[HIGH COURT OF AUSTRALIA.]

WILLIAMSON . . . . . APPELLANT;
COMPLAINANT,

AND

AH ON . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM A COURT OF PETTY SESSIONS OF WESTERN AUSTRALIA.

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MELBOURNE, *Oct.* 25, 26.

SYDNEY, *Nov.* 22.

Knox C.J., Isaacs, Higgins, Gavan Duffy, Powers, Rich and Starke JJ.

Immigration—Powers of Commonwealth Parliament—Incidental power—Prohibited immigrant—Prosecution—Evidence—Burden of proof—Averment in information Jurisdictional fact—Retrospective legislation—Res judicata—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 51 (XXVII.), (XXXIX.)—*Immigration Act* 1901-1925 (*No.* 17 *of* 1901—*No.* 7 *of* 1925), *secs.* 3, 5, 7, 18.

Held, by *Isaacs*, *Powers*, *Rich* and *Starke* JJ. (*Knox* C.J. and *Gavan Duffy* J. dissenting), that the Parliament of the Commonwealth has power under sec. 51 (XXVII.) and (XXXIX.) of the Constitution to cast upon a person prosecuted upon a charge of being a prohibited immigrant found within the Commonwealth the burden of proving that he is not an immigrant, as well as that he has not evaded an officer of Customs; and, therefore, that sub-secs. 3, 3A and 3B of sec. 5 of the *Immigration Act* 1901-1925 are valid.

Per Higgins J. :—Sec. 5 (3) and (3A) is valid so far as regards the averment that the defendant "evaded an officer." Parliament has full power under sec. 51 (XXXIX.) of the Constitution to prescribe on whom the burden of proof lies as to a necessary fact, when an offence is alleged against its valid Act; but, *quœre*, has it power to prescribe as to the burden of proof of the fact (immigration) which alone gives it power to make the law? In this case, the evidence of immigration, in 1911, is sufficient without the aid of the section.

Held, also, by *Isaacs*, *Higgins*, *Powers*, *Rich* and *Starke* JJ., that those sub-sections apply on a prosecution instituted after the passing of the *Immigration Act* 1925 in respect of an act of immigration which is alleged to have taken place after the passing of the *Immigration Restriction Act* 1901 and before the passing of the *Immigration Act* 1925.

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APPEAL from a Court of Petty Sessions of Western Australia.

In the Court of Petty Sessions at Perth on 10th July 1926 a complaint, dated 15th May 1926, was heard whereby Clifford Williamson, an officer of Customs said that "(1) Ah On is an immigrant; (2) the said Ah On evaded an officer; (3) the said Ah On was found within the Commonwealth, namely, at Perth, on 14th May 1926; (4) on 14th May 1926 at Perth the said Ah On was required to pass the dictation test prescribed by the *Immigration Act* 1901-1925 of the Commonwealth of Australia and failed to do so; (5) the said Ah On is a prohibited immigrant found in the Commonwealth in contravention of the said Act."

For the defence the decision of the Full Court of the Supreme Court of Western Australia of 22nd December 1925 quashing a conviction of Ah On on the complaint of Clifford Williamson was relied upon as an estoppel. The charge in that case was that Ah On was an immigrant, that he was found in the Commonwealth on 15th October 1925, that on 15th October 1925 he was required to pass the dictation test and failed to do so, that within three years before such failure he had entered the Commonwealth and that he was a prohibited immigrant found within the Commonwealth in contravention of the *Immigration Act* 1901-1925 (*Ah On* v. *Williamson* (1)). Another matter of defence relied on was that the Full Court of the Supreme Court, on 18th May 1926, had held in *Ah Hing* v. *Hough* (2) that the Immigration Acts were not retrospective, and therefore that none of the provisions of the Acts of 1924 and 1925 applied to the prosecution. Evidence was given for the prosecution and for the defence. The defendant and another witness gave evidence that the defendant arrived at Fremantle by the steamship *Sultan* in November or December 1897, and no direct evidence was given contradicting that statement.

The Magistrate, acting on the decision of the Full Court in *Ah Hing* v. *Hough* (2) that the Immigration Acts were not retrospective, dismissed the complaint. In giving his reasons the Magistrate said:—"I find as a fact that the defendant did not arrive in Australia in 1897, nor until many years after. I find that the evidence is insufficient to enable me to decide definitely

(1) (1925) 28 W.A.L.R. 74. (2) (1926) 28 W.A.L.R. 95.

when the defendant did so arrive. In view of the Full Court decision in *Ah Hing* v. *Hough* (1) I have felt a small doubt as to whether I am right in doing so, but I find as a fact that the defendant has not proved that he did not evade an officer, and I do so because I am convinced of the fact. On the other hand, I find that the defendant's evidence is insufficient to enable me to find definitely that he did evade an officer. I find as a fact that the defendant has not truly stated in his personal evidence the name of the vessel by which he travelled to, nor the date and place of his arrival in, the Commonwealth. I am satisfied in a general way that the defendant was an immigrant found within the Commonwealth; also that he was required to pass a dictation test and that he failed to do so."

From the decision of the Police Magistrate the complainant now, by special leave, appealed to the High Court.

Other material facts are stated in the judgments hereunder.

Sir Edward Mitchell K.C. (with him *Dixon Hearder*), for the appellant. The offence with which the respondent was charged is created by sec. 5 (1) of the *Immigration Act* 1901-1925. The Magistrate found that the respondent was an immigrant who had been found in the Commonwealth and that he had failed to pass the dictation test. That being so, the other element of the offence, namely, that he had evaded an officer of Customs is, by reason of the respondent having failed to prove by his personal evidence that he did not evade an officer of Customs, to be deemed to have been proved, and the respondent is to be deemed to be a prohibited immigrant (see *Li Wan Quai* v. *Christie* (2)). The provisions of sub-secs. 3 and 3A of sec. 5 are evidentiary, and merely relate to the burden of proof. Sec. 5 does not purport to give the Court jurisdiction over all persons, but only over immigrants who fail to fulfil certain requirements; and the Parliament of the Commonwealth has power under sec. 51 (XXVII.) and (XXXIX.) to prescribe what evidence shall be received and upon which party the burden of proof shall lie (*Fong Yue Ting* v. *United States* (3)). If a person is unable

(1) (1926) 28 W.A.L.R. 95.
(2) (1906) 3 C.L.R. 1125.
(3) (1893) 149 U.S. 698.

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to rebut the averments in the information, one of which is that he is an immigrant, he is deemed to be a prohibited immigrant, not because the Act deems him to be one, but because being properly before the Court he has not discharged the burden of proof cast upon him. A person can enter the Commonwealth only on condition that he passes a dictation test. If he does not pass it, he does not cease to be an immigrant merely because he remains in the Commonwealth for some time, but he continues to be subject to the condition and if he afterwards fails to pass the dictation test he is a prohibited immigrant. [Counsel referred to *Gabriel* v. *Ah Mook* (1); *Inter-State Commerce Commission* v. *Brimson* (2).] The question of the Act being retrospective does not arise. Sec. 5 (3) deals merely with the mode of proof of certain facts: it is procedural only and does not deal with substantive rights. As to the question of *res judicata*, the charge and the facts in the previous proceedings against the respondent are different from those in the present case (*Chia Gee* v. *Martin* (3)).

Ham, for the respondent. Secs. 5 (3) (*a*) and 5 (3A) are *ultra vires* the Commonwealth Parliament, for they are not incidental to the immigration power. The question whether a person falls within the scope of the *Immigration Act* must be determined on actual facts. The provisions of sub-secs. 3 and 3A of sec. 5 are a usurpation of the judicial power of the Commonwealth. They do not relate to immigration or immigrants, but are directed to relieving the prosecution from showing that the person accused is subject to the Act generally, and they are applicable to any Australian-born citizen. Any person has a right to have the question whether he falls within the provisions of the Act determined in judicial manner. If sub-secs. 3 and 3A are valid, the Parliament might equally have provided that the averments in the information should be conclusive proof of the particular matters. The effect of the sub-sections is to deprive the Judiciary of the right to determine whether a person falls within the immigration power, and the sub-sections are therefore an infringement of the judicial power of the Commonwealth. The judicial power ends when Parliament attempts to

(1) (1924) 34 C.L.R. 591.
(2) (1894) 154 U.S. 447, at p. 448.
(3) (1905) 3 C.L.R. 649.

