[HIGH COURT OF AUSTRALIA.]

THE ORIENT STEAM NAVIGATION COMPANY LIMITED . . . . } APPLICANT;
DEFENDANT,

AND

GLEESON . . . . . RESPONDENT.
INFORMANT,

ON APPEAL FROM A COURT OF PETTY SESSIONS OF VICTORIA.

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MELBOURNE, *Feb.* 17.

Gavan Duffy, C.J., Starke, Dixon, Evatt and McTiernan JJ.

Immigration—Powers of Commonwealth Parliament—Prohibited immigrant—Agent of ship—Prosecution—Evidence—Burden of proof—Immigration Act 1901-1925 (*No.* 17 *of* 1901—*No.* 7 *of* 1925), *secs.* 3 (*k*)*, 9*—*The Constitution* (63 & 64 *Vict. c.* 12), *sec.* 51 (XXVII.), (XXXIX.).

A company was convicted and fined on two informations—each information alleging that the company was the agent of a certain vessel and that on or about the date specified a prohibited immigrant within the meaning of the *Immigration Act* 1901-1925 entered the Commonwealth from the vessel contrary to that Act.

* The *Immigration Act* 1901-1925, sec. 3, provides:—"The immigration into the Commonwealth of the persons described in any of the following paragraphs of this section (hereinafter called 'prohibited immigrants') is prohibited, namely:—" (then follows a list of prohibited immigrants). The section then proceeds:—"But the following are excepted:—(*h*) Any person possessed of a certificate of exemption as prescribed in force for the time being; (*i*) members of the King's regular land or sea forces; (*j*) the master and crew of any public vessel of any Government; (*k*) the master and crew of any other vessel landing during the stay of the vessel in any port in the Commonwealth: Provided that the master shall upon being so required by any officer, and before being permitted to clear out from or leave the port, muster the crew in the presence of an officer; and if it is found that any person, who according to the vessel's articles was one of the crew when she arrived at the port, and who would in the opinion of the officer be a prohibited immigrant but for the exception contained in this paragraph, is not present, then such person shall not be excepted by this paragraph, and until the contrary is proved shall be deemed to be a prohibited immigrant and to have entered the Commonwealth contrary to this Act; Provided also that identification

Held, (1) that the power of Parliament to make laws with respect to immigration enables it to impose upon the ship's agent, who is authorized on its behalf to perform the duties imposed by laws in force in the port, an absolute liability to a penalty upon entry of an immigrant from the vessel: and (2) on the facts of this case, that there was evidence sufficient in law to support the conclusion that the company was the ship's agent in the relevant sense, and that the evidence established that the persons alleged to be prohibited immigrants had entered the Commonwealth from the ship, and warranted the conclusion that the two members of the crew in question entered the Commonwealth from the vessel within the meaning of sec. 3 (*k*) of the *Immigration Act* 1901-1925; that the third proviso to sec. 3 (*k*) is valid, and that the offence charged was proved.

ORDER TO REVIEW.

James Gleeson laid two informations against the Orient Steam Navigation Co. Ltd. under the provisions of the *Immigration Act* 1901-1925. One of the informations in substance alleged that the defendant Company on or about 12th April 1930 at Melbourne was the agent of a certain vessel, to wit, the S.S. *Istok*, and on or about the said date a prohibited immigrant within the meaning of the *Immigration Act* 1901-1925 of the Commonwealth of Australia, namely, Marko Bakocevic, entered the Commonwealth from the said vessel contrary to the said Act. The other information was in similar terms but related to another prohibited immigrant, Ivan Vodopja.

On 12th April 1930, the master of the *Istok* wrote to the Collector of Customs informing him that the above-named two persons had deserted from the steamer at the Port of Melbourne in the State of Victoria. The crew list of the *Istok* showed that the above-named two persons were members of the ship's crew and were of Yugoslav nationality. On 12th April the master also wrote to the defendant

cards bearing the full name, thumbprint, photograph, and prescribed description of each member of the crew, and indorsed by the master, have been produced to any officer on demand: Provided further that the exception contained in this paragraph shall not apply to any member of the crew as to whom the master reports in writing to an officer that the member has deserted or is absent without leave, and, until the contrary is proved, the member shall be deemed to be a prohibited immigrant and to have entered the Commonwealth contrary to this Act;" &c.

