[HIGH COURT OF AUSTRALIA.]

WALL . . . . . APPELLANT:

AND

THE KING; EX PARTE KING WON . . RESPONDENTS

AND

THE KING; EX PARTE WAH ON . . . RESPONDENTS.

[No. 2.]

ON APPEAL FROM THE SUPREME COURT OF THE NORTHERN TERRITORY.

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MELBOURNE, *Mar.* 22.

SYDNEY, *April* 14.

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

Prohibition—Prosecution for being prohibited immigrant—Committal of accused to gaol pending hearing—Discharge of accused on habeas corpus—Reasons for discharge—Prohibition of further proceedings on information—Estoppel—Res judicata—Immigration Act 1901-1925 (*No.* 17 *of* 1901—*No.* 7 *of* 1925), *secs.* 5, 14A—*Northern Territory Acceptance Act* 1910 (*No.* 20 *of* 1910), *secs.* 8, 9—*Summary Jurisdiction Act* 1850 (*S.A.*) (*No.* 6 *of* 1850), *secs.* 9, 10, 15, 49—*Habeas Corpus Act* 1679 (31 *Car.* II., *c.* 2), *sec.* 6.

The two respondents had been charged on informations before the Court of Summary Jurisdiction at Darwin in the Northern Territory with being prohibited immigrants, and under warrants issued by a Special Magistrate had been committed to gaol for safe custody pending the hearing of the charges. Before the informations were heard the Supreme Court of the Northern Territory, upon habeas corpus proceedings, discharged the respondents from custody upon the ground that they were not immigrants and so were not subject to the provisions of the *Immigration Act* 1901-1925. The Supreme Court then, upon the application of the respondents, issued *ex parte* orders absolute for writs of prohibition prohibiting the Court of Summary Jurisdiction and the informant from further proceeding with the informations, and writs were issued accordingly.

Held, by *Knox* C.J., *Higgins*, *Gavan Duffy*, *Powers*, *Rich* and *Starke* JJ. (*Isaacs* J. dissenting), that, although the Supreme Court was in error in discharging the respondents from custody, since the warrants under which they were detained showed a lawful cause for their detention, yet the making of the orders for discharge did not establish want of jurisdiction in the Court of Summary Jurisdiction to hear and determine the informations for the offences, nor did those orders operate as an estoppel; and therefore that prohibition did not lie.

Decisions of the Supreme Court of the Northern Territory (*Roberts* J.) reversed.

APPEALS from the Supreme Court of the Northern Territory.

Writs of habeas corpus releasing King Won and Wah On from custody having been issued by the Supreme Court of the Northern Territory under the circumstances stated in *Wall* v. *The King*; *Ex parte King Won and Wah On* [*No.* 1] (1), on the application of King Won and Wah On to the Supreme Court of the Northern Territory *Roberts* J. on 27th July 1926 made orders absolute *ex parte* for the issue of writs of prohibition directed to the Court of Summary Jurisdiction at Darwin and Alfred George Wall, prohibiting them from further proceeding with the informations charging King Won and Wah On respectively with being prohibited immigrants within the meaning of the *Immigration Act* 1901-1925. Writs of prohibition were accordingly issued on the same day.

From the orders for the issue of the writs of prohibition Wall now, by leave, appealed to the High Court.

Sir Edward Mitchell K.C. (with him *C. Gavan Duffy*), for the appellant. The orders for the issue of writs of prohibition were made without jurisdiction. The orders releasing the prosecutors from custody on the habeas corpus proceedings determined that the prosecutors were wrongly held in custody under the warrants of commitment pending the hearing of the informations, and had no more effect than if the Magistrate had determined that he had no jurisdiction to issue those warrants. Those orders had not the effect of stopping the informations from being proceeded with. The prosecutors are not in any better position than if the warrants of commitment had never been made. The case comes within the

(1) *Ante*, 245.

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principles applied by the High Court in *Amalgamated Society of Carpenters and Joiners* v. *Haberfield Pty. Ltd.* (1). The granting of the order absolute for prohibition *ex parte* was a wrong exercise of jurisdiction. The evidence of the habeas corpus proceedings was not properly brought before the Supreme Court.

Sanderson (with him *Foster*), for the respondents. The orders upon the habeas corpus proceedings operated as an estoppel. They are binding upon the parties and upon the Court of Summary Jurisdiction. The decision upon the habeas corpus proceedings was that the respondents were not subject to the jurisdiction of the Court of Summary Jurisdiction because they were not immigrants, and the fact that a person is not subject to the jurisdiction of a Court because of some special character he bears is a ground for prohibition (*Wadsworth* v. *Queen of Spain* (2); *Curlewis and Edwards on Prohibition*, pp. 159-161; *Grant* v. *Gould* (3)). This Court cannot now go behind the decision of the Judge of the Supreme Court of the Northern Territory that the respondents were not immigrants. The grounds upon which the learned Judge decided that they should be discharged from custody are binding. The decision is that they have a certain status and that the Court of Summary Jurisdiction had no jurisdiction. That decision can be used as a ground for prohibition as well as a ground of defence. [Counsel referred to *Search's Case* (4); *Attorney-General for Hong Kong* v. *Kwok-a-Sing* (5).] The Supreme Court had a discretion to grant the prohibition *ex parte* (see *Rules of the Supreme Court of the Northern Territory*, r. 13; *Short and Mellor's Practice of the Crown Office*, 2nd ed., p. 266, r. 71).

Sir Edward Mitchell K.C., in reply.

Cur. adv. vult.

