of the legitimate government, although it cannot be exercised, is in no way diminished by mere military occupation ".

That in 1914 no more than mere military occupation was either intended or effected seems to me to be made abundantly clear by the cablegram from London to the Governor-General, by the terms of Colonel Holmes's proclamation, by the terms of capitulation and by the nature of the military administration in fact established. I am clearly of opinion that the plaintiff is not a person who was " born within His Majesty's dominions and allegiance ". And it appears to me equally clear that nothing happened later to make him a British subject.

Article 119 of the Treaty of Peace with Germany, which was signed at Versailles on 28th June 1919, provided that " Germany renounces in favour of the Principal Allied and Associated Powers all her rights and titles over her overseas possessions ". It is seen that there was no cession to Great Britain. Later there was conferred upon the Commonwealth of Australia, in pursuance of the Covenant of the League of Nations a mandate in respect of German New Guinea and certain other former German territories in the Western Pacific. The *New Guinea Act* 1920-1935 (Cth.) came into force by proclamation on 9th May 1921. It recited the conquest and continued occupation by the Commonwealth of German New Guinea, the Treaty of Peace, and an agreement by the Principal Allied and Associated Powers that a mandate should be conferred upon the Commonwealth. It also recited that a mandate was to be issued to the Commonwealth in respect of German New Guinea " with full power to administer the same, subject to the terms of the Mandate, as an integral part of the Territory of the Commonwealth ". Section 4 of the Act provides that : " The Territories and Islands formerly constituting German New Guinea . . . are hereby declared to be a Territory under the authority of the Commonwealth, by the name of the Territory of New Guinea ". By s. 5 the Governor-General was authorized to accept the mandate when issued. The Act then proceeds to provide for the civil administration of the Territory.

Mr. *Hardwick* placed reliance on the words " as an integral part of the Territory of the Commonwealth ", which appear in the mandate itself as well as in the preamble to the Act, and some support for his argument may be thought to be derived from a passage in the judgment of *Isaacs* J. in *Mainka* v. *Custodian of Expropriated Property* (1), where his Honour said :—" The words in the Australian Mandate appear to mean, not that the

(1) (1924) 34 C.L.R. 297, at pp. 300, 301.

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mandated territory is deemed to be physically part of the continent of Australia, but as territory belonging to the King in right of the Commonwealth of Australia". The mandate was, of course, a "C" class mandate. As to the origin of the expression in question see *Ffrost* v. *Stevenson* (1) (per *Latham* C.J.).

If the passage quoted from the judgment of *Isaacs* J. means that the Mandated Territory of New Guinea became, for all purposes, part of the King's dominions (which I gravely doubt, for the inelegant wording of the passage, as reported, strongly suggests to me that something important has been left out), it must, I think, be regarded as at variance with the whole current of authoritative opinion, and *Evatt* J. so regarded it in *Ffrost* v. *Stevenson* (2). The novel character of the mandatory system inevitably gave rise to many problems and much discussion among international jurists, but one point on which there seems to have been unanimity—or something nearly approaching unanimity—is that a Territory the subject of a "C" mandate does not become part of the dominions of the mandatary in such a sense as to confer on the inhabitants the nationality of the mandatary. This is certainly the view which one would be disposed to take prima facie and without authority. In *Ffrost* v. *Stevenson* (3) *Latham* C.J. said:—"The Treaty of Peace, read as a whole, avoids cession of territory to the mandatary, and, in the absence of definite evidence to the contrary, it must, I think, be taken that New Guinea has not become part of the dominions of the Crown". *Oppenheim* (*International Law*, 5th ed. (1937), p. 194) says:—"In April 1923 the Council of the League adopted certain resolutions with regard to the national status of the inhabitants of 'B' and 'C' mandated areas, the substance of which is that they have a distinct status from that of the mandatary's nationals and, while not disabled from obtaining individual naturalization from the mandatary, do not automatically become invested with its nationality. The Council having no power to make law, these resolutions must be regarded rather as an opinion and a direction entitled to great weight than as juridical propositions, but it is generally accepted that they embody the correct doctrine". But I regard the question as really concluded for me by *Ffrost* v. *Stevenson* (4).

It was decided by all the justices in *Ffrost* v. *Stevenson* (4) that the Mandated Territory of New Guinea was a place out of His Majesty's dominions in which His Majesty has jurisdiction within the meaning of the *Fugitive Offenders Act* 1881 (Imp.) (44 & 45

(1) (1937) 58 C.L.R., at p. 550.
(2) (1937) 58 C.L.R., at p. 582.
(3) (1937) 58 C.L.R., at p. 552.
(4) (1937) 58 C.L.R. 528.