extend the ambit of the immigration power to persons who are not immigrants. The charge against the respondent is under sec. 7 of the *Immigration Act*, and the notice of appeal so treats it. Unless the offence is created by sec. 5 the provisions of sub-secs. 3 and 3A do not apply. [Counsel referred to *Adelaide Steamship Co.* v. *The King* (1); *Schiffmann* v. *Whitton* (2); *Symons* v. *Schiffmann* (3).] Having once been tried and acquitted on a charge under sec. 7 of being a prohibited immigrant found within the Commonwealth, the respondent cannot again be tried on the same charge. *Chia Gee* v. *Martin* (4) is distinguishable or was wrongly decided. [Counsel referred to *R.* v. *Tonks* (5); *R.* v. *Barron* (6); *Ex parte Spencer* (7).] The charges in each case are substantially identical, namely, that the respondent was a prohibited immigrant found within the Commonwealth. It is not sec. 5 which creates the offence, but sec. 7. Sec. 5 merely extends the time for putting the dictation test. If sec. 5 creates separate offences the provisions of sub-secs. 3 and 3A can only be used on a charge for one of those offences for which the penalty is provided by sec. 18. The provisions of sub-secs. 3 and 3A cannot be given a retrospective effect. The respondent must be taken to have arrived in the Commonwealth not later than 1911. No further obligations can be imposed upon him than were in existence at that time. The immigration power does not enable the Commonwealth Parliament to pass an Act imposing upon a person who has already entered the Commonwealth a criminal liability in respect of his entry. Sub-secs. 3 and 3A are not procedural provisions, or are not within the class of provisions which are retrospective, for they change the methods of proof for the purposes of conviction (*Phillips* v. *Eyre* (8)). On their proper interpretation sub-secs. 3 and 3A only apply to persons who come into the Commonwealth after they were enacted (*Colonial Sugar Refining Co.* v. *Irving* (9); *In re Pulborough School Board*; *Bourke* v. *Nutt* (10); *R.* v. *Griffiths* (11)). Before the dictation test was applied the respondent had become a member of the Australian

(1) (1912) 15 C.L.R. 65.
(2) (1916) 22 C.L.R. 142.
(3) (1915) 20 C.L.R. 277, at p. 281.
(4) (1905) 3 C.L.R. 649.
(5) (1916) 1 K.B. 443, at p. 450.
(6) (1914) 2 K.B. 570.
(7) (1905) 2 C.L.R. 250, at p. 251.
(8) (1870) L.R. 6 Q.B. 1.
(9) (1905) A.C. 369.
(10) (1894) 1 Q.B. 725, at p. 737.
(11) (1891) 2 Q.B. 145.

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community (*Ex parte Walsh and Johnson*; *In re Yates* (1)), and was outside the immigration power of the Commonwealth Parliament. [Counsel also referred to *Potter* v. *Minahan* (2); *Chia Gee* v. *Martin* (3); *Brown* v. *New Jersey* (4).]

Sir Edward Mitchell K.C., in reply. A person who has entered the Commonwealth without complying with the conditions laid down by Parliament cannot become a member of the Australian community. Sec. 5 applies to all persons who have entered the Commonwealth since the establishment of the Commonwealth. Secs. 5 and 7 should be read together. Sec. 3 having enumerated certain persons who are prohibited immigrants, sec. 5 enumerates other persons who are to be deemed to be prohibited immigrants and sec. 7 imposes a penalty upon any one of those prohibited immigrants who enters or is found within the Commonwealth. Where the substantial matter dealt with—which in this case is immigration—is within the powers of the Parliament, it is competent for the Parliament to enact that certain facts which are peculiarly within the knowledge of one party shall be proved by that party. [Counsel also referred to *Li Sing* v. *United States* (5); *Fong Yue Ting* v. *United States* (6); *R.* v. *Associated Northern Collieries* (*The Vend Case*) (7); *Gardner* v. *Lucas* (8).]

Cur. adv. vult.

NOV. 22. The following written judgments were delivered :—

KNOX C.J. AND GAVAN DUFFY J. This is an appeal from the decision of a Police Magistrate sitting in a Court of Petty Sessions at Perth, Western Australia. The complaint alleged that the defendant (respondent) (1) was an immigrant, (2) had evaded an officer, (3) was found within the Commonwealth, namely, at Perth, on 14th May 1926, (4) was on 14th May 1926 at Perth required to pass the dictation test prescribed by the *Immigration Act* 1901-1925

(1) (1925) 37 C.L.R. 36.
(2) (1908) 7 C.L.R. 277, at p. 282.
(3) (1905) 3 C.L.R., at p. 655.
(4) (1899) 175 U.S. 172, at p. 175.
(5) (1901) 180 U.S. 486.
(6) (1893) 149 U.S., at pp. 699, 700.
(7) (1911) 14 C.L.R. 387, at pp. 402-404.
(8) (1878) 3 App. Cas. 582, at p. 603.

of the Commonwealth of Australia and failed to do so, (5) was a prohibited immigrant found within the Commonwealth in contravention of the said Act.

The Magistrate heard evidence both for the prosecution and for the defence and came to the conclusion that allegations Nos. 1, 3 and 4 were proved. He found himself unable to say whether the defendant had or had not evaded an officer, and he was therefore unable to find that allegations Nos. 2 and 5 were proved, unless he had recourse to the provisions with respect to the onus of proof contained in sec. 5 (3), (3A), (3B) of the *Immigration Act* 1901-1925, the relevant portions of which are as follow :—" (3) In any prosecution under either of the last two preceding sub-sections, the averment of the prosecutor, contained in the information, that the defendant is an immigrant who (*a*) has evaded an officer . . . shall be deemed to be proved in the absence of proof to the contrary by the personal evidence of the defendant either with or without other evidence. (3A) Proof to the contrary by the personal evidence of the defendant, within the meaning of the last preceding sub-section, shall not (unless it is proved that the defendant was born in Australia) be deemed to have been given unless the defendant in his personal evidence states truly the name of the vessel by which he travelled to Australia and the date and place of his arrival in the Commonwealth. (3B) Where the prosecutor applies to the Court for an adjournment of the proceedings to obtain evidence in rebuttal of any evidence tendered by the defendant, the Court shall grant an adjournment for such time as is necessary for that purpose."

The Magistrate was of opinion that the judgment of the Supreme Court in *Ah Hing* v. *Hough* (1) prevented him from having recourse to those provisions in the case before him, and he therefore dismissed the charge.

The principal question argued before us was the validity of those provisions, and we have come to the conclusion that they are invalid because they are not within the competence of the Commonwealth Parliament to enact. The legislative power contained in sec. 51 (XXVII.) of the Constitution enables Parliament to make laws for the peace, order and good government of the Commonwealth with

(1) (1926) 28 W.A.L.R. 95.

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respect to immigration and emigration. Within the scope of that power Parliament is omnipotent; and, had it directed that the onus of proving that he had not been guilty of an offence lay on any defendant who was within the limits of that power, no objection could have been taken to the validity of the enactment. But here Parliament has not confined itself to saying that an immigrant who is charged with evading an officer must prove that he has not done so, but has enacted that any person whatever who is charged with the offence must show in the way directed both that he is not an immigrant and that he did not evade an officer. The Constitution by sec. 51 (XXVII.) authorized Parliament to deal with immigrants, but Parliament has attempted to bring within its net all those who do not prove in the prescribed way that they are not immigrants. This is a demarcation of power beyond that allotted by the Constitution. It is said that Parliament has done no more than prescribe the procedure to be adopted by its Courts, and that such a power must be inherent in the Legislature. It is true that Parliament has power to prescribe the procedure of its Courts, but it cannot, under pretence of prescribing their procedure, give power to those Courts to deal with the subject matter which it has no authority to relegate to them. During the argument we were pressed with the contention that the enactment must be valid because similar enactments were common in Great Britain, in Australian States and elsewhere. The British Parliament is at liberty to make any enactment it chooses and its Courts must recognize and obey that enactment without question. The case of the Australian States is somewhat different. It is said that they have no authority to punish a crime committed outside their territorial limits, but, if they have no authority to punish such a crime, they may legislate in any manner they choose with respect to crimes committed within such limits, and may determine what shall be the constituent factors, and what the method of proof of such crimes. Before the foundation of the Commonwealth, the Legislature of Western Australia might have enacted provisions exactly similar to those which are now impugned because its power was not limited to laws with respect to immigrants, but extended to the regulation of the whole conduct

of persons within the State, and to the proof and punishment of the dereliction of any duty it thought fit to impose on them.

In our opinion the appeal should be dismissed.

ISAACS J. The importance of this case is not easily measurable, and the issues need to be plainly stated. On its decision, as the position presents itself to me, depends the power of the National Parliament to give any effective force to what is known as the White Australia policy, or to any policy of controlling undesirable immigration. Indeed, the main principle contended for as the reason for annulling the relevant legislation would equally apply to seriously weaken other legislative powers, as, for instance, the customs, commerce and aliens. As to immigration, experience and well-known circumstances have compelled, not only America, but also the self-governing communities of the Empire, as Canada, South Africa, New Zealand, as well as Australia, both before and since Federation, to enact stringent substantive laws in order to safeguard the ethnic, social and industrial conditions of the people of the land and maintain their standards of living. In most cases, and in late years invariably, special evidentiary provisions have been included without which the main substantive provisions would be of little use. These evidentiary provisions have been found necessary to prevent or counteract the surreptitious or fraudulent evasion of the actual immigration laws by persons who in truth are smuggled into the country and are only discovered, if ever, with difficulty. This is the class of persons with which this case is concerned, and, broadly speaking, the only class of persons intended to be reached by the legislation impeached by the respondent. Responsible Government is the constitutional check on arbitrary administration. In my opinion, no mere length of time and no apparent assimilation with the general population, if secured by successful evasion of law, can confer on the offender any moral or legal right to claim this country as his *patria*. An intruder he was from the first, and an intruder he remains. There may, in the *Walsh and Johnson Case* (1), be found some expressions to the contrary, but they are not the opinions of a majority of the Court. That case decides nothing which would

(1) (1925) 37 C.L.R. 36.

