[HIGH COURT OF AUSTRALIA.]

O'KEEFE . . . . . PLAINTIFF;

AND

CALWELL AND OTHERS . . . . . DEFENDANTS.

H. C. OF A. 1949.

MELBOURNE, *Feb.* 28; *March* 1, 18.

Latham C.J., Rich, Dixon, McTiernan, Williams and Webb JJ.

Immigration—Minister's power of deportation—"Person . . . . liable to be prohibited . . . from entering or remaining in the Commonwealth"—"Prohibited immigrant"—Dictation test—"Within five years after he has entered the Commonwealth"—The Constitution (63 & 64 *Vict. c.* 12), *s.* 51 (*xxvii.*)—*Immigration Act* 1901-1940 (*No.* 17 *of* 1901—*No.* 36 *of* 1940), *ss.* 3-5.*

In s. 4 (1) of the *Immigration Act* 1901-1940 the expression "person . . . liable to be prohibited . . . from entering or remaining in the Commonwealth" means a person whose immigration into the Commonwealth is prohibited on any of the grounds mentioned in s. 3: An immigrant is not "liable to be prohibited" within the meaning of s. 4 (1) merely because, having been in the Commonwealth for less than five years, he may under s. 5 (2) be given a dictation test and will, if he fails to pass, be "deemed to be a prohibited immigrant offending against" the Act.

So *held* by *Rich, McTiernan, Williams* and *Webb* JJ. (*Latham* C.J. and *Dixon* J. dissenting).

MOTION treated as trial of action.

In an action in the High Court by Annie Maas O'Keefe against Arthur Augustus Calwell, Alan Hewitt Priest and the Commonwealth, the claim indorsed on the writ was substantially as follows:—

1. The plaintiff is a married woman residing with her husband, John William O'Keefe, and her eight children at Beach Reserve, Shenfield Avenue, Bonbeach in the State of Victoria, at which address she has been ordinarily resident since 3rd May 1943. 2. On 14th June 1947 the plaintiff married her said husband, who on that date and at all times relevant was and is a British subject and an Australian citizen within the meaning of the *Nationality and Citizenship Act* 1948. 3. On the said 14th June and at all

*The provisions of these sections are described in the judgments, *post*; for s. 4, see p. 273.

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times relevant subsequent thereto the plaintiff was a British subject. 4. On 26th January 1949 the *Nationality and Citizenship Act* 1948 was proclaimed to come into operation. 5. On 26th January 1949 the plaintiff became an Australian citizen. 6. The defendant Arthur Augustus Calwell was at all relevant times and is sued as the Commonwealth Minister of State for Immigration. 7. The defendant Alan Hewitt Priest was at all relevant times and is sued as the Commonwealth Migration Officer. 8. On 9th February 1949 the defendant Calwell purported to make an order under s. 4 of the *Immigration Act* 1901-1940 declaring the plaintiff to be a prohibited immigrant and purported to direct that she be required by notice in writing given by an authorized officer to leave the Commonwealth within the period specified in such notice. 9. On 10th February 1949 the defendant Priest purported by notice in writing to require the plaintiff to leave the Commonwealth within the period ending on 23rd February 1949.

The plaintiff claimed: (*a*) A declaration that she is and at all times material was a British subject and an Australian citizen. (*b*) A declaration that she is not and at all material times was not an immigrant nor a prohibited immigrant within the meaning of the *Immigration Act* 1901-1940 and that she is not nor was she at any relevant time subject to any of the provisions of the said Act and that the said Act does not apply nor can its provisions lawfully be applied to her. (*c*) A declaration that the provisions of s. 25 (6) of the *Nationality and Citizenship Act* 1948 do not refer to her nor can such provisions lawfully be applied to her, or, in the alternative, a declaration that in so far as the said sub-section does apply or can be applied to her the said sub-section is ultra vires the Commonwealth. (*d*) A declaration that the said order of the defendant Calwell dated 9th February 1949 is null and void, illegal and beyond the powers of the Commonwealth and the defendant Calwell and that the direction of the defendant Calwell was bad in law. (*e*) A declaration that the notice of the defendant Priest dated 10th February 1949 is bad in law and of no effect. (*f*) A declaration that in so far as the *Immigration Act* 1901-1940 or any of the regulations made thereunder or any of the provisions of the said Act or regulations applies to the plaintiff, the said Act and regulations or such provisions of the said Act and regulations are ultra vires the Commonwealth. (*g*) An injunction restraining the defendants and each of them and their respective servants, officers and agents from attempting to deport or deporting the plaintiff or otherwise ordering or further ordering or compelling her to leave the Commonwealth without her consent.

The plaintiff moved for an interlocutory injunction, and the parties agreed that the motion be treated as the trial of the action. By consent it was ordered by *Latham* C.J. that the case be referred to the Full Court to be argued on the affidavits filed, and the admissions, made by the parties.

The parties agreed to admit the following :—1. The plaintiff was not at any material time the holder of a passport which was in force. 2. In January 1947 she was an alien and was not the holder of a landing permit issued by or on behalf of the Minister authorizing the admission of the holder into Australia. 3. She was not at any material time possessed of a certificate of health purporting to be a certificate of health for the purposes of the *Immigration Act* 1901-1940, s. 3 (*b*). 4. No certificate of health for the purposes of s. 3 (*b*) of the *Immigration Act* 1901-1940 has been prescribed.

It appeared from evidence on affidavit that the plaintiff, then a Dutch subject, arrived in Australia, with her first husband and her family, on 18th September 1942. They were fugitives from the Japanese and were evacuated from the Netherlands East Indies by a ship of the Australian Navy. In September 1944 the plaintiff's first husband was killed. She remained here with her family, being maintained by the Dutch Government until her second marriage. On 10th January 1947 she signed an application for a certificate of exemption from the provisions of the *Immigration Act*. On 16th January the certificate was granted, as from 10th January. Extensions of the period were subsequently granted, the last extension expiring on 31st December 1948. On 14th June 1947 the plaintiff married John William O'Keefe. She was desirous of remaining in Australia with him. Further references to the evidence will be found in the judgments hereunder.

Sholl K.C. and *Rapke*, for the plaintiff. (1) The threatened action of the defendants depends on the *Immigration Act* alone. It cannot be supported at common law or by reference to the legislative power with respect to aliens or defence. The plaintiff is a British subject, and, unless the *Immigration Act* gives the power, there is no power to deport her. The common-law power relating to aliens cannot apply to her, nor could any legislation with respect to aliens affect her. There does not appear to be any defence legislation which would apply. Deportation cannot be justified under the emigration power (*Ex parte Walsh and Johnson* ; *In re Yates* (1)). (2) The plaintiff is not and never was within the scope of the *Immigration Act*. Alternatively, if and to the extent

(1) (1925) 37 C.L.R. 36, at p. 65.

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that the Act purports to apply to her, it is ultra vires. The essential characteristic of immigration is entry into a country voluntarily and with the intention either of settling or, at least, of remaining for some time. It would not be appropriate to describe shipwrecked sailors marooned on the Australian coast, or the crashed passengers of a non-Australian aircraft, as "immigrants." Immigration involves a conscious entry as of choice. The members of the American forces which came to Australia during the war could not be described as immigrants. It was quite independently of her own will that the plaintiff was brought to Australia. It can be accepted that she was glad to escape the Japanese and, to that extent, she travelled gladly to whatever the destination might be of the ship that carried her, so long as it was away from the Japanese, but she had no say in the choice of an Australian destination, and it was, therefore, not of her own will that she found herself in Australia. It may be that, in certain aspects of the question whether a person is an immigrant, intention as a test will be rejected on practical grounds: For instance, the distinction between *animus manendi* and a mere intention to visit (*R.* v. *Macfarlane*; *Ex parte O'Flanagan and O'Kelly* (1)). On the other hand, *animus revertendi* has been treated as relevant (*Potter* v. *Minahan* (2)), and ss. 3c-3j recognize some mental element. Where, as here, it is clear that a person's entry into Australia is not voluntary, the only proper conclusion is that that person is not an immigrant. The cases have given to the word "immigration" in the Constitution a wider meaning than is to be found in the dictionaries, which stress the intention to settle; but the cases so far have all been cases of voluntary entry, and, although there are dicta which do not distinguish between voluntary and involuntary entry, there is no decision which is contrary to the present submission. The following decisions, in particular, are not opposed to the plaintiff's submission: *Chia Gee* v. *Martin* (3); *Ah Yin* v. *Christie* (4); *R.* v. *Macfarlane* (5); *Ex parte Walsh and Johnson* (6). Generally, as to what constitutes "immigration," see *Berriedale Keith, Imperial Unity and the Dominions* (1916), p. 254; *Moore, Constitution of the Commonwealth*, 2nd ed. (1910), pp. 373, 465-467; *Ah Sheung* v. *Lindberg* (7); *Attorney-General for the Commonwealth* v. *Ah Sheung* (8); *Potter* v. *Minahan* (9). The submission is that the plaintiff was never

(1) (1923) 32 C.L.R. 518, at p. 532.
(2) (1908) 7 C.L.R. 277.
(3) (1905) 3 C.L.R. 649.
(4) (1907) 4 C.L.R. 1428: See p. 1432.
(5) (1923) 32 C.L.R. 518: See pp. 531-533, 552, 556, 575, 580-583.
(6) (1925) 37 C.L.R. 36.
(7) (1906) V.L.R. 323.
(8) (1906) 4 C.L.R. 949, at p. 951.
(9) (1908) 7 C.L.R., at p. 285.