Sec. 9 provides: "The master, owners, agents, and charterers of any vessel from which any prohibited immigrant enters the Commonwealth contrary to this Act shall be guilty of an offence against this Act, and be jointly and severally liable on summary conviction to a penalty of one hundred pounds for each prohibited immigrant so entering the Commonwealth."

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Company requesting it to pay to the Collector of Customs £100, to be held by him for the payment of any penalty that the master might be held liable to pay under sec. 9 of the *Immigration Act* in any proceedings instituted against him on the ground that Marko Bakocevic (who was according to articles of the ship *Istok* one of the crew of the ship when it arrived at the Port of Melbourne in the said State, and who was alleged to be a prohibited immigrant) on or about 12th April 1930 at Melbourne entered the Commonwealth contrary to the said Act from the said ship. The Company, in consideration of the Commonwealth allowing the master to proceed on his voyage, undertook to pay this order on demand to the Collector of Customs at the Port of Melbourne and to accept service of process on behalf of the master of the vessel. On 8th April 1930 the branch manager of the Company wrote to the Collector of Customs, Melbourne, stating—" S.S. *Istok*. I confirm my report to your department yesterday morning to the effect that the under-mentioned members of the crew of the above steamer had left the vessel and had not returned, and must therefore be regarded as deserted and consequently prohibited immigrants . . . Following upon my report to you the Police Department were immediately furnished with a full description of each, including photographs, and I have in addition written to the Commissioner of Police offering a reward of £5 in each case for information leading to the arrest of any of these men." The men referred to included the above-named two persons.

At the hearing of the informations in the Court of Petty Sessions at Melbourne the above letters and documents were put in evidence, in addition to certain oral evidence, most of which was objected to. The Company was convicted on both informations, and was fined £100 with 10s. 6d. costs on each.

The defendant obtained an order nisi to review these decisions, which now came on for hearing before the High Court.

Fullagar, for the applicant, to move the order absolute.—The information in each of the cases charged the defendant with being the agent for the ship in question. The information in both cases was precisely the same, but related to different immigrants. The

case turned upon the effect of the documentary evidence, and the prosecution could not have succeeded if it were not for the legislation contained in the third proviso to par. (*k*) of sec. 3 of the *Immigration Act* 1901-1925. There is no evidence that any officer ever formed an opinion under the first proviso to sec. 3 (*k*). The case for the prosecution rested upon the letter of 12th April 1930 by the master informing the Collector of Customs that the two alleged prohibited immigrants had deserted, and upon the letter of 8th April 1930 by the branch manager of the defendant Company to the Collector of Customs confirming his report to the effect that the two above-named members of the crew had left the vessel and had not returned, and must therefore be regarded as having deserted and, consequently, as being prohibited immigrants; and also upon the requests, each dated 12th April 1930, by the master of the vessel to the Company requesting it to pay to the Collector of Customs the sum of £100 to be held by him as the security for any penalty to which the master might be liable under sec. 9 of the *Immigration Act* 1901-1925 on the ground that the above-named persons entered the Commonwealth contrary to such Act, and authorizing the Company to accept service on his behalf of any process for the recovery of such penalty, and upon the undertakings signed by the branch manager of the Company to pay such orders on demand to the Collector of Customs and to accept service of process on behalf of the master of the vessel. Such request by the master and undertaking by the Company could not be evidence of anything against the Company. The Company was convicted in each case, and fined the prescribed penalty of £100. But, first, there was no evidence that the Company was the agent of the vessel, and the only evidence which could possibly be suggested on that head is that contained in the above letters and documents, and there is no evidence in them that the Company was the agent. Secondly, the third proviso to sec. 3 (*k*) does not apply to a prosecution under sec. 9 of the Act: that is its true construction. Thirdly, the third proviso to sec. 3 (*k*) is unconstitutional and invalid. On the proper construction of the proviso its only operation is to create a presumption against the members of the crew themselves. In *Preston* v. *Donohoe* (1) it was held that the proviso did apply to a

(1) (1906) 3 C.L.R. 1089.