Vict. c. 69). As to other important questions there were differences of opinion, and even on this question two different approaches were made, for *Rich*, *Dixon* and *McTiernan* JJ. regarded the fact that the Territory was so treated in the Order in Council of 12th October 1925 (Imp.) (No. 1030) as establishing that it was a place out of His Majesty's dominions in which His Majesty had jurisdiction, whereas *Latham* C.J. and *Evatt* J. based the same conclusion on more general considerations. But all of their Honours reached the same conclusion on the only point that is important for the purposes of the present case. It is true that the decision in *Ffrost* v. *Stevenson* (1) related to the *Fugitive Offenders Act* 1881 (Imp.), whereas the statute which I have to consider is the *Nationality Act* 1920 (Cth.). But it seems to me to be quite impossible for me to hold, consistently with *Ffrost* v. *Stevenson* (1), that the Mandated Territory of New Guinea became a part of His Majesty's dominions for the purpose of deciding a question of nationality. Even if I thought otherwise, other questions would or might arise with regard to the plaintiff in the present case, but the view which I do take is, of course, decisive against him.

Later Commonwealth legislation with respect to the Territory of New Guinea is to be found in the *Papua-New Guinea Provisional Administration Act* 1945-1946 and the *Papua and New Guinea Act* 1949-1950, but it was not, and, so far as I can see, could not, be suggested that the status of the plaintiff was in any way affected by either of these statutes.

I think I should add that I am indebted to counsel for their references to authority.

The action must be dismissed with costs.

Action dismissed with costs.

Solicitors for the plaintiff, *Mervyn Finlay & Co.*

Solicitor for the defendants, *D. D. Bell*, Crown Solicitor for the Commonwealth.

J. B.

(1) (1937) 58 C.L.R. 528.

[HIGH COURT OF AUSTRALIA.]

DOWLING . . . . . APPELLANT;
DEFENDANT,

AND

BOWIE . . . . . RESPONDENT.
INFORMANT,

ON APPEAL FROM THE SUPREME COURT OF THE NORTHERN TERRITORY.

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MELBOURNE, *Oct.* 9, 10.

SYDNEY, *Nov.* 19.

Dixon C.J., Williams, Fullagar, Kitto and Taylor JJ.

Liquor (N.T.)—Offence—Sale to half-caste—Definition of half-caste—Provision for exemption of certain half-castes from provisions of ordinance—Onus of proof of exclusion from definition—Defence—Honest belief on reasonable grounds in exemption—Licensing Ordinance 1939-1952 (*No.* 25 *of* 1939—*No.* 19 *of* 1952) (*N.T.*), *s.* 141—*Aboriginals Ordinance* 1918-1947 (*No.* 9 *of* 1918—*No.* 8 *of* 1947) (*N.T.*), *ss.* 3, 3A.

Section 141 of the *Licensing Ordinance* 1939-1952 (N.T.) provides:—"(1) A person shall not sell, give or supply, or permit to be sold, given or supplied, liquor to a person who is an aboriginal or a half-caste within the meaning, and for the purposes, of the *Aboriginals Ordinance* 1918-1947."

Section 3 of the *Aboriginals Ordinance* 1918-1947 (N.T.) defines the term "half-caste". Section 3A of this Ordinance provides as follows:—"3A (1) The Chief Protector may, by notice in the *Gazette*, declare that any person shall not be deemed to be a half-caste for the purposes of this Ordinance or of any provision thereof. (2) On the publication of any such notice in the *Gazette*, the person named in the notice shall, to the extent specified therein, cease to be a person to whom the definitions of 'aboriginal' and 'half-caste' in the last preceding section apply. (3) The Chief Protector may, by notice published in the *Gazette*, revoke any declaration made in pursuance of sub-section (1) of this section so far as that declaration applies to any particular person and thereupon the declaration shall no longer apply to the person specified in the notice of revocation".

Held that on a prosecution for an offence under s. 141 (1) of the *Licensing Ordinance* the onus lay upon the prosecution of establishing that the person to whom the liquor was sold, given or supplied was not a person who was not to be deemed to be a half-caste for the purposes of the *Aboriginals Ordinance* 1918-1947 by reason of a declaration made under s. 3A.

Held also that it would be a defence to a prosecution under s. 141 that the person selling, giving or supplying the liquor had honestly believed on reasonable grounds that the person to whom he sold gave or supplied was " not to be deemed to be a half-caste " for the purposes of the *Aboriginals Ordinance* 1918-1947 by reason of a declaration made under s. 3A.

Decision of the Supreme Court of the Northern Territory (*Kriewaldt* J.) reversed.

APPEAL from the Supreme Court of the Northern Territory.