within the immigration power; alternatively, she was not in January 1947 a person to whom s. 4 (1) of the Act was applicable. The expression in s. 4 (1), "liable to be prohibited from entering or remaining" &c., does not appear to have any relation to any other provision of the Act. The Act nowhere provides in so many words for the making of an order prohibiting any person from remaining in the Commonwealth. So far as the sub-section says "prohibited from entering," it cannot relate to a person who has already entered. A deportation order under s. 4 (5) would not take the form of "prohibiting" &c., although the effect may be the same; but s. 4 (1) can hardly be referring to someone coming within s. 4 (4) or (5). The only meaning of which the expression seems susceptible is "liable to be dealt with as a prohibited immigrant"; that is, it would seem to cover the two classes of persons referred to in s. 7 of the Act. The plaintiff would have come within the second of these classes, namely, "person . . . deemed to be a prohibited immigrant offending against this Act," if, prior to the issue to her of a certificate purporting to be under s. 4 (1), she had been given a dictation test and had failed to pass it. It is true that she could have been given such a test under s. 5 (2) at any time up to September 1947, but it cannot be said that in January 1947 she was subject to a "liability" within the meaning of s. 4 (1) merely because there was a possibility that the test would be applied thereafter and she might fail to pass it. The plaintiff was not at any relevant time a prohibited immigrant within s. 3 of the Act. It is submitted that s. 3 relates only to the time of entry, to the time during which the immigrant is or should be in the hands of the immigration officers on the way in. For instance, if the immigrant has been allowed by the officers to enter without a dictation test, s. 3 (*a*) would not enable the test to be given later. It is only under s. 5 that the test can be given at a later stage. Thus, at the relevant time, the plaintiff was not subject to any "liability" created by the *Immigration Act*. She did not at or in relation to the time of her entry become a prohibited immigrant under s. 3; she did not, in January 1947 or thereafter, satisfy the description in s. 4 (1) of a person to whom a certificate of exemption might be given, and s. 5 (2) is no longer applicable to her; therefore, she cannot be dealt with under s. 4 (4). (3) If the plaintiff's entry into the Commonwealth was "immigration" within the meaning of the Constitution and the Act and if she was within s. 4 of the Act at any relevant time, nevertheless, when the Minister sought to expel her she had become a member of the Australian community and was not subject to the immigration power. That a

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person may cease to be an immigrant by becoming absorbed into the community is shown by *Potter* v. *Minahan* (1) and *Ex parte Walsh and Johnson* (2). The question is one of fact, and it is submitted that the facts which are in evidence here show that the plaintiff had become a member of the community and was no longer subject to s. 4 (4) of the Act. The existence of a certificate of exemption under s. 4 (1) is not a bar to this conclusion. The plaintiff, although originally she had no intention of making Australia her permanent home, subsequently changed her mind on receiving the offer of marriage from the man to whom she is now married. She has in fact made her home here and by her actions, has identified herself with the community in the locality in which she lives. The cases do not suggest that there must be some bilateral arrangement showing consent or acceptance on behalf of the Government. (4) Even if the plaintiff is now within the immigration power and the scope of the Act, the procedure sought to be put in operation against her amounts to an attempt to confer the judicial power of the Commonwealth on the Minister and/or the immigration officer contrary to s. 71 of the Constitution. The Act, s. 4 (4), is therefore invalid. Before the Act was amended in 1940 a conviction by a court was a necessary pre-condition to deportation. The new s. 4 seems designed to avoid this and to give the Minister a power of adjudication which has, or may have, penal consequences. The declaration of the Minister under s. 4 (4) that a person is a prohibited immigrant amounts to an adjudication which could result in a conviction under s. 7. The declaration would be binding for the purposes of s. 7. If the declaration was followed by the notice requiring the person to leave the Commonwealth and he did not comply with it, he would be in contravention of the Act, and that would bring him within the words of s. 7.

[McTIERNAN J. referred to *Ex parte Walsh and Johnson* (3).]

[Counsel referred to *Rola Co. (Australia) Pty. Ltd.* v. *The Commonwealth* (4); *R.* v. *Fine* (5); *Nationality and Citizenship Act* 1948, ss. 3, 7, 25, 26.]

Tait K.C. (with him *A. M. Fraser*), for the defendants. Declarations (*a*) and (*c*) asked for in the writ are irrelevant to any of the matters which have been argued on behalf of the plaintiff, and, whatever is the outcome of that argument, should not be made. To support the action taken and proposed to be taken against the

(1) (1908) 7 C.L.R. 277.
(2) (1925) 37 C.L.R. 36: See pp. 63-65, 110, 137, 138.
(3) (1925) 37 C.L.R., at pp. 95, 96.
(4) (1944) 69 C.L.R. 185, at pp. 198, 199, 203, 204, 211, 213, 215-218.
(5) (1912) 29 T.L.R. 61.

plaintiff the defendants rely solely on s. 4 of the *Immigration Act*, and, so far as constitutional power is concerned, on the immigration power conferred by s. 51 (xxvii.) of the Constitution. The power to legislate with respect to immigration is a power to control the entry into Australia of any person whose home is not already in Australia and to retain control over that person after entry so long as he can be regarded as an immigrant. A person may cease to be an immigrant by being absorbed into the community, but it is possible for the legislaton to retain such a control over the immigrant that it cannot be said in law that he has become a member of the Australian community. It may be that this is not a power which can continue for an unlimited time so as to cover a case in which the facts show plainly that the person in question has been absorbed into the community; but, at least, it is within power to subject the immigrant to something in the nature of a period of probation, to fix some reasonable period of time within which the immigrant cannot be regarded as having been absorbed into the community. So far as the power is concerned, it cannot be limited by any such distinction as the plaintiff endeavours to make between voluntary and involuntary entry. Such a distinction is inconsistent with the existing authorities. It necessarily involves an inquiry as to state of mind which would be impracticable in law. Moreover, the distinction—if in the abstract it is legitimate—has no reality in relation to the facts of the present case. The plaintiff did not come here against her will; in so far as her mind operated on the matter, she was at least willing to come here and she acquiesced in coming. Section 4, on its proper construction, is a legitimate exercise of the legislative power over immigration. The words of s. 4 (1), "any person," having regard to the context, refer to a person who has entered or proposes to enter Australia and who is not already a member of the Australian community. In so far as the following words refer to a person who is liable to be prohibited from *entering* the Commonwealth, they are apt to include a person who has not yet reached Australia; a person, for instance, in another country who desires to come to Australia may apply for a certificate of exemption before he commences his journey to this country. The certificate could therefore be issued at a stage before any question arose whether the person on coming here would come within any of the classes of "prohibited immigrants" set out in s. 3. Thus, the class of person "liable to be prohibited . . . from *entering*" is wider than, though it may include, "prohibited immigrants." The class "liable to be prohibited . . . from . . . *remaining*" must be equally extensive. If that is not

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what the section means, there is no reason why it should not have said simply: "any person who is a prohibited immigrant." The word "liable," therefore, cannot be limited to cases where there is an existing liability, that is, one already accrued in law; it must be given the wider, colloquial, sense in which it includes a liability which may accrue if some event happens in the future. This view is supported by a consideration of the various classes of "prohibited immigrants" described in s. 3. Some of the paragraphs of s. 3 may be said to be subjective in that they describe a characteristic possessed by a person at the time of entry: for example, a person suffering from a particular disease, or one who has been convicted of a particular type of crime. Such a characteristic may not be known at the time of the person's entry; but the point of time to which any subsequent inquiry as to the possession of the characteristic must be directed is the time of entry. When it is established that he had that characteristic at the time of entry, he is shown to have been a prohibited immigrant at the moment of entry. Other paragraphs of s. 3, however, provide a more objective test; they depend on the happening of some event which does not necessarily happen until after the time of entry. Under s. 3 (*a*), for example, the characteristic is failure to pass a dictation test; under s. 3 (*gf*), failure to prove that he is the holder of a passport. Section 3 contains no limitation of time as to either of these two tests. As to the dictation test, it may be that, as a matter of construction, a limitation has to be read into s. 3 (*a*) by reason of s. 5, but otherwise these "objective tests" may, it is submitted, be applied at any time, however long, after entry until the person in question has ceased to be an immigrant by being absorbed into the community. On the relevant date, 16th January 1947, the plaintiff was a person liable to be prohibited from remaining in the Commonwealth. Assuming that s. 5 limits the time for a dictation test to five years from entry, that time had not elapsed in the plaintiff's case, and she was an immigrant to whom the test might have been given. That assumes that she still remained an immigrant on 16th January 1947. The argument that she had become a member of the community and therefore ceased to be an immigrant has still to be met. This is a question of fact, and the plaintiff has adduced no evidence of substance to justify a conclusion in her favour. The critical date for this purpose is 16th January 1947. The most that appears is that at that time the plaintiff's attitude of mind was that she desired to become a member of the Australian community. The matter of absorption into the community is not, so to speak, a "unilateral" one. Something more is needed

than evidence of the immigrant's own mental attitude: see *Ex parte Walsh and Johnson* (1). It is submitted that s. 4 confers no judicial power. It merely provides administrative machinery by which immigrants may be deported. It is not in any way penal. It is quite independent of the penal provisions in other sections of the Act which apply to persons who are prohibited immigrants under s. 3. A declaration by the Minister under s. 4 (4) that a person is a prohibited immigrant has no effect beyond what s. 4 itself provides; it does not make the person a prohibited immigrant for the purposes of any other section of the Act.

Sholl K.C., in reply. The defendant's construction of the words of s. 4 (1), "liable to be prohibited" &c., involves that an immigrant, until absorbed into the community, is "liable to be prohibited . . . from entering or remaining" at any interval of time at all, though he has committed no breach of the Act. If the word "liable" was capable of this sense, it would be correct to say of every member of the community that he is liable to imprisonment for theft, although he has done nothing on which a charge against him could be founded. The construction of s. 4 (1) which the plaintiff contends is the only reasonable construction may be expressed by substituting for the phrase "authorizing any person who . . . is liable to be prohibited . . . from entering or remaining in the Commonwealth, to enter or remain in the Commonwealth" the words "authorizing any person who, in the absence of a certificate of exemption, would be a prohibited immigrant (or a person so deemed) under the provisions providing for his becoming such on entry (ss. 3, 3K) or after entry (ss.5 (2), (5), 6 (*b*), 8, 8A, 8AA, 8AB, 8B) to enter or (as the case may be) remain in the Commonwealth." This construction is supported by s. 3 (*h*), which, in excepting from the class of prohibited immigrants a person having a certificate of exemption, assumes that without it the holder would be a prohibited immigrant, and by s. 4 (6), which would be unnecessary unless, without a certificate of exemption, the person landing from a vessel would be a prohibited immigrant.

Cur. adv. vult.

March 18.

