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MOORE AND HESKETH v. PHILLIPS.

Solicitors, for appellants, *Braham & Pirani*, Melbourne.
Solicitors, for respondent, *Fink, Best & Hall*, Melbourne.

B. L.

Cons *Ruddock v Vadarlis* (2001) 183 ALR 1

Cons *Ruddock v Vadarlis* (2001) 66 ALD 25

[HIGH COURT OF AUSTRALIA.]

AH YIN . . . . . APPELLANT;
DEFENDANT,

AND

CHRISTIE . . . . . RESPONDENT.
INFORMANT,

ON APPEAL FROM A COURT OF GENERAL SESSIONS OF VICTORIA.

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MELBOURNE, *June* 20, 21, 26.

Griffith C.J., Barton, Isaacs and Higgins JJ.

Prohibited immigrant—Infant—Domicile of father in Australia—Immigration Restriction Act 1905 (*No.* 17 *of* 1905), *sec.* 4—*Immigration Restriction Act* 1901 (*No.* 17 *of* 1901), *sec.* 3.

The fact that the father of an infant, born out of Australia, and who has never been in Australia, is domiciled in Australia is irrelevant to the question whether that infant on coming to Australia is a prohibited immigrant within the meaning of the *Immigration Restriction Acts* 1901-1905.

APPEAL from Court of General Sessions, Melbourne.

Ah Yin was, on the information of John Mitchell Christie, at the Court of Petty Sessions, Melbourne, convicted for that he, being a prohibited immigrant, did enter the Commonwealth in contravention of the *Immigration Restriction Acts* 1901-1905. Ah Yin thereupon appealed to the Court of General Sessions. It appeared that Ah Yin and Ah Chung, aged respectively 15 and 17 years, arrived in Melbourne by the *Taiyuan* from China. Judge Molesworth, who presided in the Court of General Sessions,

found the following facts:—That Ah Yin and Ah Chung were the sons of Loo Loon Hock and Ah Sim, to whom Loo Loon Hock was married in China in May 1886 according to the laws in force in China, and who died about May 1906, and that Loo Loon Hock had not married any other woman; that Loo Loon Hock was a native of China, which was his domicile of origin, came to Melbourne and settled there in 1895, and having gone on a holiday trip to China, returned to Victoria about May 1905, intending to make Australia his home and to become domiciled there for the rest of his life; that Loo Loon Hock and his two sons desired that those sons should make Australia their permanent home, and that Loo Loon Hock desired to bring his third son to Victoria if allowed to do so; that Ah Yin and Ah Chung each failed to pass the education test under the *Immigration Restriction Acts* 1901-1905, and were properly convicted. The appeal of Ah Yin was therefore dismissed and his conviction confirmed.

Ah Yin now appealed to the High Court.

Arthur, for the appellant. If the appellant is domiciled in Victoria, he is not an immigrant within the meaning of the *Immigration Restriction Acts* 1901-1905, and those Acts do not apply to him: *Ah Sheung* v. *Lindberg* (1). This question was left open by this Court in *Attorney-General for the Commonwealth* v. *Ah Sheung* (2). The appellant is domiciled in Victoria because his father is domiciled there. The rule is stated in *Dicey's Conflict of Laws* (ed. of 1896), p. 120, thus:—"The domicile of a legitimate or legitimated minor is, during the lifetime of his father, the same as, and changes with, the domicile of his father." *Urquhart* v. *Butterfield* (3); *Ryall* v. *Kennedy* (4); *Lamar* v. *Micou* (5). This principle is applicable in determining the status of a person alleged to be an immigrant. The Court will recognize the appellant as being the legitimate son of Loo Loon Hock, for, although polygamy is permitted in China, Loo Loon Hock had only one wife. See *Dicey on Conflict of Laws* (ed. of 1896), pp. 626, 638; *Hyde* v. *Hyde* (6); *Brinkley* v.