James William Dowling was the son of the licensee of the Parap Hotel, Darwin, and accustomed to assist in the management of the hotel. On 1st July 1952 James Shannon, who was a half-caste racially, was provided by a police officer with a sum of money in order to enable him to endeavour to purchase liquor at the Parap Hotel. Shannon entered the hotel and asked for a bottle of wine, which was supplied to him by Dowling. The transaction was completely open and at the normal price. Shannon left and very shortly afterwards the police officer entered the hotel and saw Dowling. After preliminary discussion the police officer asked Dowling if he knew that Shannon was not a person in respect of whom any declaration had been made under s. 3A of the *Aboriginals Ordinance* 1918-1947. To this Dowling replied that he was sure that Shannon was a person in respect of whom a declaration had been made. Reference was then made to several lists which contained the names of about five hundred persons in respect of whom declarations had been made. The lists had been compiled some considerable time before, and were not complete. After checking the lists with the police officer Dowling was unable to find Shannon's name. Nevertheless, he still protested that he had believed Shannon to be a person in respect of whom a declaration had been made. Dowling was then charged under s. 141 of the *Licensing Ordinance* 1939-1952 with having unlawfully sold liquor to Shannon, a half-caste within the meaning and for the purposes of the *Aboriginals Ordinance* 1918-1947.

At the hearing on 2nd July 1952 evidence was given of the facts set out above, but the prosecutor offered no proof that Shannon was not a person in respect of whom a declaration had been made. Dowling gave evidence of his belief that Shannon was a person in respect of whom a declaration had been made, and that the ground of his belief was that he had, over a period of years, seen Shannon at other hotels in Darwin, where he had appeared to have been drinking. Dowling was convicted and sentenced to imprisonment for a period of six months.

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From this conviction, he appealed to the Supreme Court of the Northern Territory, which, on 15th September 1952, dismissed his appeal.

From the decision of the Supreme Court of the Northern Territory Dowling applied to the High Court of Australia for leave to appeal, pursuant to s. 21 of the *Supreme Court Ordinance* 1911-1936 (N.T.). It was agreed upon the hearing of the application for leave to appeal that that hearing should be treated as the hearing of the appeal.

The arguments and relevant statutory provisions are sufficiently set out in the judgments.

J. L. Travers, for the appellant.

E. H. Hudson Q.C. (with him *H. M. Mighell*), for the respondent.

Cur. adv. vult.

NOV. 19.

The following written judgments were delivered :—

DIXON C.J. This was an application for leave to appeal made pursuant to s. 21 of the *Supreme Court Ordinance* 1911-1936 (N.T.). Leave was sought to appeal from an order of the Supreme Court of the Northern Territory dismissing an appeal from a conviction by a Court of Summary Jurisdiction. The matter was argued as if it were a substantive appeal and it was agreed that we should now dispose of it finally on that footing. The appellant as he may be called was convicted under s. 141 of the *Licensing Ordinance* 1939-1952 (N.T.) for that he did sell liquor to James Shannon, a person who is a half-caste within the meaning and for the purposes of the *Aboriginals Ordinance* 1918-1947 (N.T.). The conviction follows the material part of sub-s. (1) of s. 141 of the *Licensing Ordinance* which makes it an element of the offence that the person is a half-caste within the meaning and for the purposes of the *Aboriginals Ordinance*. The appellant objects that it was incumbent upon the informant, who is the respondent here, to prove each and every part of this element in the offence and that the proof failed that James Shannon was a half-caste within the meaning and for the purposes of the *Aboriginals Ordinance*. Section 3 of the *Aboriginals Ordinance* defines " half-caste " to mean any person who is the offspring of parents one but not both of whom is an aboriginal and to include any person one of whose parents is a half-caste. There is in the same section an artificial definition of the word " aboriginal " of considerable length. It extends the

term to include half-castes in various circumstances. For example, it extends to a female half-caste not legally married to a person who is substantially of European origin or descent and living with her as her husband. Again it covers a half-caste whose age exceeds twenty-one years and who, in the opinion of the Chief Protector of Aboriginals, is incapable of managing his own affairs and is declared by the Chief Protector to be subject to the Ordinance. The question is not whether it was shown that James Shannon was the offspring of parents one of whom was an aboriginal within this long definition. The objection is that it was not made to appear that under another provision now to be mentioned he had not been taken out of the description. That provision is s. 3A, sub-s. (1) of which enables the Chief Protector, by notice in the *Gazette*, to declare that any person shall not be deemed to be an aboriginal or a half-caste as the case may be for the purposes of the *Aboriginals Ordinance* or of any provision thereof. Sub-section (2) provides that upon the publication of any such notice in the *Gazette*, the person named in the notice shall, to the extent specified therein, cease to be a person to whom the definitions of "aboriginal" and "half-caste" in s. 3 apply. Sub-section (3) then empowers the Chief Protector to revoke such a declaration with reference to any particular person. The appellant maintains that to establish the case against him it was necessary for the respondent as informant to offer some affirmative evidence excluding the possibility that James Shannon had been named in a declaration published in the *Gazette* and unrevoked. Otherwise the respondent would not prove that Shannon was a half-caste within the meaning, and for the purposes of, the *Aboriginals Ordinance*. The respondent on the other hand contends that, if Shannon were so named, the burden of proving it would lie on the appellant as defendant. The onus of proof of such a fact, says the respondent, would lie upon the defendant because it is a special matter amounting to the exception of a particular individual or individuals from the operation of a general rule.