April 14. The following written judgments were delivered:—

KNOX C.J., POWERS, RICH AND STARKE JJ. The Supreme Court of the Northern Territory, upon the prosecution of King Won and Wah On, hereafter called the prosecutors, granted two orders

(1) (1907) 5 C.L.R. 33.
(2) (1851) 17 Q.B. 171.
(3) (1792) 2 H. Bl. 69, at p. 102.
(4) (1587) 1 Leon. 70.
(5) (1873) L.R. 5 P.C. 179, at p. 201.

absolute, each of which directed that a writ of prohibition should issue to His Majesty's Court of Summary Jurisdiction at Darwin in the Northern Territory, prohibiting it from further proceeding upon informations which charged the prosecutors with being prohibited immigrants within the meaning of the *Immigration Act* 1901-1925.

The prosecutors had each been committed under warrant to the Darwin Gaol for safe custody by a Special Magistrate; each warrant requiring the gaoler to have the respective prosecutors before the Court of Summary Jurisdiction on 20th July 1926 to answer the said informations against them and to be further dealt with according to law. Before the informations were heard, the Supreme Court of the Northern Territory discharged both prosecutors upon habeas corpus proceedings. The Supreme Court then issued, *ex parte*, the orders absolute already mentioned. An appeal was made to this Court against the discharge of the prosecutors upon habeas, but it was dismissed as incompetent. However, appeals have also been brought against the orders absolute in prohibition; those appeals are competent.

The Supreme Court was undoubtedly in error throughout the proceedings: it ought not to have discharged the prosecutors or issued prohibition to the Court of Summary Jurisdiction. The only question the Supreme Court should have investigated upon the habeas proceedings was whether the prosecutors were detained under lawful authority. Information having been laid in due form under the *Immigration Act* 1901-1925 alleging that the prosecutors were prohibited immigrants, it was within the jurisdiction of the Court of Summary Jurisdiction to investigate that allegation; likewise it was within its jurisdiction to hold the prosecutors for safe custody pending the hearing and determination of the information. The warrant under which they were detained showed a lawful cause for their detention (*Immigration Act* 1901-1925, secs. 5 and 14A; *Northern Territory Acceptance Act* 1910, secs. 8 and 9; *Summary Jurisdiction Act* 1850 (S.A.) (No. 6 of 1850), secs. IX., X., XV. and XLIX.). This should have ended the habeas proceedings, for there was no want or excess of jurisdiction on the part of the Court of Summary Jurisdiction. The Supreme Court, however, proceeded to investigate

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the question whether the prosecutors were or were not immigrants, held that they were not, and so discharged them from the custody in which they were held.

Now, the Supreme Court had jurisdiction, as we have held, to examine the legality of the detention of the prosecutors, but that it erred in the exercise of that jurisdiction is beyond question. No appeal, however, lay from its orders discharging the prosecutors.

From these orders, it is said, several consequences flow: one, that want of jurisdiction in the Court of Summary Jurisdiction to hear and determine the information against the prosecutors is "conclusively settled"; the other, that the prosecutors, "being delivered or set at large upon the habeas corpus," the Court of Summary Jurisdiction is, by force of the provision of the *Habeas Corpus Act*, prohibited from again committing the prosecutors upon the informations already mentioned.

Both these propositions are but applications of the wider rule that a man shall not be twice vexed for the same cause, reinforced, as it is, by the provisions of the *Habeas Corpus Act* 1679, sec. 6 (sec. 5 in *Chitty's Statutes*, 6th ed.).

We are content to assume that the *Habeas Corpus Act* prohibits a second commitment of the prosecutors for the same cause as the first (*Attorney-General for Hong Kong* v. *Kwok-a-Sing* (1); *R.* v. *Governor of Brixton Prison*; *Ex parte Stallmann* (2)). A commitment for the same cause is one that raises for decision the "same question with reference to the validity of the grounds of detention as the first" (3). We are content also to assume, in this case, that the prosecutors were discharged in the habeas corpus proceedings upon the merits; that is, on the ground that they were not immigrants amenable to the provisions of the *Immigration Act* 1901-1925. Even so, these matters do not disclose any want of jurisdiction in the Court of Summary Jurisdiction over the informations laid before it. They do not support a plea to the jurisdiction but to the informations in the nature of a plea of *autrefois acquit*.

It is, nevertheless, insisted that the discharge of the prosecutors by the Supreme Court necessarily involved, and actually decided,

(1) (1873) L.R. 5 P.C. 179.
(2) (1912) 3 K.B. 424.
(3) (1873) L.R. 5 P.C., at p. 202.

that the Court of Summary Jurisdiction had no jurisdiction or authority over the proceedings before it; the decision, it is said, operates as an estoppel and conclusively settles the question. No doubt the discharge of the prosecutors establishes for the purposes of the informations before the Court of Summary Jurisdiction the fact that they were not "immigrants," and their rights to be such as determined by the Supreme Court; namely, that their detention was unlawful and an infringement of their right to liberty (*Halsbury's Laws of England, sub* Estoppel, vol. XIII., par. 464, pp. 331-332). It is not, however, every matter or reason in point of law that may be found in the judgment of the Supreme Court that operates as an estoppel. One can easily put a case of a Court consisting of several Judges, each advancing different reasons in point of law for his decision, and yet coinciding in conclusion as to the legal right of the litigant. Litigants are not estopped by the reasons or arguments advanced by the Court, but by the determination of their rights in law.

The judgment in this case was that the prosecutors be released and discharged out of the custody of the keeper of the gaol at Darwin. The illegality of the detention, and not the jurisdiction of the Court of Summary Jurisdiction, was the matter of adjudication. The illegality, for aught the order sets forth, might rest upon formal defects in the warrant of commitment, upon the want of jurisdiction over the matter of the informations, or upon the fact that the prosecutors had committed no offence. Indeed, upon examining the proceedings in this case, it is plain that the illegality founded upon arose from the finding of fact that the prosecutors were not immigrants; that, therefore, they had not committed the offences charged: they were not persons "amenable to the Act" in the words of the Supreme Court. The learned Judge of that Court next proceeded to his proposition or argument or opinion in point of law, that persons "not amenable to the Act" are not amenable to the jurisdiction of the Court of Summary Jurisdiction. In his own words: "as the applicant is not a person amenable to the Act, the Special Magistrate has no jurisdiction to try him, and therefore no power to hold him pending trial." This argument is, on its face, fallacious. However, the learned Judge then proceeded to judgment

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upon the legal right of the prosecutors; namely, that they were entitled to be discharged.