(1) (1906) V.L.R., 323; 27 A.L.T., 189.
(2) 4 C.L.R., 949.
(3) 37 Ch. D., 337, at p. 381.
(4) 40 N.Y. Super. Ct., 347.
(5) 112 U.S., 452, at p. 470.
(6) L.R. 1 P. & M., 130.

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Attorney-General (1); *In re Bethell*; *Bethell* v. *Hildyard* (2); *Encyclopædia of Laws of England*, vol. v., p. 415; *Eversley on Domestic Relations*, 3rd ed., p. 481.

[Counsel also referred to *Lau Ow Bew* v. *United States* (3); *In re Look Tin Sing* (4); *In re Buchsbaum* (5); *Fong Yue Ting* v. *United States* (6); *Mayne's Commentaries on the Indian Penal Code*, p. 316.]

Bryant (with him *Macfarlan*), for the respondent. *Primâ facie*, any person, who has never been in Australia before and seeks to enter there, is an immigrant, and the onus is upon him to show that he is within the exceptions to the Immigration Restriction Acts. The act of entry constitutes the person an immigrant: *Chow Quin* v. *Martin* (7). Domicile has nothing to do with the political status of a person. As to the matters to which domicile is applied as a test, see *Dicey's Law of Domicile*, pp. 38, 40. The test whether a man is an immigrant must be capable of being applied immediately on his entry into the Commonwealth. There may be an exception from the Acts in favour of a person who has been a resident of one of the States, and has gone away temporarily with the intention of returning. But there is no exception which is based on domicile.

Arthur in reply. Permission to a man to make his home in the Commonwealth involves permission to bring his wife and family there.

Cur. adv. vult.

June 26.

The following judgments were read:—

GRIFFITH C.J. The appellant, a boy of fifteen, who has been convicted on a charge of being a prohibited immigrant, was born in China of Chinese parents. His mother never left that country, but his father, before the birth of the appellant, came to Australia, afterwards visiting China on several occasions, the last of which was in 1903. He returned to Australia in 1906, where, as found

(1) 15 P.D., 76.
(2) 38 Ch. D., 220.
(3) 144 U.S., 47.
(4) 21 Fed. Rep., 905.
(5) 141 Fed. Rep., 221.
(6) 149 U.S., 698, at p. 734.
(7) 3 C.L.R., 649, at p. 655.

by the learned Chairman of General Sessions, he then acquired a domicile of choice. After his wife's death in 1906 he sent for his children. On these facts it is contended that the appellant also is a domiciled Australian, and is therefore not an immigrant within the meaning of the *Immigration Restriction Acts* 1901-1905. It is admitted that he is an alien.

Reliance is placed on the doctrine that the domicile of an unmarried minor, if he is legitimate, follows and changes with that of his father, and, if he is illegitimate, follows and changes with that of his mother. For the purposes of argument it is assumed that the appellant is to be regarded as the legitimate son of his father, although the laws of China allow polygamy. There is no doubt that for certain purposes minors acquire what may be called a derivative domicile. It is not suggested that there is any hitherto recognized rule of international comity under which such a derivative domicile confers upon an alien a right to enter another country, but it is said that such a right necessarily follows from the principles of the law of domicile.

The application of that law has, so far as I know, been confined to the determination of questions of civil status, questions of capacity to contract marriage, and questions of succession to personal property.

The question involved in the present case is quite different. It is the question of the right of a stranger to claim admission to a foreign country. That is a matter depending upon political, not upon civil, status. See *per* Lord *Westbury* in *Udny* v. *Udny* (1)). It is settled law, as pointed out by this Court in the case of *Robtelmes* v. *Brenan* (2), quoting the decision of the Judicial Committee in *Attorney-General for Canada* v. *Cain and Gilhula* (3), that one of the rights possessed by the supreme power in every State is the right to refuse to permit an alien to enter that State, and to annex what conditions it pleases to the permission to enter it, and to expel or deport him from the State at pleasure. The Commonwealth has under the Constitution power to exclude any person, whether an alien or not.