The argument treats the case as governed by the common law doctrine that where a statute having defined the grounds of some liability it imposes proceeds to introduce by some distinct provision a matter of exception or excuse, it lies upon the party seeking to avail himself of the exception or excuse to prove the facts which bring his case within it. The common law rule distinguishes between such a statutory provision and one where the definition of the grounds of liability contains within itself the statement of the exception or qualification, and in the latter case the law

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places upon the party asserting that the liability has been incurred the burden of negativing the existence of facts bringing the case within the exception or qualification. See *Barritt* v. *Baker* (1). The distinction has been criticized as unreal and illusory and as, at best, depending on nothing but the form in which legislation may be cast and not upon its substantial meaning or effect. The question, however, where in such cases the burden of proof lies may be determined in accordance with common law principle upon considerations of substance and not of form. A qualification or exception to a general principle of liability may express an exculpation excuse or justification or ground of defeasance which assumes the existence of the facts upon which the general rule of liability is based and depends on additional facts of a special kind. If that is the effect of the statutory provisions, considerations of substance may warrant the conclusion that the party relying on the qualification or exception must show that he comes within it. Cf. *Pye* v. *Metropolitan Coal Co. Ltd.* (2) ; *Darling Island Stevedoring & Lighterage Co. Ltd.* v. *Jacobson* (3).

But in the present case an essential element in the liability imposed by s. 141 of the *Licensing Ordinance* is that the person to whom liquor is sold should be governed by the *Aboriginals Ordinance*. He must be a half-caste (or aboriginal) not only within the meaning but also for the purposes of the *Aboriginals Ordinance*. Section 141 is not a law for safeguarding against intoxicating liquor anybody but those who are under the protection provided by the *Aboriginals Ordinance*. For when s. 141 makes it necessary that the person to whom it applies shall be an aboriginal or half-caste for the purposes of the *Aboriginals Ordinance* it selects a criterion which means that he must be under that protection. The descriptions of people who come under that protection are very varied, as a result of the definitions in s. 3, and depend in the case of one category on the existence of an opinion in the Chief Protector that the half-caste is incapable of managing his affairs and upon his having made a declaration to the effect. Conversely it depends under s. 3A on the non-existence of declarations that a given person or persons shall not be deemed within the definition. The non-existence of such a declaration therefore forms one of the facts necessary to bring the person to whom liquor has been sold within the purview of s. 141. It is a fact which an informant, having access to the file of *Gazettes* or

(1) (1948) V.L.R. 491, at p. 495.
(2) (1934) 50 C.L.R. 614 ; (1936) 55 C.L.R. 138.
(3) (1945) 70 C.L.R. 635.

an official list of exempt aboriginals and half-castes, would have no difficulty in proving but it is not a fact that would be within the knowledge of the party proceeded against, nor would it be particularly easy for him to disprove it.

All substantial reasons point to the conclusion that it is part of the case of an informant that the person to whom liquor has been supplied has not been excluded from the definition of aboriginals or half-castes under s. 3A. Consequently, the burden lay upon the appellant to offer evidence of this fact. This view was accepted by *Kriewaldt* J., but his Honour considered that the burden of proof had been sufficiently discharged. The reasons his Honour gives for considering the fact made out depend less upon what was given in evidence than upon the view he took of the course and conduct of the hearing before the magistrate. For my part, I think that the informant simply failed to offer evidence upon this subsidiary but essential issue and that the omission cannot be supplied by the matters to which the learned judge refers. The point appears to have been distinctly taken for the defendant at the conclusion of the evidence before the magistrate and however persuaded his Honour may have felt by the notes of evidence that the hearing of the charge proceeded on the basis that all parties knew that Shannon was a half-caste and not exempt, it is, I think, impossible judicially, as well as unsafe, to treat that as a substitute for evidence, particularly in the case of a criminal charge having grave consequences for the defendant.