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help such an offender. He would come in as a political stowaway, and a stowaway does not become a recognized passenger simply because he is not discovered until he has travelled some distance.

How, then, can this nefarious and dangerous practice be nullified where it escapes detection at the time of entry? The only method so far found effective in which a legislature can provide for such a case and secure obedience to its enactments on immigration is *to throw the burden of proof as to membership of the community on the suspected person.* A nation has the strongest right to trust its executive officers who are administering the law to be both vigilant and careful to form, wherever necessary, a fair and honest prima facie opinion as to the citizenship of any person within the territory, and to accuse no one of intrusion except upon strong moral grounds for believing the fact. If such an opinion, however, exists, the public have a right where the nature of the case requires it, to call on the suspected person by such procedure as the legislature makes lawful to satisfy a judicial tribunal as to the actual fact. That seems to me only elementary self-protection and to be inseparable from any self-governing constitution. I must confess to some surprise that it is necessary to justify it. For, otherwise, persons who are criminals, anarchists, public enemies, or loathsome hotbeds of disease, may, by secret or fraudulent entry into the country and being sheltered for a time by their associates, defy and injure the entire people of a continent. There is nothing in the Constitution, and nothing in natural justice, which requires this Court to sanction such an absurd and almost fatal situation. The Constitution was not made for a static Commonwealth. It was made—as I have repeatedly said before, sometimes with more and sometimes with less effect—as a practical working instrument for a growing nation, and there may be stability of legal principles and fidelity to the words of the Constitution quite consistently with adaptation of those principles and words to the new circumstances of a progressive people. And certainly the fullest protection to the constitutional rights of the individual is not inconsistent with his public obligation in case of doubt to prove his right to share the privileges of the Australian community.

In this case the great responsibility rests on the Court—for the facts as they stand do not permit of escape from that responsibility—to say whether, among all the English-speaking countries of the world possessing autonomy, the Commonwealth of Australia alone lacks the means of effective self-protection. And it may be added that if this capacity be denied to the Commonwealth Parliament it now exists nowhere in Australia, because, in face of the Commonwealth legislation on the subject, the States are powerless to interfere.

1. *The Facts.*—The facts of this case deserve stating with some approach to precision, because they present the question very sharply. If the respondent could succeed in being declared an Australian, it would be hard to imagine a more striking instance of national helplessness before a proved Chinese immigrant, who in all moral probability—he alone being able to confirm or dispel it—surreptitiously foisted himself on this community, successfully eluded observation for some years, and eventually has unquestionably perjured himself wholesale in the witness-box to escape the consequences. Much of his fraud has been detected, but, if the sections now attacked had not been in existence, he probably would never have offered himself as a witness and so would never have been exposed at all. As it is, a material link in the legal chain is missing, despite moral certainty, without the challenged statutory provisions, and so, without them, the respondent must succeed. The material facts are these :—Ah On, in May 1926, was found in Australia by the appellant Williamson, a Customs House officer, who administered a dictation test. Naturally the respondent failed to answer the test. A complaint was laid against him at Perth as being a prohibited immigrant, found within the Commonwealth, in contravention of the *Immigration Act* 1901-1925. The complaint contained the following averments : (1) Ah On is an immigrant, (2) he evaded an officer, (3) he was found within the Commonwealth on 14th May 1926, (4) he failed to pass the dictation test. If those averments were proved according to law, there in no doubt Ah On was a prohibited immigrant and had contravened sub-sec. 1 of sec. 5 of the Act. Now, it is material to observe that, quite apart from any statutory rule as to evidence and basing his conclusions in the ordinary course on evidence actually given, as, in my opinion,

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he must do, as to certain of the averments, the Police Magistrate found certain important facts. He found: (1) that Ah On immigrated to Australia about 1911 and not in 1897, as Ah On swore; (2) that his age is from twenty-five to twenty-seven at most, and not forty-two or forty-three as the respondent's evidence would make it; (3) that the respondent's statement that he had been engaged in gardening in Australia for twenty-eight years was untrue, and that even now his hands—which he declined to submit to medical examination—present the appearance of little if any hard work; (4) that he untruly stated the name of the vessel by which he arrived and the date and place of his arrival in the Commonwealth; (5) that, although the Magistrate is "convinced of the fact" that Ah On evaded an officer on his arrival, the positive evidence was insufficient to enable the Magistrate to find the fact definitely—he, however, did not believe the respondent's story that he had not evaded an officer; (6) that Ah On was found within the Commonwealth and was required to pass and failed to pass a dictation test. These conclusions of fact have not been challenged, and, on recognized principles applicable to appeals, could not be successfully challenged. This Court is obviously altogether unable to supply by any finding of its own the missing link, namely, that the respondent on his arrival in 1911 evaded an officer. Of course, in the circumstances, which are notoriously typical, the Crown could never hope to give—for it is a moral impossibility that it should be in a position to give—positive evidence, either that the respondent arrived in 1911 or where he arrived, or what he did when he arrived. That is all within his knowledge exclusively so far as the Crown is concerned. Unless, therefore, the challenged statutory provisions of sub-secs. 3 and 3A are available the respondent must succeed and, in effect, go forth an Australian.

2. *Retrospectivity.*—Before the Police Magistrate the only objection taken to applying those sub-sections was that, having been passed since 1911, the date of Ah On's arrival in Australia, they did not operate in relation to him. This was on the ground of retrospectivity. The Magistrate very properly followed the decision on this point of the Supreme Court of Western Australia. The answer, however, as to retrospectivity is obvious. If, on the true construction, they

are merely evidentiary and operate only to regulate future curial procedure, they are not retrospective. If, on the other hand, they are not merely evidentiary, but—as argued—operate to create by judicial direction a status of immigrant outside the limits of parliamentary power, they are invalid. Consequently the only real question is as to their validity, because that also has been raised as an objection on this appeal.

3. *Statutory Averment Indivisible.*—It is true that, in the circumstances of this case as it stands, only par. (*a*) of sub-sec. 3 of sec. 5 is necessary to complete the chain of legal proof against the respondent and so entitle the appellant to succeed. But, in my opinion, it is not legally possible to detach that paragraph from the words that precede it. No doubt the separately lettered paragraphs are distinct from each other, and would in the event of the invalidity of any of them be as to themselves severable. But each of them is indissolubly linked with the words which precede them. We must, for the purpose of this case, read the sub-section as saying "the averment of the prosecutor, contained in the information, that the defendant is an immigrant who has evaded an officer shall be deemed to be proved in the absence of proof to the contrary" &c. What "averment" is to be so deemed to be proved? Not an averment that the accused "has evaded an officer," but that the accused is "an immigrant who has evaded an officer." You can no more take out "immigrant" and retain the evasion, than you can take out "officer" and retain the evasion. If sub-sec. 3 be used at all, it cannot be used without "immigrant," and to excise that word would be to cut out the heart of the sub-section. That to my mind is clear if we had no other guide than sub-sec. 3 itself. But when sub-sec. 3A is read, we have not only confirmation, but absolute demonstration, that Parliament in framing sub-sec. 3 regarded the "averment" there mentioned as always including "immigrant." Otherwise it would be sheer nonsense always requiring the defendant to state "truly the name of the vessel by which he travelled to Australia and the date and place of his arrival in the Commonwealth." The result is that we are driven to consider whether it is, as contended, beyond the legislative power of the Parliament to cast the burden

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of proof—so far as sec. 5, sub-sec. 1, is concerned—on the accused to show he is not an "immigrant."

