, it is right to look not only at the provision immediately under construction, but at any others found in connection with it, which may throw light upon it, and afford an indication that general words employed in it were not intended to be applied without some limitation." In that case the House of Lords cut down the generality of the words "any judgment or order of Her Majesty's High Court of Justice" so as to exclude orders of discharge in habeas. That was done by reason of an extraneous consideration, namely, a general constitutional right. The ruling was repeated on the same grounds and with extended application in *O'Brien's Case* (3), again on an extraneous constitutional ground. Mr. *Watt* referred on this point to a judgment of my brother *Rich* and myself in *Waterside Workers' Federation of Australia* v. *Gilchrist, Watt & Sanderson Ltd.* (4). The passage

(1) (1915) A.C. 1011, at p. 1017.
(2) (1890) 15 App. Cas., at p. 529.
(3) (1923) A.C. 603.
(4) (1924) 34 C.L.R., at pp. 521-522.

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is cited—though it represents a principle frequently stated and acted upon in this Court—because it is the most recent expression of my views, and I adhere to them. I quote the passage somewhat fully because it applies equally to a later phase of this case. At the pages mentioned it is said :—" They unmistakably cover in their literal signification even departures from all jurisdictional limits which have been prescribed. In the case of a plenary legislature no one would, we think, venture to dispute that such is the literal and primary ambit of the words used. But before we so determine in the present case, we must have regard to the nature of the legislator and to the subject of the legislation. For it is always material in construing a document to inquire whose instrument it is and what are the surrounding circumstances. The legislator is the Commonwealth Parliament, a legislature of enumerated powers, and, in this case, of a power limited in more than one way. It is a well established principle of construction of even English statutes to limit general words by considerations which, in *Stradling* v. *Morgan* (1), are called ' foreign circumstances.' The latest case of supreme authority is that of *In re Viscountess Rhondda's Claim* (2). In that case Viscount *Birkenhead* L.C. (with whom concurred Lord *Atkinson*, Lord *Buckmaster*, Lord *Sumner* and Lord *Carson*) said (3) :—' The words of the statute are to be construed so as to ascertain the mind of the Legislature from the natural and grammatical meaning of the words which it has used, and in so construing them *the existing state of the law, the mischiefs to be remedied, and the defects to be amended, may legitimately be looked at together with the general scheme of the Act.*' The learned Lord Chancellor referred, among other things, to ' a constitutional question of the utmost gravity.' See also per Lord *Dunedin* (4) and by Lord *Wrenbury* (5), the latter approving *Stradling* v. *Morgan*. Numerous prior examples are found, of ' foreign circumstances,' that is, circumstances extraneous to the enactment interpreted, limiting the generality of its terms. Among them are *Jefferys* v. *Boosey* (6), *Ex parte Blain* (7) and *Cooke* v.

(1) (1559) 1 Plowd. 199, at p. 205.
(2) (1922) 2 A.C. 339.
(3) (1922) 2 A.C., at p. 365.
(4) (1922) 2 A.C., at p. 390.
(5) (1922) 2 A.C., at p. 397.
(6) (1854) 4 H.L.C. 815.
(7) (1879) 12 Ch. D. 522.

Vogeler (1). These authoritative decisions indicate that, even where Parliament confessedly possesses plenary power within its own territory, the full literal intention will not ordinarily be ascribed to general words where that would conflict with recognized principles that Parliament would be prima facie expected to respect. Something unequivocal must be found, either in the context or the circumstances, to overcome the presumption. But if that is the case where Parliament has the power to go as far as the words themselves would literally extend, how much greater is the obligation of reducing the generality of words, if that be reasonably possible, where the parliamentary power is restrained by a written Constitution and where the full imputed intention would entirely nullify the enactment. The maxim *ut res magis valeat quam pereat*, as applied to *Macleod* v. *Attorney-General* (2), is applicable to sec. 31 (1) (see *Jumbunna Coal Mine* v. *Victorian Coal Miners' Association* (3), *Irving* v. *Nishimura* (4) and *W. & A. McArthur Ltd.* v. *Queensland* (5)). This is, indeed, a rule of very general application (see cases cited in *Broom's Maxims*, 7th ed., at p. 399)."

The only extraneous circumstance applicable here is the all-essential one of the ambit of the legislative power of " immigration and emigration." When we read the document in which Parliament has inserted sec. 8AA—and, may I add, has deliberately and by way of amendment so inserted it—its intention to act under that power becomes to my mind incontestable. Tracing the course of the Immigration Acts through the years 1901 to 1925, having regard to the self-designation of those Acts in the body of the enactments, and to the terms of many of the successive provisions, I am unable to escape the conclusion that Parliament intended that the immigration power should at all events be one of the legislative powers supporting the enactments, and therefore that, even though they were supportable also by other legislative powers, the extent to which the enactments went was not to exceed the frontier of the immigration power. The construction I give to sec. 8AA not only brings it within the scope of the immigration power and leaves it valid and operative,

(1) (1901) A.C., 102.
(2) (1891) A.C. 455.
(3) (1907-08) 6 C.L.R. 309, at pp. 363-364.
(4) (1907) 5 C.L.R. 233, at p. 238.
(5) (1920) 28 C.L.R., at p. 550.

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but also preserves to the full the legislative jurisdiction as it originally comes to the Commonwealth with regard to every non-Australian individual who is permitted to enter it.

A great deal of discussion took place as to whether the provisions of sec. 8AA, if found insufficiently supported by the immigration power, could be upheld in their full primary sense under the trade and commerce power (sec. 51 (I.)) or under the power relating to any department of the public service (sec. 52 (II)) or under sec. 61 and sec. 51 (XXXIX.). As to this, several contentions arose. One was as to the use of deportation as a legitimate provision incidental to main powers of legislation.

(5) *Deportation.*—I agree with the Solicitor-General—and indeed, Dr. *Evatt* did not contest this—that deportation as a means of self-protection in relation to constitutional functions is within the competency of the legislative organ of the Australian people. This nation cannot have less power than an ordinary body of persons, whether a State, a church, a club, or a political party who associate themselves voluntarily for mutual benefit, to eliminate from their communal society any element considered inimical to its existence or welfare. We have only to imagine, as I suggested during the argument, some individual found plotting with foreign powers against the safety of the country, or even suspected of being a spy or a traitor. It matters not, as I conceive, whether he is an alien or a fellow-subject, whether he is born in Kamtschatka or in London or in Australia, the national danger is the same. No one stays to ask where a bomb which is on one's premises was manufactured. The urgent question is how to get rid of it. Needless to say, I speak only of national *power*, that is, the right of the community as a whole to preserve its own existence. Power may be abused. That does not affect its presence or even its utility. A surgeon's knife may be put to base uses; but it is a necessary means in extreme or dangerous cases to save life. Whether a power is abused or not depends entirely on the wisdom and the sense of justice of those entrusted with it. The central fact to bear in mind in applying this truth to the present case is that in every department of public action it is the *Commonwealth itself* that functions. The Commonwealth, as a whole, functions—and can function—only by its

designated organs. Obstruction to or interference with the judicial organ is obstruction to or interference with *the Commonwealth itself*. So of obstruction to or interference with the Parliament and the Executive. In some instances the particular organ has implied executive power to remove obstruction, as is shown in *Barton* v. *Taylor* (1). But where that does not exist a law is necessary, and this it is the function of the legislative organ to supply. The law, however, in authorizing the removal of the obstruction, authorizes the removal from the path of the Commonwealth itself of an obstacle which is contrary to its peace, order and good government. Obstruction and interference are not confined to physical hindrance of active exercise of powers. Parliament, in its survey of national affairs, may be content with the normal condition of trade and commerce, and of opinion that it should thus continue. If it affirmatively so declared, the matter would be transparently clear. It may equally declare that if any one endeavours to prevent that normal course of trade and commerce from continuing, he may be either punished for his past acts or prevented from repeating them. Prevention by discarding him as a member of the community, that is, by banishing him, is no doubt an extreme step to be judged of by the legislative and executive departments, but I cannot doubt that a Court must hold it to be a competent step—see the opinion of Sir *J. Campbell* and Sir *R. Rolfe* in *Forsyth's Cases and Opinions on Constitutional Law*, pp. 465-466. If, for instance, one man were thought by the whole of the rest of Australia, to be so great a danger in relation to defence that nothing short of expulsion—consistently with his continued existence—would be an adequate protection to the community, it would be absurd to say his single will to remain could prevail over that of six millions of people to the contrary. He could admittedly at will sever his political connection with Australia. Is Australia powerless to sever that connection at its united will? I cannot doubt it. Further, in that case, deportation of that man could be properly directed as being a hindrance or obstruction to peace, order and good government of the Commonwealth, in relation to a matter in respect of which the Parliament has power to make laws, namely, national defence. There is nothing in the

(1) (1886) 11 App. Cas. 197.

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written Constitution to require the power of deportation always to be exercised through the medium of the Judiciary. If it is enacted as a punishment for crime, it necessarily falls to the judicial department. The Court then determines the matter, as it does every other, upon the proved circumstances of the case.

If it is enacted not as a punishment for crime, but as a political precaution, it must be exercised by the political department—the Executive—and possibly on considerations not susceptible of definite proof but demanding prevention or otherwise dependent on national policy. These principles, which are self-evident, have been abundantly recognized in America in cases of which *Mahler* v. *Eby* (1) is the latest.

(6) *Other Legislative Powers.*—But then it is said that for another reason sub-sec. 2 of sec. 8AA is not incidental to any legislative power other than immigration, not even to trade and commerce and departmental. The reason assigned was that an act founded on the belief of the Minister as to the extent of a power was not an act in respect of the subject matter of the power. As a legal proposition that may be conceded; but how is it applicable here? It comes to a matter of interpretation of the statute. There are two alternative methods of reading the sub-clause. One is to read it as empowering the Minister to be satisfied not only of facts but also of law, that is, as investing him with authority to determine problems of constitutional law, with a subsequent reference to a Board, of whom only one must be a lawyer, and possibly a police magistrate, to reconsider the Minister's conclusions. That is one way of reading the provision. The other is that the Minister is entrusted with the function of finding *pro hac vice* facts only, leaving their legal character for determination, if necessary, by the Courts. The first is very unlikely, indeed highly improbable, and at the least the matter is ambiguous. In that case the key to the problem as to whether the provisions of sec. 8AA are supportable under those powers is precisely that which has been already applied in respect of the immigration power, and is much more readily applicable to the less explicit language of the words now under construction. That is to say, the doctrine of *Macleod's Case* (2) is applicable. Reading the relevant provisions

(1) (1924) 264 U.S., at pp. 32-39.

(2) (1891) A.C. 455.

by the aid of that doctrine, which at root is the doctrine of *ut res magis valeat quam pereat* and is of special importance when it is sought to nullify the legislative will of a Parliament, there is no attempt to enlarge the constitutional area of any subject matter, and there is no attempt to confer judicial power on the Executive. The Minister has only to be satisfied of acts which in fact are directed to hinder or obstruct, to the prejudice of the public, transactions which legally fall either within the trade and commerce power or are for the provision in fact of what are in law Commonwealth public services.