On this ground I think that the conviction must be quashed.

The appellant supported his appeal not only upon the ground with which I have dealt but also upon the ground that he honestly believed on reasonable grounds that Shannon was exempt by a declaration. I am prepared to concede that under s. 141 this would be a defence if made out in fact. But I am not satisfied that it has been made out. *Kriewaldt* J. accepted the view that the appellant believed that Shannon was exempt but considered that the grounds of that belief were inadequate to sustain the defence. I am not prepared to differ from this view or to say that the magistrate ought to have found that the grounds of his belief were reasonable.

But for the reason I have already given I think that the appeal should be allowed.

WILLIAMS AND TAYLOR JJ. The applicant in this matter was convicted before a stipendiary magistrate at Darwin of the offence of selling liquor to one, James Shannon, " a half-caste within the meaning of and for the purposes of the *Aboriginals Ordinance*

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1918-1947 ". The offence was charged under s. 141 of the *Licensing Ordinance* 1939-1952 (N.T.), which, in its present form, came into operation on 17th April 1952. That section is in the following terms :—" (1) A person shall not sell, give or supply, or permit to be sold, given or supplied, liquor to a person who is an aboriginal or a half-caste within the meaning, and for the purposes, of the *Aboriginals Ordinance* 1918-1947. Penalty : Where the offence is a first offence, imprisonment for not less than six months and not more than one year ; in any other case, imprisonment for not less than one year and not more than two years. (2) It shall be a defence in proceedings for an offence against this section to prove that the liquor was urgently required for medicinal purposes. (3) Notwithstanding the provisions of this Ordinance or of any other law in force in the Territory, a minimum penalty prescribed by this section shall not be reduced or mitigated ".

There is no doubt that Shannon was a half-caste as that term is defined by s. 3 of the *Aboriginals Ordinance*, but it is equally clear that not every person who is embraced by the terms of this definition is a " half-caste within the meaning and for the purposes " of that Ordinance. This is the result of the promulgation in 1936 of s. 3A of that Ordinance, which provides as follows :—" 3A. (1) The Chief Protector may, by notice in the *Gazette*, declare that any person shall not be deemed to be a half-caste for the purposes of this Ordinance or of any provision thereof. (2) On the publication of any such notice in the *Gazette*, the person named in the notice shall, to the extent specified therein, cease to be a person to whom the definitions of ' aboriginal ' and ' half-caste ' in the last preceding section apply. (3) The Chief Protector may, by notice published in the *Gazette*, revoke any declaration made in pursuance of subsection (1) of this section so far as that declaration applies to any particular person and thereupon the declaration shall no longer apply to the person specified in the notice of revocation.". Accordingly, a person named in any such notice ceases to be a person to whom the relevant portions of the definition apply.

The evidence shows that about 7.30 p.m. on 1st July 1952, Shannon was provided by a police officer with a sum of money to enable him to endeavour to purchase liquor at the Parap Hotel in Darwin. After entering the hotel Shannon saw the defendant, who was the son of the licensee and accustomed to assist in the management of the hotel, and asked for a bottle of wine. This was supplied to Shannon over the counter and no suggestion is made that the transaction was not completely open or that anything other than the usual price was charged. Shortly after the purchase

the police officer entered the hotel and, after a discussion with the defendant, took him to the police station where he was charged with the offence upon which he was subsequently convicted. He was convicted on the following day and in accordance with s. 141 was sentenced to imprisonment for a period of six months. From this conviction he appealed to the Supreme Court of the Northern Territory and, his appeal having been dismissed, he seeks leave to appeal to this court.

At the close of the proceedings before the stipendiary magistrate, the defendant contended, firstly, that there was no evidence to establish that Shannon was " a half-caste within the meaning and for the purposes of the *Aboriginals Ordinance* 1918-1947 " or, to employ the expression used during argument, " a person who was not exempt ", and secondly, that the evidence established that the defendant honestly believed on reasonable grounds that Shannon was an exempt person. The views of the magistrate on these two contentions did not clearly appear from the transcript before us. He appears to have found that Shannon was " a half-caste and that the defendant sold him liquor ", and that therefore he must be convicted. He was, he said, influenced in making this finding by the defendant's own statement that " a half-caste by the name of Shannon came into the bar ". These remarks were made after he had convicted the defendant and after he had been invited by the prosecutor to express his views on the contentions to which we have referred. Further, when asked after the conviction had been recorded, if he would be prepared to express his reasons for finding that the accused did not make an honest mistake, the magistrate said that all he was able to say was that he was satisfied that Shannon was a half-caste and that the sale had been made by the defendant. He did add that it might well be that the defendant believed that Shannon was entitled to be supplied and, indeed, that the defendant probably entertained this belief. During the discussion prior to conviction, concerning the question whether there was sufficient evidence that Shannon was one of the class of persons specified in s. 141, the prosecutor suggested to the magistrate that if he had any doubt on this point he might care to act under s. 60 of the *Aboriginals Ordinance* and having seen Shannon determine the question for himself. The court was referred to the terms of s. 60 and, although a view pursuant to this section would, no doubt, have assisted in determining whether Shannon was racially a half-caste, it is impossible to see how it could have assisted in determining whether Shannon fell within the indeterminate class of half-castes " within the meaning and for the purposes of the *Aboriginals Ordinance* 1918-1947 ". However, no