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prosecution under sec. 9, but the question of the third proviso was not there raised. That case was wrongly decided, and on its true construction the third proviso would not apply. The third proviso to sec. 3 (*k*) is invalid: it is not covered by the power in the Commonwealth Parliament to legislate with regard to immigration. Parliament may make laws with respect to immigrants, but it cannot define what persons shall be deemed to be immigrants and so give itself power to declare who shall be deemed to be immigrants.

[EVATT J. referred to *Williamson* v. *Ah On* (1).]

That case is distinguishable (2), and was decided under sec. 5 (3) of the Act. All that is known is that the individual is on the vessel on one day and is not there on the next. This is an attempt to extend a matter of substantive law. There is no evidence in this case that either of the individuals in question landed in the Commonwealth. If the person may or may not be an immigrant the Commonwealth power does not extend to enable Parliament to legislate concerning him. An arbitrary criterion should not be adopted to bring within the legislative power something which may not be within it. In *Williamson* v. *Ah On* there was distinct evidence that the individual in question was an immigrant. In this case each man may or may not have been an immigrant. The language of sec. 3 (*k*) is totally different from that of sec. 5 (3), under which *Ah On's Case* was decided. There being no evidence in this case that either man ever landed in the Commonwealth, the exception in sec. 3 (*k*) does not apply, and, therefore, the proviso in the section cannot apply. Moreover, sec. 9 of the Act is not a valid exercise of the power to legislate with respect to immigration. It is a law making a person guilty of an offence who may have had nothing whatever to do with the immigration of anybody. There is no evidence at all that the Company was the agent of the vessel. The above documents show no more than that the Company had in some entirely undefined way some interest in what had happened to these members of the crew.

Sir Edward Mitchell K.C. (with him *Herring*), for the respondent. In considering the validity of sec. 9 it is of assistance to look also at

(1) (1926) 39 C.L.R. 95.

(2) (1926) 39 C.L.R. (see pp. 108, 110).

sec. 10. Both sections should be read together. Secs. 9 and 10 are a valid exercise of the powers of the Commonwealth Parliament. Sec. 9 is a valid and reasonable exercise of the power over immigration. *O'Shea* v. *Commissioner of Taxes* (*Vict.*) (1) deals with a situation analogous to that raised by the present case, and is based upon similar legislation. The evidence shows that the Company was the agent of the vessel in this very matter. Moreover, the two men in question failed to prove that they were the holders of passports, and, therefore, came within the provisions of sec. 3 (*gf*). The requests by the master to the Company dated 12th April 1930, and the assents to such requests by the branch manager of the Company, each admit the fact alleged that the defendant was the agent of the vessel within sec. 9. The documentary evidence was supplemented by oral evidence, though the same was objected to. There was, in any event, ample evidence upon which the Magistrate could act.

Fullagar, in reply. Sec. 10 supports the view that sec. 3 (*k*) is invalid, the latter section dealing with a matter of substantive law. On the true construction of sec. 3 (*k*) it should be confined to making the statement of the master evidence against himself only. If that be the true interpretation of sec. 3 (*k*), *Preston* v. *Donohoe* (2) does not affect the defendant as in that case the master was prosecuted.

The following judgments were delivered:—

GAVAN DUFFY C.J. I need say no more than that I think this appeal should be dismissed and the order nisi discharged.

STARKE J. I agree. Sec. 3 (*k*) is, I think, within the competence of Parliament. It deals with the coming of persons into Australia from a ship. The master and crew may land, but if a member of the crew is reported to have deserted or to have absented himself without leave, then he is deemed, until the contrary is proved, to be a prohibited immigrant and to have entered the Commonwealth contrary to the Act. That provision affects the burden of proof and is merely evidentiary, and is therefore within

(1) C.L.R. 313, at p. 317. (2) (1906) 3 C.L.R. 1089.

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the power of the Commonwealth according to the decision of this Court in *Williamson* v. *Ah On* (1).

The provision in sec. 9 makes the persons in charge or control of ships responsible for the landing from those ships of prohibited persons who are on board. The Parliament places on those in control of ships the duty of preventing prohibited persons landing. Such a provision is within its powers.