The following written judgments were delivered:—

LATHAM C.J. The plaintiff Annie Maas O'Keefe moved for an interlocutory injunction to restrain the defendants from deporting her from the Commonwealth. It was agreed between the parties

(1) (1925) 37 C.L.R., at pp. 55, 82.

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that the motion for an injunction should be treated as the trial of the action, and the action was referred to the Full Court under the *Judiciary Act* 1903-1947, s. 18, to be argued before the Full Court.

The plaintiff was born at Monado, Celebes, on 17th December 1908 and was a Dutch subject. With her then husband and family of seven children she escaped from the Japanese Forces in the islands and the whole family was brought to Australia by the Australian corvette H.M.A.S. Warrnambool on 18th September 1942. She was registered as an alien under the *National Security* (*Aliens Control*) *Regulations* on 28th October 1942. The Dutch Government took charge of the family and provided for their care and maintenance. A child was born in Australia to the plaintiff and her husband on 27th August 1943. Her husband, after receiving special training in Australia, rendered service with the intelligence section of the Dutch Army and was killed in the crash of a Dutch transport plane in September 1944. The plaintiff received a widow's allowance from the Dutch Government. On 16th January 1947 the plaintiff applied for a certificate of exemption under the *Immigration Act* 1901-1940. The certificate of exemption which was issued to her was expressed to be in force for a period of three months from 10th January 1947. It was extended to 12th June 1947 and ultimately to 31st December 1948. When the extension was granted in June 1947 the plaintiff was informed that the extension had been granted on the understanding that she would leave the Commonwealth before 31st December 1947. The extension to 31st December 1948 was accompanied by a statement that the extension must be regarded as final and that it was expected that arrangements for the plaintiff's departure from Australia would be effected before November 1948. On 14th June 1947 the plaintiff married John William O'Keefe, a British subject. She thereby became a British subject: see *Nationality Act* 1920-1946, s. 18. Some correspondence took place with the Department of Immigration with respect to the effect of her marriage upon her right to remain in the Commonwealth, and her husband was informed by the Department on 19th June 1947 that the marriage between him and the plaintiff would not confer any right on the plaintiff to remain in Australia as a permanent resident.

The certificate of exemption expired on 31st December 1948 and on 10th February 1949 a notice in writing was given to her by an authorized officer requiring her to leave the Commonwealth within the period ending on 23rd February 1949. Section 4 (5) of the *Immigration Act* 1901-1940 provides that if a person (to whom the section is applicable) fails to leave the Commonwealth within

the period specified in such a notice, that person may be deported from the Commonwealth pursuant to an order of the Minister. The plaintiff claims that she has a right to remain in Australia notwithstanding the notice and notwithstanding any order that may be made by the Minister. She issued a writ claiming, in the first place, a declaration that she is and at all times material was a British subject and an Australian citizen.

The fact that the plaintiff became a British subject did not remove her from the possible application of the *Immigration Act*. She was an alien when she entered the Commonwealth in September 1942. But even if she had then been a British subject she would have been subject to the Act if she were an immigrant: see *Attorney-General for the Commonwealth* v. *Ah Sheung* (1). The fact that she became a British subject after entry into Australia has no bearing upon the applicability of the *Immigration Act*.

It was contended that the plaintiff had become an Australian national under the *Nationality and Citizenship Act* 1948, s. 25 (4), because she was a British subject immediately prior to the date of commencement of the Act, had prior to that date been married to an Australian citizen, and had entered Australia prior to that date. It was argued on the contrary that s. 25 (6) excluded her from the category of Australian citizenship because she was a person who had both applied for and been issued with a certificate of exemption under s. 4 of the *Immigration Act* and had not been granted permission by the Minister to remain in Australia for permanent residence. It is not necessary to decide between these arguments because there is nothing in either the *Immigration Act* or the *Nationality and Citizenship Act* which shows that the inclusion of a person within the class of Australian citizens affects the application of the *Immigration Act* to that person.

There is no general principle that excludes deportation under a Dominion law in the case of either British subjects or local nationals. Whether such deportation is authorized or not depends merely upon the terms of the statute. See *Co-operative Committee on Japanese Canadians* v. *Attorney-General for Canada* (2), where it was said, in relation to a statute authorizing deportation: "Whether or not the word 'deportation' is in its application to be confined to aliens or not remains therefore open as a matter of construction of the particular statute in which it is found . . . The general nature of the Act and the collocation in which the word is found, establish, in their Lordships' view, that in this statute the word 'deportation' is used in a general sense and as an action applicable to all persons

(1) (1906) 4 C.L.R. 949.

(2) (1947) A.C. 87, at p. 105.

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irrespective of nationality. This being in their Lordships' judgment the true construction of the Act, it must apply to all persons who are at the time subject to the laws of Canada. They may be so subject by the mere fact of being in Canada, whether they are aliens or British subjects or Canadian nationals. Nationality *per se* is not a relevant consideration. An order relating to deportation would not be unauthorized by reason that it related to Canadian nationals or British subjects."

The first declaration sought has no relation to any challenged right of the plaintiff and it should not be made.

Section 3 of the *Immigration Act* 1901-1940 provides that:— " 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:—(*a*) any person who fails to pass the dictation test: that is to say, who, when an officer or person duly authorized in writing by an officer dictates to him not less than fifty words in any prescribed language, fails to write them out in that language in the presence of the officer or authorized person. . . . (*b*) any person not possessed of the prescribed certificate of health." (No certificate of health has been prescribed and, in my opinion, this provision therefore has no application.), (*c*), (*d*), (*e*), (*f*), (*g*), idiots and similar persons and persons suffering from certain diseases or likely to become a charge upon the public; (*ga*), (*gb*), (*gc*) certain convicted persons, prostitutes *et al*; (*gd*) any person who advocates the overthrow by force or violence of established government &c.; (*ge*) " any alien who, on demand by an officer, fails to satisfy the officer—(*a*) that he is the holder of a landing permit, issued by or on behalf of the Minister, authorizing the admission of the holder into Australia, and that he is able to comply with the conditions specified therein; or (*b*) that his admission into Australia has otherwise been authorized by or on behalf of the Minister "; (*gf*) any person who in the opinion of an officer is not under the age of sixteen years, and who, on demand by an officer, fails to prove that he is the holder of a passport issued by certain authorities as described.

Section 3 continues—" But the following are excepted:—(*h*) Any person possessed of a certificate of exemption as prescribed in force for the time being; " and certain other persons.

It is admitted by the plaintiff (1) that she was not at any material time the holder of a passport which was in force; (2) that in January 1947 she was an alien and was not the holder of a landing permit issued by or on behalf of the Minister authorizing the admission

of the holder into Australia ; (3) that she signed an application for a certificate of exemption on 10th January 1947.

Section 4 of the Act contains the following provisions :—" (1) The Minister, or an officer thereto authorized in writing by the Minister (in this section referred to as ' an authorized officer '), may issue a certificate of exemption in the prescribed form authorizing any person who, unless he possesses such a certificate, is liable to be prohibited under this Act from entering or remaining in the Commonwealth, to enter or remain in the Commonwealth without being subject to any of the provisions of this Act restricting entry into or stay in the Commonwealth. (2) The certificate shall be expressed to be in force for a specified period only, but the period may be extended from time to time by the Minister or by an authorized officer. (3) Any such certificate may at any time be cancelled by the Minister by writing under his hand. (4) Upon the expiration or cancellation of any such certificate, the person named therein may, if found within the Commonwealth, be declared by the Minister to be a prohibited immigrant and may thereupon be required by notice in writing given by an authorized officer, in accordance with the directions of the Minister, to leave the Commonwealth within a period to be specified in the notice. (5) If the person fails to leave the Commonwealth within the period specified in the notice, he may be deported from the Commonwealth pursuant to an order of the Minister. (6) Where, in pursuance of this section, a person enters the Commonwealth from any vessel, a penalty shall not attach to the vessel or its master, owners, agents or charterers in respect of such entry ; but the master, owners, agents or charterers of the vessel may, at any time within five years after the entry of the person into the Commonwealth, be required by notice in writing given by any Collector of Customs, to provide a passage for that person from the Commonwealth to the place whence he came, and in default of compliance with that requirement shall be guilty of an offence. Penalty : One hundred pounds." The evidence shows that the procedure prescribed by this section has been followed up to the point of the giving of the notice mentioned in sub-s. (4).

It may be observed that a certificate of exemption may be issued before the entry of the immigrant—see s. 4 (6).

It was suggested in argument that s. 4 enabled the Minister to force a certificate of exemption upon any person whomsoever against his will so as to bring that person within the provisions of the section relating to deportation, and that such a law could not be a law with respect to immigration. But a certificate can be

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issued under this section only to persons who, if they do not possess such a certificate, are liable to be prohibited under the Act from entering or remaining in the Commonwealth—not to " any person." The *Nationality and Citizenship Act* 1948, s. 25 (6), was relied upon to support the proposition that a certificate could be issued without any application by the person concerned. This provision excludes from Australian nationality a person who had " applied for or was issued with a certificate of exemption under s. 4 of the *Immigration Act*." It was argued that this provision showed that a certificate could be issued without any application. But all that this provision does is to exclude from the operation of other provisions of the *Nationality and Citizenship Act*, not only persons who obtain a certificate, but also persons who apply for a certificate—whether their application is successful or not. But even if a certificate could be issued to a person against his will, it could be issued only if that person was a person liable to be prohibited &c., so that a certificate issued to any other person would have no legal significance. But, further, the exemption in s. 3 (*h*) is given to persons possessed of a certificate of exemption " as prescribed." Reference to the regulations made under the Act (S.R. 1926 No. 185 as amended, S.R. 1940 No. 144) shows that a certificate is obtainable only upon application and payment of a fee, and that the certificate must bear the signature of the person exempted. There is, in my opinion, no foundation to support the argument that a certificate of exemption can be issued *in invitum* at the arbitrary will of the Minister or an officer.

If a person to whom s. 4 is applicable does not choose to apply for a certificate of exemption, then steps can be taken to convert the liability to prohibition of entry into or stay in Australia into an actuality of prohibition. If this is done, s. 7 of the Act can be applied and, after conviction, the person who preferred to abstain from applying for a certificate of exemption could be deported.