It was said that no connection is shown between the statute and the power. As I read the statute the connection between it and the power is clear and on the face of the enactment. Whether a concrete case so falls within the statute as to be connected with the power depends upon the circumstances. If a Court finds that the case itself is outside the power and therefore outside the Act, it will say so. No judicial power is given to the Minister. In the event of challenge the Courts would decide the law. The judgment of Lord *Selborne* in *R.* v. *Burah* (1), in my opinion, covers the ground, and I am not sure that this same conception is not the underlying principle of such cases as *Low Wah Suey* v. *Backus* (2) and those there cited. The added omnibus provision in the sub-section as to the presence of a person in Australia may not be at first so self-evident. I agree with the Solicitor-General's view that in this case it is immaterial whether that provision is in itself a law upon any of the matters referred to. It might be regarded as an added condition or restriction on the exercise of the powers already authorized by the earlier words of the sub-section. The condition or restriction might legislatively have been omitted, but its insertion does not introduce illegality: it merely gives protection *pro tanto* to the person affected. But I am unable to see why Parliament could not, in protection of the Commonwealth in respect of defence, customs, coinage or immigration, for instance, enact that any person who was shown to the satisfaction of the Minister to be a spy, a traitor, a smuggler, a coiner or an importer of prostitutes, might be summarily deported. Such legislation on admitted subjects of power might be considered

(1) (1878) 3 App. Cas., at p. 904. (2) (1912) 225 U.S. 460.

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arbitrary and even dangerous; but those are elements entrusted to the wisdom of Parliament when weighing in its own scales of social justice the comparative claims of individuals and the nation. If it says Yea, no Court can say Nay. The *Sugar Co.'s Case* (1) was referred to, as opposed to the legality of every limb of sub-sec. 2. The learned Solicitor-General urged upon the Court, if it thought any part of that decision exceeded the subject matter of the certificate of reference of this Court, to disregard it on the ground that sec. 74 of the Constitution imposes an inescapable duty on this Court. In my opinion, when that decision is carefully examined, it contains nothing in derogation of the views I have stated. Without entering upon irrelevant matters, I would say in the first place that, as appears from p. 246 of the report in the *English Law Reports* (2), their Lordships clearly did not consciously exceed the limits of the certificate. The judgment may for present purposes be divided into two portions. The first begins at p. 254 and ends at the word "motion" on p. 256 of the same report (3). That part deals with sec. 51 of the Constitution down to and including sub-head XXXVIII. As to this it is only necessary to say the legislation in the present case does not assume to deal with any subject matters except those presently comprised in the legislative powers of the Commonwealth Parliament. The second part of the *Sugar Co.'s Case* judgment is devoted to sub-head XXXIX. Their Lordships as to this say (4): the words "cover matters which are incidents in the exercise of some actually existing power, conferred by statute or by the common law." Those words, in my opinion, are distinct authority for the legislation under consideration, construed as I have construed it. A Parliament is not, unless there be express provision to the contrary, bound to express its will in any technical or special form, and no Court has any warrant to require it. If sec. 8AA were passed as a separate and independent provision, I should hold that as legislation it covered the whole ground of these two cases. It would be a waste of time for me, in view of the opinions of the majority, to enter upon a more detailed statement of the reasons

(1) (1914) A.C. 237; 17 C.L.R. 644.
(2) (1913) 17 C.L.R. at p. 645.
(3) (1913) 17 C.L.R., at pp. 653-655.
(4) (1914) A.C., at p. 256; 17 C.L.R., at p. 655.

leading me to this conclusion. But it is necessary for me to observe that if, upon applying to the section under construction the *Macleod* doctrine, the provision as to the Minister's finding is sufficient to make the section invalid, it will not be difficult, if consistency be maintained, to invalidate many Commonwealth statutory provisions hitherto considered unquestionable. But, while that is so, I am forced to put one limit on the construction of the words. Inasmuch as Parliament has, in my opinion, assumed to make its legislation conform to *all* its powers, it follows that it did not intend that its enactment should transcend *any* of them. Consequently, although supportable to the full extent of the parliamentary intention by the trade and commerce and public department and public authority powers, that full extent cannot be properly considered to go beyond the limits of the immigration power. The net result of that is that, properly construed, *no one falls within it who did not immigrate before* 1901. That of itself disposes of the case of Walsh. I do not stop to inquire whether his "movement" stopped, or his "home" was in fact established, before 1901. He immigrated here before that year and has since remained, and that is enough in my view to exclude him. On the other hand, all persons who immigrated after that time are included, but none are included who were not such immigrants, because the intention, as I have said, is not to exceed any power.

(7) *Retrospection.*—The question whether the section is retrospective in the sense of affecting prior immigration, though part of its general construction, I deal with separately. Of course it is prospective only with regard to the proclamation and the "acts" it aims to prevent. That is, it is not an *ex post facto* law. But whether it is on its fair construction retrospective as applying to past immigration is quite another matter. To begin with, it is undeniably concerned with the subject of immigration. That at least is certain. It excludes persons who never immigrated. That also is certain. It is, on lawful construction, confined, as I have said, to persons who immigrated since 1st January 1901. But, if it is not retrospective at all as to immigration, then its operation must be still further confined to persons who immigrate *after the passing of the enactment.* Can that be seriously entertained as the intention of Parliament?

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I, at any rate, could not think so; any more than I could think that the case of *Meyer* v. *Poynton* (1) should have been decided differently on the ground that the later provisions in 1917 applied only to naturalizations after that year. I think this matter may be simply tested. Suppose an Act is passed in these terms: Sec. 1—" All immigration into the Commonwealth is subject to the condition that if the person immigrating shall at any time whatever be found disclosing military information to a foreign power he may be deported by order of the Minister." That would be naturally prospective, both as to immigration and as to the acts sought to be prevented. But suppose sec. 2 said: " ' Immigration ' in this Act includes all immigration from 1st January 1901." The statute would still be prospective as to the acts to be prevented, but would be retrospective as imposing a condition on the permission to immigrate into the Commonwealth. In my opinion, once it is conceded, as it must be, that the words " any person not born in Australia " are not restricted to future immigrants, but include all persons at the given moment who have at any time since 1900 immigrated into Australia, then the legislative intention must be to affix retrospectively a qualification on all past immigration into Australia as well as to condition future immigration.

(8) *The Minister's Finding.*—But there remains a highly important reason—applicable indeed to both cases—for holding that, even establishing full validity and application of the section to both applicants, the order for deportation cannot be sustained. I refer to the Minister's finding. *There is no proof that either of the applicants was ever notified of what acts the Minister was satisfied the applicant was concerned in.* I have no hesitation in saying that, apart from that of constitutional power, this branch of the case yields no precedence to any other question in the case. It is impossible to minimize it without minimizing also the strict jealousy of the law in favour of personal liberty, or without departing from the second corollary I have formulated above. Let me first state the position as succinctly as it will permit. The statutory process of deportation consists in steps: (1) The Minister satisfies himself that a person is concerned in *certain illicit acts*; (2) he calls upon that person to

(1) (1920) 27 C.L.R. 436.

show cause before a Board why he should not be deported; (3) the Board hears the person charged, or the person fails to appear; (4) the Board, if he appears, recommends deportation; (5) the Minister orders deportation; (6) deportation.

The question is whether a person subject to deportation is entitled to know from the Minister what "acts" the Minister considered him guilty of, so that he may at the proper time judge for himself whether to abstain from appearing before the Board or to contest before the Board the Minister's findings. Observe necessary facts:—The Minister must of course know the "acts" he relies on *before* he calls on the person to show cause. Otherwise it would be nonsense to say he was satisfied of the "acts." He must also be satisfied of their "direction," but that is additional. If the Board recommends deportation, as well as if there be failure to appear before it, the Minister still has the duty of making an order before deportation is lawful.

Now comes a crucial question. On what does Parliament intend the Minister to act, if he orders deportation? Is it merely for not appearing before a Board, or merely on the Board's recommendation for any reason the Board advances? Or may the Minister select some new reason? Or must he, if he makes the order, make it by *reason of the acts he has already found* as a basis and with the failure to attend, or the Board's recommendation added? Undoubtedly the latter, in my opinion. But if the Minister must first find "acts," and must afterwards base his deportation order on those same "acts" (plus the recommendation or the failure to attend), how in the name of common justice can it be denied that the accused is entitled to know with sufficient precision what those alleged "acts" are, and know that they are the "*acts*" *which the Minister himself has found*? It is never to be forgotten that the determination of the Court, where liberty is sought by means of a writ of habeas corpus, is not to be arrived at by considerations appropriate to Police Court proceedings. No question of waiver of legal objections, even where there is a Court to hear them, or of failure on the imprisoned applicant's part to perceive all the illegality of his detention, can affect the *duty of the Court to test for itself his right to personal liberty.* That is the practical application of the second corollary above

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stated. Lord *Birkenhead* in *O'Brien's Case* (1) said that the writ of habeas corpus "is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement." If "imperative," no Judge can put aside an obvious reason for instantly liberating a man, merely because it escaped notice earlier. Lord *Dunedin* (2) says the law of England is "ever jealous for personal liberty." The procedure is said by Lord *Shaw* (3) to be one of "fundamental rights of the citizen," and this reminds us of the words of *Hallam* that the writ is "the principal bulwark of English liberty" (4). Acting on that inescapable principle, I have considered the circumstance to which I have referred, although it was not previously insisted upon, but which stands self-revealed when the facts are thoroughly understood. The summons by the Minister to show cause does allege that he was satisfied as therein stated. It follows the exact words of sub-sec. 2, including the word "or" after the word "States." But those are words, not of facts found, but of the possible classes or types of acts that may possibly be found. Now, before going further, there are some things I would wish to make perfectly clear. I am not resting on any formal or technical or clerical defect. It is not that the word "or" should be replaced by the word "and." That would make no difference in what I am about to say. The word "or" merely gives emphasis to the defect that exists. Nor is that defect attributable in any manner to the way in which the summons is drawn. It is a fundamental defect. It arises from a broad interpretation of the sub-section, which may, I freely admit, be possibly regarded differently by different minds; and my view is therefore put forward with the full consciousness that others may regard the matter differently. Still, as I have a distinct and positive opinion, based on what I conceive to be the elementary sense of justice in view of the consequences, it becomes my duty to express and act upon it.

The question turns on the true construction of the sub-section. As I read the whole section, the Legislature intended that its drastic provisions—I trust I may say "drastic" without doing more

(1) (1923) A.C., at p. 609.
(2) (1923) A.C., at p. 621.
(3) (1923) A.C., at p. 639.
(4) (1923) A.C., at p. 646.

than express their legal effect—should never be put into operation unless the Executive considered in the first place there was a serious industrial disturbance of a national nature. In that case a proclamation would issue. Then, during that presumably emergent time, the Minister, if satisfied that any person not born in Australia was concerned in certain *acts*, might initiate steps towards his expulsion from the Commonwealth. The classes of acts, with reference to their general bearing, are prescribed; the acts themselves naturally cannot be. They have to be ascertained by the Minister. They are to be acts of the following general type: they must be directed towards hindering or obstructing to the detriment of the public either (a) the transport of goods or the conveyance of passengers in relation to trade and commerce with other countries or among the States, or (b) the provision of services by any department or public authority of the Commonwealth. The Minister must also be satisfied that the presence of the person in Australia will be injurious to the peace, order or good government of the Commonwealth in relation to matters with respect to which the Parliament has power to make laws. Now, it is trite law that, before you can properly and fully understand any part of an instrument, you must read that part in connection with all the rest of the instrument. You must read what goes before and what comes after to see what is the full effect of the particular part under construction. When that is done and the subject matter, the purpose and the whole scheme of the instrument are grasped, one is in a position to say what the relevant words mean. The contest here shows that the end in view is the deportation of a person from the Commonwealth, and with sec. 3 (*gg*) a prohibition against his ever re-entering it. The reason is that because he has been—as ascertained by a Minister of the Crown—(1) concerned in acts in themselves deliberately intended to injure the people of Australia and (2) a public danger to the Commonwealth, he is considered by Parliament as fittingly compelled to suffer the lifelong degradation of expulsion, with all the pecuniary loss, contumely and personal pain this expulsion may entail. If he has, in the belief of the Minister of the Crown, been concerned in such acts, Parliament is of opinion that due regard for the welfare of innocent and law-abiding citizens requires such drastic method of