We agree that this judgment, and the fact upon which it was based, can never again be controverted in any further proceedings against the prosecutors for the same or substantially the same offence; but we are unable to assent to the view that anyone is estopped by the learned Judge's legal proposition or unsound argument, or even that the proposition or argument as stated, is, in any relevant sense, a decision that the Court of Summary Jurisdiction had no jurisdiction over the informations laid before it. Indeed, we think the opinion asserts that there was no offence, rather than that the prosecutors were committed by a tribunal that had no jurisdiction. However that may be, litigants cannot be estopped as to a legal proposition which is erroneous upon its face, though they may be estopped from disputing the legal right or obligation adjudged in consequence of that error in law.

These views do not herald the incoming of any revolution in the law, nor do they weaken that great bulwark of liberty—the writ of habeas corpus. In result, they admittedly maintain the authority of His Majesty's Court of Summary Jurisdiction at Darwin, in strict accordance with law; they also maintain the constitutional efficacy of the writ of habeas corpus, even to the extent of supporting the discharge from detention of subjects who ought never to have been discharged if the law had been rightly administered in the Supreme Court of the Northern Territory. The informations laid against the prosecutors will never, we should think, be again proceeded with; if they are, the personal freedom of the prosecutors, in our opinion, will not be in jeopardy.

The appeals against the orders absolute should be allowed and the writs of prohibition set aside. The appellant, though he succeeds, must, according to his undertaking, pay the costs of the prosecutors on these appeals.

ISAACS J. *Wall v. The King*; *Ex parte Wah On*.—Few cases of greater importance have occupied the attention of this Court. I do not refer to the technical *ex parte* objection. In a case involving great principles concerning liberty, that objection, apart

from its untenability, is hardly consistent with the dignity of the Crown to put forward, or with the dignity of this Court seriously to consider. Outside that technicality, this case tests the reality of the doctrine that hitherto has been the boast of the Constitution, that personal freedom once attained on habeas corpus by the order of a competent Court—that order standing unchallengeable —shall never again be brought into peril for the same cause. The success of the Crown in this appeal would confer upon this case the unique distinction of being the first occasion on record, at least for 300 years, where a British Court has upheld the right to prosecute a man with a view to his imprisonment, upon a criminal charge in respect of which he had been by unimpeachable order declared innocent and released on habeas corpus. If that distinction be achieved, it must be without my assistance. I regard such a course as dangerous to liberty and a reversal of the constitutional progress that finds its highest watermark in the recent case of *Secretary of State for Home Affairs* v. *O'Brien* (1).

The precise question raised by the appeal needs careful statement to prevent misapprehension and confusion. It is not whether the Magistrate's Court at Darwin has jurisdiction ordinarily to try cases of this nature. It is whether that Court can now be held to have jurisdiction to try Wah On, and, if necessary, imprison him during the trial, and further, if necessary, imprison him by way of punishment, upon the pending charge of being a prohibited immigrant, after Wah On has been discharged upon habeas by a superior competent Court on the ground that he is not a prohibited immigrant, and that therefore the Magistrate's Court has no jurisdiction to try him.

It may be useful, even at the risk of usurping the function of the reporter, if this appeal should succeed, to state the effect. In substance the law of this case would be :—Where criminal proceedings under the *Immigration Act* were instituted in a Court of Summary Jurisdiction against W and a superior competent Court on Monday upon habeas by a judgment not appealable decided that the Court of Summary Jurisdiction had no jurisdiction to entertain those proceedings, the accused being proved to be innocent of the charge

(1) (1923) A.C. 603.

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and therefore at once entitled to his liberty in respect of it, and discharge ordered accordingly, it was not inconsistent for, but was obligatory on, the same superior Court on Tuesday upon prohibition to hold that, in respect of the self-same proceedings, the self-same man, the self-same charge and the self-same circumstances, the same Court of Summary Jurisdiction had a full jurisdiction to entertain and proceed with the hearing of the charge, and thereupon to pronounce upon the guilt or innocence of the accused and deal with him accordingly. Small wonder that no precedent was produced for so startling a result. Apart from establishing that the habeas order is that of a competent Court and unchallengable, the recent judgment of this Court does not affect the question. Needless to say, in view of this Court's judgment that the habeas decision of the Court of the Territory cannot be examined, we are not in a position to examine it now and say that what must be accepted and has been accepted as unquestionable and therefore right, is to be now declared to be questionable and wrong. "It is not competent for the Court, in the case of the same question arising between the same parties, to review a previous decision not open to appeal" (*Badar Bee* v. *Habib Merican Noordin* (1)). What does matter now, and the only thing that matters now, is *the effect of the habeas judgment of the Supreme Court of the Territory as it stands*, according to well-established principles of law.

So that the exact problem we have to consider is, not the general question of the Magistrate's jurisdiction, but whether, so far as this case is concerned, the question of the Magistrate's jurisdiction is not closed by what has been declared to be the order of a competent Court of equal power with the Court of King's Bench. If that order ever had, or ever can have, the effect of concluding the question of the Magistrate's jurisdiction to proceed, it had that effect when the prohibition motion was before the Supreme Court, and the learned Judge of that Court was bound to recognize and enforce, and he did properly recognize and enforce, that effect; and we on this appeal should affirm that view. But if we were to hold that view erroneous, it must be because the habeas order had not and has not the effect stated, and, if it had not and has not that effect, the Magistrate's

(1) (1909) A.C. 615, at p. 623.