Section 5 of the Act provides that any immigrant who has evaded an officer or obtained entrance to the Commonwealth by certain other means mentioned may, if at any time thereafter he is found within the Commonwealth, be required to pass the dictation test and shall, if he fails to do so, be " deemed to be a prohibited immigrant offending against the Act." Section 5 (2) provides :—" Any immigrant may at any time within five years after he has entered the Commonwealth be required to pass the dictation test, and shall if he fails to do so be deemed to be a prohibited immigrant offending against this Act." This period of five years had not expired when the plaintiff obtained her certificate of exemption in January 1947,

so that a dictation test could then have been administered. The five-year period in the case of the plaintiff expired in September 1947.

Section 6 allows the entry of a prohibited immigrant under conditions of providing security and obtaining a certificate of exemption.

Section 7 provides that :—" Every prohibited immigrant entering or found within the Commonwealth in contravention or evasion of this Act and every person who, by virtue of this Act, is deemed to be a prohibited immigrant offending against this Act shall be guilty of an offence against this Act, and shall be liable upon summary conviction to imprisonment for not more than six months, and in addition to or substitution for such imprisonment shall be liable pursuant to any order of the Minister to be deported from the Commonwealth."

The plaintiff further claims by her writ a declaration that she is not and at all times material was not an immigrant nor a prohibited immigrant within the meaning of the *Immigration Act* 1901-1940 and is not and was not at any relevant time subject to any of the provisions of the Act.

It was contended for the plaintiff that she was brought here under military orders, and so did not enter Australia voluntarily, and that for this reason she was not an immigrant and the *Immigration Act* did not apply to her. The suggestion that entry must be voluntary before a person can become subject to the provisions of the *Immigration Act* prohibiting entry was made in *Chia Gee* v. *Martin* (1) where stowaways were arrested on board a ship, brought ashore in custody and charged with being prohibited immigrants. It was held that they could properly be convicted, and it was said : " It would be reducing the Act to a nullity if it were held that the test of whether a man were an immigrant or not was to be some intention in his mind, which intention the Commonwealth authorities might have no means of discovering " (2). But it is unnecessary to consider various instances of involuntary entry into Australia or detention in Australia which were suggested in argument as possibilities. In the first place, the plaintiff escaped from the Japanese Forces and undoubtedly came to Australia with her own full consent, and her affidavit shows that she was glad to come here. In the second place, the *Immigration Act* deals not only with entry into Australia, but with remaining in Australia—with strangers to Australia who obtain entry into Australia and who want to stay here (whatever intention they may have had when they made their original entry). There is no doubt that the plaintiff

(1) (1905) 3 C.L.R. 649. (2) (1905) 3 C.L.R., at p. 654.

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wishes to remain in Australia. She is not being held in Australia against her will. If that were the case she would have no objection to being requested to leave Australia.

It is further argued that the plaintiff has now made her home in Australia and has become a member of the Australian community, so that the *Immigration Act* can no longer be applied to her—*Potter* v. *Minahan* (1). In January 1947, when she applied for and was granted a certificate of exemption, she was an alien awaiting return to her own country when conditions permitted. Laws with respect to immigration may properly control, not only the act of entry into Australia, but also the conditions upon which persons not already members of the Australian community may be permitted to remain in Australia. The basis of s. 4 of the Act is that persons may be permitted to remain in Australia for limited periods, which may be extended from time to time, so that as long as they are in Australia under an authorized permit they are not remaining in Australia in contravention of the Act. The exemption may be for any period—days, months or years. There is no time limit prescribed in the Act. But such persons, expressly allowed to remain for a temporary period, cannot, during that period, become members of the Australian community so as to become entitled to remain here permanently. It is true that the plaintiff has married an Australian husband, has an Australian home, has children who are going to school here, has joined her husband's church, and has her whole life here. But a person cannot become a member of the Australian community by his own act when he has been admitted and has been allowed to remain in Australia only under a temporary permit authorized by statute. Section 4 expressly provides that such a person, who originally could have been excluded altogether, may be deported in accordance with the provisions of the section.

There is in my opinion no ground for holding that such provisions cannot be enacted under a power to make laws with respect to immigration. Such a power is a power to make laws with respect to the whole subject of immigration—with respect to each and every element in immigration. "Immigrants" include persons who are intending settlers in a country other than their own and seek to enter (or do enter) that country and to remain in it for the purpose of making a permanent home there, or who, having entered another country without any original intention to settle there, do in fact endeavour to remain in that country as members of the community. Control of immigration involves control of the admission of such persons and determination whether such admission is to be allowed

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

to be permanent or only temporary. Such control is the means of determining the composition of the population of a country in respect of the admission of external elements. Admission of any person not already a member of the community may, under a power to make laws with respect to immigration, be allowed or prevented either completely or partially and subject to conditions as Parliament thinks proper. There could be no effective control of the subject of immigration if it were not possible to limit the entry and stay of persons who claimed that they were only making a short visit, or if it were not possible to deport persons who were allowed into the country only for a specified period and who then changed their minds and wished to remain permanently. Immigration into a country, if completed, involves two elements, (*a*) entry into the country, and (*b*) absorption into the community of the country. Both of these elements can be controlled under a power to make laws with respect to immigration. It is unnecessary and somewhat unconvincing to seek to justify legislation as immigration legislation upon the basis of a contention that *any* entry into a country is "immigration," even though the entry is obviously only temporary. Such legislation is justified as legislation upon the subject of immigration because without control of the entry of all persons not already members of the community there cannot be control of the second element—possible absorption into the community. Thus laws with respect to immigration may impose conditions of entry upon such persons and may provide for the limitation of the period during which they are to be permitted to remain in Australia, and may lawfully provide for their deportation upon the expiry of that period.

This view of the nature of the power to make laws with respect to immigration is established, in my opinion, by decisions of this Court. I refer to *Robtelmes* v. *Brenan* (1) per *Barton* J.—"The right to deport is the complement of the right to exclude; the right to exclude is involved in the right to regulate immigration. The right to prescribe the conditions upon which persons may remain and reside within this Commonwealth is included in that power to regulate immigration by Statute"; *R.* v. *Macfarlane*; *Ex parte O'Flanagan and O'Kelly* (2) per *Knox* C.J.—"Parliament may prescribe the conditions on which an 'immigrant' may be permitted to enter"; *Ex parte Walsh and Johnson*; *In re Yates* (3) per *Isaacs* J. applying the passage quoted above from *Robtelmes* v. *Brenan* (4).

(1) (1906) 4 C.L.R. 395, at p. 415.
(2) (1923) 32 C.L.R. 518, at p. 533.
(3) (1925) 37 C.L.R. 36, at p. 83.
(4) (1906) 4 C.L.R., at p. 415.

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But it is argued that s. 4 of the Act is invalid because it purports to invest the Minister with judicial power in breach of the Constitution of the Commonwealth, s. 71, which requires judicial power to be invested in courts, and only in courts. It is argued that the declaration of the Minister that a person is a prohibited immigrant (s. 4 (4)) assumes to make a binding determination exposing to penalties the person in respect of whom the declaration is made. Examination of the terms of the section shows that this is not the case. If the person in respect of whom the Minister made such a declaration were charged with being a prohibited immigrant found in Australia in contravention of the Act (see s. 7), the Minister's declaration would be an irrelevant fact and would not be admissible in evidence. It would not establish that the person *was* a prohibited immigrant, and the Crown would still have to prove its case by showing that the person fell within one of the categories of prohibited immigrants described in the Act. The declaration by the Minister is merely a procedural step towards the deportation of persons to whom s. 4 applies, namely persons not members of the Australian community who, unless they have a current certificate of exemption, are liable to be prohibited from entering or remaining in Australia. It produces no other effect whatever.

It was also argued that the order for deportation amounted to the imposition of a penalty without any judicial proceeding. Deportation is not necessarily punishment for an offence. The Government of a country may prevent aliens entering, or may deport aliens: *Musgrove* v. *Chun Teeong Toy* (1). Exclusion in such a case is not a punishment for any offence. Neither is deportation: see *Attorney-General for Canada* v. *Cain & Gilhula* (2) —"The power of expulsion is in truth but the complement of the power of exclusion." The deportation of an unwanted immigrant (who could have been excluded altogether without any infringement of right) is an act of the same character: it is a measure of protection of the community from undesired infiltration and is not punishment for any offence. This view of the nature of deportation was adopted by this Court in *Ex parte Walsh and Johnson*; *In re Yates* (3).

In my opinion, therefore, s. 4 is valid legislation with respect to immigration.

It is contended, however, that even if s. 4 is valid, it does not apply to the plaintiff because, it is said, she is not a person who "unless she possesses such a certificate, is liable to be prohibited

(1) (1891) A.C. 272.
(2) (1906) A.C. 542, at p. 547.
(3) (1925) 37 C.L.R. 36: See pp. 60, 96.

under the Act from entering or remaining in the Commonwealth." It is contended that she is not a " prohibited immigrant," and that she could not be convicted of an offence under s. 7 as being found within the Commonwealth in contravention of the Act, and that there is no provision in the Act which makes her a person who is deemed to be a prohibited immigrant offending against the Act and that therefore s. 4 cannot be applied to her. I agree that her entry was not unlawful and that she was not and has not yet become a prohibited immigrant, or a person deemed to be a prohibited immigrant.

For this reason, as well as for the other reasons mentioned, the plaintiff seeks a declaration that any order for deportation would be invalid and an injunction restraining the defendants from deporting or attempting to deport her without her consent.

The provisions of s. 4 apply only to persons who, " unless they possess a certificate of exemption, are liable to be prohibited under the law from entering or remaining in the Commonwealth." An attempt to apply the provisions of the section to other persons would be entirely nugatory.