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prevention. The consequences are not in a legal sense punishment as for crime, but preventive measures for the future. Of the propriety of these provisions Parliament and not any Court is the supreme authority to decide. It is entirely outside my province to express, or even to suggest in the faintest manner, any approbation or disapprobation of the provisions enacted or of the way in which the Executive has endeavoured to carry them into effect. My duty, at this instant, is simply and exclusively to ascertain how far they have been legally put into force. And before I can form any opinion upon that I must gather their meaning. I hold, as a matter of interpretation, that the intention of Parliament is that, before deportation can be ordered, it must be recommended by an impartial Board, and that while that Board may for any reason of extenuation or explanation decline to recommend deportation, it *cannot properly affirmatively recommend deportation for any reason other than the "acts" as to which the Minister was "satisfied" the person was concerned in.* The Minister may be satisfied, as to any alleged acts of the person involved, by any means of information he considers trustworthy. That is for him, and him alone, to determine. But he must, as I understand the section, make up his mind with reference to some specific acts. How otherwise can he satisfy himself as to what they are directed to? How can he, for instance, form any belief whether they are directed to purely intra-State trade or merely to a State public departmental service? And assuming the Minister effectively does this with sufficient particularity, what is the next necessary step. He may "summon the person to appear before a Board . . . to show cause why he should not be deported from the Commonwealth." Then he appoints the Board. The Board is clearly intended to be independent. It cannot receive secret instructions from the Minister. How is it to know what it is to do when the person appears to show cause why he should not be deported, except from the recorded finding of the Minister as notified to the person concerned. Clearly there is nothing but the notification necessarily given to the person either in the summons or otherwise, intimating *of what acts the Minister is satisfied* and in respect of which the person is to "show cause." The Legislature has interposed the Board between the Minister and the person summoned, as a protection

to him. It would be wholly foreign to that if, instead of being a protection, the Board were simply to be the medium of a possible fresh and independent attack. It is no answer to say the Board may consider the " acts " found by the Minister. The question is whether they *must* do so. There seems to me no just means of enabling the person to show cause except by furnishing him with a sufficiently clear indication *of the " acts " as being those in which the Minister finds he has been concerned.* It is said in opposition to that, that the section does not say the Board must consider the " acts " as found by the Minister. True, that precise form of language is not used. But what does " show cause " involve ? Does it mean that, without anything whatever alleged or charge notified, a man must affirmatively prove to an irresponsible tribunal he is not unfit to remain in Australia ? There are no words requiring a charge before the Board. Again, do those words permit any charge of any nature, possibly a charge which the Minister had considered and not been satisfied of ? I reject any such *carte blanche* commission to the Board. But, if the argument so advanced be sound, let us pursue it one step further. If the person fails to appear " the Minister may make an order for his deportation." On what grounds ? If the Board recommends deportation " the Minister may make an order for his deportation." On what grounds does Parliament intend he shall make that order ? The argument is that the Minister may disregard all the " acts " he has previously been satisfied of and, armed only with the Board's recommendation or only with the failure to appear, may, *for any other reason* he selects, order deportation. If that were true, I think arbitrariness and despotism could no farther go. But I for my part decline altogether to attribute that meaning to the Parliament of this country. Unless, however, it is so attributed, it stands undeniably true that an essential condition is wanting to the orders of deportation in this case. Unless that has been done, the section is not complied with, and one necessary statutory condition of the deportation orders is wanting. We were told that particulars were given as to the acts proposed to be *proved to the Board.* I repeat, that is nothing whatever to the point. The question is: *What particulars have been proved to have been given as to the acts found by the Minister.* The answer is, there is no such proof. And

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therefore nothing to show even by presumption in respect of what "*acts*" the Minister subsequently made his order. Nor is it, in my opinion, any answer to say that the party has not in fact been prejudiced. If he *might* have been prejudiced by an insufficient intimation of the acts in question, the proceeding offends against what the law terms natural justice (see per Lord *Esher* in *Cotterill* v. *Lempriere* (1)). This principle obtains not merely in indictments in criminal cases (see *R.* v. *Stocker* (2)), but wherever an accusation is made by which the accused may be made to suffer. It applies to a civil action to recover a penalty for a criminal act (*Davy* v. *Baker* (3)) and informations in the Exchequer for forfeiture (*R.* v. *Morley* (4)). It applies to the case of expulsion from a club. In *Cassel* v. *Inglis* (5) *Astbury* J. says that, except in exceptional cases and where not otherwise provided, "the accused shall be informed of the character of the charge to be investigated." Parliament, judging by the subject matter and the whole frame of the section, must presumably have intended to make the protection real and not illusory. Discarding all questions of form, it intended the accused should know definitely what was prima facie found against him and what would be acted on in case he did not appear. When it is remembered how multitudinous and how various are the possible "acts" comprised in the double classification, the matter becomes, I venture to think, free from real doubt. "Acts" directed against the transport of goods or the conveyance of passengers in inter-State trade may range from exploding a ship or b locking a train to stopping a case of fruit crossing the border; hindering or obstructing the provision of services by any department may range from impounding the mails or holding up the transcontinental railway to impeding on a solitary occasion the delivery of a penny stamp. The information given in the summons to show cause—and there was apparently no further information as to what the Minister decided—would tell the accused nothing as to date, place, circumstances or persons; it would tell him nothing as to whether he had been regarded by the Minister as a principal or an accomplice. And,

(1) (1890) 24 Q.B.D. 634, at p. 639.
(2) (1696) 5 Mod. 137.
(3) (1769) 4 Burr. 2471.
(4) (1827) 1 Y. & J. 221.
(5) (1916) 2 Ch. 211, at pp. 230, 231.

as already mentioned, the particulars did not affect this uncertainty. The case of *Welsbach Light Co. of Australasia* v. *Commonwealth* (1) is instructive on this point. It was cited to support the present order. The nature of the case is essentially different; that is, there was no question of an accusation to be answered, and the result of a mere opinion carried automatically identical consequences. The resemblance between the two cases may therefore be matched by that between a camel and a caterpillar. It was held by four Justices—one reluctantly—that an opinion of the Attorney-General on alternative matters was good. Three Justices dissented. But even the Judges who formed the majority pointed out the special nature of the case. *Griffith* C.J. (2) distinguished the case from one where a person is charged with an offence and "is entitled to know definitely the charge he is called upon to meet." He referred to the circumstance that "the fact alleged cannot be disputed or disproved," and that the opinion was one to be formed "on emergency and without opportunity of full investigation." His Honor said he came to his conclusion "by having regard to the subject matter, the evil to be remedied, and the nature of the remedy." *Barton* J. said (3) it was "not an accusation, nor a finding." I relied on the subject matter and the circumstances, including identity of consequences. My brother *Higgins*, for reasons given, had doubt but was not prepared to dissent. My brothers *Gavan Duffy*, *Powers* and *Rich* dissented on this point. Altogether that case is rather a weighty authority by way of antithesis in support of the view I have stated.

(9) *Summary.*—It may be useful if I summarize my conclusions of law on the main case, apart from the three basic principles and their working corollaries. They are as follows:—(1) The immigration power in sec. 51 (XXVII.) does not extend to any person whatsoever whose immigration into Australia took place before 1st January 1901, but it does extend to every person whatsoever whose immigration into Australia took place after that date. (2) No person once subject to that power can by his own act withdraw himself from it, nor can Parliament by legislation or abstention from legislation either extend, abandon or abridge its constitutional power. (3) The

(1) (1916) 22 C.L.R. 268. (2) (1916) 22 C.L.R., at p. 276.
(3) (1916) 22 C.L.R., at p. 277.

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rights of any person desiring to immigrate to enter after the date mentioned and to remain in Australia depend entirely on the presently existing relevant law of the Commonwealth. (4) A law with respect to immigration, and also every other law with respect to any granted legislative power of the Commonwealth, except so far as fettered by special constitutional restriction, may be prospective or may be restrospective to the inception of the Commonwealth at the discretion of the Parliament, representing for this purpose the supreme will of the whole Commonwealth, and to this a Court is constitutionally bound to give effect. (5) *Full effect can be given by a Court to a retrospective law only by holding that its provisions were the relevant law at the date to which it relates back*—(This is perhaps the pivotal consideration as to the constitutional power). (6) A retrospective immigration law retrospectively regulates the conditions upon which the Commonwealth permits immigration at the time to which the provisions of the law relate: No valid claim to Australian citizenship by an immigrant can exist contrary to those conditions. (7) Deportation is within the competency of Parliament as legislation within any of its granted powers, and may be made exercisable according to the nature of the case by either the judicial or the executive organ of the Commonwealth. (8) Sec. 8AA of the *Immigration Act* 1901-1925 is valid as an exercise of legislative power under sec. 51 (XXVII.) (immigration and emigration), sec. 51 (I.) (trade and commerce), sec. 51 (XXXIX.) and sec. 52 (II.) (public departments and public authority). (9) The section, on its true construction—which must be the same for all purposes—does not include any person who immigrated to Australia before the establishment of the Commonwealth, but does retrospectively include all persons who immigrated after that point of time and before the enactment, as well as those who immigrate after the enactment: It therefore does not for any purpose include Walsh, and does for all purposes include Johnson. (10) On the true construction of the section it is a necessary condition, before any person affected can be lawfully required to show cause to a Board or suffer deportation, that he should be informed with reasonable definiteness of the particular acts of which the Minister is satisfied and for which the Minister, subject to failure to appear before a Board or to the Board's recommendation, proposes to

deport him. (11) No such information was, according to the evidence before us, ever given. (12) By reason of the non-application of the statute to him—and, if necessary, by reason of the failure to notify the "acts" as found by the Minister—Walsh is entitled to his liberty. (13) By reason of the failure to notify the "acts" as found by the Minister, Johnson is entitled to his liberty.

I am therefore of opinion that the rules should be made absolute and the applicants discharged.

HIGGINS J. At the time of this application for a writ of habeas corpus the applicant Walsh, pending deportation from Australia as in pursuance of sec. 8AA of the *Immigration Act* 1901-1925, is kept in custody in Garden Island as in pursuance of sec. 8C of the Act. His counsel urge that, even if all the requirements of sec. 8AA have been satisfied, the section is invalid—that it is not sanctioned by any power conferred on the Federal Parliament by the Constitution. It is also urged that sec. 8AA, even if valid, does not on its true interpretation apply to the prisoner. The prisoner came to Australia in 1893 and settled, and has had his home here ever since. No doubt he was an immigrant in 1893, for he was born overseas; but his immigration was over and completed long before the Federal Constitution came even into operation (1st January 1901).

The Act is called the *Immigration Act*; and the heading is "An Act to place certain restrictions on immigration and to provide for the removal from the Commonwealth of prohibited immigrants"; and, as the Act is an Act of the Federal Parliament, it must be taken, prima facie at all events, to be intended to be an exercise of the power conferred on that Parliament by sec. 51 (XXVII.) of the Constitution—the power to make laws "for the peace, order, and good government of the Commonwealth with respect to immigration." There is no indication, on the face of the Act, of any intention to exercise any other of the powers specified in sec. 51. The primary question, therefore, is: Is sec. 8AA an Act with respect to "immigration"? The answer is surely obvious: that sec. 8AA is not an Act with respect to immigration at all, but an Act with respect to deportation of residents of Australia, members of the Australian community, who have been immigrants at any time. To

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make a law for the deportation of such immigrants is not to make a law with respect to immigration—the act or action of immigrating, the movement of persons from some other country into Australia. I am precluded by the judgment of the majority of the Court in the *Irish Envoys' Case* (1) from adding to the notion of such movement the notion of intention to settle in Australia; but, at the least, any law under sec. 51 (XXVII.) must be directed to the movement, the migration, to Australia—directed usually to preventing or discouraging entrance, or allowing or encouraging entrance, either absolutely or on conditions; or otherwise to regulating entrance. Similarly, an import duty is a tax on the movement of goods into Australia; it is not a tax on the goods as property (*Attorney-General of New South Wales* v. *Collector of Customs for New South Wales* (2); *Attorney-General of British Columbia* v. *Attorney-General of Canada* [*No.* 2] (3)). A power of Parliament to make laws with respect to the importation of alcohol would obviously not include a power to prohibit the manufacture of alcohol or a power to extrude such imported alcohol as is already in the country. It is a fundamental mistake to treat the power to make laws as to immigration as if it were a power to make laws as to immigrants.