Court, should the case come again before it, must rightly so hold. The obvious consequence, and we could not reverse that on appeal, would be that the Magistrate's Court would be free, and possibly on new evidence, to hold that Wah On is not of Australian citizenship, that he is, and at material times was, a prohibited immigrant, that the Court has power to commit him and imprison him, and so to do in effect by the Magistrate's Court what this Court has held to be impossible for the High Court of Australia, namely, to nullify the decision of the Supreme Court on habeas. What, then, becomes of the sacred principle of personal freedom once declared by a competent Court? And how can the result be reconciled with the essential and distinctive point of *Secretary of State for Home Affairs* v. *O'Brien* (1)? For there is obviously no point in saying "Let the Magistrate's Court first try the man and we can afterwards determine its right to do so!" The time for determining that is the present moment, if ever.

As to the point at issue, if I had not actually heard advanced, and with persistence, the main contention in support of this appeal, I should have thought it incredible that at the stage we have reached in our constitutional and legal history it could ever have been seriously presented to a British Court of Justice, or, if presented at all, could have survived an instant's consideration. Stated in the form of a legal proposition, it was this: When a competent Court, on an application for a writ of habeas, has made an order for the release from imprisonment of a person seeking his liberty, the decision of the competent Court is confined to the mere order for habeas and discharge, and, though in the absence of statutory provision to the contrary, it is unappealable and unchallengeable, yet the actual determination of the Court as to what constitutes the illegality of the cause of detention is no part of the Court's decision, and cannot be relied on by the party discharged if he be further proceeded against for the same cause. On the soundness or otherwise of this astounding doctrine the fate of this appeal depends; for the additional ground relied on—that the prohibition order was made *ex parte*—deserves scant treatment, which will be bestowed later. It would, I think, be sufficient to say that the appellant's proposition

(1) (1923) A.C. 603.

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is negatived by the majority decision in this case on the habeas appeal. My learned brothers who composed the majority, after narrating the discharge of the respondent, say (1): "He was so discharged because the Judge of the Supreme Court was of opinion on the evidence submitted to him that the respondent was not in fact an immigrant within the meaning of the *Immigration Act of* 1901-1925." To my mind that in itself is sufficient refutation of the bald proposition relied on by the appellant. That opinion, as will presently be seen, was not the "decision" of the Magistrate which required the discharge on habeas, but was merely an indispensable step towards reaching that decision. But, at the same time, the mere judicial narration of the opinion is enough to dispel the notion that the formal order alone is to be looked at to see what was decided.

But, quite apart from the recognition contained in the passage I have quoted, the main doctrine is not only directly opposed to an unbroken line of authority for over 300 years, but is wholly subversive of the deeply-rooted principle of individual liberty to which I have referred, a principle confirmed and strengthened by legislation. That principle stated in legal form is that every person illegally imprisoned may by habeas obtain from a competent Court his prompt and *permanent* deliverance from imprisonment *for that cause*. I refer *passim* to the judgment of Lord *Halsbury* in *Cox* v. *Hakes* (2), and particularly to the last line of p. 516 and the first seven lines of p. 517. The order for release is quite illusory if he can be immediately proceeded against and imprisoned for the same charge.

In the present case, after obtaining his discharge by the order of what this Court has declared to be "a competent Court" for that purpose, and after that Court has solemnly declared the man innocent and the whole proceeding illegal, the Crown is pursuing the respondent on the identical proceeding with a view to the Magistrate's Court exercising all its powers of interim arrest and final punishment. Yet, says the Crown, the law of habeas corpus permits this double harassing and forbids the person released from relying on the unreversed and unreversible judgment of the competent Court that

(1) *Ante*, 249.

(2) (1890) 15 App. Cas. 506, at pp. 514-517.

the accused is not guilty and cannot be guilty, and that the whole process is entirely unlawful and without jurisdiction.

We had recently a case which furnishes a telling illustration of what might happen if the Crown's view be right. It was the case of Walsh, whom we declared on habeas proceedings to be, on the facts established, quite outside the legislative power of the Commonwealth with respect to immigration, and we ordered his discharge from custody (*Ex parte Walsh*; *In re Yates* (1)). Is his Australian status fixed or not? If the Crown's argument is correct, our decision included nothing but "discharge." The Court's elaborate exposition of the law demonstrating the illegality of the "cause" would on that basis go for nothing but an academic pronouncement of law. For "the same cause" Walsh could have been re-arrested and could not have relied on the determination of this Court as finally settling his status as any part of the Court's decision, but he would have had to give evidence of the facts afresh, and run the risk of a new decision as to them, just as if the former decision had never been given. Is so preposterous and oppressive a result the true situation according to our law? I decline to believe it, and refuse judicially to hold it, and for the reasons I shall give. Beyond the bare statements that the Magistrate's Court is a competent Court—and that the habeas order is a mere order for discharge and does not affect that competency—no reason and, for the best of reasons, no precedent was advanced in support of the appeal.

My own position as to the first statement—apart from the effects of the habeas order—may be found very distinctly stated in my recent judgment. I thought the Magistrate's Court not only competent, but exclusively competent. But that involved what I considered the incompetency of the Supreme Court to usurp exclusive jurisdiction. The second statement involves analysis, and both the circumstances and the occasion compel some elaboration in order to show that the order for discharge was merely the appropriate legal *consequence* of what was primarily and affirmatively *decided* on the application, and that there are other legal consequences, though they are non-relevant. The decision itself ascertained the cause of

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

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the imprisonment to be the commitment by the Magistrate's Court, and determined that commitment to be illegal, not for irregularity, and not for any reason confined to the commitment itself, but for total want of jurisdiction to try Wah On, a want of jurisdiction which included commitment as an incident. The issue so decided is seen by reference to the judgment as pronounced, the formal document being merely the necessary consequential direction, and the decision itself as to want of jurisdiction is conclusive and binding as regards these proceedings. If necessary, I go further and say, the judgment having been held to be that of a competent Court, that it conclusively establishes *in rem* the status of Wah On as an Australian citizen, and that cannot now be controverted any more than the established status of Walsh, whom I take to be incontrovertibly decided to possess Australian citizenship.