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view took place and the magistrate proceeded upon the basis to which we have referred. What the magistrate's views were concerning the defence of honest belief on reasonable grounds it is impossible to gather from the transcript. He did, however, hold the view that the defendant probably believed that Shannon was an exempt person and said that it might well be "that he did believe that Shannon was entitled to be supplied". But apparently he concluded that no defence on this ground was open and that he was bound to convict the defendant.

On appeal the learned judge of the Supreme Court, after a careful review of the authorities, expressed the view that the onus lay upon the prosecution to establish that Shannon was not an exempt person and that therefore the conviction was supportable only if there was evidence on this issue. With his Honour's view on this point we agree. The prosecution, however, contended that the issue whether Shannon had been excluded by notice from the operation of the *Aboriginals Ordinance* was the subject matter of an exception proof whereof rested upon the appellant. But, apart from the provisions of sub-s. (2) of s. 141, there are no words of exception in that section. The relevant exception, if there is one, is contained in s. 3A of the *Aboriginals Ordinance*, which is one of the material provisions to be applied in determining the class of persons in dealings with whom an offence under s. 141 may be committed. The circumstance that this class is variable and indeterminate and that it must be ascertained by considering, in addition to the definitions contained in s. 3 of the *Aboriginals Ordinance*, the provisions of s. 3A and declarations thereunder, whether by way of exemption or revocation, does not touch the question, for even if terms of s. 3A should be construed as words of exception from the section which precedes it, they do not constitute an exception from the provisions of s. 141 of the *Liquor Ordinance*. The class of person specified in that section is not defined by reference to the provisions of s. 3 of the *Aboriginals Ordinance* and thereafter or therein an exception made, but by reference to a narrower class of persons—those to whom the definitions of "aboriginal" or "half-caste" apply. *Ex parte Ferguson*; *Re Alexander* (1) is an illustration of a statutory offence described in terms which introduced a true exception and in that case *Jordan* C.J. concisely stated the relevant principles: "In these cases, a special rule of construction became established at common law. If the offence were defined as consisting of a single concatenation of factors, all were regarded as necessary ingredients

(1) (1944) 45 S.R. (N.S.W.) 64; 62 W.N. 15.

of the offence, whether they were positive or negative in their nature; but, if the definition were twofold, in the sense that after a definition of the offence there was a distinct and separate provision exempting from liability in a certain event, only the first part was regarded as defining the ingredients of the offence, and the second was regarded as matter of confession and avoidance available by way of defence" (1). After referring to the provision made by s. 145A (2) of the *Justices Act* 1902-1940 (N.S.W.), his Honour proceeded: "Section 14 of the Commonwealth Crimes Act, 1914 as amended, dealing with persons charged before a Court of summary jurisdiction with an offence against a law of the Commonwealth, is substantially to the same effect. A substantially identical provision was contained in the English Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 24, and it was explained by *Blackburn* J., in *Roberts* v. *Humphreys* (2) that it was pointed against decisions of the Court of Common Pleas under Jervis' Act (11 and 12 Vict. c. 43), and made it incumbent on the defendant to prove any exception in his favour. In my opinion, what is meant by s. 14 of the Commonwealth Crimes Act, 1914, is that, as a matter of evidence, it is for the defendant to prove any exception, whether it be associated with or separate from the description of the offence, and that, as a matter of pleading, it is unnecessary for the prosecutor to specify or negative it, but if he does, it is unnecessary for him to give any proof in relation to it: *Bell* v. *Hyde* (3). It is, of course, in every case a question of construction whether any particular words are words of exception" (4). *Barritt* v. *Baker* (5) is an illustration of an offence created by a provision which contained a negative element as one of the essential ingredients of the offence and not as an exception. In dealing with the point *Fullagar* J. referred to s. 214 of the *Justices Act* 1928 (Vict.) and proceeded: "The history and purpose of this section are explained in *Roberts* v. *Humphreys* (6), and it has been discussed in Victoria notably in *Shillinglaw* v. *Roberts* (7); *Donoghue* v. *Terry* (8); *Bell* v. *Hyde* (9); *De La Rue* v. *Matthews* (10). The section is expressly made applicable 'whether the exception, etc., does or does not accompany in the same section the description of the offence'. Thus there need not be, in order to attract the operation of the