The acquisition of a domicile of choice by a person coming

(1) L.R. 1 H.L. Sc., 441, at p. 457. (2) 4 C.L.R., 395.
(3) (1906) A.C., 542.

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from abroad to any country depends, then, upon the permission given by that country to enter it and make it his home. When such domicile has been acquired, certain consequences follow as to him, and possibly as to those persons who, although absent, take a derivative domicile through him.

But these consequences are quite irrelevant to the question of the extent or conditions of the permission given to the particular person to enter and remain in the country. Permission given to a person to enter a country does not necessarily imply permission to his wife and family to enter the country. If it did, it would be necessary to exercise an extra degree of caution before admitting strangers to the privilege of entrance. Whether such permission shall be given or not, and on what conditions it shall be given, if at all, are matters entirely within the discretion of the supreme power of the State, and the exercise of that discretion cannot be reviewed by a Court of law. No rule of international law or comity has been suggested which controls the discretion of the supreme power in this respect, and such a rule, even if theoretically recognized, would obviously be incapable of enforcement.

The exercise of the discretion may, and probably must, be regulated by Statute; but, so far from the Commonwealth legislature recognizing any such rule as that now suggested, the exceptions in favour of the wives and families of immigrants, which were contained in the Act of 1901, have been repealed, and there is nothing in the law as it now stands to suggest that the permission granted to any person to enter the Commonwealth extends beyond himself personally.

I think that any person who seeks to enter the Commonwealth from abroad is, *primâ facie*, an immigrant within the meaning of the Act. It is unnecessary to consider the question whether a resident of the Commonwealth returning after a short absence is an immigrant, or the other questions left undecided in the case of *Attorney-General for the Commonwealth* v. *Ah Sheung* (1).

It is sufficient to say that the appellant cannot bring himself within any recognized rule that would prevent him from being

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

regarded as an immigrant, and therefore, on failure to pass the statutory test, as a prohibited immigrant.

It is, no doubt, a very hard case, but our duty is to declare, and not to make the law.

The appeal must be dismissed.

BARTON J. In the case of *Robtelmes* v. *Brenan* (1) the Chief Justice laid it down as incontrovertible that it is "an essential prerogative of a sovereign State to determine who shall be allowed to come within its dominions, share in its privileges, take part in its government, or even share in the products of the soil." In the same case (2) I put the matter in the words of Mr. Secretary Marcy, as quoted with approval in the judgment of the majority of the Supreme Court in *Fong Yue Ting* v. *United States* (3), viz.:—"Every society possesses the undoubted right to determine who shall compose its members, and it is exercised by all nations, both in peace and war," and I added (4), "the right to exclude is involved in the right to regulate immigration." And the Court held that the right to legislate for deportation, which is the complement of the right to legislate for exclusion, was conferred upon the Commonwealth by paragraph 27 (among others) of sec. 51 of the Constitution.

It is true that the case of *Robtelmes* v. *Brenan* (5) was that of an alien—a Pacific Islander; but it is not possible to read the reasoning of the members of this Court as reported, without coming to the conclusion that it covers the right to deal by legislation with all the conditions upon which persons of communities other than our own may be allowed to enter this country or to remain within its bounds. The power has been exercised by the *Immigration Restriction Acts* 1901-1905, and also by the *Contract Immigrants Act* 1905, and the operation of this legislation is not confined to aliens.

The appellant, a Chinese youth, has been convicted of having entered the Commonwealth in contravention of the Immigration Restriction Acts, being a "prohibited immigrant." *Primâ facie* he is such, as a person attempting to enter Australia for the first

(1) 4 C.L.R., 395, at p. 401.
(2) 4 C.L.R., 395, at p. 413.
(3) 149 U.S., 698.
(4) 4 C.L.R., 395, at p. 415.
(5) 4 C.L.R., 395.

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time, and having failed to pass the language or dictation test: see *Chia Gee* v. *Martin* (1). But it is set up for him that he has nevertheless the right to enter, because his father (a Chinese named Loo Loon Hock) has in fact acquired a domicile in Australia; that, as the appellant is only 15 years of age, his domicile has changed with that of his father, and become an Australian one; and that the Immigration Restriction Acts, therefore, do not apply to him.