4. *Invalidity.*—The contention for invalidity is rested on the principle that the Commonwealth Parliament cannot enlarge its powers by simply "deeming" anything to be within them. As applied to this case the argument is that it cannot lawfully "deem" a person an immigrant if that person in fact is for any reason not subject to the immigration power, and as such a case may be included the provision is illegal. To that principle, baldly stated, no one could for a moment refuse assent. The plain answer is: Parliament has not on any reasonable construction of the words done so or attempted to do so. It is one thing to say, for instance, in an Act of Parliament, that a man found in possession of stolen goods shall be conclusively deemed to have stolen them, and quite another to say that he shall be deemed to have stolen them unless he personally proves that he got them honestly. The first is a parliamentary arbitrary creation of a new offence of theft, leaving no room for judicial inquiry as to the ordinary offence; the second is only an evidentiary section, altering the burden of proof in the ordinary case of theft, and requiring certain pre-appointed evidence to fit the special circumstances in the interests of justice, because the accused best knows the facts, and leaving the Court with these provisions to examine the facts and determine the matter. But for the contrary opinion of those of my learned brethren who hold the opposite view, my answer to the contention of learned counsel in this case would be summary. I should have thought that sec. 51, by sub-sec. XXVII. ("immigration and emigration") and sub-sec. XXXIX. (incidental powers), read by the light of our constitutional and legal history, fully justifies without elaborate exposition every word of the challenged legislation. It seems to me very like burning daylight to substantiate the parliamentary power by reference to authority and practice. It is trite law, since *Hodge* v. *The Queen* (1), that within the prescribed limits of the Constitution the Parliament of a self-governing Dominion has "authority as plenary and as ample . . . as the Imperial Parliament in the plenitude of its power possessed and could bestow." In *Robtelmes* v. *Brenan* (2)

(1) (1883) 9 App. Cas. 117, at p. 132. (2) (1906) 4 C.L.R. 395, at p. 419.

O'Connor J. said: "It is beyond question that when a legislative power is once given to a self-governing community, that power, within its limits, exists to the amplest extent necessary for the purpose of making it effective." Now, as to the substantive portions of the *Immigration Act*, that is, those regulating immigration, it is already firmly decided in previous cases that the Act is valid and operative, and is, therefore, within the prescribed limits set by the Constitution. The only question remaining is whether the ancillary or incidental provisions enacted with reference to procedure in a Court of justice go outside the limits, or whether they, however drastic, are anything more than evidentiary sections—not in any way enlarging or attempting to enlarge the powers of the Parliament, but securing the effective enforcement of an otherwise admittedly lawful exercise of a power expressly granted. In my opinion, when we have regard both to principle and to precedent, it is clear the sections are within the competency of Parliament, and are nothing more than a necessarily strict requirement as to burden of proof to be satisfied by the best evidence. "English lawyers," say *Dicey and Keith* in the *Conflict of Laws*, 3rd ed., at p. 762, "give the widest possible extension to the meaning of the term 'procedure.' The expression, as interpreted by our Judges, includes all legal remedies, and everything connected with the enforcement of a right. It covers, therefore, the whole field of practice; it includes the whole law of evidence," &c. At p. 763 it is pointed out that a rule of law, so far as it affects, not the *enforcement* of a right, but the *nature* of the right itself, does not come under the head of procedure. That distinction is, I venture to think, the touchstone for determining this case. In which category do the assailed sub-sections fall? Little, if any, objection would, I apprehend, be taken to them if they were confined to the matters included in the subdivided paragraphs of sub-sec. 3. But, as already shown, those paragraphs are inseparably connected with the previous words of the sub-section. The crucial question resolves itself, then, into this: Is it within the competency of Parliament or not to cast the burden of proof as to whether a person is an "immigrant" on that person, or must that burden always, by the Constitution, rest on the Crown? It is not out of place to point out that this Court, as recently as 1924, constituted by three Justices (my brothers

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Gavan Duffy J. and *Starke* J. and myself), has already, in *Gabriel* v. *Ah Mook* (1), upheld the validity of this legislation. But, as this is a Full Bench, revision of that view is clearly proper if the view then taken be considered erroneous.

5. *Jurisdictional Fact.*—The novel ground on which it is endeavoured to maintain consistency between conceding legislative power to cast the burden of proof on the defendant as to evasion or failure to pass the dictation test, &c., on the one hand, and denying that power as to immigration, on the other hand, is that the latter is said to be "a jurisdictional fact." The expression "jurisdictional fact" is found in the American case of *Ng Fung Ho* v. *White* (2), but as there used, is expressive of an important distinction. The Court there was dealing with *executive* action with respect to deportation. Obviously, as aliens alone can by American law be deported, the status of "alien" is an essential jurisdictional fact for the executive, and it has no power to alter it. And even where a legislature had power limited to "immigration" since the establishment of the Commonwealth, the fact and date of immigration might be said to be in the same sense a jurisdictional fact on which to rest its regulations of conduct respecting immigration. But, as it is established that—apart from sub-secs. 3 and 3A—the Commonwealth Parliament has not exceeded its jurisdictional fact, why can it not regulate the evidence as to the judicial proof of whether that jurisdictional fact exists? If, for instance, Parliament had said the Crown may give prima facie evidence of the defendant's arrival in Australia by producing a ship's passenger list containing his name, or by an affidavit as to information and belief, could it be said that, merely because the date and fact of arrival from oversea or other indicia of Australian citizenship were jurisdictional facts, such legislation or any legislation whatever of that nature was forbidden? It certainly seems to me that such a proposition is transparently untenable, and to treat it as serious would be a waste of time. Once, however, concede that a Parliament of limited jurisdiction, no matter how the limits are fixed, may legislate as to the burden of proof at all regarding a jurisdictional fact, then it becomes a mere question of construction whether the given legislation is within the

(1) (1924) 34 C.L.R. 591.

(2) (1922) 259 U.S. 276, at p. 284.

recognized limits of evidentiary law, or is on proper construction an attempt to extend the frontiers of substantive power. "*Jurisdictional fact*," *in other words, is not and cannot be the decisive criterion as to burden of proof* when *legislative* action is under consideration. The American cases do not employ the expression "jurisdictional fact" to deny legislative power. The position is well put by *Warrington* J. for the Circuit Court of Appeals, in *Ng You Nuey* v. *United States* (1), in these words: "Citizenship is a fact, as well as a right, and to exact proof of the fact is not an attempt to destroy the right but is to apply a rule of evidence to ascertain the truth or not of its existence." It is not, however, unimportant to observe that, if the proposition contended for is sound, it is equally applicable to State Constitutions. There is always—unless specially enlarged by Imperial law—one "jurisdictional fact" limiting State legislative powers. Those powers are to make laws "in and for" the State; and the grand jurisdictional fact is that the crime, for instance, penalized was committed within the territory. *Macleod* v. *Attorney-General for New South Wales* (2) illustrates this. But, if a State Evidence Act said that in all prosecutions for bigamy the second marriage averred shall be deemed to have taken place in the State, unless the accused shall truly state where it took place, would that be invalid as an attempt to enlarge the State legislative power? The answer must, in my opinion, be unhesitatingly in the negative. We must, therefore, look further than the suggested criterion. For this purpose it is proper to ask what is the recognized legitimate basis in English law for casting on a party the burden of proof without in any way attempting to alter the substantive law of rights and duties that is assumedly being enforced? As already said, this concerns many of the legislative powers of the Commonwealth, and so, in view of the circumstances, calls for careful examination.

6. *Construction.*—Much stress was placed on the word "deemed" as carrying the legislation too far. "Deemed" there, I think, means "adjudged," but though, as I have said, stopping there would be fatal, as closing the judicial door, the following words keep that door open to an extent which enables the defendant to give all the evidence in his power by way of defence, as fully as if

(1) (1915) 224 Fed. Rep. 340, at p. 343.

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

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the sub-sections were not there. All that is required of him is that he shall not, by his election to remain absent, deprive the Court of the very *best evidence* of identity and of the attendant facts of his immigration, which by his defence he maintains took place in circumstances entitling him to remain. Those attendant facts are specially within his cognizance, and this is a clear reason for laying on him the burden of proof or otherwise suffering judgment. It is certainly made imperative on the defendant to appear in the witness-box personally. Can that be said to be unjust? It is frequently, as everyone knows, a necessary safeguard against impersonation by mere description. Actual observation by a Court is in most cases essential to prevent imposition and to test identity. Then, he is required to *state*, and to state *truly*, (1) the name of the vessel by which he travelled to Australia, (2) the date and (3) the place of his arrival in the Commonwealth. I am, I confess, quite unable to appreciate the plea of hardship, even if it were my province to consider it. In truth, I consider it only to judge whether the requirement is so outrageous as to amount to a mere parliamentary disguise for exceeding the written limits of the Constitution. What is there of hardship in asking a man to "state" those matters, and requiring them to be "truly" stated? He is not required to swear of his own knowledge to their absolute accuracy, though if he were that would not alter the matter. Every particular stated may be true and yet, like one's own age, the knowledge may rest on trusted information. But the truth of the facts stated—each of which is directly relevant and pertinent to the issue—is important to the whole community, if the individual's claim to share community rights is to be tested regarding matters which he and not the community can be expected to know. And that is why in sub-sec. 3B an opportunity for testing their truth is provided for. No hardship and no injustice can be reasonably apprehended. If in construing the Constitution the public welfare of the Australian nation is not to be subordinated to the individual claims of arrivals from abroad to incorporate themselves as Australians, this power must surely be conceded to Parliament.