Section 3 prohibits the immigration into the Commonwealth of the persons described in the paragraphs of the section who are called in the Act " prohibited immigrants." The application of s. 4, however, does not depend upon a person being in fact a prohibited immigrant. It depends upon that person being liable to be prohibited under the Act from entering or remaining in the Commonwealth unless he possesses a certificate of exemption. The words cannot be interpreted as simply equivalent to " person who is or is deemed to be a prohibited immigrant." So to interpret them would ignore the words of the section. The history of s. 4 has some significance in this connection. Until the amending Act of 1940, when the section assumed its present form, the section provided that when a certificate of exemption expired or was cancelled the person named in the certificate should, if found within the Commonwealth " be deemed to be a prohibited immigrant offending against this Act " and that he could be deported. In the present section the words quoted no longer appear. New and very different words—" liable to be prohibited " &c.—have been substituted, and the section should not be construed as if no change had been made in its terms. Further, the relevant time for determining whether a person is liable &c. must necessarily be the time when he applies for the certificate. It is at that time that it must be determined whether a certificate can lawfully be issued to him. It cannot be the time—which might be many years later—when the

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certificate had expired or had been cancelled and an order was made for deportation. Such a construction appears to me to make nonsense of the section.

A person who is a member of the Australian community cannot be a prohibited immigrant because he, when returning to Australia, is not an immigrant: see *Potter* v. *Minahan* (1) and *Ex parte Walsh and Johnson*; *In re Yates* (2). These cases show that such a person is not subject to any liability of being prohibited under the Act from entering or from remaining in the Commonwealth. No action can be taken under the Act which would prevent such a person from either entering the Commonwealth or remaining in the Commonwealth.

Other persons can be classified as follows:—(1) Prohibited immigrants, i.e., persons who are actually prohibited immigrants because they answer one or more of the descriptions contained in pars. (*a*) to (*gh*) of s. 3. Such persons, if found within the Commonwealth, may be prosecuted and if convicted may be deported (s. 7). (2) Persons who are deemed to be prohibited immigrants offending against the Act—e.g., s. 5 (1) and (2), s. 6, par. (*b*). Section 7 applies to such persons. (3) Persons to whom the dictation test (s. 3 (*a*)) might have been applied but who have been exempted from the test: ss. 4A, 4B, 6. Certain information with respect to such persons must be placed annually before Parliament—s. 17. There are also provisions in s. 4AA under which there may be an exemption from the passport requirement of s. 3 (*gf*). (4) Persons who, though not actually prohibited immigrants, are persons to whom provisions of the Act might be applied (though they have not already been applied) so as to make them prohibited immigrants because they would or might, upon such application, then answer one or more of the descriptions contained in pars. (*a*) to (*gh*) of s. 3.

Persons in the fourth class, so long as they possess a certificate of exemption, are excepted from s. 3 by par. (*h*) of that section and, accordingly, are not prohibited immigrants. If, however, within five years a dictation test was administered to an immigrant and he failed in the test, he would then become a prohibited immigrant. During the five years and before the dictation test is administered, he is subject to the liability or risk of becoming a person who, without a certificate of exemption, would be a prohibited immigrant. During this period, therefore, he is a person who is liable to be prohibited under the Act from remaining in the Commonwealth. Paragraph (*ge*), referring to aliens who fail to

(1) (1908) 7 C.L.R. 277. (2) (1925) 37 C.L.R. 36.

satisfy an officer upon demand that they are the holders of landing permits or that their admission into Australia has otherwise been authorized, provides another illustration of a case where a person may be in Australia without any contravention of the law but may be brought into the category of prohibited immigrants by the action of an officer. Such an immigrant, until such a demand is made, is in the position of a person who is liable to be prohibited from remaining in Australia. Paragraph (*gf*), relating to passports, provides another example which is directly relevant to the present case. A person who had no passport and who accordingly could not satisfy an officer on demand that he had a passport, is a person liable to be prohibited under the Act from remaining in the Commonwealth because, upon failing to prove that he was the holder of a passport, he would become a prohibited immigrant under s. 3 (*gf*).

The plaintiff on 16th January 1947 applied for and obtained a certificate of exemption. If she had refused to apply, action could have been taken by demanding a passport or applying a dictation test, so that she would (if a passport were demanded) or at least might (in the case of the dictation test) become a prohibited immigrant. Accordingly, she was a person who was liable to be prohibited from remaining in the Commonwealth. It is admitted that she held no passport and, accordingly, she could not have provided the necessary proof. Thus on the date mentioned she was a person liable to be prohibited under the Act from remaining in the Commonwealth. The Minister therefore under s. 4 (4) had the power, whenever her certificate of exemption expired or was cancelled, of declaring that the plaintiff was a prohibited immigrant, and the further power of requiring her to leave the Commonwealth within a specified period, with the result that she may be ordered to be deported from the Commonwealth if she had not left the Commonwealth within that period. Even if, contrary to the opinion which I have expressed, it is relevant to consider whether the plaintiff was a person liable to be prohibited &c. in February 1949, it is still the case that, even if the view is taken, by reason of s. 5, that a dictation test could not then have been applied, a demand could then (and now) be made for a passport, so that, if the plaintiff failed (as she must fail) to prove that she had a passport, she would become a prohibited immigrant. Thus she is to-day a person liable to be prohibited from remaining in Australia because she would then, in the absence of such proof, become a prohibited immigrant and could not lawfully remain in Australia—s. 3 (*gf*) and s. 7.

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Accordingly, in my opinion, the provisions of s. 4 have been satisfied so that an order for deportation may validly be made.

In my opinion, for the reasons stated, the action should be dismissed.

It is perhaps desirable to state that the Court in this case is concerned only with the legality of the action of the Minister, and not with any question as to the propriety or desirability of the exercise of the ministerial powers in the present case.

RICH J. The argument in this action ranged over a number of important matters, but none of these arises unless the defendants are right in contending that the impending deportation of the plaintiff is authorized by s. 4, sub-ss. (4) and (5) of the *Immigration Act* 1901-1940. This Act has been amended a number of times, but it is the Act in its present amended form that requires our consideration. The power of the Minister to order the deportation of an immigrant under s. 4, sub-ss. (4) and (5) is not unlimited. He can only take action where the immigrant is a person who without a certificate of exemption is liable to be prohibited from entering or remaining in the Commonwealth. In the instant case the question is whether the plaintiff was on 16th January 1947, the date when she first received a certificate, a person liable to be prohibited from remaining in the Commonwealth. The meaning of these words has been fully discussed in the judgment of my brother *Williams* and I need not cover the same ground as I find myself in substantial agreement with his reasons. It is trite law that the words of a statute in the first instance must be given their ordinary and natural meaning, and I can find nothing in the present Act which would justify me in departing from that meaning. Since in January 1947 the plaintiff had not brought herself within any of the classes of immigrants who are prohibited immigrants, and it is not immigrants but prohibited immigrants who are liable to be prohibited from remaining in the Commonwealth, she is not a person whom the Minister was authorized by s. 4 (4) to declare to be a prohibited immigrant or to require to leave the Commonwealth.

I would therefore give judgment for the plaintiff and grant an appropriate injunction.

DIXON J. The question for decision in this suit is whether s. 4 of the *Immigration Act* 1901-1940 validly operates to enable the Minister of State for Immigration to require the plaintiff to leave the Commonwealth and, upon her failing to comply, to order her deportation.

The answer is to my mind governed by the way in which two subsidiary questions are determined. The first is whether upon the true meaning of s. 4 and upon the facts affecting her case the plaintiff falls within the intended operation of the provision. The second is whether, if she is within its intended operation, the provision is to that extent beyond the legislative power of the Parliament and on that ground must either be considered void *pro tanto* or, by the usual artificial process of restrictive interpretation, be confined within the Constitution and treated as having a less extensive application than is actually expressed. The facts concerning the plaintiff which are material to these questions are few. She came to Australia as an alien and arrived on 18th September 1942. She was an evacuee brought by a ship of the Royal Australian Navy as a fugitive from the Japanese and she exercised no choice in the matter. She was landed in circumstances which do not bring her within any of the paragraphs of s. 5 (1) of the Act. She has been in Australia ever since. On 10th January 1947, at the suggestion of an officer of the Department of Immigration, which she visited, the defendant signed an application for a certificate of exemption from the provisions of the Act for three months from that day. The certificate was granted and afterwards the period was twice extended. The certificate of exemption expired on 31st December 1948. In the meantime on 14th June 1947 the plaintiff, who in September 1944 had become a widow, married a British subject. Her nationality accordingly became British. On 9th February the Minister, purporting to act under s. 4, declared the plaintiff to be a prohibited immigrant. On 10th February 1949 an authorized officer of the Minister for Immigration, purporting to act under s. 4 of the Act, required her to leave the Commonwealth within a period that ended on 23rd February 1949. It may be assumed that during her residence in Australia the plaintiff had formed the desire or purpose of making Australia her permanent home and strove *qua tenus in illa induere patriam*, if it is permissible thus to convert the stock phrase. What then would be the application to these facts of s. 4, when construed according to its natural meaning, that is independently of any constitutional necessity of restricting its apparently expressed intention ?

Subject to one condition, which in my opinion involves the chief question in the case, the section so construed would clearly apply to empower the Minister to declare the plaintiff to be a prohibited immigrant and to enable an authorized officer to require her to leave the Commonwealth. Upon non-compliance she would fall

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within the sub-section authorizing a deportation order. It is unnecessary to say more by way of justification for the statement that the section would so apply than that, subject always to the one questionable condition, she would fall within the very words of the material sub-sections.