(1) (1944) 45 S.R. (N.S.W.), at pp. 66, 67; 62 W.N., at p. 16.
(2) (1873) L.R. 8 Q.B. 483, at p. 489.
(3) (1939) V.L.R. 300, at pp. 307, 308.
(4) (1944) 45 S.R. (N.S.W.), at p. 68; 62 W.N., at p. 17.
(5) (1948) V.L.R. 491.
(6) (1873) L.R. 8 Q.B. 483.
(7) (1891) 17 V.L.R. 136.
(8) (1939) V.L.R. 165.
(9) (1939) V.L.R. 300.
(10) (1945) V.L.R. 275.

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section, a description of the offence followed by an express and separate statement of the exception. So, in *Shillinglaw* v. *Roberts* (1) the charge was laid under a section which ran in this form : ' Every person other than a legally qualified medical practitioner or a registered pharmaceutical chemist who shall sell any poison shall ' be guilty of an offence. It was held that the burden lay upon the person charged of proving that he was a medical practitioner or a chemist. On the true construction of the Act there is a general prohibition of the selling of poisons, and two classes of persons were exempted ; the person charged is required by sec. 214 to prove, if he can, that he is within one of the exempted classes. But the section will not, in my opinion, operate to relieve the prosecutor from proving any fact which is an essential element in the specification of the prohibited act. So in *Donoghue* v. *Terry* (2) the statute in question made it an offence to ' use a motor car without the consent of the owner '. There was no general prohibition subject to an exception ; the absence of the owner's consent was an essential element in the specification of the prohibited act, and Lowe J. held that it must be proved by the prosecution. In the present case the prohibited act is specified (to put it shortly) as ' betting in a street '. The place is an essential element in the specification of the offence, and the prosecution must prove not merely the making of a bet but the making of a bet in a street. The word ' street ' is defined in an ' extensive ' definition, in which words of exception occur. A place is a street if it is enclosed or unenclosed land other than a race-course. But the prosecution must prove that the place is a street, and the prosecution fails to prove this unless it proves that the place comes within the definition. And it does not prove that the place comes within the definition unless it proves not merely that it was enclosed or unenclosed land, but also that it was not a race-course. As I have said, I do not think it was disputed here that the evidence failed to establish that the place was not a race-course within the statutory meaning of that word. And, in my opinion, the justices were right in holding that, unless the evidence established that, the prosecution failed. It was argued with considerable force that this view in this case reduced the whole question of the application of sec. 214 to a matter of form rather than substance. It was said that the substantial effect of the legislation was to enact that any person who bets on any land other than a race-course should be guilty of an offence, and that, if the legislation had taken that form, it must have been held that betting on a race-course was an exception

(1) (1891) 17 V.L.R. 136. (2) (1939) V.L.R. 165.

within the meaning of sec. 214. But it seems to me that the question must often turn on the form of the legislation. The problem is not a problem of formal logic. The Court is not to undertake the task of classification and to decide what is the logical statement of the rule and the logical statement of the exception. Its task is purely and simply one of statutory construction. It has only to say what are the elements which the Legislature has specified as the *prima facie* ingredients of the offence. When it has determined, as a matter of construction, what those ingredients are, it necessarily follows that the burden of proving the totality of those ingredients rests upon the prosecution. The solution of the logical problem of the classification of things is governed by logical considerations, and logical considerations will determine what is to be stated as a rule and is to be stated as an exception. But the Legislature may formulate its rule or its rule and exception as it pleases. It might, for example, provide that any person who made a bet in a city, town or borough should be guilty of an offence. Or it might provide that any person who made a bet in any municipality other than a shire should be guilty of an offence. The substance might be precisely the same, but it might well be held that sec. 214 applied to the latter case but not to the former. This would be because the essential elements in the specification of the offence are differently stated in each case. Here the Legislature has indicated that what it requires to be proved is the making of a bet in a street. And that is not proved unless evidence is adduced to warrant the conclusion that the place is beyond reasonable doubt a street within the statutory definition. It is immaterial, I think, that that definition involves a negative " (1). We find ourselves in complete accord with the observations contained in these two passages, and applying the principles therein referred to, it follows that the issue whether Shannon was an " unexempt person " was not the subject matter of an exception, but was one of the ingredients of the offence.