7. *Common Law Basis.*—That this is so on accepted doctrines of English common law is not to be doubted. The burden of proof, as

applied to the issues in controversy, means that where the law of the land places that burden on a party the *Court must adjudge against him unless he satisfies the burden.* The Indian Legislature has adopted and formulated the position thus in the *Indian Evidence Act* 1872, sec. 101 :—" Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person." That is the first step in the reasoning. The second is to inquire how and when that burden is placed on a party. Abstaining from tracing particular rules, it is generally true that by the common law the burden is placed variously and according to the circumstances. One governing principle can, I think, be gathered from the decisions, and it may be thus stated: *The burden of proof at common law rests where justice will be best served having regard to the circumstances both public and private.* There are some primary and general rules, and these are sometimes required to give way in presence of special circumstances. Judges have, by a process of reasoning, evolved these rules and subsidiary rules which in essence are judicial legislation, and which now govern all judicial tribunals as firmly as if enacted by statute. The broad primary principle guiding a Court in the administration of justice is that he who substantially affirms an issue must prove it. But, unless exceptional cases were recognized, justice would be sometimes frustrated and the very rules intended for the maintenance of the law of the community would defeat their own object. The usual path leading to justice, if rigidly adhered to in all cases, would sometimes prove but the primrose path for wrongdoers and obstruct the vindication of the law. One of the leading secondary rules, which have been laid down by Judges of great eminence in order to avoid that catastrophe, is that the primary rule should be relaxed when " the subject matter of the allegation *lies peculiarly within the knowledge of one of the parties* " (*Taylor on Evidence,* 11th ed., vol. I., p. 284). The historic reasoned foundation for the principle is *R.* v. *Turner* (1) in 1816, though examples existed before, as *Borthwick* v. *Carruthers* (2). In *R.* v. *Turner* a distinguished Court (Lord

(1) (1816) 5 M. & S. 206.

(2) (1787) 1 T.R. 648.

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Ellenborough C.J. and *Bayley* and *Holroyd* JJ.) held that in a prosecution under the game laws the accused was bound to negative the allegations in the information. The grounds of the decision were that, having regard to the many exceptions which would have exonerated the accused, "*common sense*" and "*reason*"—which I may venture to observe are at the root of the common law—showed that the burden of proof should lie on the defendant. The Court considered there was no hardship in casting the affirmative proof on the defendant, as he must be presumed to know his own qualification, whereas the prosecutor had no means of knowing it. Lord *Ellenborough* said (1) that otherwise there would be "a moral impossibility" of ever convicting. That case has been criticized and qualified, but its central doctrine stands. Its universality, as a common law rule, cannot be maintained, but the soundness of the principle that the possession of peculiar means of knowledge by a party is a reasonable ground for casting to some extent and according to the circumstances a special responsibility with regard to proof cannot be impugned. It has since been acted upon by very great Judges, as in *R.* v. *Hanson* (2), in 1833, by *Abbott* C.J. (see *Russell on Crimes*, 6th ed., vol. III., p. 401); in *Hibbs* v. *Ross* (3); and in *General Accident, Fire and Life Assurance Corporation* v. *Robertson* (4), by Lord *Loreburn* L.C. and Lord *Shaw*, concurred in by the whole House. Dr. *Lushington* applied to collision cases the rule of not throwing the *onus probandi* on a party "where there is a moral impossibility that he can obtain the evidence required" (*The Concord* v. *The Manchester*, digested in the *Law Times* (5)). The words he used were, as is seen, those of Lord *Ellenborough* in *Turner's Case*. *Wigmore on Evidence*, 2nd ed., vol. v., p. 442, sec. 2486, observes, with regard both to the primary rule requiring the party having the affirmative allegation to prove it, and the secondary rule that the party who presumably has peculiar knowledge enabling him to disprove it should do so, that neither can be regarded as decisive. He says:—"There is, then, no one principle, or set of harmonious principles, which afford a sure and universal test for the solution of

(1) (1816) 5 M. & S., at p. 210.
(2) Unreported.
(3) (1866) L.R. 1 Q.B. 534, at p. 541.
(4) (1909) A.C. 404, at pp. 413, 416.
(5) (1840) 7 L.T. (N.S.), at p. 441.

a given case. The logic of the situation does not demand such a test; it would be useless to attempt to discover or to invent one; and the state of the law does not justify us in saying that it has accepted any. There are merely specific rules for specific cases, resting for their ultimate basis upon broad and undefined reasons of experience and fairness." The Courts thus, partly by general rules displaceable in presence of special circumstances, and partly by special rules to meet special circumstances on which the Courts determine how far the displacement is just and is to apply, have moulded the common law so as to enable the Court to do broad justice. In some cases they have met the position by allowing hearsay evidence rather than rejecting it. In certain cases they have furthered justice in other ways, among which I shall mention only one. I refer to the practice of admitting in certain circumstances affidavits to the best of the deponents' knowledge and belief. In *Stokes* v. *Grissell* (1) *Williams* J. says, of Chamber applications: "Where the party swears to the best of his knowledge and belief as to a *matter upon which from its nature he cannot swear positively, if the affidavit is unanswered by the other side, I assume the fact to be proved.*" That is only saying "I deem the fact to be proved." It is only different in degree, not in kind, from the averment in the present case. So stands the matter at common law. If the Legislature with its plenary power as to "immigration" determines for the public security and general welfare to advance the matter to the point of making the party having the special means of knowledge always bound to give it at his peril, how can this Court, or any Court, deny its constitutional right to do so? On what principle can the Court take up that attitude? Certainly not on any general principle of natural justice. If example were necessary to illustrate this point, the view taken by the Indian Legislature is instructive. In the *Indian Evidence Act* 1872, sec. 106, it is enacted: "When any fact is especially within the knowledge of any person, the burden of proving that fact is on him."

8. *English Legislation.*—I am aware that, as has been said several times during the argument of this appeal, the Imperial Parliament is

(1) (1854) 14 C.B. 678, at pp. 689, 690.

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supreme. But I may observe once for all, that Imperial legislation has a deeper significance than that. It is not to be dismissed as necessarily an arbitrary exercise of power, even as to evidence and the burden of proof. This, of course, it may be on occasion. But, usually, and presumably in such cases, we should regard the legislation as merely bringing evidentiary rules into necessary accord with new conditions of life for facilitating and assisting Courts in arriving at truth. I therefore think that each enactment of the Imperial Parliament should be looked at to see whether it can be regarded as a mere arbitrary decree, or as a valuable example of true adjective law ancillary and assistant to the enforcement of the main substantive law. Such examples may be found in such statutes as the *Foreign Enlistment Act* (33 & 34 Vict. c. 90, sec. 9), the *Customs Law Consolidation Act* (39 & 40 Vict. c. 36, sec. 178) and the *Stamp Duties Management Act* (54 & 55 Vict. c. 38, sec. 18), all of which use the word "deemed." But there, as in the legislation directly under consideration "deemed" is applied only in the absence of evidence to the contrary. Those examples, like the Australian sub-sections, are instances, not of the legislature overriding the Courts or attempting to enlarge the scope of the substantive law, but only of effectively enforcing it as it stands by means of procedure which lays the burden of establishing the truth on the right shoulders. And I may add that in the increasing complexities of modern affairs the necessity of increasing also the instances where this method of arriving at the real fact should be employed is commending itself to the British Legislature. For an instance of British legislation requiring persons suspected of being aliens to prove British nationality, see *Simon* v. *Phillips* (1) As to our own Constitution, unless Courts in matters of evidence regarding what have been termed "jurisdictional facts" are virtually *legibus solutæ*, the Parliament must have power to prescribe evidentiary rules and legal presumptions within limits. "The duty of the legislator," says *Best on Evidence*, 12th ed., p. 28, sec. 42, "therefore," (that is, having regard to the stated requirements of justice) "is not discharged by framing substantive laws and establishing forms of judicial procedure; in order *to do complete*

(1) (1916) 85 L.J. K.B. 656, at pp. 658, 659.

justice he must go farther, and supply rules for the guidance of tribunals in the disposal of all matters of fact which come before them, whatever the nature of the inquiry or however difficult or even impossible it may be to get at the real truth." After an elaborate statement of reasoning the learned author, quoting a French jurist, says the law establishes "presumptions to which the Judge is obliged to conform." And then comes a quotation from *Rolfe* B. in *Attorney-General* v. *Hitchcock* (1): "The laws of evidence as to what is receivable or not, are founded on a compound consideration of what abstractedly considered is calculated to throw light on the subject in dispute, and of what is practicable." The same common sense, the same reason and the same general considerations that are admissible to guide a Court in regulating procedure are surely equally available to the legislative organ of the nation.