The questionable condition lies in the words in sub-s. (1) "any person who, unless he possesses such a certificate, is liable to be prohibited under this Act from entering or remaining in the Commonwealth." These words describe the persons to whom an exemption certificate may be issued under sub-s. (1) of s. 4. On these words hinge the ensuing sub-sections which, on the expiry or cancellation of a certificate granted to any such person, allow him or her to be declared a prohibited immigrant, required to leave and, on failure to do so, to be deported. Unless the person holding the expired or cancelled certificate fell within these words when it was obtained by him or her, sub-ss. (4) and (5) will not apply. The fact that the plaintiff applied for and obtained a certificate will not be enough, unless at the time of her doing so she was a person falling within the description. The question whether she did fall within the description depends upon the meaning of the words quoted. At that time she was not a prohibited immigrant within the meaning of s. 3. For she had entered without being asked to pass a dictation test under par. (*a*) of that section, no certificate of health had been prescribed under par. (*b*) for her to be possessed of, she had not failed to satisfy any officer that her entry was authorized by or on behalf of the Minister so as to come under par. (*ge*), no officer had demanded a passport under par. (*gf*) and she was not within any other paragraph of the section. At no time after her entry into the country had she been required under s. 5 to pass a dictation test. The period of five years within which she might have been so required under sub-s. (2) of s. 5 expired on 18th September 1947; and that no doubt is the practical reason why the Minister has proceeded only under s. 4. Once the plaintiff received her certificate of exemption the subsequent expiry of the period of five years had no importance under s. 4. The important fact is that it had not expired when her certificate of exemption was granted. At that date her position was that she was not a prohibited immigrant under s. 3 and was not deemed under s. 5 to be a prohibited immigrant offending against the Act and there was no other provision imposing upon her a then presently operating prohibition against her remaining in the country. She could not fall within the words of s. 4 (1) "liable to be prohibited . . . from entering" because she had already entered and she had done so

without violating any actual prohibition applicable to her. What then at the date of her exemption certificate was the plaintiff's position under the words " liable to be prohibited under this Act from . . . remaining in the Commonwealth " ? She was not under any then actually operative prohibition against remaining here ; but she was liable to a dictation test under s. 5 (2) and upon failing to pass the test she would have been deemed to be a prohibited immigrant offending against the Act.

Is this enough to bring her within the words " liable to be prohibited under this Act . . . from remaining " ? Or on the other hand are these words only satisfied when there is an actual prohibition of the person in present operation ? Perhaps an intermediate position or positions are possible, namely that the words may also be satisfied where under s. 5 (5) an immigrant is found to be affected with a disease which forms a ground for a deportation order or where an alien suffers a conviction which under s. 8 provides cause for a like order, or where reason exists for the Minister concluding under s. 8A (1) that a lately arrived person is of a class described in pars. (*a*), (*b*) or (*c*) of that sub-section. It is an intermediate position because in such a case the liability to deportation depends on the intervention of the Minister's discretion only and involves no further act or omission on the part of the person whose departure from Australia is desired, as does failure in the dictation test. But except s. 5 (5) these provisions do not work by means of prohibiting the person from remaining here. They go directly to deportation orders. As for s. 5 (5), it seems quite improbable that s. 4 (1) was adopted in contemplation simply of a possible situation under that provision.

Substantially I think that the question is whether the words " liable to be prohibited under this Act from remaining " mean in effect " liable to be prohibited by the use of the dictation test from remaining " or on the other hand have the same meaning as if they were written " under a prohibition from remaining."

After some fluctuation of opinion I have reached the conclusion that the former of these two meanings or operations of the sub-section is that which the legislation has expressed. My reasons may be divided under five headings. In the first place I think the expression " liable to be prohibited," although including the case of a prohibition already incurred, suggests the idea of a prohibition not yet incurred but which the party is " liable " to incur. In the second place, one meaning of the word " liable " is " exposed to " or " in jeopardy of " and in the context it is a natural reading. Thirdly, the dictation test is but a procedure and when administered

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results in the party becoming a prohibited immigrant. In administering the immigration laws it has always been so regarded. Fourthly, if sub-s. (1) had been restricted to persons whose entry or whose continued presence was already unconditionally prohibited it would have been natural to call them prohibited immigrants and for the draftsman to resort to the words " liable to be " would hardly have been natural. Fifthly, the concluding words of sub-s. (1) of s. 4 appear to me to confirm this interpretation of the word " liable." The words are " without being subject to any of the provisions of this Act restricting entry into or stay in the Commonwealth." These words seem naturally to include s. 3 (*a*) and s. 5 (1) and (2), which authorize the administration of the dictation test. Yet the words appear to go back to the idea of liability to be prohibited from entering or remaining.

I think that in the first branch of the alternative expression under consideration, namely the branch dealing with persons liable to be prohibited from entering, the same meaning should be attached to " liable." There no doubt it includes persons labouring under an actual present prohibition as it does in the branch dealing with the prohibition against remaining in the Commonwealth. But it extends to the case of immigrants to whom it is not desired to administer the dictation test and who are not exposed to any other objection to their entering. In such cases to give them a certificate of exemption and waive or suspend the dictation test is a course not only reasonable but consonant with practice and with the presumptive intention of s. 3 (*h*) and of s. 4 in its first form. The introduction in the year 1940 of the new provision in sub-s. (1) and the rewriting of the section may of course have effected a wider change than was intended, but it seems to have been directed rather to enabling the grant of exemptions after entry, to including an " officer authorized thereto " with the Minister and to stating the effect of the exemption. No doubt unless the immigrant is actually prohibited the master owners &c. of the vessel carrying him are not liable to the penalty from which s. 4 (6) relieves them when he is exempted. But while that indicates that immigrants otherwise actually prohibited may obtain exemption it does not show that those exposed to the machinery which when put in operation will result in their becoming prohibited immigrants are not also capable of receiving an exemption certificate.

For the reasons I have given I think that the plaintiff falls within the intended operation of s. 4.

It is now necessary to turn to the constitutional power of the Commonwealth and consider whether such an operation in relation to the plaintiff is valid.

It was suggested that sub-s. (4) of s. 4 and perhaps sub-s. (5) amounted to an invasion of the judicial power which can only be conferred under Ch. III. of the Constitution. The basis of the suggestion is an interpretation of sub-s. (4) which I think is mistaken. The sub-section does not as was assumed contemplate a finding by the Minister that the party in fact fell within one or other of the categories of prohibited immigrant formulated by other sections of the Act. It is concerned only with the grant of a certificate of exemption to persons falling under the description contained in s. 4 (1) and with its expiration or cancellation. On none of these matters is the Minister's declaration conclusive. Indeed his authority to make a declaration that the party is a prohibited immigrant depends on the existence of those facts.

But the ground upon which most reliance was placed was that owing to the circumstances in which the plaintiff came to Australia s. 4 could not validly apply to her. It was also maintained that if at some time during her history, that is on her arrival in Australia or during her residence here, she may have been amenable to the provision, she had now passed into the Australian community and was no longer subject to s. 4.

Without the guidance of decided cases I should have regarded the legislative power with respect to immigration contained in s. 51 (xxvii.) of the Constitution as ample justification for s. 4 in its application to such a case as that of the plaintiff. Its valid operation upon her does not appear to me to depend upon the question whether the manner of her entry and the reasons for her continued presence here warrant the application to her of the word immigrant. The purpose of s. 4 is to provide a means of ensuring that persons who come here ostensibly or actually for a temporary stay do not make Australia their permanent home. Whether or not a person who comes here for a temporary purpose may be said to have done anything which comes within some allowable meaning of the word " immigration " itself, it must, as I think, be within the power with respect to immigration to take measures to see that he does not remain here. It is a constitutional power carrying with it everything necessary or proper for the fulfilment of its purpose and it must be incidental to the power to provide for the admission of strangers on terms that they leave after a specified period and do not so to speak turn themselves into settlers. In the same way similar terms may be imposed on those whose entry has been allowed designedly or inadvertently but who have not any title to stay. We are not here concerned with persons who belong to the Australian community and who re-enter Australia after an absence.

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Once the plaintiff came under s. 4 and received an exemption certificate no attempt on her part to make Australia her permanent home could prevent the operation of the provision. The legislation adopts the machinery of an exemption certificate to prevent persons entering or remaining except by consent and then so long only as the consent continues. If that is within the legislative power with respect to immigration, as I think it is, it is difficult to understand how a person holding an exemption could by nevertheless resolving to make Australia her permanent home and by identifying herself with this country pass from the operation the Constitution allows to the provision. Had she become by lapse of time and long continued acceptance a member of the community before receiving her exemption it might have been otherwise. However, those are not the facts. But a construction has been given to the constitutional power with respect to immigration by a series of cases. After what was said about the power and the Act by *Cussen* J. in *Ah Sheung* v. *Lindberg* (1) and by this Court in *Chia Gee* v. *Martin* (2), *Potter* v. *Minahan* (3) and *R.* v. *Macfarlane*; *Ex parte O'Flanagan and O'Kelly* (4), it seems impossible to do other than treat the power over immigration as relating to all movement of strangers into the Commonwealth independently of the intention of the persons who enter. So long as the new arrival is a stranger and not one of the people of Australia the legislature may deal with the question whether he enters and on what terms he enters or remains. See particularly per *Starke* J. in *R.* v. *Macfarlane* (5). The Act is construed accordingly. See per *McMillan* J. in *Mann* v. *Ah On* (6). The chief point of distinction relied upon for the plaintiff was that when the plaintiff reached Australia she came involuntarily. She exercised no choice but was brought by a naval vessel as an evacuee from a scene of Japanese invasion. It is no doubt a distinction in fact. But I cannot see how it takes the case outside the principle. If the principle is that the intention of the person entering is irrelevant, it cannot matter that the plaintiff had no intention except to do what she was told and to escape from the Japanese. If the principle is that it is incidental to the immigration power to control the entry and presence in Australia of all strangers lest they settle here, then the circumstances of the entry and the intention or want of intention of the visitor are equally irrelevant.

In my opinion the objection that s. 4 is constitutionally incapable of operating with reference to the plaintiff fails. The suit should be dismissed.

(1) (1906) V.L.R. 323.
(2) (1905) 3 C.L.R. 649.
(3) (1908) 7 C.L.R. 277.
(4) (1923) 32 C.L.R. 518.
(5) (1923) 32 C.L.R., at p. 580.
(6) (1905) 7 W.A.L.R. 182.