If this view is right—if this is not a law with respect to immigration at all, but a law for the deportation of residents who have been immigrants—sec. 8AA cannot be valid by virtue of the power conferred by sec. 51 (XXVII.); and if Parliament has attempted to exercise that power, and no other, the section, 8AA, cannot be upheld by virtue of any other of the numerous powers contained in secs. 51 and 52 of the Constitution. I have never known the doctrine to be questioned which is laid down by Lord *St. Leonards*, in his book on Powers, that a donee of a power may execute it without referring to it, or taking the slightest notice of it, provided that the intention to execute it appear (*Sugden on Powers*, 8th ed., p. 289). Parliament appears to me to have clearly stated the power which it intended by this section and Act to exercise; and it cannot be treated as having exercised some other power.

But even assuming that this were a law with respect to immigration, the section is invalid on another ground also, if (as counsel for the

(1) (1923) 32 C.L.R. 518. (2) (1908) 5 C.L.R. 818.
(3) (1924) A.C. 222.

Government contend) it applies to this applicant, to a man who immigrated into Australia in 1893 and made Australia his home. For the Federal Parliament has no power to legislate for Australia as to the time which passed before the Constitution, before the Federal Parliament existed. The Parliament has power to make laws for Australia for the time since 1st January 1901. It has no power to legislate with respect to immigration which took place before the Constitution. This point was not mentioned in the case of *Potter* v. *Minahan* (1), because it could not be raised; for the act of immigration there alleged took place in 1908—after the Constitution. All the five members of the Bench agreed on the major premiss—that persons who are already members of the Australian community are not subject to immigration laws. The only difference was that the majority thought that Minahan was necessarily a member of the Australian community by reason of birth in Australia; whereas the minority thought that he had ceased to be a member. The case of *R.* v. *Macfarlane* (2) does not, in my opinion, decide that this section is valid; for in that case the persons held to be affected by the Act were persons who had not made their homes in Australia—were merely visitors.

It would be more satisfactory if I could find on the face of the Act something that would justify me in saying that, on its true interpretation, the section and the Act were not intended to apply to a man in the position of this prisoner. It would, indeed, be my duty, before coming to the conclusion that the section is invalid, to see whether, on a fair interpretation, an exception in favour of those in the position of this applicant should not be implied. The result, the release of the applicant, would equally follow. But my ingenuity is not sufficient to enable me to construe the section in such a manner. Apart from the current knowledge of recent history, and the bizarre effect, the humour, of a finding that the Act does not apply to the applicant, I cannot honestly construe these words "any person not born in Australia" &c. as not applying to him. I cannot regard the aim of the draughtsman as having been so faulty. I regard the words "any person" as being as comprehensive in its denotation as the same words so often repeated in the clauses of

(1) (1908) 7 C.L.R. 277. (2) (1923) 32 C.L.R. 518.

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sec. 3, the interpretation section. In sec. 3 (*a*) "any person who fails to pass the dictation test" corresponds with "any person not born in Australia" in sec. 8AA; and so does sec. 3 (*b*), "any person not possessed of the prescribed certificate of health," and similarly right through sec. 3. Even if there are indications in certain other sections that Parliament misconceived the scope of its power to make laws as to immigration, that fact would not show that Parliament meant to exclude men in the position of the prisoner from the operation of sec. 8AA. After all, the only difference that I can find between most of my learned colleagues and myself on this subject of immigration is that they regard sec. 8AA as not applying to members of the Australian community, because if it did apply the section would be invalid; whereas I think myself forced to regard the section as intended to apply to members of the Australian community, and therefore am forced to say that the section is invalid. I agree absolutely with the words of the Chief Justice (1), that "when the person seeking to enter the Commonwealth is a member of the Australian community, his entry is not within the power to make laws with respect to immigration."

Taking, as I do, this view as to the section, 8AA, in question, I should, strictly speaking, be justified in saying simply that the order nisi should be made absolute. But the section has so many aspects, and the arguments on both sides have been so searching, every inch of ground being contested, that I propose to examine the section further. It might be described as a section for the banishment, ostracism, deportation of undesirable persons by the Minister—persons whom the Minister deems undesirable—if they were not born in Australia. Substantially, it enacts that if the Governor-General make a proclamation to the effect that there exists in Australia a "serious industrial disturbance" the Minister may, if satisfied of two things, summon any person not born in Australia before a Board to show cause why he should not be deported from the Commonwealth. The two things of which the Minister has to be satisfied are (a) that the person has been concerned in acts directed towards hindering, &c., to the prejudice of the public, the transport of goods or passengers in relation to trade or commerce with other countries, &c., or the provision of services by any

(1) *Ante*, p. 64.

department, &c.; (b) that the presence of that person in Australia will be injurious to the peace, &c., of the Commonwealth in relation to the matters with respect to which the Parliament has power to make laws.

It will be noticed that the person need not be connected in any way with the serious industrial disturbance; that his hindering of the transport of goods or passengers may be a lawful hindering (as, e.g., when a woolbroker dissuades woolgrowers from sending wool to a glutted market in London); that "prejudice of the public" means prejudice in the opinion of the Minister for the time being —a political officer; that the hindering may have occurred many years before the Minister acts; that the person's presence here need not be injurious because of that hindering, but may be regarded as injurious in relation to divorce laws, coinage laws, census laws, &c.; that the Minister may be satisfied without taking any evidence; that the Board is to consist of three members, all appointed by the Minister who is already satisfied as to the facts; that the Board need not determine whether the facts as to which the Minister is satisfied are true or not; and that the Minister may order deportation, and the incidental arrest and detention, on a mere recommendation of the Board (with no grounds stated) that the person be deported.

Now, our duty is narrow and definite. It is obvious that if one political party may banish opponents, another political party may act likewise, should it get into control—as happens frequently in South America. But it is not for us to consider these provisions from the point of view of wisdom or statesmanship; no crudity, no folly, no subversal of time-honoured principles of British liberty, will entitle us to treat this section as being invalid if it has been passed under the powers granted to the Federal Parliament by the Constitution. We have neither the means, nor the right, to ascertain the reasons which may in fact justify or excuse such a section; nor, if we have an abhorrence of the ways of the prisoner, are we entitled to give it play: we have merely to say whether this section is authorized by the Constitution.

I have already said that the section cannot be upheld as an immigration law. But the Solicitor-General relies, in the alternative, on the section as being a law with respect to *emigration*. But

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Parliament did not, as appears from the title and heading, intend to exercise this power to make laws with respect to emigration; and, besides, banishment is not emigration. Emigration must be interpreted in the ordinary vernacular sense; and, in that sense, emigration may be encouraged or discouraged, or forbidden, or regulated by Parliament. According to the Oxford dictionary, the general meaning of "emigration" is "the action of migrating or departing out of a particular place or set of surroundings"; but its especial sense is "the departure of persons from one country, usually their native land, to settle permanently in another." If the "man in the street" were asked, "Is this a law as to emigration?" I rather think he would answer, "How can it be? The man is *forced* by Act to leave the country." To my mind, it is useless on this point to cite to us Acts for compulsory banishment if passed by legislatures which have unlimited powers of legislation—such as Acts of Great Britain or of New Zealand or of South Africa. It is useless to cite any Acts even of Canada, where all the residuary powers are conferred on the central legislature (sec. 91 of the *British North America Act* 1867). It is useless to cite Acts of the United States as to deporting aliens. There is no law, and no power to pass a law, under the United States Constitution, for the deportation of United States citizens; but there is power to pass any law as to aliens. Aliens have no legal right enforceable in the Courts to come to or to remain in a country to which they do not belong (*Musgrove* v. *Chun Teeong Toy* (1)).

Now, our Australian Constitution confers on the Federal Parliament certain specified powers only of legislation (secs. 51, 52, &c.); and no Act of that Parliament can be treated as valid which does not come within the scope of one of those powers. I include, of course, under the powers specified, the important power contained in sec. 51 (XXXIX.) to make laws with respect to "matters incidental to the execution of any power vested by this Constitution in the Parliament . . . or in the Government of the Commonwealth." The word "incidental" is the critical word; and I propose to examine this power presently.

But the Solicitor-General contends that he is entitled to rely on the powers to make laws on other subjects also, and in particular

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

on the power to make laws with respect to "trade and commerce with other countries, and among the States" (sec. 51 (I.)). He contends that sec. 8AA is a law with respect to such trade and commerce, because the section actually refers to such trade and commerce, making it one of the conditions of the Minister's exercise of the power to deport that the person has been concerned in acts directed towards hindering, &c., the transport of goods, &c., in relation to trade and commerce with other countries, &c. In my opinion, that part of this section which refers to trade or commerce is not a law with respect to trade and commerce; and even if it were, the section cannot be sustained as the exercise of the power with respect to trade and commerce. The only power which—according to the title and heading of the Act—Parliament intended to exercise was the power as to "immigration." As I have stated already, the Act is intituled "An Act to place certain restrictions on immigration and to provide for the removal from the Commonwealth of prohibited immigrants" (the applicant here is not a prohibited immigrant; for he has not yet been deported: sec. 3 (*gg*)). When the donee of several powers purports to execute only one of these, he cannot be treated as having executed any of the others (*Attorney-General* v. *Vigor* (1)); and there is no execution of a power unless the donee intend to execute it (*Sugden on Powers*, 8th ed., p. 289; *Farwell on Powers*, 3rd ed., pp. 201, 215, &c.; *In re Ackerley*; *Chapman* v. *Andrew* (2); *In re Sharland*; *Rew* v. *Wippell* (3)). In this case, Parliament has expressly set itself to execute the power as to "immigration," and that only; and counsel for the respondent cannot rely on any other. In the case of *Pankhurst* v. *Kiernan* (4) I expressed the view that when the Federal Parliament purports to pass an Act on a subject which prima facie belongs to the State legislatures only (such as the price of bread, the registration of dogs, or the protection of property from destruction), the Act must be treated as invalid unless the Federal Parliament clearly indicate that it regards the Act as necessary or expedient for the purposes of some definite Federal subject, such as defence; and, if the Act is capable of coming under that subject, the Court would accept the

(1) (1803) 8 Ves. 256, at pp. 292-294.
(2) (1913) 1 Ch. 510, at p. 514.
(3) (1899) 2 Ch. 536.
(4) (1917) 24 C.L.R. 120.

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statement of the purpose of the Federal Parliament as conclusive. My view was not upheld by my learned brethren in that case, and I have no right to press it as being the law. But I know of no opposition to the doctrine that if A have several powers which might be regarded as applicable to some definite subject matter, and if he distinctly say that he is using power X only, he will not be treated as having exercised powers Y or Z.