9. *Test of Validity.*—It is not the function of the judiciary to revise the work of the legislature, to re-appraise the reasonableness or the justice of its enactments. The judiciary, in relation to pronouncing upon the legality of a statute, can do no more than say whether it does or does not pass beyond what Professor *Thayer* calls "the outside border of reasonable legislative action" (*Legal Essays*, p. 27). For instance, applying the reasoning of Lord *Halsbury* L.C. in *Sharp* v. *Wakefield* (2), if the legislation were so arbitrary and fanciful, so flagrantly destructive of any real and reasonable chance to place the real facts before the Court for determination of the issue—in short, a mere disguise for extending the legislative power—the Court would not hesitate to say the statutory provisions attacked were beyond the uttermost border of incidental aid to effectuate the main power. But to say that of these sub-sections would be equivalent to asserting the utter unreasonableness, beyond the possibility of honest difference of opinion, of many legislatures dealing with this subject matter.

10. *Dominion Precedents.*—Before Federation the States had Chinese Immigration Acts. In some, the justice had power to convict merely on view of the defendant. In other States the

(1) (1847) 11 Jur. 478, at p. 482; 1 Exch. 91, at p. 105.
(2) (1891) A.C. 173, at p. 179.

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legislation was sometimes in addition more direct on the burden of proof. Victoria (Act No. 1073, sec. 10) made the *averment in an information that the defendant was a "Chinese"*—that is, not exempt from the operation of the Act—"*sufficient proof thereof until the contrary is shown.*" So in Queensland (53 Vict. No. 22, sec. 14) and in Tasmania (51 Vict. No. 9, sec. 14). When Australia federated, why are we to assume that the Commonwealth power of immigration, which when exercised is supreme, contained less authority? In New Zealand, by the Act of 1908, No. 78 (*Immigration Restriction Act*), it is provided by sec. 38 (2) that "for the purpose of any proceeding under this Part of this Act *the burden shall lie on the defendant of proving* that he is exempt from the operation of any of such provisions." By the Act of 1920, No. 23, sec. 2, that is extended to all prosecutions under the *Immigration Act*, that is, to all prohibited immigrants. In Canada, by the Act of 1917, c. 7, sec. 2, there is added a section to the principal *Chinese Immigration Act* (Rev. St. 1906, c. 95), and called sec. 7B, which provides that "Whenever any officer . . . has reason to believe that any person of Chinese origin is illegally in Canada, he may without a warrant apprehend such person, and, if such person is unable to prove to the satisfaction of the officer that he has been properly admitted into and is legally in Canada, the officer may detain such person in custody and charge him before a magistrate with being illegally in Canada, which charge shall be tried summarily by the magistrate, *and the burden of proof of such person's right to be in Canada shall rest upon such person*," &c. By Act 1921, c. 21, sec. 5, in similar circumstances the onus of proof is placed on the defendant. Similarly, by Act 1923, c. 38, sec. 26. The Canadian Parliament's legislative power in respect of Chinese immigrants is, like the Australian power, under the specific word "immigration" (sec. 95 of the *British North America Act* 1867). In South Africa, by sec. 23 of the Act of 1913, No. 22, "Immigrants' Regulation," it is enacted: "*The burden of proving that a person has not entered or remained in the Union or any Province in contravention of this Act shall lie upon such person.*" With such a consensus of British Dominions as to the propriety and even the necessity of such a burden being laid on the individual claiming to be part of the community, how is it

possible to deny the right of the Australian people, through their Parliament, to secure themselves in like manner ?

11. *American Law.*—In America, where the common law is the basis but the Constitution is more stringent than our own, the same view is taken. For some time there appears to have been some difference of opinion among the Federal Judges of District and Circuit Courts as to whether the relevant congressional enactment was valid. That enactment is contained in sec. 3 of the Act of 1892, c. 60, and is in the strongest terms. It says " that any Chinese person or person of Chinese descent arrested under the provisions of this Act or the Acts hereby extended shall be *adjudged* to be unlawfully within the United States unless such person shall establish, by affirmative proof, to the satisfaction of such justice, judge, or commissioner, his lawful right to remain in the United States." " Adjudged " is the same as " deemed." Alien character is under the United States Constitution what has been termed during this case " a jurisdictional fact," and a " person of Chinese descent " may be either an American citizen or an alien.

The judicial decisions, however, show not only that at all times the great weight of opinion was on the side of the legality of the legislation but that at present the contrary view is practically silenced. It will be sufficient to quote some of the later cases, because the earlier are there cited. In 1923, in the non-Chinese case of *Bilokumsky* v. *Tod* (1), the Court said :—" It is true that alienage is a jurisdictional fact ; and that an order of deportation must be predicated upon a finding of that fact. . . . It is true that the burden of proving alienage rests upon the Government. For the statutory provision which puts upon the person arrested in deportation proceedings the *burden of establishing his right to remain in this country applies only to persons of the Chinese race* (see *Ng Fung Ho* v. *White* (2)." Similarly in Australia it may be noted the cases in which the burden is cast on the defendant is limited to certain classes of immigrants. In 1921, in the case of *Sit Sing Kum* v. *United States* (3), the Federal Circuit Court of Appeals for the Second Circuit (New York) held unanimously that the arrested person had the burden of proving

(1) (1923) 263 U.S. 149, at p. 153. (2) (1922) 259 U.S., at p. 283.
(3) (1921) 277 Fed. Rep. 191.

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his American citizenship. So, in still later Circuit Court appeal cases. In *Jung See* v. *Nash* (March 1925) (1) is found a lengthy string of cases holding the same view. Lastly, *Chin Lund* v. *United States* (December 1925) (2) is to the same effect.

The objection fails, in my opinion, therefore, whether approached as an ordinary matter of verbal construction or as a matter requiring the aid of principle and precedent outside the mere words of the Constitution.

One other objection was raised, namely, a prior adjudication. This has no substance, and was, in effect, disposed of during the argument.

The appeal, in my opinion, should be allowed.

HIGGINS J. I propose to examine, first, the particular facts making up the charge that the defendant is a prohibited immigrant; and, second, the provisions of sec. 5 (3) and (3A) as to the evidence of those facts.

If Ah On is a prohibited immigrant, under sec. 7, then he is liable to imprisonment, and liable, if the Minister so order, to be deported from Australia. He is said to be a prohibited immigrant because (1) he is an immigrant; (2) he evaded an officer of Customs; (3) he was found in Australia (Perth) on 14th May 1926; (4) he was required on that date to pass the dictation test, and failed to do so. According to his own evidence, and the Magistrate's finding, Ah On was an immigrant *at some time*—he was born in China and came to Australia. He was found in Perth on 14th May 1926, and then failed to pass the dictation test which he was required to pass. But there is no evidence that he evaded an officer unless the averment of the prosecutor that he did so is sufficient, by virtue of sec. 5 (3) and (3A).

I respectfully concur with the view of the Full Court of Western Australia in *Ah Hing's Case* (3) (as I understand it) that the words of sec. 5 (1) are not retrospective, that they apply to future immigrants and future facts only, including future evasion. The Act is a penal Act; and there are no words to make the section

(1) ((1925) 4 Fed. Rep. (ser. 2) 639, at p. 644.

(2) (1925) 9 Fed. Rep. (ser. 2) 283.

(3) (1926) 28 W.A.L.R. 95.

retrospective—as to the facts which make up the substantive offence. But "future" in relation to what time? The *Immigration Restriction Act* 1901 has had numerous amendments; but as amended it is still the same Act. If the finding of the Magistrate is right, on the actual evidence before him, Ah On entered Australia as an immigrant, in or about 1911—not in 1897 as Ah On swore; and the immigration was therefore future in relation to the Act.

In sec. 5 of the Act, as originally passed in 1901, the provision as to evading an officer was included: "Any immigrant who evades an officer or who enters the Commonwealth at any place where no officer is stationed may if at any time thereafter he is found within the Commonwealth be asked to comply with the requirements of paragraph (*a*) of section three" (to pass the dictation test), "and shall if he fails to do so be deemed to be a prohibited immigrant." So the facts which make up the offence are all future to 1901, to the original Act. One does not give a retrospective effect to the section when affirming that the facts alleged exactly fit Ah On. I infer, from the context of sec. 5, that to "evade an officer" means intentionally to avoid a Customs officer in entering—an officer who might require the immigrant to pass the dictation test or otherwise control his entrance (see discussion of the word "evade" in *Wilson* v. *Chambers & Co. Pty. Ltd.* (1)).

But the second question is, assuming that the allegations, if proved, would make Ah On a prohibited immigrant, have the allegations been proved? There is no proof that Ah On evaded an officer—a vital fact for the success of the prosecution—unless by virtue of sec. 5 (3) and (3A):—"(3) In any prosecution under either of the last two preceding sub-sections, the averment of the prosecutor, contained in the information, that the defendant is an immigrant who (*a*) has evaded an officer . . . shall be deemed to be proved in the absence of proof to the contrary by the personal evidence of the defendant either with or without other evidence. (3A) Proof to the contrary by the personal evidence of the defendant . . . shall not (unless it is proved that the defendant was born in Australia) be deemed to have been given unless the defendant in his personal evidence states truly the name of the vessel by which

(1) (1926) 38 C.L.R. 131, at pp. 147 et seq.