This matter—apart from the *ex parte* objection—resolves itself into four propositions of law of general application, each sustained by firm and consistent authority of the highest nature, and one indisputable conclusion of mixed law and fact specially applicable to this case. The propositions of law are:—(1) Every habeas corpus inquiry is primarily and essentially as to the legality or illegality of the cause of imprisonment, in order to determine whether the applicant has a *right to liberty*. (2) Illegality in the relevant sense means want of jurisdiction to detain the applicant. When, and only when, the Court first decides that for an ascertained cause jurisdiction is wanting for the imprisonment, the Court is empowered and required to order, as a consequential result, the discharge of the applicant, the discharge being then an automatic remedy prescribed by law for the wrong found to exist. (3) Unless stated in the formal order of discharge, the actual decision of the Court as to what was the precise want of jurisdiction constituting the wrongful restraint of liberty, for which it ordered the applicant to be set free, is to be found in its judgment as delivered. (4) That decision, unless lawfully set aside, is for ever conclusive on every Court with respect to the proceeding it concerns and, if it declares the applicant's status, it is final also as to that, and he can never again be put in peril of his liberty contrary to that decision. These propositions I take to be absolutely essential to the preservation

of individual liberty from oppressive official proceedings, and the finality of what, in a case such as the present, is virtually an acquittal by summary process of law.

The conclusion of mixed fact and law, which appears on the face of the judgment of *Roberts* J., is as to what his decision in truth was. Beyond dispute, it was that the Magistrate's Court has no jurisdiction even to try the applicant on the pending charge because on the facts as they exist he is not an immigrant within the immigration power and, therefore, cannot in law be a prohibited immigrant.

Applying to that conclusion of mixed fact and law the fourth proposition of law, the appeal should be dismissed. The legal propositions I have stated I consider in order.

1. *The Nature of the Habeas Inquiry.*—It is perhaps at the very root of this matter that the inquiry which the Court is to make on a habeas application is primarily to ascertain *the applicant's right to freedom, and to determine the grounds of that right,* and not primarily to say whether he be discharged or not. The latter function is secondary, and is regulated by law. If the right to freedom is decided, then the law itself prescribes the course the Judge must take. This position is of the very essence of *Secretary of State for Home Affairs v. O'Brien* (1), as I shall explain later. Here it is sufficient to point to Lord *Birkenhead's* words (2), to Lord *Dunedin's* words (3) and to Lord *Shaw's* observations (4). The issue of the writ and the actual discharge are, as hereafter shown, mere automatic *remedial* consequences of the decision as to the *right.*

During the argument I referred to the case of *Attorney-General of Hong Kong* v. *Kwok-a-Sing* (5), which clearly illustrates this distinction. There *Mellish* L.J. for the Judicial Committee expounded the relevant law, with special reference to sec. 6 of the *Habeas Corpus Act.* I am unable to see how, after that exposition, any reasonable doubt can remain. After addressing himself to the wording of the section the learned Lord Justice proceeds to consider the portion of the common law not covered by the section, and

(1) (1923) A.C. 603.
(2) (1923) A.C., at p. 610 (last 8 lines), at p. 611 (last 4 lines), at p. 612 (first 5 lines), and at p. 613 (first 4 lines).
(3) (1923) A.C., at pp. 621-622, *passim.*
(4) (1923) A.C., at p. 641.
(5) (1873) L.R. 5 P.C., at pp. 201-202.

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observes: "It can only apply when the second arrest is substantially *for the same cause* as the first, so that the return to the second writ of habeas corpus *raises for the opinion of the Court the same question* with reference to the validity of the grounds of detention as the first." Their Lordships' words therefore clearly show that the decision of the Court—for its decision must be on the question actually raised for its opinion—is as to the *validity of the ground of detention*. They then apply that ruling to the facts of the case. Kwok-a-Sing had been, as they held (1), properly discharged on habeas in respect of the first warrant, which was an illegal warrant, being for murder and piracy and beyond the Governor's "jurisdiction." But the second warrant was for "piracy *jure gentium*," and therefore valid, and so formed a different "cause" from the first. The Privy Council did not say the first discharge was in respect of one warrant, and this arrest is in respect of another, and that ends it—they went deeper to the real "cause." Anything more distinctly opposed to the Crown's main contention that a Court cannot regard anything but the mere direction to issue a habeas and to discharge, and that alone is the decision of the Court, is difficult to imagine.

It may appear a work of supererogation to add to this clear pronouncement of the ultimate tribunal a reference to the authorities supporting it, and assumed by their Lordships to regulate the law, but the consequences of the present issue are so grave that, while I judicially may, I ought to state with whatever clearness I can command why I accept the exposition of the Privy Council as conclusive of this case. The word "cause" employed by the Privy Council in the passage quoted is the appropriate, almost the technical, term which the law reserves in this connection. It has a history, and that history helps greatly to elucidate the matter. As early as the reign of Elizabeth, in *Search's Case* (2), it was held that where Search was discharged on habeas because of the illegality of a royal authority to arrest him, and afterwards was arrested again "*for the same cause*," the Court did not merely discharge him for the second time, but issued an attachment against the parties causing the second arrest. No doubt can exist that the Court did not regard the "cause" as being simply the first arrest, but the

(1) (1873) L.R. 5 P.C., at p. 201. (2) (1587) 1 Leon. 70.

underlying authority leading to that arrest, and a second arrest depending upon the same authority was "the same cause." Nor did the Court regard the first order as limited to the discharge, but as determining the illegality of the "cause," and on its repetition it at once added punishment. This is in accordance with *Hawkins' Pleas of the Crown*, vol. II., p. 218, sec. 28, where it is said: "There is no doubt but that . . . a Judge of any inferior common law Court" may be so punished "for proceeding in a cause after a habeas corpus, or writ of error allowed." Previously to *Search's Case* (1) it was held that in habeas corpus the "cause" of commitment ought to be certified, and then "upon the return the Court ought to *examine the cause* if it be sufficient or not" (*Hinde's Case* (2)). To "examine" imports a decision on the matter examined.