McTIERNAN J. I am of the opinion that the declaration that the plaintiff is a prohibited immigrant and the notice to leave the Commonwealth which has been given to her are both void. This declaration and notice depend upon the certificate of exemption issued to the plaintiff. I am of the opinion that the plaintiff was not a person to whom it was lawful under s. 4 of the *Immigration Act* 1901-1940 to issue the certificate, and it is a nullity. It follows that neither the declaration nor the notice can stand. Section 4 provides that a certificate of exemption may be issued to a person who " is liable to be prohibited under this Act from entering or remaining in the Commonwealth." The person is described by reference to the liability which he may suffer unless a certificate is issued to him: if he has not the certificate he may suffer the casualty of being prohibited from entering or remaining in Australia. I think that to say that a person is liable to be prohibited under the Act from entering or remaining in Australia is equivalent to saying that the person is in the class which s. 3 calls " prohibited immigrants." This section provides that the " immigration into the Commonwealth of the persons described in ' pars. (*a*) to (*gh*) inclusive ' is prohibited." This prohibition means that those persons are prohibited from entering or remaining in the Commonwealth. After defining the classes of persons whom s. 3 calls prohibited immigrants, the section goes on to say: " But the following are excepted :—(*h*) Any person possessed of a certificate of exemption as prescribed in force for the time being." Section 4 provides for the issue of such a certificate. The section gives power to the Minister to make the exceptions for which s. 3 (*h*) provides. The subjects of such exceptions or exemptions are persons who would otherwise be prohibited immigrants: not persons outside the classes described as prohibited immigrants but exposed to the risk of being brought within one of such classes. The words which I have quoted from s. 4 may be read as meaning a person answerable in law or subject to the liability of being prohibited from entering or remaining in the Commonwealth or a person who is exposed to or may suffer the application to him of some test or condition in the Act which if not satisfied by him would result in his falling within the description of a prohibited immigrant. This ambiguity is resolved by referring to s. 3 (*h*) and reading it with s. 4 (1). The plaintiff was never within any one of the categories of persons described as prohibited immigrants. The provision of s. 3, which says : " But the following are excepted : (*h*) Any person possessed of a certificate of exemption as prescribed in force for the time being," has no application to the plaintiff. She was not a prohibited immigrant, because she did not

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come within any of the paragraphs from (*a*) to (*gh*) of s. 3. It should be added that no certificate has been prescribed under s. 3 (*b*). There was therefore no need, and in my opinion, no lawful authority to issue to her a certificate of exemption. It is otiose to exempt a person from a prohibition to which he is not subject or to except him from a category to which he does not belong. Section 4 (4) provides that upon the expiration or cancellation of such certificate, the person named therein may, if found within the Commonwealth, be declared by the Minister to be a prohibited immigrant. It is not to be presumed, in the absence of clear words, that Parliament gave the Minister power to declare persons to be prohibited immigrants who are not within any of the extensive categories which are contained in s. 3. This consideration lends support to the view that s. 4 confers power to give a certificate of exemption to a person who, if not possessed of the certificate, would be a prohibited immigrant. I think that the words " a person who is liable to be prohibited under the Act from entering or remaining in the Commonwealth " are a description of a person who is really a prohibited immigrant. Section 4 applies to a person who is a prohibited immigrant and a fit subject for a certificate of exemption, not to a person who is not yet in that condition. The plaintiff would have been within s. 4 if, for example, a dictation test had been duly given to her and she failed to pass it: or if some other provision of s. 3 had been lawfully brought into play to deal with her and her entry or stay in Australia thereby became obnoxious to the Act.

I entertain no doubt that the " immigration power " of the Commonwealth would extend to the making of a law to expel the plaintiff from this country.

I base my conclusion in the present case upon the view that the plaintiff was not a person to whom a certificate of exemption could be lawfully issued. It follows that the administrative action which has been taken to exclude her from the Commonwealth lacks any legal foundation. She is entitled to a declaration to that effect, and an injunction protecting her against deportation pursuant to the departmental notice of 10th February 1949.

WILLIAMS J. The plaintiff has received a notice in writing, purporting to be given under the provisions of s. 4 (4) of the *Immigration Act* 1901-1940, directing her to leave the Commonwealth within the period ending on 23rd February 1949, and the purpose of this action is to impeach the validity of the notice and to obtain an injunction restraining the defendant A. A. Calwell the Minister of State for Immigration from making an order under

s. 4 (5) of the Act that she be deported from the Commonwealth. There is ample evidence that unless restrained by such an injunction the defendant Minister intends to proceed with her deportation.

The *Immigration Act* 1901-1940 has been amended by the *Immigration Act* No. 86 of 1948, but the latter Act will not come into force until it is proclaimed and no proclamation has been made. Other Acts were mentioned in the course of the argument, particularly the *Nationality and Citizenship Act* 1948, which came into force on 26th January 1949, but in the end it was, I think, common ground, and it certainly appeared to me, that the only relevant Act was the *Immigration Act* 1901-1940 (hereinafter called the Act).

The plaintiff with her first husband, both of whom were then Dutch subjects, and seven of their eight children, first entered the Commonwealth on 18th September 1942 by disembarking from an Australian warship at Darwin. They had been evacuated by this ship, together with about forty Dutch soldiers, from one of the islands of the Netherlands East Indies to save them from capture by the Japanese. The plaintiff and her family subsequently proceeded to Melbourne where they have since lived. She was registered as an alien under the *National Security* (*Aliens Control*) *Regulations* on 28th October 1942. These regulations were continued in force by the *Defence* (*Transitional Provisions*) *Act* 1946 until 31st December 1947 but were discontinued from that date by the *Defence* (*Transitional Provisions*) *Act* 1947. In August 1943 a ninth child of the marriage was born in Melbourne. On 7th September 1944 the plaintiff's husband was killed when a Dutch transport plane crashed on a flight to Cairns.

On 16th January 1947 a certificate of exemption under s. 4 of the Act was issued to the plaintiff. It was for a period of three months from 10th January 1947. This period was subsequently extended until 31st December 1947, and later until 31st December 1948. On 14th June 1947 the plaintiff was married in Melbourne to her present husband, an Australian named John William O'Keefe. She thereby became a British subject under the *Nationality Act* 1920-1946, s. 18. The plaintiff applied for but was refused a further period of exemption beyond 31st December 1948. On 9th February 1949 the defendant Minister made a declaration that the plaintiff was a prohibited immigrant and directed that she be required by notice in writing given by an authorized officer to leave the Commonwealth within the period specified in such notice. The next day the defendant A. H. Priest, an authorized officer, gave the plaintiff notice in writing requiring her to leave the Commonwealth within the period already mentioned.

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The first question that arises is whether the intended deportation of the plaintiff is authorized by the provisions of the Act. If this question is answered in favour of the plaintiff, that is to say in the negative, it will be unnecessary to discuss the other contentions raised by her counsel. The defendants contend that the deportation of the plaintiff is authorized by s. 4 (4) and (5) of the Act. Section 4 (4) provides that upon the expiration or cancellation of a certificate of exemption, the person named therein may, if found within the Commonwealth, be declared by the Minister to be a prohibited immigrant, and may thereupon be required by notice in writing given by an authorized officer, in accordance with the directions of the Minister, to leave the Commonwealth within the period to be specified in the notice. Section 4 (5) provides that if the person fails to leave the Commonwealth within this period, he may be deported from the Commonwealth pursuant to an order of the Minister. Section 4 (1) provides that a person to whom the Minister or an authorized officer is authorized to issue a certificate of exemption is any person who, unless he possesses such a certificate, is liable to be prohibited under the Act from entering or remaining in the Commonwealth. As these are the only persons to whom certificates of exemption may lawfully be issued under the section, it appears to me necessarily to follow that they must also be the only persons whom the Minister can lawfully declare to be prohibited immigrants upon the expiration or cancellation of the certificate and require them to leave the Commonwealth.

It is therefore crucial to determine what is meant by the expression in s. 4 (1) " any person who, unless he possesses such a certificate, is liable to be prohibited under this Act from entering or remaining in the Commonwealth," and in particular what is meant by the word " liable " in this expression. The Act contains provisions prohibiting immigrants entering the Commonwealth and provisions prohibiting immigrants who have entered the Commonwealth from remaining in the Commonwealth. Some of the latter provisions relate to immigrants who have entered the Commonwealth by evading an officer or at some place where no officer is stationed or by means of forged permits or passports or other dishonest conduct. Section 5 (1) provides that such an immigrant may, if at any time thereafter he is found within the Commonwealth, be required to pass the dictation test and shall, if he fails to do so, be deemed to be a prohibited immigrant offending against the Act. The plaintiff is not an immigrant who falls within these provisions. She entered the Commonwealth openly and whilst under the control of the Naval authorities of the Commonwealth. The sections which may

throw light upon the meaning of the expression under discussion include ss. 3, 4 (6), 5 (2), 7 and 17.

The opening words of s. 3 are that the immigration into the Commonwealth of the persons described in any of the following paragraphs of this section (hereinafter called prohibited immigrants) is prohibited. Prima facie the words of a statute must be given their ordinary natural grammatical meaning, and the ordinary meaning of immigration into the Commonwealth is entry into the Commonwealth as an immigrant.

The section contains fifteen paragraphs denoted by the letters (*a*) to (*gh*) defining persons whose immigration into the Commonwealth is prohibited. In my opinion at least pars. (*a*), (*b*), (*ge*), (*gf*) and (*gh*) apply to the time when an immigrant is seeking to be admitted into the Commonwealth. The definitions contained in pars. (*c*) to (*gd*) describe the personal characteristics of immigrants which cause them to be persons whose immigration into the Commonwealth is prohibited. It may be that these characteristics cause such immigrants to continue to be prohibited immigrants after entry into the Commonwealth but there is no evidence that the plaintiff is a prohibited immigrant on any of these grounds. These prohibitions are, as counsel for the plaintiff said, of a subjective character. A person who possesses such characteristics is a prohibited immigrant on personal grounds. On the other hand pars. (*a*), (*b*), (*ge*), (*gf*) and (*gh*) are of an objective character and define events upon the happening of which a person, who is not a prohibited immigrant on personal grounds, becomes a prohibited immigrant.