I gravely question whether upon the evidence Loo Loon Hock has acquired an Australian domicile. Again, I doubt whether, if he has acquired one, his son, born in a country where polygamy is lawful, can be regarded for present purposes as his legitimate son in Australia (though I do not doubt he is such to all intents in China) in such a sense that his domicile has become that of his father, if domiciled here. But I do not think we are called upon to decide either of these questions, because, even if Mr. *Arthur* had convinced us on both points, I do not see how we could hold Ah Yin not to be a prohibited immigrant within the meaning of the Statutes.

The whole tenor of the Principal Act goes to show that the privileges it confers in allowing persons to enter the Commonwealth are purely personal. Paragraph (*n*) of section 3 excepted from prohibition, not any person who had in fact formerly been domiciled in the Commonwealth or in a Colony which had become a State, but "any person who *satisfied an officer* that he had formerly been" so domiciled. There was no hint of any extension to others of the privilege, so founded upon the personal act of satisfying the officer, save that in paragraph (*m*) of sec. 3 of the *Immigration Restriction Act* 1901, there was an exception, subject to suspension by proclamation, in favour of "a wife accompanying her husband if he is not a prohibited immigrant, and all children apparently under the age of eighteen years accompanying their father or mother if the father or mother is not a prohibited immigrant." A glance at all the subjects of prohibition and of exception from prohibition will show conclusively that there is no disability imposed, no privilege conferred by the Act, which is not dependent on purely personal conditions or

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

circumstances. And the Act of 1905, not in the least rendering faint this stamp of personality, actually repeals both of the sub-sections I have quoted, and makes no substitution whatever for their provisions. So far then as there ever was a right under paragraph (*m*), it did not extend beyond the person of the immediate recipient. So also as to paragraph (*n*). And now both are in terms extinguished.

It is clear to me that the Acts give by necessary implication the strongest negation to any claim of right on the part of persons not within the express exceptions who cannot pass the dictation test when duly required, if such claim is founded on the acquired domicile of a parent resident in the Commonwealth, even where the parentage of the immigrant rests on a marriage which would be held valid in our Courts in cases involving the matrimonial relations or claims to property.

No doubt this is a case of hardship, as the Chief Justice has said. Hardship is involved occasionally in the application of most general rules of conduct and measures of policy. But the question whether the principle on which legislation proceeds will be impaired by the avoidance of hardship—that is to say, the question whether it is compatible with the public safety to multiply exceptions—is not for us, but for those to whom the legislative power has been entrusted.

I am of opinion that the appeal fails.

ISAACS J. Ah Yin, the appellant, arrived in Australia on 8th September 1906 by the ship *Taiyuan* from Hong Kong, and landed at Williamstown, Victoria. He had never before been in Australia. On arrival he failed to pass the dictation test required by the *Immigration Restriction Acts* 1901-1905, and was subsequently convicted under sec. 7 of the Act of 1901 as a prohibited immigrant. The conviction was sustained on appeal to General Sessions by Judge Molesworth. This is an appeal from that decision.

The appellant denies that he is an immigrant within the meaning of the *Immigration Restriction Acts* 1901-1905, because his father is domiciled in Australia. In point of fact it cannot be denied he is personally an immigrant, and possesses no Australian

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character whatever. But it is asserted that, because by a fiction of law for certain purposes such as testacy, intestacy, succession and marriage, the domicile of a father is attributed to the children, this fiction ought to be utilized in the present case to convert Ah Yin into an Australian. I do not stop to inquire into the intricate questions raised upon the argument respecting the recognition of polygamy or the various effects of fictional domicile. It is sufficient to say that they have no relation to the subject in hand.