But perhaps it is unnecessary to dwell further on this point; for, even if we were at liberty to consider the other specified powers, it is clear that sec. 8AA does not contain a law as to trade and commerce with foreign countries, &c. It enacts nothing with regard to trade and commerce; it imposes no new duty, confers no new right or power as to that subject. The very elements of a law are wanting. The section is not aimed at the subject of trade and commerce at all, or at the enforcement of any law on that subject. There is, certainly, a reference to such trade or commerce in the section, as I have stated; for one of the conditions on which the section purports to allow the Minister to deport is that the man has, in the Minister's opinion, been concerned in acts hindering, &c., the transport of goods, &c., beyond seas—at any time in the past, however distant; but no consequence follows from that fact of hindrance. The man is not to be deported unless his presence here is, in the Minister's opinion, injurious "in relation to matters with respect to which the Parliament has power to make laws"; and such matters would include marriage, lighthouses, coinage, weights and measures, &c., quite as much as trade and commerce with foreign countries. Indeed, the more one considers the isolated reference to trade and commerce in the section, the more distinctly it is seen to be not a genuine law with respect to the subject mentioned in sec. 51 (I.).

When one wants to find the subject on which an Act is passed, I think it is safe to put this as a test—what does the Act really aim at accomplishing; and if the aim comes within the subjects assigned to the Federal Parliament, the Act is valid; otherwise not. This I take to be the test approved of by the Judicial Committee, through Viscount *Haldane*, in the recent important case of *Toronto Electric*

Commissioners v. *Snider* (1). This was the view which, as it appears, I took in *Huddart, Parker & Co. Pty. Ltd.* v. *Moorehead* (2), a case to which counsel have referred. There I put it, what is the target aimed at? What are the things or the actions regulated —as distinguished from the motive which influenced Parliament? I said that the thirty-nine articles contained in sec. 51 are subjects of legislation, "not pegs on which the Federal Parliament may hang legislation on any subject that it likes." I am still of the same opinion. If one had to describe summarily the aim of this section, without question—begging phrases, I think it might be fairly said to be the banishment of persons (not born in Australia) whom the Minister deems to be undesirable residents of Australia; and this subject is not one of the subjects permitted to Parliament by sec. 51.

Apart from the effect of sec. 51 (XXXIX.) (which I shall presently examine), none of the specified powers of sec. 51 has such a section as sec. 8AA within its scope or ambit. To make a law with respect to aliens, providing for their deportation, is allowed by pl. XIX.; to make a law for the deportation of people of any race such as the Kanakas of the Pacific islands is allowed by pl. XXVI.: but there is no power conferred expressly to make a law for the deportation of ordinary British subjects. There is an express power (pl. XXVII.) to make laws as to immigration and emigration; and it is not disputed that under this power British subjects could be excluded from coming to Australia and making their homes here. But where is there to be found any power to interfere with the liberty of a British subject who has settled in Australia, by deporting him to his former country or elsewhere? The very fact that powers are expressly conferred in such a manner as would allow deportation of Pacific islanders, and as would allow deportation of aliens, affords a strong presumption that Parliament was not intended to have power to deport British subjects, however drastically Parliament may interfere with their immigration. In considering this question of power, we are in duty bound to consider and construe the whole of the clauses in sec. 51, "so as to reconcile the respective powers

(1) (1925) A.C., see p. 408.

(2) (1908-09) 8 C.L.R., at pp. 414, 415.

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and give effect to all" (*Citizens Insurance Co. of Canada* v. *Parsons* (1)); and in the Royal Commissions case (*Attorney-General for the Commonwealth* v. *Colonial Sugar Refining Co.* (2)) the Lords of the Privy Council, after referring to the specific subjects assigned by sec. 51 of the Constitution to the Federal Parliament, said: "None of them relate to *that general control over the liberty of the subject which must be shown to be transferred* if it is to be regarded as vested in the Commonwealth."

But it is urged that the section, so far as it purports to enable the Minister to deport a British subject, is warranted by sec. 51 (XXXIX.): Parliament may make laws with respect to "matters incidental to the execution of any power vested by this Constitution in the Parliament." The critical word is "incidental": is the deportation of a man settled in Australia, in the absence of crime on his part (there is no crime mentioned in sec. 8AA), a matter incidental to the execution (= exercise ?) of the power to legislate as to trade and commerce ? I have already stated my opinion that there is not in this section any legislation as to trade and commerce with foreign countries, &c. There is no duty imposed, no right or power given, as to trade or commerce, by the words in the condition as to hindering trade or commerce. From the nature of the case, the alleged law as to trade or commerce must be found in the words of the section which precede the words allowing deportation. The power to deport cannot be treated as being at the same time part of the principal law and also as incidental to the power to make that principal law (see also *Attorney-General for the Commonwealth* v. *Colonial Sugar Refining Co.* (3)). But even if a law as to such trade or commerce had been made by the section, a law for deportation cannot be treated as "incidental" to the power to make laws in respect to such trade or commerce. No doubt, it would be competent for Parliament, under pl. XXXIX., to prescribe punishment for breach of such a law, punishment even by imprisonment or deportation—or transportation. I do not, of course, say that the "incidental" power ends there; it is unnecessary, and it would be dangerous, to attempt to define the limits of this incidental

(1) (1881) 7 App. Cas. 96. (2) (1914) A.C., at p. 255.
(3) (1914) A.C. 237.

power. But for a Minister to interfere with the liberty of the subject by sending him from his home away over the seas, without crime on his part, is clearly not within the limits of the power. Such an interference must rest on a substantive, independent power, such as the analogous powers as to aliens, as to Pacific islanders, as to the influx of criminals. Since I wrote the last preceding paragraph, I find that this very distinction between a "substantive and independent power" and a power which can be implied as incidental to other powers is recognized by *Marshall* C.J. in *McCulloch* v. *Maryland* (1): "The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great *substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them.*"

The limits of incidental powers have been illustrated in various cases. In *Kielley* v. *Carson* (2) the Newfoundland Legislative Assembly committed a man for contempt for alleged breach of the privileges of the House. The contempt was not committed in the presence of the Assembly. The man brought an action for assault and false imprisonment. *Parke* B., in delivering the opinion of an unusually numerous body of Judges, said (3):—"Their Lordships see no reason to think, that in the principle of the common law, any other powers are given them" (the local Legislature) "than such as are necessary to the existence of such a body, and the proper exercise of the functions which it is intended to execute. These powers are granted by the very act of its establishment, an act which on both sides, it is admitted, it was competent for the Crown to perform. This is the principle which governs all legal incidents. '*Quando lex aliquid concedit, concedere videtur et illud, sine quo res ipsa esse non potest.*' In conformity to this principle we feel no doubt that such an Assembly has the right of protecting itself from all impediments to the due course of its proceeding. To the full extent of every measure which it may be really necessary to adopt to secure the free exercise of their legislative functions, they are justified in acting by the principle of the common law. But the power of

(1) (1819) 4 Wheat. 316, at p. 411.
(2) (1841-4) 4 Moo. P.C.C. 63.
(3) (1841-42) 4 Moo. P.C.C., at pp. 88 et seqq.

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punishing anyone for past misconduct as a contempt of its authority, and adjudicating upon the fact of such contempt, and the measure of punishment as a judicial body, irresponsible to the party accused, whatever the real facts may be, is of a very different character, and *by no means essentially necessary* for the exercise of its functions by a local legislature, whether representative or not. All these functions may be well performed without this extraordinary power, and with the aid of the ordinary tribunals to investigate and punish contemptuous insults and interruptions. . . . Their Lordships, therefore, are of opinion. that the principle of the common law, that things necessary pass as an incident, does not give the power contended for by the respondents as an incident to, and included in, the grant of a subordinate legislature." This case was followed in *Fenton* v. *Hampton* (1); in *Doyle* v. *Falconer* (2); in *Barton* v. *Taylor* (3); and by this Court in *Willis and Christie* v. *Perry* (4). The Assembly had only self-protective and self-defensive powers, had no punitive powers. As was said in *Barton* v. *Taylor* (5), " no powers of that kind are incident to or inherent in a colonial Legislative Assembly (without express grant), except 'such as are necessary to the existence of such a body, and the proper exercise of the functions which it is intended to execute' (6). Whatever, *in a reasonable sense, is necessary* for these purposes, is impliedly granted whenever any such legislative body is established by competent authority." There is no necessary inconsistency between this doctrine, placing the limits of the implied power in the necessity of the circumstances, and the eloquent words of *Marshall* C.J. uttered in *McCulloch* v. *Maryland* (7), whatever we may think as to the application of the words in that case; for even the British authorities use the word " necessary " in a reasonable sense; and there may be a choice of means in exercising the implied power. What is important for the present purpose is that there is no ground for the assertion that under the incidental power in pl. XXXIX. Parliament may cause men to be deported lest they should be injurious to the Commonwealth in respect of Commonwealth

(1) (1858) 11 Moo. P.C.C. 347.
(2) (1866) L.R. 1 P.C. 328.
(3) (1886) 11 App. Cas. 197.
(4) (1912) 13 C.L.R. 592.
(5) (1886) 11 App. Cas., at p. 203.
(6) (1841-42) 4 Moo. P C.C., at p. 88.
(7) (1819) 4 Wheat. 316.

powers; a fortiori, where the acts of the man to be deported may have merely hindered foreign commerce, and the injury to the Commonwealth may be in respect of divorce or coinage or lighthouses. Hindrance to foreign commerce is not an offence, of course—it may be actually praiseworthy in some eyes, as in the case mentioned of a woolbroker. It is evident that the draughtsman avoided any condition which would involve a legal offence, for it would then be said that any offence must be sent to the Courts and the judicial power—not to a Minister. I am prepared to give full effect to pl. XXXIX. according to the words as they stand; but I am not prepared to treat the word "incidental" as if it were "conducive," or likely to add an additional motive to the performance of the law's command. In the case of *G. G. Crespin & Son* v. *Colac Co-operative Farmers Ltd.* (1) our late colleague *Barton* J., speaking of pl. XXXIX., said that "authority to make laws 'with respect to' any subject extends to matters incidental to such laws. That is, of necessity, included in the power granted. There is also by sec. 51 (XXXIX.) a power to make laws with respect to matters incidental, &c. *Though the incidental power would have been exercisable without this express grant*, the sub-section makes assurance doubly sure." The same view is expressed, though in different words, by *Griffith* C.J. in *R.* v. *Kidman* (2) (and see per *Higgins* J. (3)). But there is no ground for the notion that, where power A is granted to the Federal Parliament and power B is not, power B may be exercised because the exercise of it may be helpful to the carrying out of power A or of the law under power A. The decision of the Judicial Committee invalidating the *Royal Commissions Act* (*Attorney-General for the Commonwealth* v. *Colonial Sugar Refining Co.* (4)) certainly limits, does not expand, any conception which one might have formed of the effect of pl. XXXIX.

For these reasons, I am of opinion that pl. XXXIX. does not empower the Parliament to make this deportation law as incidental to the power to make laws for trade and commerce; and for substantially the same reasons I think that it does not empower the Parliament to make this deportation law as incidental to the execution of any

(1) (1916) 21 C.L.R. 205, at p. 214.
(2) (1915) 20 C.L.R., at p. 433.
(3) (1915) 20 C.L.R., at p. 449.
(4) (1914) A.C. 237; 17 C.L.R. 644.

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power vested by this Constitution in the Government of the Commonwealth. Under sec. 61 of the Constitution the executive power is vested in the King, and is exercisable by the Governor-General (that is to say, by the Government); and it "extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth." Assuming that, as incidental to this executive power, the Parliament may pass an Act constituting a police force, or for the establishment of gaols for offenders, it does not follow that Parliament may also deport from the Commonwealth people who are not likely to obey the laws. Such a power is not "incidental" to the execution and maintenance of the laws, even though it might assist in reducing the number of crimes committed, as well as the number of people who might possibly commit crimes. The Solicitor-General contends that such a law for deportation would be analogous to the exercise of a legislature's implied power to remove persons obstructing its proceedings; but what is a necessary power for a deliberative assembly in order that it may be able to deliberate is not necessary for the executive Government to have over the whole country in order that the Government may execute and maintain the laws.