More difficult questions arise on the evidence presented to the Court below—whether there was sufficient evidence that the men mentioned in the proceedings landed in the Commonwealth and whether the Orient Company was the agent of the vessel. On the whole, I think that the letters of the Orient Company itself afforded some evidence on this point, in the absence of any rebutting evidence on its behalf. I think the letters are sufficient prima facie proof of those facts.

The appeal should therefore be dismissed.

DIXON J. I agree that the appeals should be dismissed and the orders nisi discharged. The prosecutions were brought under sec. 9 of the *Immigration Act* 1901-1925, and the defendant Company was charged as the agent for the vessel. The first ground taken for the defendant is that sec. 9 is void, because it exceeds the constitutional power of the Commonwealth Parliament to make laws with respect to immigration. It is said that it imposes penalties on four classes of persons, merely because they stand in some legal or business relation to the ship from which a prohibited immigrant enters the Commonwealth; that they are not penalized because of any act or omission on their part in respect of immigration, or because of any purpose they entertain, or of any knowledge they possess that an offence is to take place or has taken place. It is contended that such a law is not sufficiently connected with immigration to come within the power. It is true that the section requires no *mens rea*, and it is true that the master, owner, agent and charterer of the vessel are penalized whenever a prohibited immigrant enters from the vessel, and that no act or omission on their part is made the ground of the offence. The liability is incurred

(1) (1926) 39 C.L.R. 95.

by them simply because of the relation in which they stand to the vessel, and, curiously enough, although the section creates an offence, the offenders are made jointly and severally liable for a single penalty. Some questions of construction may arise upon the section: for instance, whether "charterer" includes one who makes a mere contract of affreightment, or is confined to a charterer by way of demise; whether "agent" includes a person who acts only in provisioning a ship and obtaining freight or refers to the person whose duty it is to perform on behalf of the ship the legal obligations which attend entry into and departure from a port in the Commonwealth. Such questions may appear to affect the question whether the persons included within sec. 9 are too remote from the act of immigrating to come under the legislative power. But I do not consider it necessary to investigate more fully the description of those made liable. The section is not inseverable. It purports to impose an absolute liability upon four descriptions of persons connected with the ship, one of which is the agent, a term which must at least include representatives of the ship fulfilling on its behalf the requirements imposed by the law of the port. It is enough for the purposes of this case if there is evidence that the defendant answers this description, and if it is competent for the Legislature to impose upon such an agent an absolute liability. In my opinion the power of the Parliament to make laws with respect to immigration does enable it to impose upon the ship's agent who is authorized on its behalf to perform the duties imposed by laws in force in the port, an absolute liability to a penalty upon entry of an immigrant from the vessel. Such a provision is directed to promoting in those who control the ship, or who may affect its control, care to prevent entry of persons from the ship as immigrants; and is therefore a law with respect to immigration.

The next question is whether there is evidence sufficient in law to support the conclusion that the defendant Company is the ship's agent in the relevant sense. The only evidence consists, first, of a document written by the branch manager of the defendant which shows that it had an interest in the movements of the vessel, that it thought proper to give a guarantee in order to insure her clearance, and that it was prepared to accept service of process on

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behalf of the master, and, second, of a letter by the branch manager reporting the desertion of members of the crew and offering a reward. This evidence is, no doubt, very weak, but, in the absence of any countervailing circumstance, it appears to me to be sufficient to raise a prima facie case that the defendant Company undertook the performance of obligations arising from the vessel's presence in port. But even if the Company is the ship's agent, the further question necessarily arises whether there was evidence establishing that the persons alleged to be prohibited immigrants had entered the Commonwealth from the ship. The evidence consists of an admission by the defendant Company that they were members of the ship's crew on its arrival in Melbourne and were absent at the time of its departure. It follows from this admission that they had left the ship, and had either landed, boarded another ship, or lost their lives in the water. The first of these three possibilities is so much more probable than the others that a presumption of fact arises that they landed. There is, therefore, evidence warranting the conclusion that the two members of the crew in question entered the Commonwealth from the vessel within the meaning of sec. 9, and, within the meaning of par. (*k*) of sec. 3, "landed during the stay of the vessel in a port of the Commonwealth." It was argued that the third proviso to sec. 3 (*k*) could not operate unless and until it was shown that the members of the crew landed during the stay of the vessel. It is enough to say that, whether this be so or not, evidence was given raising a presumption of fact that members of the crew did so land. Evidence was given that the master had reported in writing to the Collector of Customs, who is an officer within the meaning of the third proviso of sec. 3 (*k*), that two members of the crew had deserted. If the proviso be valid, that is enough to bring it into operation and to put the burden of proof upon the defendant. In my opinion the proviso is valid. I think it may be supported as an exercise of the power to make laws with respect to immigration. It is unnecessary to consider whether it might also be supported under sec. 51 (XXXIX.) of the Constitution. I think upon its construction the section is confined to proof in legal proceedings of the character of "prohibited immigrant" and the fact of unlawful entry. Upon such