In the reign of Charles II. it was regarded as settled law that for habeas corpus there must be a "cause," that is, some illegality shown as to the detention (*Anon* (3)). In 1758 *Wilmot* C.J., in his famous opinion, said (4): "The Court, at the instance of a subject aggrieved, commands the production of that subject, and *inquires after the cause* of his imprisonment." Again, he says (5): "The *injustice* of the imprisonment ought to appear in the first instance, before the party has a right to demand the *remedy*." He also says (6): "If a lawful *cause* of restraint is not returned, the party will be discharged." That is to say, the unlawful cause is the *wrong*, and the discharge the *remedy*. But the decision must be primarily as to the wrong. The law itself prescribes the remedy; that is not the decision of the Court in the true sense. The "cause" is the term used by Lord *Kenyon* and *Lawrence* J. in *R.* v. *Suddis* (7) to mean the cause of restraint. So per *Cockburn* C.J. in *Re Allen* (8). Finally, I would on this point refer to *R.* v. *Governor of Brixton Prison*; *Ex parte Stallmann* (9). That case, which strictly follows *Kwok-a-Sing's Case* (10), is a very distinct authority to show that a Court having for any reason to consider the legality of subsequent proceedings is bound to inquire as to the "cause" of

(1) (1587) 1 Leon. 70.
(2) (1577) 4 Leon. 21.
(3) (1671) Cart. 221, per *Vaughan* C.J.
(4) (1758) Wilm., at p. 88.
(5) (1758) Wilm., at p. 91.
(6) (1758) Wilm., at p. 121.
(7) (1801) 1 East 306, at pp. 315, 316.
(8) (1860) 3 E. & E. 338, at p. 355.
(9) (1912) 3 K.B. 424, *passim*.
(10) (1873) L.R. 5 P.C. 179.

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the imprisonment from which a person was previously discharged on habeas (per Lord *Alverstone* C.J. (1), concurred in by Lord (then Justice) *Darling* and Lord (then Justice) *Phillimore*).

These authorities are some of many which to my mind demonstrate that the inquiry is as to the *cause*, and the decision is as to the cause; the remedy of discharge, remand or bail flowing in effect automatically.

2. *Discharge connotes Want of Jurisdiction.*—It is elementary that the "cause of restraint," whatever it may be, in order to found a right to discharge under habeas, must be one which is illegal in the sense that it is *beyond the jurisdiction* of the authority directing it. That "cause" may vary indefinitely, and it will presently be my care to indicate how it may be ascertained what was the "cause" which the discharging Court found to exist as justifying the discharge. But for the moment I am concerned with establishing that the "cause" must, apart from the question of bail, possess the characteristic of being jurisdictional. This is clear from a multitude of authorities. *Wilmot* says (2):—"In imprisonment for criminal offences, the Court can act upon it only in one of these three manners:—1st. If it appears clearly that the fact, for which the party is committed, is no crime; or that it is a crime, but he is committed for it by a person who has no jurisdiction, the Court discharges. 2nd. If doubtful whether a crime or not, or whether the party be committed by a competent jurisdiction; or it appears to be a crime, but a bailable one, the Court bails him. 3rd. If an offence not bailable, and committed by a competent jurisdiction, the Court remands or commits." In *Ex parte Fernandez* (3) *Erle* C.J. said:—"The commitment being the act of a lawful Court acting within its competency, there can be no invasion of the liberty of the subject in the sense in which the phrase is used. To issue a habeas corpus for the purpose of reviewing the decision of the Judge, would be to my mind a *gross abuse of the process.*" In *In re Thompson* (4) the right to a habeas turned upon the question of whether the justices had jurisdiction to convict. So in *Re Bailey* (5). This was again the ground

(1) (1912) 3 K.B., at pp. 443, 444.
(2) (1758) Wilm., at pp. 106-107.
(3) (1861) 10 C.B. (N.S.) 3, at p. 37.
(4) (1860) 6 H. & N. 193.
(5) (1854) 3 El. & Bl. 607, at pp. 618, 619.

of the judgment of *Hawkins* J. in *In re Authers* (1). In *R.* v. *Governor of Holloway Prison*; *Re Siletti* (2), *Bigham* J. says: "I think the only question that this Court can entertain is the question of jurisdiction." This is quoted by *Ridley* J. in *R.* v. *Governor of Brixton Prison*; *Ex parte Servini* (3).

In *Forsyth's Cases and Opinions on Constitutional Law*, at p. 446, it is said: "Where a prisoner is in custody under the sentence of a Court of competent jurisdiction, no inquiry will be made by the Court on the return to a writ of habeas corpus as to the validity of the sentence and lawfulness of the custody." Sir *William Anson*, in his work on the Constitution, speaking of persons who exceed their jurisdiction in administering military law, says: "The *remedies* for such excess of jurisdiction are by writs of prohibition, of certiorari, of habeas corpus" (*Law and Custom of the Constitution*, 3rd ed., vol. II., Part 2, at p. 187). *Holdsworth* in his *History of English Law*, vol. IX., p. 113, says of habeas corpus, "it was a mode of keeping the jurisdiction of the Council within due bounds."