It is unnecessary for me, holding the views that I have stated, to come to a decision as to the point on which the Chief Justice has laid so much stress. I am not convinced that an Act, for instance, with respect to invalid pensions (pl. XXIII.) would be invalid if it left it to a postmaster or other official to decide whether any particular applicant for the pension is an invalid or not. It is true that the official might treat the word "invalid" as having a larger meaning than the High Court would allow it; but his decision would not be binding in other cases, or on other postmasters. Under the United States Constitution it is wonderful how many delicate questions, involving law as well as fact, have been committed to the decision of boards and officers, and with the approval of the Supreme Court. In *Reetz* v. *Michigan* (1) it was objected to a medical registration Act of Michigan that as the board of registration was directed to refuse a certificate if there were no sufficient proof that the applicant had been registered under a certain earlier Act,

(1) (1903) 188 U.S. 505.

this involved a legal question with which no tribunal other than a regularly constituted Court could be empowered to deal—that the Legislature could not enable the board to exercise judicial powers without appeal. But the Supreme Court of the United States rejected the argument, and said (1) :—" We know of no provision in the Federal Constitution which forbids a State from granting to a tribunal, whether called a Court or a board of registration, the final determination of a legal question. . . . Due process is not necessarily judicial process." The difficulty in the United States on the subject seems to be due to the peculiar provision of the United States Constitution that no one is to be deprived of life, liberty or property without due process of law, and we have not got that provision in the Australian Constitution. For my part, I desire to leave such an important matter for consideration when the decision of the point becomes necessary for the decision of some case.

It is unnecessary for me also to decide the point on which my brother *Isaacs* lays stress—as to the form of the summons under sec. 8AA. There is no doubt that the summons is badly drawn, although drawn in the words of the section—that the Minister states himself to be satisfied (as to the first condition) that " you have been concerned . . . in acts directed towards hindering . . . the transport of goods . . . *or* the provision of services by any department . . . of the Commonwealth." The Minister does not say that he is satisfied as to *both* or *either* of the alternatives. This might be a serious objection to the proceedings if the proceedings were for an offence against the law ; but they are not. It might even be a serious objection if the Board before whom the prisoner is summoned were under a duty to inquire into the matters as to which the Minister is satisfied ; but the Board is not under any such duty. I do not say that the Board, under the section, is not at liberty, if it think fit, to inquire as to these matters ; but its only *duty* is to decide whether it should recommend that the prisoner be deported from the Commonwealth (sec. 8AA (3) ; sec. 8A). The Solicitor-General admits this position. It was open to the Board, if it thought fit, to assume the Minister's findings to be right, and to ask the

(1) (1903) 188 U.S., at p. 507.

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prisoner to show cause, on such grounds as the Board thought fit (e.g., ill-health, domestic reasons, a bond as to future conduct, &c.) why he should not be deported from the Commonwealth. The actual report of the Board is now in evidence, and the only operative part is a recommendation that the prisoner be deported from the Commonwealth. It is, to my mind, a mistake to treat these unusual proceedings as if they were an indictment or an information. The only question is, do the proceedings, based on this faulty summons, offend against natural justice. The form of the summons is not prescribed by Act or by regulation. The learned counsel for the prisoner took many objections, but it never occurred to them to object that the Minister must say definitely the fact of which he was satisfied, or the particular acts which were directed towards hindering, &c. I cannot think that, at this stage of proceedings such as these, when the Board has concluded its task without any objection taken to the form of the summons, we should be justified in treating the whole proceedings as contrary to natural justice on such an artificial ground. Even if a man were charged with shooting, out of season, "a snipe" or "a woodcock," and made no objection to the form of the charge, I do not think that it would be essential to natural justice that he should be released from prison because of the defective charge.

My opinion is that if sec. 8AA applies to the prisoner on its true interpretation, the section is invalid. I should prefer if possible to join with my colleagues in the view that the section does not apply to the prisoner; but I do not see anything in the words used which would justify me in implying an exception to the clear words of the section. It does not matter to the prisoner on which ground he is released; but, in my opinion, the section is invalid.

As for the prisoner Johnson, the position is different. A native of Holland, he immigrated into New South Wales in 1910, became naturalized, married here and has a child. It cannot be said of him, as of Walsh, that his immigration took place before the Constitution, before there was any power to legislate as to immigration into Australia. It is true that Johnson established his home, became a member of the Australian community, long before sec. 8AA; but I am not justified in saying that a Federal Act cannot be made

retrospective (see *R.* v. *Kidman* (1)). But there are no words in the section or in the Act which make the provisions of the section retrospective so as to apply to Johnson's immigration—his act of immigrating, his movement into Australia—in 1910.

There is no power to deport residents—citizens—of Australia under the immigration power or under any other power conferred; and, in my opinion, the section is invalid as to Johnson also.

Both men must be released.

Perhaps I should add that I have not failed to consider the preliminary objections taken by Dr. *Evatt* to the removal of these cases to this Court. The sections of the *Judiciary Act* have by him been subjected to a searching and valuable examination; but the only objection to which I am able to attach much weight, in view of this Court's previous decisions, is that as to sec. 40 (1) being rather a section providing for a certiorari than a section passed under the powers of sec. 77 of the Constitution. My view is that, whatever the form adopted in sec. 40 (1), the Parliament has power under sec. 77 (III.), in investing any Court of a State with Federal jurisdiction, to define the limits or conditions of the investiture.

RICH J. Certain preliminary objections were taken to the removal of the applications for habeas corpus from the Supreme Court. Three of these call for observation. It was first argued that sec. 40 of the *Judiciary Act* was not a law of definition and investiture. I cannot accede to that argument. Sec. 75 of the Constitution inalienably vests in the High Court jurisdiction in certain matters. Apart from this the Parliament, by secs. 76 and 77, is empowered to distribute and define the exercise of the judicial power of the Commonwealth. Included in sec. 77 is the power to divest the State Court of the power which otherwise belongs to it in respect of any matters coming within the judicial power of the Commonwealth. The Commonwealth Parliament has exercised all these powers in sec. 38A, 39 and following sections of the *Judiciary Act*. Sec. 40 must therefore be given its operation as divesting the State Court of its Federal jurisdiction to hear the case, its State jurisdiction having previously disappeared under sec. 39. It was

(1) (1915) 20 C.L.R. 425.

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next contended that sec. 40 did not apply to the removal from State Courts of summary applications for habeas corpus. The word "cause" is not a technically restricted term. It includes any proceeding competently brought before it and litigated in a particular Court (*Green* v. *Lord Penzance* (1)). In the interpretation of the *Judiciary Act* "suit" includes any original proceeding between parties and "cause" includes suit (sec. 2). An application for habeas corpus is an original proceeding between the party aggrieved and the detaining party. This objection, therefore, cannot be sustained.

In approaching the applications themselves I preface my opinion with the remarks made by Lord *Macnaghten* in *Vacher & Sons Ltd.* v. *London Society of Compositors* (2) :—"But 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." It is my duty to deal with the facts and law of these cases exclusively from a legal standpoint. The respondent is called upon to justify his detention of the applicants, and the only question for me is whether he has succeeded in making out that justification. He relies on the Minister's order for deportation, which he asserts is duly made under and in accordance with Commonwealth law. The deportation order is the final link in a chain which begins with sec. 8AA of the *Immigration Act*. The intermediate links are the Minister's satisfaction that the applicants were concerned in certain acts of the legal character described in the section; a summons to show cause by reason of those acts; a hearing by the Board; a recommendation by the Board that the applicants be deported. If any one of those links breaks, the justification fails. I will take each link in order. Sec. 8AA I regard as a valid section under every legislative power possessed by the Commonwealth Parliament. It is avowedly made under the immigration power, but that does not exclude any other power. I should think it ridiculous that

(1) (1881) 6 App. Cas., at p. 671.

(2) (1913) A.C. 107, at p. 118.

Parliament, intending to make its legislation effective, especially in what it thinks a serious industrial disturbance, would intend to abandon any of its powers. Therefore, there being no negative words nor any necessary implication that Parliament was deliberately and purposely limiting itself to one power to the exclusion of all others, I think the section, if it can under any circumstances come within the other powers, should be held to do so. An Act of Parliament must always be read as within the Constitution unless its language makes that impossible. I see no impossibility here. On the contrary, everything points to a reasonable construction that brings it within the legislative powers. Without diverging into detail, I am of opinion that the section is valid as an exercise of powers as to immigration, inter-State trade and commerce, departments of State, any other public authority created by the Commonwealth, and as a defensive precaution with respect to all other powers. In stating that conclusion I have taken into consideration all the arguments as to deportation, judicial powers, connection with the subject matter, and other reasons put forward in argument. In saying what I have said about validity, I have necessarily had to consider the construction of the section.

The presumed intention of Parliament, unless the language makes it impossible, being that powers are not exceeded (*Macleod* v. *Attorney-General* (1)) puts an interpretation on the section not larger than the immigration power. The immigration power does not, in my opinion, give any authority over any person now in Australia who has been here since and prior to Federation. But there is nothing in that or in any other power or in the words of the section to prevent sec. 8AA from applying to every person in Australia who arrived here by immigration since that event. I am distinctly of opinion that persons who arrive here by immigration since Federation are always liable to Commonwealth legislation under the immigration power even though that legislation is retrospective. I think there is nothing in the Constitution to deprive the Commonwealth Parliament of the recognized and ordinary parliamentary power of legislating retrospectively, with all the incidental effects. This section is a

(1) (1891) A.C. 455.

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retrospective defeasance of any right which an immigrant since Federation might previously have claimed in pursuance of the prior state of Commonwealth law.

The next necessary link is the Minister's satisfaction as to the applicants' acts. In my opinion, this must be insisted on strictly *in favorem libertatis*. In my opinion, the justification to be shown by the party detaining requires that the Minister was satisfied as to some specific acts. There is no proof, nor is it anywhere suggested in these proceedings, that the Minister was satisfied of any specific acts. No such acts are anywhere referred to. I think this link breaks. The next link is the summons. All the summons contains as to acts is a round statement, not even confined to one particular character of acts and not specifying any single particular which could give a clue to any acts. This link and the preceding one break together. The next two links are formal enough, but, as the continuity is broken, they are useless to afford any justification.

Applying what I have said to the respective applicants, I am of opinion that the attempted justification fails as to Walsh because he is outside the Act and, even if he were not, there is no proof that the Act was complied with. As to Johnson, though the Act applies to him, it has not been carried out as its provisions require.

Before parting with the case I would like to add that there is no possible reason for thinking that the Board was in a false position in consequence of promised remuneration or of any instructions, and least of all for thinking that its members were actuated by anything but the best of faith in all they said or did.

STARKE J. These are rules nisi obtained by Thomas Walsh and Jacob Johnson from the Supreme Court of New South Wales calling upon Robert Walter Yates to show cause why writs of habeas corpus should not issue, directed to him, and they were removed into this Court on motion on behalf of the Attorney-General of the Commonwealth pursuant to the provisions of sec. 40 of the *Judiciary Act*. The validity of sec. 40 was challenged by the applicants, and it was also contended that the section did not extend, on its proper interpretation, to the rules obtained by them.