matters, falling as they do within the subject over which the Commonwealth has power, the Parliament may place the burden of proof upon either party to proceedings in a Court of law. The onus of proof is a mere matter of procedure. If the Parliament may place the burden of proof upon the defendant, it may do so upon any contingency which it chooses to select. In this case it has changed the burden of proof contingently upon the master reporting in writing to an officer that a member of the crew has deserted or is absent without leave. The defendant complains that this contingency has little bearing upon the question whether the member of the crew is a prohibited immigrant. But this is of no importance because Parliament may change the burden of proof unconditionally or conditionally. The proviso appears to me to do no more. It may be that the consequence is hard upon the Company which must disprove both immigration and the existence of the conditions which make immigration prohibited, although the master's report may have little or no bearing upon these questions. But it would be no less harsh if the burden of proof upon a charge under sec. 9 were unconditionally placed upon the defendant.

These provisions being in my opinion valid, it remains to consider whether the third proviso to sec. 3 (*k*) applies to sec. 9. It is a proviso to the exception expressed by par. (*k*) which takes out of the category of "prohibited immigrant" the master and crew of any vessel landing during the stay of the vessel in a port of the Commonwealth. Because in form it is a proviso the defendant contends that it operates only in relation to this exception and therefore has no application save in prosecutions against a master or a member of a crew. The drafting of modern statutes is not so exact as to give cogency or plausibility to such an argument. The fact that an enactment takes the form of a proviso raises but a very weak presumption that it is confined to affecting the operation of the main provision. In this case I think it is reasonably clear that the proviso applies generally, and is not confined to prosecutions of a member of the crew. Whenever in any prosecution the issue is whether a member of the crew is a prohibited immigrant and has entered the Commonwealth, the proviso makes the written

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report of the master enough to turn the burden of proof upon the defendant.

I therefore think that, with the aid of the third proviso to sec. 3 (*k*), the offences charged were proved.

EVATT J. I agree that the appeal should be dismissed. Mr. *Fullagar's* first contention—that the third proviso to sec. 3 (*k*) does not as a matter of construction apply to prosecutions under sec. 9—is determined adversely to him in *Preston* v. *Donohoe* (1).

In my opinion sec. 9 is a valid exercise of the power of the Commonwealth to make laws with respect to immigration. That section imposes upon persons in direct or indirect control of vessels in Commonwealth waters the duty of preventing the entry from the vessels into the Commonwealth of prohibited immigrants. Such imposition of vicarious responsibility is well known. Instances are to be found in the *Navigation Act*, and in various *Immigration Acts* before Federation.

The third and first provisoes to sec. 3 (*k*) are also in my opinion valid. They operate to make proof of certain matters prima facie evidence that a person is a prohibited immigrant. The criterion adopted seems both reasonable and relevant, but *Williamson* v. *Ah On* (2) seems to show that the relevance of the criterion does not matter. The principle of *Williamson* v. *Ah On* determines this part of the case. Difficult though it may be, a person charged under sec. 9 is at liberty to rebut prima facie proof by "contradictory and better evidence" (per *Rich* and *Starke* JJ. (3)). As to the facts I agree with my brother *Starke*.

MCTIERNAN J. I agree.

Order nisi discharged with costs.

Solicitors for the applicant, *Green, Wynne, Riddell, Dobson & Middleton.*

Solicitor for the respondent, *W. H. Sharwood,* Crown Solicitor for the Commonwealth.

H. D. W.

(1) (1906) 3 C.L.R. 1089.
(2) (1926) 39 C.L.R. 95.
(3) (1926) 39 C.L.R., at p. 128.