In *In re Baines* (4), a case of habeas, Lord *Cottenham* L.C. made some observations which are highly important to remember when we find the words "illegal" and "illegality" in connection with habeas corpus. He first refers to an objection that the Court below had improperly exercised its jurisdiction and pronounced an illegal judgment. Then the Lord Chancellor says (5):—"There may be very many grounds upon which a judgment may be illegal, and in one sense, the Court, in pronouncing such judgment, exceeds its jurisdiction; but that is not the sense in which the expression is used, when applied to such a case as the present. The object of the jurisdiction I am now exercising is *to keep the Ecclesiastical Courts within the jurisdiction* which the law has assigned, and not to correct any error into which they may fall in the exercise of it. *If this distinction be not carefully kept in view, every Court and Judge having authority to issue the habeas corpus would become a Court of appeal from the Court by whose authority the party was committed, and so usurp the jurisdiction which the law has reposed in those Courts* to which an appeal is given." Until my impression was recently corrected, I

(1) (1889) 22 Q.B.D. 345, at p. 350.
(2) (1902) 87 L.T. 332.
(3) (1914) 1 K.B. 77, at p. 82.
(4) (1840) Cr. & Ph. 31.
(5) (1840) Cr. & Ph., at p. 44.

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thought that and similar utterances, including those of *Marshall* C.J. later quoted, went so far as to show that a Court attempting to do what the Chancellor deprecated, namely, to discharge on habeas a person regularly committed by a competent Court—and particularly a Court of exclusive jurisdiction—by its trying the very issue reserved to the committing Court, was itself to that extent acting incompetently—whether it was the Court of Chancery or King's Bench, or Supreme Court of a State, or, by inheritance, the Supreme Court of the Territory. I thought that, though the Court was quite within its competence up to the point that the exclusive jurisdiction of the committing Court appeared, yet at that point its jurisdiction found a barrier against entering the other Court's exclusive domain, and that it could not by a wrong decision give itself a jurisdiction that the law denied it and make itself a competent Court in spite of that law. But I must now judicially consider that an erroneous impression. But at least the Lord Chancellor's words and the authorities quoted point to what is the necessary inquiry, namely, as to the jurisdiction of the committing Court. This is what Lord *Halsbury* meant in *Cox* v. *Hakes* (1) by the expression "the right to an instant determination as to the lawfulness of an existing imprisonment." That now includes an inquiry into the truth of the facts set out in the return, if the return should be sufficient in law (2). The foundation of the habeas is thus in reality the same as that of prohibition, the remedy, however, being one of wider application and always for more speedy and direct liberation, but none the less final and conclusive in subsequent proceedings as to the matter decided.

3. *How the actual Decision is ascertained.*—It is always necessary in a case like the present to go further and inquire *what was the precise want of jurisdiction* which the discharging Court determined. It may have been limited to one stage of the proceedings, and, if so, imprisonment at another stage would not be for the same cause. It may have been limited to the need of some prior authorization for a warrant, or to some other necessary condition precedent. Those defects being afterwards supplied, a second imprisonment would not be for the same cause. But it may have been a total and incurable

(1) (1890) 15 App. Cas., at p. 514. (2) (1890) 15 App. Cas., at p. 516.

want of jurisdiction on the part of the committing tribunal to issue any process against the applicant, or to try him on the charge, that is, even to entertain the proceedings against him on that charge. If so, any subsequent attempts by that tribunal to proceed on that charge against the person discharged is a usurpation of the King's justice. And that is precisely the position here. Unless there exists some screen of technicality which obscures judicial vision, the most casual inspection of the judgment pronounced by *Roberts* J. makes perfectly plain the ground for Wah On's discharge. The learned Judge says: "This motion was based upon the applicant's claim that he is a member of the Australian community, and therefore not an 'immigrant' within the meaning of the *Immigration Act*, and *not amenable to the jurisdiction of the Magistrate's Court.*" He also says: "I must decide whether the commitment was made with jurisdiction, or whether *the inferior tribunal was and is incompetent to deal with the applicant at all.*" It is therefore transparently plain that the issue was whether the imprisonment was illegal on the "ground" or for the "cause" that the Magistrate's Court was incompetent—that is, had no jurisdiction—to deal with Wah On at all. It was not that the want of jurisdiction was in relation to the interlocutory commitment only, but that there was a total and absolute want of jurisdiction, of which the particular commitment was only an incident, and its fate was involved in the general incompetency of the Magistrate's Court. This is an illustration of the distinction made in *Kwok-a-Sing's Case* (1). *Roberts* J. has thus stated the issues, examined the facts and the law, and stated his *reasons* for the *conclusions* at which he ultimately arrived. His conclusion—that is, his decision as to the *wrong* of which the applicant complained—is stated in these words:—"My conclusion is that when the applicant landed in Australia in 1924, notwithstanding his long absence, he was returning to an old home which he had never abandoned. He was not an immigrant within the meaning of the *Immigration Act* 1901-1925. . . . As the applicant is not a person amenable to the Act, *the Special Magistrate has no jurisdiction to try him, and therefore no power to hold him pending trial.*" That was the decision. Then followed the legal consequence in these

(1) (1873) L.R. 5 P.C. 179

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words: "The order will be made absolute"—in other words, "discharge." Which are the reasons and which is the conclusion is not, to my mind, a doubtful matter. I do not think that question vital, because, as I shall show, reasons that are involved in the decision are just as potent for present purposes as the summarized decision. But of the two factors decided by the Supreme Court, namely, (1) that Wah On was not an immigrant, and (2) that the Magistrate's Court had no jurisdiction to try him on the pending charge, it is not rationally possible to say that the first was the ultimate decision as to his right to freedom, and the second was the reason for the first. A Court that so reversed the order of thought would not simply err, it would invert the process of reasoning. It is equally plain, however, from the direct reading of the learned Judge's judgment, that he held, as his ultimate *decision* as to the substantive right to liberty, that the Magistrate's Court had no jurisdiction to try him, for the *reason* that the applicant was not an immigrant. Both conclusions were arrived at, but the "non-immigrant" factor was necessarily the initial step declaring innocence and leading up to the decision as to the right to freedom, and the "non-jurisdiction" factor was the final and ultimate step in that decision based on the first conclusion and declaring immunity from the Magistrate's jurisdiction, and being the *decision* that determined the illegality of the detention complained of, and that called for the automatic *remedy* of discharge.