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he travelled to Australia and the date and place of his arrival in the Commonwealth." Now, according to the Magistrate, the defendant did *not* comply with 3A—did not state truly the name or date or place; and if the provision requiring personal evidence of the nature prescribed is valid, there has been no "proof to the contrary" of the averment. The Magistrate has usefully found certain of the facts, so far as he was able on the evidence adduced, so as to enable the Courts (I presume) to deal with the case finally if they should not agree with his view of the law. But as to evading an officer, the finding is only that the defendant has not proved that he did not evade an officer.

In my opinion, when an Act is within the powers of Parliament—such as an Act with respect to "immigration"—the evidence by which an offence against that Act may be proved is within the competence of Parliament, under sec. 51 (XXXIX.) of the Constitution. Parliament can legislate not only as to immigration, but as to "matters incidental to the execution of any power vested by this Constitution in the Parliament." Moreover, the evidence by which an offence may be proved is a matter of mere procedure; and the general principle applies that alterations in procedure are retrospective—are applicable to facts which took place before the alterations (see *Maxwell on Statutes*, 3rd ed., pp. 314 et seq.).

The argument that it is a usurpation of the *judicial* power of the Commonwealth if Parliament prescribe what evidence may or may not be used in legal proceedings as to offences created or provisions made by Parliament under its legitimate powers is, to my mind, destitute of foundation. Now, I see no reason for thinking that the finding of the Magistrate as to the act of immigration having taken place about 1911 is unsound. The Magistrate saw Ah On in the box, and could better estimate his age than we can. Taking this view, and the view which I have stated as to the power of Parliament to dictate what evidence is admissible as to an alleged offence against the Act, I find it unnecessary to decide the grave question whether, if there were no actual evidence on the subject of the man's immigration, Parliament has power to enact that the mere averment of the prosecutor shall be proof that the man "is an immigrant." At present, I may say, however, that I doubt the validity of such

a provision, inasmuch as the fact to be proved is a jurisdictional fact—a fact touching the power of Parliament itself to legislate. The effect of such a provision would really be that Parliament, having power to make laws "with respect to immigration," would have power to make laws also with respect to persons whom some officer alleges to be immigrants. Parliament has power to make laws with respect to commerce between the States (sec. 51 (I.)); could it enact that an averment made by an officer of Customs that certain commerce was inter-State should be conclusive proof of the fact, because some such conditions as those contained in sub-sec. 3A have not been satisfied.

I cannot see how the alleged analogies found in other Dominions can affect our decisions: the Constitutions are so very different. But a case decided by the United State Supreme Court might be very relevant. Congress has power to establish a uniform rule of naturalization (of aliens); has Congress ever enacted that a person shall be deemed to be an alien if the prosecutor aver that he is an alien? And if there has been such an enactment, has it been declared to be valid? But the construction of our own Constitution is the first consideration, and it seems to me very doubtful whether the authority to make laws with respect to "matters *incidental to the execution* of any power vested by this Constitution in the Parliament" (sec. 51 (XXXIX.)) can include authority to make laws which save the Commonwealth Government the trouble of proving that a man accused comes within the scope of the power.

But even if such a provision as to the averment of a jurisdictional fact, such as that the "man is an immigrant," should be found to be beyond the powers of Parliament, it does not follow that the provisions as to the averment that the man has "evaded an officer" is beyond the powers. It is true that the averment used in sec. 5 (3) is, in form, compound—"that the defendant is an immigrant who has evaded an officer." But it is not our function to dispense, or to dispense with, syntax. The use of a relative such as "who" instead of the conjunction "and" is very frequent in narration in ordinary usage. We do no violence to the language used by treating the compound averment as containing also two separate averments. They are easily severable—they are severed already in sub-sec. 1

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of the same sec. 5; and it is our duty to give effect to the will of Parliament to the full extent that the enactment can be justified under the Constitution—even to the extent of adopting such an interpretation of the enactment as may involve loose English (I do not say the English *is* loose) rather than *ultra vires* legislation (see *Black's Constitutional Law*, 2nd ed., pp. 60-65). If a witness swore that X was born in Australia, and has been engaged in gardening, a jury would be free to believe as to the business but to disbelieve as to birth in Australia: why should we not be at liberty to differentiate between the two parts also—to accept one part as constitutional and to reject the other? It is not suggested that Parliament would not have made the averment sufficient proof of the evasion unless the averment that the man is an immigrant is also to be sufficient proof of immigration; and so, in my opinion, the provision as to the averment "has evaded an officer" must be accepted as valid.

I am still of the opinion which I expressed in the cases of *R.* v. *Macfarlane*; *Ex parte O'Flanagan and O'Kelly* (1), and *Ex parte Walsh and Johnson*; *In re Yates* (2), that the power conferred on Parliament is to legislate with respect to the act of immigrating, not power to make any law that Parliament likes with respect to persons who *have been* immigrants. But in this case, if the defendant entered Australia surreptitiously as by evading an officer, or by entering at a place where no officer is stationed, the provision seems to be clearly relevant to the act of immigrating. Accepting the interpretation of *Adelaide Steamship Co.* v. *The King* (3), *Symons* v. *Schiffmann* (4), *Schiffmann* v. *Whitton* (5), as stated in *Gabriel* v. *Ah Mook* (6), I do not find any principle established in this Court which prevents me from giving effect to my opinion that sec. 5 (3) and (3A) is valid, so far as regards the averment that the defendant evaded an officer. It ought to be noticed, in passing, however, that in *Gabriel's Case* no point was taken as to the validity either of sec. 5 (2), or of sec. 5 (3) and (3A).

It is further urged that the defendant here is entitled to the benefit of his plea of *res judicata*. It appears that on an appeal from

(1) (1923) 32 C.L.R. 518, at pp. 574-576.
(2) (1925) 37 C.L.R., at p. 110.
(3) (1912) 15 C.L.R., at p. 102.
(4) (1915) 20 C.L.R. 277.
(5) (1916) 22 C.L.R. 142.
(6) (1924) 34 C.L.R. 591.

a Magistrate to the Supreme Court in a previous case of *Williamson* (the same complainant) v. *Ah On* (the same defendant), a conviction of Ah On was set aside on 22nd December 1925 (1). But it is sufficient for my purpose to say that the facts charged were not the same facts as are charged here. Not only were the dates of "finding" in the Commonwealth, and of application of the dictation test, different; but the previous complaint was based on sec. 5 (2), not on sec. 5 (1). The fact, vital to the complaint in this case, that Ah On "evaded an officer," was not charged in that case; and see *Collins* v. *Gough* (2), *Hall* v. *Levy* (3), *Brunsden* v. *Humphrey* (4) and cases cited in *Halsbury's Laws of England*, vol. XIII., pp. 332, 355.

I am of opinion that the defendant ought to have been convicted.

POWERS J. The questions to be decided in this case and the facts before the Court have been fully set out in the judgments already delivered. The most important question, and the only constitutional question, to be decided is whether the Commonwealth Parliament had power to pass sub-sec. 3 and sub-sec. 3A of sec. 5 of the *Immigration Act* 1901-1925. Sub-sec. 3 reads: "In any prosecution under either of the last two preceding sub-sections the averment of the prosecutor, contained in the information, that the defendant is an immigrant who (*a*) has evaded an officer . . . shall be deemed to be proved in the absence of proof to the contrary by the personal evidence of the defendant *either with or without other evidence.*" Sub-sec. 3A reads: "Proof to the contrary by the personal evidence of the defendant, within the meaning of the last preceding sub-section, shall not (unless it is proved that the defendant was born in Australia) be deemed to have been given unless the defendant in his personal evidence states truly the name of the vessel by which he travelled to Australia and the date and place of his arrival in the Commonwealth." In the case before the Magistrate all the material facts necessary to justify him in convicting the defendant were proved, except the fact that the defendant had evaded an officer. The Magistrate held that (1) the prosecutor had not proved that the defendant had evaded an officer; (2) the defendant had not

(1) (1925) 28 W.A.L.R. 74.
(2) (1785) 7 Bro. P.C. 94.
(3) (1875) L.R. 10 C.P. 154.
(4) (1884) 14 Q.B.D. 141, at p. 147.

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proved that he had not evaded an officer. The defendant could not, therefore, properly be convicted unless "the evasion of an officer," could be deemed to have been proved by the averment in the information "that the defendant was an immigrant who had evaded an officer," &c.