The judicial power of the Commonwealth is vested in the High Court, and in such other Federal Courts as the Parliament creates and in such other Courts as it invests with Federal jurisdiction (Constitution, sec. 71). Federal jurisdiction is simply authority to exercise the judicial power of the Commonwealth. Now, the Constitution (sec. 75) expressly confers upon the High Court certain Federal jurisdiction, and sec. 76 enables the Parliament to clothe it with additional Federal jurisdiction. Sec. 77 enables the Parliament to invest the State Courts with Federal jurisdiction. But what the Parliament can grant, it can take away, wholly or in part, and can subject, at any stage of the proceedings in the State Courts, to any conditions it thinks fit. Further, it can hand over that jurisdiction to the High Court or any other Federal Court, and make the jurisdiction of the Federal Courts exclusive of that which belongs to or is invested in the State Courts (The Constitution, sec. 77). Now, the judicial power of the Commonwealth clearly extends to matters arising under the Constitution or involving its interpretation. And jurisdiction to hear such matters is conferred upon the High Court by sec. 30 of the *Judiciary Act*. But the *Judiciary Act*, sec. 39 (1), makes that jurisdiction of the High Court exclusive of the jurisdiction of the several Courts of the States, that is, exclusive of any jurisdiction which belonged to or was invested in them. The provisions of sec. 39 (2) then invest the State Courts with Federal jurisdiction in various matters, including matters arising under the Constitution or involving its interpretation, subject to certain conditions (see *Lorenzo* v. *Carey* (1)). The *Judiciary Act*, sec. 40, simply provides for the removal from the State Courts in certain cases of any cause or part of a cause arising under the Constitution or involving its interpretation. But as the jurisdiction exercised by the State Courts is, as we have seen, Federal jurisdiction, the provisions of secs. 76 and 77 of the Constitution contain ample authority, in my opinion, for the Parliament to withdraw any matter from that jurisdiction, and remove it into the High Court or any other Federal Court, and to provide for its remission again, as in sec. 42, to the State Courts. I entertain no doubt of the validity of the provisions of sec. 40 of the *Judiciary Act*. Still less, in my opinion, is there

(1) (1921) 29 C.L.R. 243.

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any reason to doubt that the proceedings by way of rule nisi in the Supreme Court fall within the terms of sec. 40. The applicants were detained under an order for deportation issued pursuant to the provisions of the *Immigration Act* 1901-1925, sec. 8AA. That order was attacked on many grounds, but the constitutional validity of the section under which it was made was directly challenged, and was indeed, as the argument in this Court demonstrated, a vital question in the case. It is not necessary, when removal of a cause, &c., is sought, to establish that the interpretation of the Constitution will necessarily call for decision, but only that that subject is involved or entangled in the controversy. If it is, the Attorney-General of the Commonwealth or the Attorney-General of a State, can remove the cause, as of course, whether he is a party to it or not, subject always to the powers conferred upon the Court by sec. 42. A party cannot remove the cause as of course, but only for sufficient cause shown to the Court. Once the cause is removed, the High Court is clothed with full authority essential for its complete adjudication: it is the *cause* which is removed, and not merely the question involving the interpretation of the Constitution; though it is that question, as already indicated, which attracts the cause to the jurisdiction of the High Court (cf. *Gaines* v. *Fuentes* (1); *Railroad Co.* v. *Mississippi* (2)). It was also argued that a rule nisi for habeas corpus was not within the meaning of sec. 40. Great reliance was placed upon the fact that the proceedings in these cases were for writs of habeas corpus, but, if they involve the interpretation of the Constitution, then, subject to the meaning of the word "cause," the section is explicit. I failed to understand how the removal of the matter from the State Court into this Court in the manner provided for by sec. 40 interfered with, or deprived the applicants of, any rights or privileges secured to them by the Habeas Corpus Acts. But a minor point was also made. It was said that a rule nisi for a habeas corpus is not a "cause" within the meaning of sec. 40. The argument rests upon the interpretation clause in the *Judiciary Act*, sec. 2. "Cause" includes any suit and also includes criminal proceedings. "Suit" includes any action or original proceeding between parties. "Matter" includes any

(1) (1875) 92 U.S. 10.

(2) (1880) 102 U.S. 135.

proceeding in a Court whether between parties or not, and also any incidental proceeding in a cause or matter. It was said that a rule nisi for habeas corpus was not a cause because it was not an original proceeding between parties and was, in truth, a matter not covered by sec. 40. The argument is disposed of in *Green* v. *Lord Penzance* (1) thus: "It"—the word "cause"—"is not a technical word signifying one kind or another, it is *causa jurisdictionis*, any suit, action, matter, or other similar proceeding competently brought before and litigated in a particular Court." Nothing in the *Judiciary Act*, in my opinion, limits this wide ambit of the word. Further, in the Crown Office Rules of 1886, I note that the person to whom a writ of habeas is directed is referred to as a party (see rr. 239, 245).

Consequently, the preliminary objections fail; and I pass to the consideration of the substance of the case—a case involving not only the liberty of citizens of this Commonwealth, but questions vitally affecting the powers of the Parliament of the Commonwealth and the validity of legislation passed by it.

Orders have been made and signed, for the deportation of the applicants Walsh and Johnson, pursuant to the provisions of sec. 8AA of the *Immigration Act* 1901-1925, and they have been arrested and detained by a peace officer of the Commonwealth under orders —also made pursuant to the section—directing him to take and keep them in custody pending deportation, and until they are placed on board a vessel for deportation from Australia. The applicants insist that the provisions of sec. 8AA of the *Immigration Act* are beyond the legislative powers conferred upon the Parliament by the Constitution. Under the British Constitution the validity of a provision such as that contained in sec. 8AA could not be challenged or canvassed before any judicial tribunal. And if such a provision were enacted by the Dominion of New Zealand or the Union of South Africa, its validity would be unassailable, and its efficacy undoubted within the territorial limits of those countries (*New Zealand Constitution Acts* 1852 and 1857 (15 & 16 Vict. c. 72; 20 & 21 Vict. c. 53); *South Africa Act* 1909 (9 Edw. VII. c. 9) sec. 59). This is because the Imperial Parliament has absolute and untrammelled power, and New Zealand and South Africa have absolute and plenary

(1) (1881) 6 App. Cas., at p. 671.

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power within the limits of their territorial jurisdiction. But in Australia, which is an example of a Federal form of government, the Parliament of the Commonwealth has only such power as is expressly or by necessary implication vested in it by the Constitution, and, excepting in so far as such powers are vested in the Parliament of the Commonwealth, they remain exclusively vested in the States (*Attorney-General for the Commonwealth* v. *Colonial Sugar Refining Co.* (1)). Again, it is quite true, I think, as is said by Lord *Haldane* L.C. in the *Sugar Case* (2), that "general control over the liberty of the subject" is not transferred to the national Parliament. Certainly the subjects of the King—whatever the position of aliens may be—cannot be banished or expelled from the Commonwealth without legislative authority for that purpose (cf. *Musgrove* v. *Chun Teeong Toy* (3); *Walker* v. *Baird* (4); *Johnstone* v. *Pedlar* (5)). Still, the Parliament of the Commonwealth may undoubtedly affect the liberty and rights of the subject by legislation within the ambit of its power (*R.* v. *Halliday*; *Ex parte Zadig* (6)). There is no doubt, I take it, that the Parliament might prohibit acts interfering with trade and commerce with foreign countries and among the States and punish those acts by fine and imprisonment, and even by internment or expulsion, if it thought fit so to do. Such legislation as that, however, would admittedly involve the use of the judicial power of the Commonwealth. But the Parliament may also use preventive or protective measures for the peace, order and good government of the Commonwealth within the ambit of its powers (cf. *R.* v. *Halliday*). And for that purpose it may use both the executive and the judicial power of the Commonwealth. A Court might be authorized to restrain, e.g., the commission of acts likely to impede or obstruct trade and commerce with foreign countries or among the States. And so too, in my opinion, the Parliament has ample legislative power to authorize the Executive to exclude persons and to suppress and prevent acts detrimental to the Commonwealth, in respect of subjects over which it has power. Thus it would be a valid law, in my opinion, if the Parliament

(1) (1914) A.C., at p. 254; 17 C.L.R., at p. 653.
(2) (1914) A.C., at p. 255; 17 C.L.R., at p. 654.
(3) (1891) A.C. 272.
(4) (1892) A.C. 491.
(5) (1921) 2 A.C. 262.
(6) (1917) A.C. 260.

provided that any alien who in the opinion of the Minister was an undesirable resident of Australia might be deported: it would be valid because the Parliament has full power over the subject of aliens. So too, in my opinion, it would be a valid law if some controlling rule was prescribed by Parliament as to trade and commerce and a Minister was empowered to enforce it (cf. *Prentice and Egan's Commerce Clause in Federal Constitution* (1898), p. 311). And this, again, because Parliament has full power over the subject. Legislation on somewhat similar lines is dealt with in many cases —in England in *R.* v. *Halliday* (1); in Australia in *Farey* v. *Burvett* (2), *Ferrando* v. *Pearce* (3), *O'Flanagan's Case* (4), *Meyer* v. *Poynton* (5), *Jerger* v. *Pearce* (6); and in America in *Fong Yue Ting* v. *United States* (7), *Low Wah Suey* v. *Backus* (8), *Ng Fung Ho* v. *White* (9), *Japanese Immigrant Case* (10), *United States* v. *Ju Toy* (11), *Mahler* v. *Eby* (12). Some regard this class of legislation as obnoxious to the principles of British liberty, but the Court can pass no opinion upon that aspect of the case. The chance of "abuse," however, is, as Lord *Dunedin* said in *R.* v. *Halliday* (13), always "theoretically present" when absolute powers in general terms are delegated to an executive body, but "practically, as things exist," he adds, the danger of abuse "is absent."

The critical question remains for consideration whether the *Immigration Act*, sec. 8AA, *as framed* is within the powers of Parliament. The question is not what Parliament could enact but what it has enacted. The Solicitor-General sought to justify the enactment under various legislative powers: (1) trade and commerce with other countries and among the States (The Constitution, sec. 51 (I.)); (2) immigration and emigration (The Constitution, sec. 51 (XXVII.); (3) matters relating to any department of the public service, the control of which is by this Constitution transferred to the executive Government of the Commonwealth (The Constitution, sec. 52);

(1) (1917) A.C. 260.
(2) (1916) 21 C.L.R. 433.
(3) (1918) 25 C.L.R. 241.
(4) (1923) 32 C.L.R. 518.
(5) (1920) 27 C.L.R. 436.
(6) (1920) 28 C.L.R. 588.
(7) (1893) 149 U.S. 698.
(8) (1912) 225 U.S. 460.
(9) (1922) 259 U.S. 276.
(10) (1903) 189 U.S. 86.
(11) (1905) 198 U.S. 253.
(12) (1924) 264 U.S. 32.
(13) (1917) A.C., at p. 271.

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(4) the executive power of the Commonwealth, which extends to the execution and maintenance of the Constitution and the laws of the Commonwealth (The Constitution, sec. 61); (5) matters incidental to the execution of any power vested by the Constitution in the Parliament or in either House thereof or in the Government of the Commonwealth; (6) any other power enabling the Parliament in that behalf. But before examining these powers in detail it will be convenient to dispose of some outlying arguments addressed to the Court.