The prohibition upon immigration is personal to the immigrant. Sec. 3 of the Act of 1901 as amended describes the personal disqualifications which are briefly:—

1. Any person who fails to pass the dictation test.
2. Any person likely to become a charge on the public.
3. Any idiot or insane person.
4. Any person suffering from an infectious or contagious disease of a loathsome or dangerous character.
5. Convicted criminals sentenced to imprisonment for a year or more, whose sentences are unexpired and who are yet unpardoned.

If the argument relied on for the appellant were accepted as correct, the most astonishing results would follow. Any man, who was in fact domiciled here, having a family abroad in any part of the world, would by reason only of his own Australian domicile, secure to his unmarried children under 21 years of age, complete exemption from the Act, even though they fell within one or more of the disqualified classes specified. Failure to pass the dictation test, as a ground of disqualification, stands, as a matter of law, on the same footing as the other objections enumerated. So that on the appellant's argument such a child—although an idiot or a lunatic, a prostitute, or a convicted felon, or although suffering from a loathsome or dangerous disease of an infectious or contagious character—would, equally with a person in the position of the appellant, be outside the operation of this Act, and could, so far as these provisions are concerned, claim free and unrestricted admission to the Commonwealth under the shelter of the imaginary domicile of the immigrant springing from the parent's personal settlement on Australian territory.

I am unable to put so strange a construction on the Statute, or

to say, as invited by counsel, that, unless the limitation he contends for is acknowledged, the Act is unconstitutional.

In one of the cases cited during the argument—*Lau Ow Bew* v. *United States* (1), Chief Justice *Fuller* says:—"Nothing is better settled than that Statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion."

Acting upon that I feel bound to reject the interpretation contended for. I agree that this appeal should be dismissed.

I wish to add specifically what is perhaps already sufficiently apparent, that I do not rest my judgment on the fact of alienage. The circumstance that Ah Yin is not a British subject is only important as part of the evidence that he is not an Australian. The Act is not confined to aliens.

HIGGINS J. I concur. In my opinion both of these cases can be decided, and it is advisable that they should be decided, on a simple ground. The power of the Commonwealth Parliament to exclude immigrants, whether aliens or not, is not contested. Without attempting an exhaustive definition of the word "immigrant" for the purposes of the Immigration Restriction Acts, and without entering on the question of recognizing Chinese marriages as valid, it is sufficient to say that, even if the domicile of the boy is the domicile of the father, and if the father is domiciled in Australia, the boy is a prohibited immigrant, as he has failed to pass the dictation test. He is an immigrant. In the Standard Dictionary, an "immigrant" is defined as one who immigrates; specifically, a foreigner who enters a country to settle there; and "immigrate" means to come into a country or region from a former *habitat*, especially a native land; specifically, to remove into a country for the purpose of settlement. I can entertain no doubt that this alien lad, coming for the first time to Australia, to live with his father who is settled in Australia, is an immigrant within the meaning of the Act. Assuming that his legal domicile is at the place of his father's domicile, it does not follow that he is not an immigrant. It may be that actual residence in Australia may have the effect

(1) 144 U.S., 47, at p. 59.

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of preventing the resident from being treated as an immigrant on his return to Australia after a voyage. But domicile, legal domicile, as such, is not the criterion for deciding whether a person is an immigrant. In this case domicile is irrelevant. Sec. 3 (*m*) of the Act of 1901 excepted from the prohibitions of that Act a wife accompanying her husband if he is not a prohibited immigrant, and all children apparently under the age of eighteen years accompanying their father or mother if the father or mother is not a prohibited immigrant. This exception implied that such children would, but for that exception, come within the class of prohibited immigrants. Sec. 3 (*n*) excepted also any person who has formerly been domiciled in the Commonwealth. These exceptions have both been repealed; and the natural inference is that the prohibition was in future to apply to children accompanying their non-prohibited father, and whether formerly domiciled in Australia or not. *A fortiori*, children are prohibited who do not accompany their father.

Appeal dismissed.

Solicitor, for appellant, *Sabelberg*, Melbourne.

Solicitor, for respondent, *Powers*, Commonwealth Crown Solicitor.

B. L.