It was, however, argued by the respondent that there was evidence before the magistrate that Shannon was not a person concerning whom a notice under s. 3A (1) had been given. In particular, it was contended that the defendant had, at the very least, inferentially admitted this to be so. The evidence shows that when the police officer entered the hotel after the sale had been made, he asked the defendant if he knew Shannon was unexempt. To this the defendant replied that he was sure Shannon was exempt whereupon the police officer said that as far as he knew

(1) (1948) V.L.R., at pp. 494, 495.

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Shannon was unexempt. Reference was then made to several lists containing the names of some five hundred exempt persons which had been supplied to the hotel some considerable time before by another police officer. The defendant said that he was sure that Shannon's name was on these lists, but, after checking them with the police officer, he was unable to find Shannon's name. Nevertheless, he still protested that he had believed Shannon to be exempt and thereafter the issue of his belief in the matter came to the forefront in the subsequent proceedings. It was contended that after it was discovered that Shannon's name did not appear on these lists, the defendant was no longer prepared to assert that Shannon was an exempt person, but merely to maintain that he had believed this to be so. In dealing with this aspect of the matter the learned judge on appeal said that he could not help but suspect that if Shannon had in fact been exempt at the relevant time, an attempt to prove that fact at the hearing of the appeal would have been made. But his Honour went on to say that, while he did not think that he could draw any adverse inference against the defendant arising out of the non-production of such evidence at the hearing of the appeal, he considered that the failure to call such evidence upon the trial of the complaint might however be relevant. We are unable to see the relevance of this circumstance. If it was for the prosecution to establish that Shannon fell within the class of persons specified by s. 141, the burden of proof could not be discharged by evidence which merely went to show that after consulting the available lists, the defendant was or might have been prepared to abandon his former belief. Nor, could the circumstance that he was prepared to accept the statement made, with some apparent doubt, by the police officer, that "as far as he knew" Shannon was unexempt, dispose of the necessity of proving this necessary ingredient by appropriate evidence. The learned judge on appeal took the view that after the defendant had consulted the lists "he acquiesced in the position that Shannon was not exempt". We do not think this view is open on the evidence, but, even if an acquiescence in the sense of an admission should be inferred, it would only constitute an admission that Shannon's name was not on the lists which had been consulted, and it is clear that, even if the lists themselves had been admitted in evidence without objection, they would not, on any view, have established that Shannon was not exempt at the relevant time.

On this point one further aspect of the evidence needs to be examined. In the cross examination of Shannon, which appears

in narrative form, there appears the following passage :—" I have been before the court a lot of times for drinking and have been sent to Fanny Bay quite often. I have been going into hotels round Darwin quite regularly. I have about a dozen convictions for drinking and supplying. I did not let anyone know that I am not supposed to be in hotels ". This statement, it is claimed, constitutes evidence that Shannon was not an exempt person at the relevant time, but we can give it no real meaning beyond an assent by Shannon to the proposition that he did not hold himself out as a person who was not exempt. This being so, the evidence does not tend to establish that he was not, in fact, exempt. Accordingly, we are of the opinion the charge against the defendant was not proved and that the applicant should have been discharged.

We should add that we are also disposed to think that the applicant should succeed on the other branch of the case. The magistrate and the learned judge on appeal were satisfied affirmatively that the applicant honestly believed that Shannon was an exempt person. The former does not appear to have addressed his mind to the reasonableness of this belief, and the latter, whilst of the opinion that the defence of honest belief on reasonable grounds was open, took the view that the belief was not based on reasonable grounds. We agree with the learned judge that this defence was open, notwithstanding that it was unnecessary on the form of s. 141 for the prosecution to establish in the course of its case that at the time of the sale the defendant knew that Shannon was not an exempt person. Lack of such knowledge is not, of course, equivalent to an honest belief to the contrary, and *Sherras* v. *De Rutzen* (1) is a classic illustration of this proposition. In that case, although it was not incumbent upon the prosecution either to allege or prove knowledge on the part of the defendant that the police officer with whom he had dealt was on duty at the relevant time, the view was taken that the defendant might exculpate himself by proof that he honestly believed on reasonable grounds that the officer was not on duty. As the present Chief Justice said in *Proudman* v. *Dayman* (2) :—" It is one thing to deny that a necessary ingredient of the offence is positive knowledge of the fact that the driver holds no subsisting licence. It is another to say that an honest belief founded on reasonable grounds that he is licensed cannot exculpate a person who permits him to drive. As a general rule an honest and reasonable belief in a state of facts which, if they existed, would make the defendant's act innocent affords an excuse for doing what would otherwise be an offence ".

(1) (1895) 1 Q.B. 918.

(2) (1941) 67 C.L.R. 536, at p. 540.