An immigrant only becomes a prohibited immigrant under s. 3 (*a*) if he is given a dictation test and fails to pass it. It was contended by counsel for the defendants that under this paragraph an immigrant, whilst he still remained an immigrant and had not become a member of the Australian community, could be given a dictation test at any time even after an officer had allowed him to enter the Commonwealth without a test. But this construction overlooks the presence in the Act of s. 5 (2) which provides that any immigrant may at any time within five years after he has entered the Commonwealth be required to pass the dictation test, and shall, if he fails to do so, be deemed to be a prohibited immigrant offending against this Act. If an immigrant who has been admitted to the Commonwealth could subsequently be required to pass a dictation test under s. 3 (*a*), s. 5 (2) would be unnecessary, and the limited period which s. 5 (2) prescribes would be inconsistent with the unlimited operation of s. 3 (*a*). To provide some limit of time counsel for

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the defendants sought to imply in both provisions a limitation to the period prior to an immigrant becoming a member of the Australian community. It is within the constitutional powers of the Commonwealth Parliament under the immigration power, s. 51, pl. (xxvii.), to fix a reasonable period of probation during which immigrants who have been admitted into Australia should continue to be subject to the risk of becoming prohibited immigrants and not be allowed to acquire the rights and privileges and immunity from deportation of members of the Australian community: *R.* v. *Macfarlane*; *Ex parte O'Flanagan and O'Kelly* (1). The period of five years fixed by s. 5 (2) and other provisions of the Act after an immigrant has been admitted into the Commonwealth as a period of probation could not be said to be unreasonable, and the Commonwealth Parliament could therefore lawfully enact that immigrants might be required to pass the dictation test not only under s. 3 (*a*) prior to being admitted to the Commonwealth, but under s. 5 (2) at any time during the subsequent period of five years. But I can find no justification for placing such an implied limitation on the operation of either section and particularly upon s. 5 (2) which contains an express limitation. In my opinion therefore s. 3 (*a*) applies to the time when the immigrant is seeking to be admitted into the Commonwealth and not subsequently, and the right to require an immigrant to pass a dictation test after admission depends solely upon s. 5 (2).

I am also of opinion that an alien only becomes a prohibited immigrant under par. (*ge*) if an officer makes the demand authorized by the paragraph and he fails to satisfy the officer upon the matters therein mentioned, and that a person only becomes a prohibited immigrant under par. (*gf*) if an officer makes the demand authorized by the paragraph and he fails to prove that he is the holder of the prescribed permit. Accordingly if an officer admits an immigrant into the Commonwealth without requiring him to pass a dictation test, or without making the demands authorized by pars. (*ge*) and (*gf*), the immigrant is no longer an immigrant whose entry into the Commonwealth can be prohibited under these paragraphs. There is no evidence that any of the events happened which could cause the plaintiff to become a prohibited immigrant under these paragraphs. The remaining paragraphs are pars. (*b*) and (*gh*). The plaintiff did not become a prohibited immigrant under these paragraphs because no certificate of health had been prescribed and the plaintiff had not been declared by the Minister undesirable as an inhabitant of or visitor to the Commonwealth before she

(1) (1923) 32 C.L.R. 518, at p. 533.

entered the Commonwealth. It appears to me that the requirements of s. 17 and in particular, in regard to s. 3 (*a*), the requirement that the return should show the number of persons admitted to the Commonwealth without being asked to pass the dictation test support the view that at least the operation of the objective paragraphs of s. 3 is limited to the time the immigrant is seeking to enter the Commonwealth.

The plaintiff is not therefore an immigrant whose immigration into the Commonwealth was prohibited on any of the grounds mentioned in s. 3. Accordingly she could only become a prohibited immigrant under the provisions of the Act applicable to an immigrant who has been allowed to enter the Commonwealth. There is no evidence that the plaintiff falls within the provisions of s. 5 (1) or s. 8A, so that the only provisions of the Act that could convert the plaintiff into a prohibited immigrant are the provisions of s. 5 (2). There is no evidence that the plaintiff has ever been required to pass a dictation test under this sub-section, so that she was not on 16th January 1947 on any ground a prohibited immigrant or a person deemed to be a prohibited immigrant offending against the provisions of the Act. But she was still exposed to the risk that she might be required to pass this test and fail to do so, and the question is whether this exposure made her a person who was liable to be prohibited from remaining in the Commonwealth within the meaning of s. 4 (1). The ordinary natural grammatical meaning of a person being liable to some penalty or prohibition is that the event has occurred which will enable the penalty or prohibition to be enforced, but that it still lies within the discretion of some authorized person to decide whether or not to proceed with the enforcement. Cf. *James* v. *Young* (1); *In re Loftus-Otway*; *Otway* v. *Otway* (2). The word "liable" is sometimes used in the sense of exposure to liability, but this is not the ordinary natural grammatical meaning of the word. It would require a context to give the word this meaning.

It was contended by counsel for the defendants that, at least in relation to the first limb of the expression "liable to be prohibited from entering the Commonwealth," the context did require this meaning and that "liable" should be given the same meaning in both limbs. For the reasons already given, in January 1947 the plaintiff was no longer exposed to the risk of becoming a prohibited immigrant under s. 3. But I agree that if "liable" in relation to liability to be prohibited from entering the Commonwealth means exposed to liability, this would tend to show that "liable" in

(1) (1884) 27 Ch. D. 652. (2) (1895) 2 Ch. 235.

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relation to liability to be prohibited from remaining in the Commonwealth has the same meaning, although it is not unknown for a word to have different meanings in different sections of an Act or even in the same section: *Halsbury's Laws of England*, 2nd ed., vol. 31, p. 482. But in my opinion there is no sufficient context to indicate that "liable" in either limb of the expression has the wider meaning. The context seems to tend to the contrary. There is, for instance, s. 4 (6) which provides that where a person enters the Commonwealth from any vessel in pursuance of the section a penalty shall not attach to the vessel or its master, owners, agents or charterers in respect of such entry. The master, owners, agents or charterers of a vessel could only be prosecuted under s. 9 where a prohibited immigrant entered the Commonwealth from the vessel such as an immigrant who had been required to pass a dictation test and had failed to do so or had failed to produce a landing permit or a passport upon demand by an officer. The vessel, its master, owners or charterers would therefore only require to be protected by a certificate of exemption from the entry into the Commonwealth of such a person and not from the entry into the Commonwealth of a person who had not been required to pass a dictation test or to produce a landing permit or passport. There is also s. 7 which provides that every immigrant entering the Commonwealth in contravention or evasion of the Act and every person who, by virtue of the Act, is deemed to be a prohibited immigrant offending against the Act (for instance, a person who is required to pass a dictation test under s. 5 (2) and fails to do so) shall be liable upon summary conviction to imprisonment for not more than six months and shall be liable pursuant to any order of the Minister to be deported from the Commonwealth. There can be no doubt that in s. 7 "liable" means liable as a person who is a prohibited immigrant or a person who is deemed to be a prohibited immigrant offending against the Act, and I can see no reason why "liable" in this section should have a different meaning to "liable" in s. 4 (1). The words used in s. 4 are "is liable" and not "would be liable" and the use of the present tense points strongly to an actual accrued liability. A person does not require a certificate of exemption unless he is a prohibited immigrant or person deemed to be a prohibited immigrant offending against the provisions of the Act and this indicates that the word "liable" in the expression is used in its ordinary natural grammatical sense and refers to a person who is, at the time he applies for a certificate, a prohibited immigrant or deemed to be a prohibited immigrant offending against the provisions of the Act and as such liable to be prohibited

from entering or remaining in the Commonwealth without a certificate.

I am of opinion that under s. 4 (1) the Minister can only lawfully declare a person to be a prohibited immigrant if he is made or deemed to be a prohibited immigrant by the express definitions of the Act, and if, as here, he declares a person to be a prohibited immigrant who is not so defined and attempts to deport him, the legality of the Minister's action can be challenged in the courts. In January 1947 the plaintiff was not such a person. Accordingly she was not a person to whom the Minister or an authorized officer was empowered to issue a certificate of exemption by s. 4 of the Act. The certificate was therefore a nullity, and its expiration could not authorize the defendant Minister to make a declaration that she was a prohibited immigrant and require her to leave the Commonwealth.

For these reasons I am of opinion that there should be judgment in the action for the plaintiff and that an injunction should be granted restraining the defendant Minister from taking any action pursuant to the notice in writing of 10th February 1949 to deport the plaintiff from the Commonwealth.

WEBB J. It was not necessary in order to make the plaintiff subject to the *Immigration Act* that she should have entered the Commonwealth with the intention of settling here, or even of remaining here for an indefinite time (*R.* v. *Macfarlane*; *Ex parte O'Flanagan and O'Kelly* (1) and *Ex parte Walsh and Johnson*; *In re Yates* (2)). But it was submitted for her that, as she was compelled to come here to escape from the Japanese, her entry into the Commonwealth was not immigration within the meaning of s. 3 of the *Immigration Act* 1901-1940, and that the Act never applied to her. However, although she was compelled by the Japanese to leave her home in North Borneo, she was not unwilling to enter Australia. In my opinion the plaintiff's entry into Australia made her subject to the *Immigration Act* and she could lawfully have been subjected to the dictation test before the issue to her in January 1947 of the certificate of exemption. At that time she had been four years and three months in the Commonwealth. If she failed to pass the test she would then have been deemed to be a prohibited immigrant offending against the Act, as provided by s. 5 (2). But when the certificate was issued the plaintiff was not a prohibited immigrant; nor was she a person

(1) (1923) 32 C.L.R. 518. (2) (1925) 37 C.L.R. 36.

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who was "liable to be prohibited from remaining in the Commonwealth" within the ordinary meaning of those words, that is to say, she was not absolutely liable although she was contingently so liable in the event of her being subjected to and failing to pass the dictation test. Nor was she prohibited from remaining in the Commonwealth because she entered it without the prescribed certificate of health required by s. 3 (*b*), as no such certificate has been prescribed. In my opinion s. 3 (*b*) operates to render immigrants prohibited only as from the time the certificate of health is prescribed. The plaintiff was not a prohibited immigrant under any of the remaining provisions of s. 3 or under any other section of the *Immigration Act*. I am unable to find in the Act anything which indicates that the ordinary meaning should not be given to the words "is liable" in s. 4 (1).

I think there should be judgment for the plaintiff and an injunction restraining proceedings to deport her.

Judgment for the plaintiff: Injunction restraining the defendant Minister, his officers, servants and agents from taking any action to deport the plaintiff from the Commonwealth pursuant to the notice in writing of 10th February 1949 given to the plaintiff by A. H. Priest, Commonwealth Migration Officer. Defendants to pay plaintiff's costs of action, including reserved costs.

Solicitors for the plaintiff: *J. P. Minogue, Carey & Moran.*

Solicitor for the defendants: *H. F. E. Whitlam,* Crown Solicitor for the Commonwealth.

E. F. H.