It was strongly contended before this Court that the Commonwealth Parliament could not, under its limited powers to deal with "immigration," declare or authorize a Court or officer to decide that a person who was not an immigrant was an immigrant, and it was argued that that was what the sub-section in question did. It was claimed that the sub-section in question was a law in excess of the powers of the Federal Parliament, and was therefore void. It was proved in this case that the defendant was an immigrant, but I do not see how the averment referred to can be divided. The question, therefore, is whether the Federal Parliament had power to enact in the Act in question that the averment in an information that the defendant *is an immigrant* who has evaded an officer shall be deemed to be proved in the absence of proof to the contrary, &c. The Federal Parliament cannot, by legislation, enlarge its powers, and it cannot simply declare that persons who are not immigrants are to be deemed to be immigrants, and so take upon itself power to deal with persons not immigrants any more than it could declare simply that persons who were not "aliens" were to be deemed to be aliens; but the question in this case is whether, assuming—as it is admitted—that sub-sec. 1 of sec. 5, the substantive provision of the section, is within the power the Federal Parliament has to pass laws with respect to "immigration," Parliament could not also pass sub-secs. 3 and 3A of sec. 5 as evidentiary clauses—as to the burden of proof—in aid of the main provisions of the section and of the Act. The question must be considered as one arising under a special Act passed by the Federal Parliament for the purpose of "*placing restrictions on immigration and to provide for the removal from the Commonwealth of prohibited immigrants.*" It has long been recognized in most countries that, to enable the authorities to enforce the provisions of such Acts or of laws dealing with aliens, it is necessary and proper to place the burden of proof

of certain facts, especially of those within the personal knowledge of the person charged, on the defendant.

I have had the advantage of reading the judgment of my brother *Isaacs*, and for the reasons so fully stated by him in his judgment I hold that Parliament had the power to pass sub-secs. 3 and 3A in the form in which they appear in the Act. Under those sub-sections the party charged has the fullest opportunity to disprove in a judicial proceeding the averment in question by evidence which is "peculiarly within the defendant's own knowledge." I cannot usefully add anything to the reasons given in the judgment referred to.

As to the other legal objections raised by the defendant's counsel to a conviction, I agree that they do not justify the dismissal of the charge made against the defendant.

I hold that the defendant ought—on the evidence before the Magistrate, coupled with the averment in the information—to have been convicted.

RICH AND STARKE JJ. The Parliament has, subject to the Constitution, power to make laws for the peace, order and good government of the Commonwealth with respect to immigration and emigration, and matters incidental to the execution of any power vested by the Constitution in the Parliament. The question in this case is whether sub-secs. 3 and 3A of sec. 5 of the *Immigration Act* 1901-1925 are within those powers. It is clear, we think, that a grant of power to a British Dominion to make laws for the peace, order and good government of its territory enables that Dominion, subject to any overriding Imperial legislation, to enact whatever laws of evidence it thinks expedient, and in particular justifies laws regulating the burden of proof, both in civil and criminal cases, and the effect of non-compliance with those laws in legal proceedings; and it is not for the Courts of law to say whether the power has been exercised wisely or not (*Hodge* v. *The Queen* (1); *Union Colliery Co. of British Columbia* v. *Bryden* (2)). It is so with the Commonwealth within the ambit of its powers.

The substantive provisions in sub-sec. 1 of sec. 5 were not

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

(2) (1899) A.C. 580.

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challenged, and are clearly laws within the competence of Parliament under the immigration power. The provisions of sub-secs. 3 and 3A are subsidiary to and in aid of the main provisions. They simply place the burden of proof upon the person charged and render it necessary that he should state truly the name of the vessel by which he travelled to Australia and the date and place of his arrival in the Commonwealth before that burden is satisfied.

No doubt the stringent nature of the provisions was dictated by the difficulty of proof in the cases mentioned in sec. 5 (1); but the provisions do not constitute, as was argued, any exercise by the Parliament of the judicial power of the Commonwealth. They merely establish a rule of evidence for observance by the Courts of law. Nor do the provisions, as was contended, set up any arbitrary or irrelevant criterion for determining whether the person charged under the provision of sec. 5, sub-sec. 1, is or is not an immigrant within the meaning of that sub-section. Indeed, sub-sec. 3 sets up no criterion whatever. In substance it makes the averments of the prosecution prima facie proof of the matter to be established, and leaves the person charged "at liberty to rebut and overcome it by contradictory and better evidence" (*Holmes* v. *Hunt* (1)).

Gabriel v. *Ah Mook* (2) is a clear recognition by this Court of the constitutional validity of sec. 5, sub-sec. 3. In the *Vend Case* (3) our brother *Isaacs* expressed an opinion in favour of the validity of a somewhat similar section in the *Australian Industries Preservation Act*, and we think the observations of the Judicial Committee in that case (4) recognize the validity of that section.

Turning now to sub-sec. 3A, it in substance provides that the burden of proof thrown upon the person charged shall not be discharged unless he state truly the name of the vessel by which he travelled to Australia, &c. The provision is directly connected with a substantive provision in sec. 5, sub-sec. 1, which is perfectly valid, and the facts required to be stated truly are in every case relevant for the purpose of determining whether a given person is or is not an immigrant within the meaning of sec. 5, sub-sec. 1, and in the

(1) (1877) 122 Mass. 505, at p. 519.
(2) (1924) 34 C.L.R. 591.
(3) (1911) 14 C.L.R., at p. 404.
(4) (1913) A.C. 781, at pp. 798, 799; 18 C.L.R. 31, at pp. 36-38.

majority of cases probably decisive. The reason for requiring the proof of these facts is based on experience. The enforcement of the Immigration Acts is "attended with great embarrassment, from the suspicious nature, in many instances, of the testimony offered" in immigration cases "arising from the loose notion entertained by the witnesses of the obligation of an oath" (cf. *Fong Yue Ting* v. *United States* (4)). It is said that some persons may not know the facts or may have forgotten them, but that is challenging the wisdom, fairness and justice of the law and not its competency. With the wisdom, fairness and justice of the law this Court has nothing to do, and cannot express any opinion upon the matter.

It is unnecessary to deal at length with the contention that the respondent has already been acquitted of the matters charged against him in this case. He was not charged in the former proceedings under sec. 5, sub-sec. 1 (*a*), but under sec. 5, sub-sec. 2. It is plain, we think, from sec. 5, sub-sec. 3, that sub-secs. 1 and 2 of sec. 5 constitute separate and distinct offences and are not instances of a general offence constituted by the provisions of secs. 3 and 7.

The ground upon which the Magistrate decided the case, namely, that sec. 5 of the *Immigration Act* is not retrospective, disappears when the relevant Acts and facts are examined. The defendant entered the Commonwealth in 1911, but at that time sec. 5, sub-sec. 1 (*a*), under which he was charged was in force. We agree that the section only applies to immigrants who enter Australia after the date of its enactment, but the defendant did so enter, and therefore fell within its terms. Further, the complaint in this case was made on 15th May 1926 and at that time the provisions in sec. 5, sub-secs. 3 and 3A, were in force. Now these sub-sections refer to prosecutions —legal proceedings—and not to the entry of persons into the Commonwealth. In this case it is therefore needless to discuss the rule that enactments dealing with procedure apply to all proceedings whether commenced before or after the passing of the Act. The proceedings here in question were in fact commenced after the passing of sec. 5, sub-secs. 3 and 3A, and necessarily fall within their terms. So far as this case is concerned, these provisions have no retroactive operation at all.

(1) (1893) 149 U.S., at pp. 729, 730.

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The decision of the Magistrate was consequently erroneous and Ah On the defendant ought to have been convicted.

Appeal allowed. Order appealed from set aside. Case remitted to Police Court, Perth, with the opinion of this Court that the defendant Ah On should have been convicted. Case to be dealt with by the Police Court consistently with this judgment. Appellant, pursuant to his undertaking, to pay the respondent's costs of this appeal.

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

Solicitor for the respondent, *F. Curran*, Perth, by *Malleson, Stewart, Stawell & Nankivell.*

B. L.

[HIGH COURT OF AUSTRALIA.]

WEBSTER . . . . . APPELLANT;

AND

THE DEPUTY FEDERAL COMMISSIONER OF TAXATION FOR WESTERN AUSTRALIA . . . . . RESPONDENT.

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PERTH, *Sept.* 16.

SYDNEY, *Dec.* 6.

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

Income Tax—Assessment—Assessable income—Wool on sheep's backs—Proceeds of business—Capital expenditure—Income Tax Assessment Act 1922-1924 (No. 37 of 1922—No. 51 of 1924), *secs.* 4, 16, 17, 23.

A partnership, of which the appellant was a member, having purchased a station property together with the sheep thereon (which were then in the wool), went into possession on 1st April 1923 and carried on the business of pastoralists. In the course of such business those sheep were shorn and the wool sold. In ascertaining the income of the partnership for the year beginning 1st April 1923 a deduction was claimed from the gross income of the partnership (including the proceeds of the sale of the wool) of the value on 1st April 1923 of the wool on the backs of the sheep purchased with the station.