One, on behalf of the applicants, that sec. 8AA conferred judicial power upon the Minister and the Board in violation of the provisions of the Constitution, and was therefore beyond the power of Parliament (see The Constitution, secs. 71 and 72). The answer is that no judicial power has been conferred on the Minister or the Board, and for reasons which have been set forth at large in *O'Flanagan's Case* (1). Another, on the part of the Solicitor-General, to the effect that a great emergency had arisen, putting the national life of Australia in peril, and justifying the section as a law enacted to preserve the peace, order and good government of the Commonwealth. The argument was adopted, I think, from certain observations by the Judicial Committee in *In re Board of Commerce Act* 1919 (2) and *Toronto Electric Commissioners* v. *Snider* (3). But the Judicial Committee in those cases was referring to the exercise of what is often called the residuary power of the Dominion Parliament, vested in it pursuant to sec. 91 of the Canadian Constitution (*British North America Act* 1867 (30 & 31 Vict. c. 3)). That provision has no parallel in the Australian Constitution. In Australia, as in Canada, the authority of the Parliament of the Commonwealth to make laws depends wholly upon the provisions of the Constitution, and the argument of the Solicitor-General has no validity unless founded upon some provision expressed or implied in the Constitution. Lastly, one suggested, I think by my brother *Higgins*, that the doctrines relating to the exercise of powers by private persons applied to the exercise by Parliament of its legislative powers. Such a doctrine is, in my opinion, both dangerous and unsound.

(1) (1923) 32 C.L.R. 518. (2) (1922) 1 A.C. 191.
(3) (1925) A.C., at p. 414.

No legislation would be safe if so strange a principle were established. As the Solicitor-General observed, the contents of Acts of Parliament are not classified according to legislative powers, but are often arranged in order to keep allied subjects together or for the convenience of administration. A law enacted by a Parliament with power to enact it, cannot be unlawful. The question is not one of intention but of power, from whatever source derived. No doubt Parliament might explicitly limit a law to the power conferred by a given placitum, and the law would be construed accordingly. But in the absence of some explicit provision, sec. 8AA can be justified, in my opinion, if it is competent under any of the powers vested in Parliament, whatever the title of the Act, and whatever indications there are in the Act as to the precise power under which it may be suggested that Parliament purported to act. Turning now to the various sources of power under which the Solicitor-General sought to justify the provisions of sec. 8AA, I take first the argument that is based upon the whole legislative power of Parliament. The provisions of sub-sec. 1 of sec. 8AA may be discarded from consideration, for they simply provide for the circumstances or conditions in which the section comes into operation. The argument is founded upon the words in sub-sec. 2 "that the presence of that person in Australia will be injurious to the peace, order or good government of the Commonwealth in relation to matters with respect to which the Parliament has power to make laws." Thus if the presence of the person be injurious to the peace of the Commonwealth in relation to a matter in respect of which no law has been made, he may, in certain circumstances, be deported. The Judicial Committee has, in my opinion, expressed the view that such legislation as this, unconnected with the exercise of any specific legislative power, is *ultra vires* and beyond the power of the Commonwealth Parliament (*Sugar Co.'s Case* (1)). But apart altogether from that case, it is, in my opinion, invalid because Parliament has prescribed no controlling rule as to any of the subjects of legislation within its power.

It was then suggested that if the provision could not be supported in its present form as an independent exercise of all the powers in

(1) (1914) A.C. 237; 17 C.L.R. 644.

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the Constitution, still it was legitimate in relation to the exercise of the trade and commerce, the department of public service, and the immigration powers, which, it was claimed, had been lawfully exercised in earlier parts of the section. Thus it was said that a law to the effect that any alien should be deported who, in the opinion of the Minister, is injurious to the peace, order and good government of the Commonwealth in relation to matters with respect to which the Parliament has power to make laws, would be a valid exercise of power. Perhaps so, because Parliament has full power over the subject of aliens; but it will be time enough to consider that case when it arises. The suggestion is ingenious and amounts to this: that the Parliament has in substance enacted that any person hindering or obstructing foreign trade, &c., or public service, &c., may, if the Minister be satisfied that he is injurious to the peace, order and good government of the Commonwealth in relation to matters in respect of which it has power to make but has made no laws, be deported. But, unfortunately for the argument, Parliament has not made such a law. It has not in sec. 8AA, upon its proper construction, prescribed any controlling rule in relation to the subjects of trade and commerce or the public services necessary to support a law under either power. It is the rule of the Minister and not the rule of the Constitution or of the Parliament that controls the so-called law in relation to the subject of trade and commerce and the public services. Such a provision cannot, in my opinion, be supported under the trade and commerce power or the power to make laws with respect to any department of the public service or public authority of the Commonwealth.

Next must be considered the power to make laws with respect to immigration and emigration. Expulsion and banishment of people from a country is not emigration in the ordinary and usual signification of the word. The emigration power will not support sec. 8AA. Nor is the expulsion of citizens or members of the community from a country ordinarily called immigration. But the immigration power has been considered in this Court on several occasions, and the Solicitor-General has presented some new aspects. According to his contention, the power does not extend to citizens of the Commonwealth who arrived in Australia before its establishment,

but, on the other hand, does extend to all persons who came into the Commonwealth after that date. "Once an immigrant always an immigrant" after that date, according to the aphorism of my brother *Isaacs* in *O'Flanagan's Case* (1). If the contention be sound, the reasoning of this Court in *Potter* v. *Minahan* (2) was singularly inapt. Minahan entered Australia after the establishment of the Commonwealth, and was prima facie an immigrant. But it was contended that he was really a "constituent part of the community known as the Australian people." At what point of time? The opinion of my brother *Isaacs* supplies the answer: "Immigration connotes two facts; the first, that there is an entry into the Commonwealth territory, and the second, that the person entering is not in fact *at the moment he enters* one of the people of the Commonwealth. The ultimate fact to be reached as a test whether a given person is an immigrant or not is whether he is or is not *at that time* a constituent part of the community known as the Australian people" (3). Now here, I think, is foreshadowed a clear principle, namely, that those who "originally associated themselves together to form" the Commonwealth and those who are "afterwards admitted to membership" cannot thereafter, upon entering, or crossing the boundary of, Australia, from abroad, be regarded as immigrating into it unless in the meantime they have in fact abandoned their membership. They have never been within, or else have passed beyond, the range of the power: it has never operated, or else has become exhausted. Of course, conditions may be attached to persons immigrating into Australia, upon entry, and so long as they remain within the range of the power. But the undoubted power of Parliament to pass retroactive laws was pressed upon us. It may, no doubt, provide that immigration laws shall operate from a time past, but how can it make them operate over persons who are beyond the range of the power before the retroactive law is made? The law is not then, in my opinion, a law with respect to immigration, but a law for bringing again within the field of immigration persons who have passed, and were allowed by law to pass, beyond its borders.

(1) (1923) 32 C.L.R. 518. (2) (1908) 7 C.L.R. 277.
(3) (1908) 7 C.L.R., at p. 308.

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The matter may perhaps be illustrated by reference to the trade and commerce power. At some time goods the subject of foreign or inter-State trade or commerce may pass beyond the range of the power relating thereto, and become engaged in the general mass of property the subject of domestic trade. May Parliament, nevertheless, pass a retroactive law prohibiting, for instance, the import of such goods into the Commonwealth and attaching as a sanction to the law the forfeiture of the goods? In my opinion, it may not, because that would be a law not in respect of trade and commerce, but in respect of the forfeiture of the goods wholly unconnected with any transaction in trade and commerce among foreign countries, &c., and, *ex hypothesi*, impinging upon the power of the States to regulate and control domestic trade and goods engaged therein. This illustration may not advance the case, but it applies in a concrete form the argument with respect to immigration to another power.

Consequently, sec. 8AA cannot be supported if upon its true construction it extends to those whom I may call citizens of the Commonwealth or part of the community known as the Australian people. But prima facie a law based upon power to deal with the subject of immigration has not in contemplation the citizens of Australia but rather those who are not citizens. It is a permissible construction, I think, in order to preserve the section, to say that it does not extend to persons whose "permanent home is in Australia" and who therefore are "members of the Australian community" (*Potter* v. *Minahan* (1); *O'Flanagan's Case* (2)). The question then becomes one of fact (*Potter* v. *Minahan*). And it is clear on the evidence that both applicants have their permanent home in Australia, and fall within the category of members of the Australian community. Walsh was born in Ireland, arrived in Australia in 1893, and has made his home here. Johnson was born in Holland, and is an alien by birth. He arrived in Australia about the year 1910, was naturalized in 1913, and has made his home here.

Lastly the incidental power must be considered. The Judicial Committee considered this power in the *Sugar Co.'s Case* (3).

(1) (1908) 7 C.L.R. 277. (2) (1923) 32 C.L.R. 518.
(3) (1914) A.C., at p. 256; 17 C.L.R., at p. 655.

"These words do not seem to them"—the Judicial Committee—"to do more than cover matters which are incidents in the exercise of some actually existing power, conferred by statute or by the common law." Common law or executive power to expel subjects from Australia without legislative authority has been negatived: legislative authority to warrant the expulsion of the applicants has been negatived. Nothing is left upon which to found the exercise of the incidental power unless it be the provision that the executive power of the Commonwealth vested in His Majesty under sec. 61 of the Constitution extends to the execution and maintenance of the Constitution. But if the power of deportation is not something "characteristically and naturally" depending upon the executive power of the Commonwealth, then it cannot, in my opinion, be dependent upon and included within the legislative power to make laws incidental to the power vested in the executive Government to execute and maintain the Constitution.

Two minor points remain for consideration:—One, pointed out by my brother *Isaacs*, that in the summonses issued to the applicants the Minister recites that he is satisfied that each applicant was concerned in Australia in acts directed towards hindering trade, &c., *or* the provision of services by any department, &c., and that his presence in Australia would be injurious to the peace, order and good government of the Commonwealth. Consequently, it is said that the Minister did not find any condition upon which his power to issue a summons to the applicants depended, and that therefore the whole proceedings were rendered unlawful. It is unfortunate that the summonses were issued in this form, but the substitution of the word "and" for "or" would not have given the applicants any greater opportunity of showing cause, though such a summons would have been clearly good. Again, if the Minister had found both conditions, but the summons had disconnected them, the proceedings would have been regular under the Act, though objectionable if found in that form in an indictment or information. To the lawyer, accustomed to the precise allegations of pleadings and indictments, such an objection seems formidable, though to the layman the point may appear somewhat pedantic. This Court surmounted a similar difficulty in *Welsbach Light Co. of Australasia*

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v. *Commonwealth* (1), and I think—though I hold the view with some hesitation when I remember that the case is one affecting the liberty of the subject—that it may do so here. "If," as *Griffith* C.J. said in the case cited (2), "it were provided by law that a person certified by a medical officer to be in his opinion suffering from any one of four specified kinds of fever which may easily be mistaken for one another might be removed to a hospital, I do not think that it would be necessary for him to specify the particular fever from which the person suffered." So here, the issue of the summons ensues, as a matter of discretion, whichever opinion the Minister forms. You "come to this conclusion," as the learned Chief Justice said," by applying the rule that the intention of a legislative authority is to be ascertained, not by any technical rules applicable to proceedings in criminal cases, but by having regard to the subject matter, the evil to be remedied, and the nature of the remedy." The other objection was raised by the applicants, and was directed against the Board and its proceedings. It was said that the Board was corrupt or might reasonably be suspected of bias, and gave the applicants no fair opportunity of showing cause against their deportation. As the argument proceeded, it became quite evident that these contentions were hopeless, both in fact and in law, and the leading counsel for the applicant Walsh withdrew them, in a somewhat ungracious manner, namely, "in deference to the opinion expressed by the majority of the Court." The difficulties before the Board did not arise from any corruption or bias or want of fairness on the part of its members, but from the dilatory, obstructive and offensive conduct of those who appeared for Walsh.

The rules must, in my opinion, be made absolute, and the applicants released.

Rules nisi absolute with costs. Order that applicants be immediately discharged from custody without the issue of a writ of habeas corpus.

Solicitors for the applicants, *R. D. Meagher & Co.*

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

B. L.

(1) (1916) 22 C.L.R. 268.

(2) (1916) 22 C.L.R., at p. 276.