Now, to begin with, anything more grotesque or oppressive than two competent tribunals trying those same issues independently and coming to possibly conflicting results, the superior Court declaring innocence and ordering discharge, and the inferior Court declaring guilt and ordering imprisonment, can scarcely be imagined. That, however, would, or lawfully might, be the result if it be true that this Court cannot take notice from the judgment pronounced of the issues decided.

It was baldly argued that as the habeas order merely directs the release and discharge of the respondent, it must be taken that all that the Supreme Court decided was that habeas should issue absolutely and that the applicant should be discharged, and that no one can inquire, because it was not part of the decision, as to the

grounds on which the imprisonment was held to be illegal. When I say that was "baldly" argued, I mean no authority was cited for a position so destructive of justice and so inimical to the protective power of the writ of habeas corpus. The combined effect of the common law and legislation on the writ is thus aptly stated by *Holdsworth* in his *History of English Law*, vol. IX., p. 118: The "Act made the writ of habeas corpus ad subjiciendum the most effective weapon yet devised for the protection of the liberty of the subject, by providing for both *a speedy judicial inquiry into the justice* of any imprisonment on a criminal charge, and for a speedy trial of prisoners remanded to await trial." The Crown's argument would shut out any notion that the discharging Court decided anything as to the "justice" of the imprisonment, because, if it did, there immediately arises the question "What was the injustice decided?" But the Crown's contention, which is in effect that the Court cannot look at the judgment pronounced but is confined to the terms of the formal order, is unsustainable both on principle and authority. It is hopelessly in conflict with the fundamental nature of a discharge upon habeas from unlawful imprisonment. The law is not so absurd as to contemplate an order for liberation for no reason assigned by the Court; nor could the basic principle of making the discharge a final as well as a summary decision as to the illegality of the cause be satisfied or enforced if the Crown's contention be admitted.

In *O'Brien's Case* (1) Lord *Birkenhead* says it was established in *Cox* v. *Hakes* (2) "that if upon the return to the writ it was *adjudged that no legal ground was made to appear* justifying detention, the *consequence* was immediate release from custody, and if discharge followed, the legality of such discharge could *never again* be brought in question." Lord *Birkenhead* did not mean merely that the "discharge" itself was unassailable, but he meant that the *right* to the discharge in the circumstances then existing was *for ever* established. That appears from his words on pp. 611-613. The Attorney-General in that case attempted to do just what the Crown is attempting to do here, namely, say that all the Supreme Court did was, and all that such a Court ever does is, to say that the habeas

(1) (1923) A.C., at pp. 609, 610. (2) (1890) 15 App. Cas. 506.

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should issue and the applicant should be discharged. The whole essence of *O'Brien's Case* (1) is opposed to such a contracted view of the matter, and if we were to assent to the Crown's argument we should be in direct conflict with the letter and the spirit of that case. The passage quoted from Lord *Birkenhead's* judgment makes it clear (1) that the judgment of the Supreme Court of the Territory is as to the *right* of Wah On to his freedom; (2) that the order for the issue of the habeas and for discharge is respecting only procedure to obtain, and the legal *consequence* of, the decision as to Wah On's right to freedom; (3) that the right to liberty so determined, whatever it may be shown to have been, can *never again* be disputed. In the same case Lord *Dunedin* puts the matter with equal clearness. He emphasises the point that the issue in habeas is whether the applicant is "entitled to be discharged." His Lordship says (2): "*The right to an order for discharge and discharge itself* are only the *corollaries of the judgment* that the applicant is *entitled to liberty.*" Nothing, in my opinion, could be more distinct. Lord *Dunedin* also refers to the "cardinal principle" of the English law that "a person once found *entitled to liberty* should not be liable to have *that determination* again called in question." Of course, it is all conditioned by the expression "by a competent Court," but the Supreme Court must now be taken to the full to have been a "competent Court."

There must, then, be some means of satisfying the Court, in any subsequent proceeding where the same question arises, as to what was the matter which was held to be illegal on the habeas application and in respect of which the prisoner was "entitled to be discharged." The observations quoted from *Kwok-a-Sing's Case* (3) would otherwise be as meaningless as those just quoted would be ineffectual. The law is, to my mind, perfectly clear as to the method of ascertaining the *grounds* on which the imprisonment was held illegal —in other words, the *cause* of illegality. It is to read the judgment as pronounced. It is a fallacy to say that the Court is limited in its range of material for this purpose to the formal order. Even where there is much more precise procedure prescribed for litigation,

(1) (1923) A.C. 603. (2) (1923) A.C., at p. 622.
(3) (1873) L.R. 5 P.C. 179.

no such rigid rule exists. I do not stop to examine less cogent authorities than those afforded by decisions of the Privy Council. The other authorities can be found in *Halsbury's Laws of England*, vol. XIII., par. 468.

I am, perhaps, anticipating what I have presently to say, but it is necessary at this point to make one observation. The doctrine of *res judicata* is a branch of the law of estoppel. Estoppel is a short term, the essential significance of which is that in the circumstances justice requires in the particular case that facts or law must be assumed as finally determined. Its growth has been gradual. Here and there we may find landmarks where Judges have nobly performed their great functions by not hesitating to adjust the inner principles of law to the conditions of society, so as more fully to effect the justice those principles were originally intended to secure. An instance is *Pickard* v. *Sears* (1). Another illustration—consisting now of many instances—is afforded by the method of establishing that certain issues are to be regarded as *res judicata*, and therefore closed against judicial re-examination. To a great extent this has arisen from the changing methods of judicial procedure. What at one time was the subject of elaborate and formal and laboured recordation is frequently now to be gathered from less formal but more speedy and equally effective methods of trial. An order nisi for habeas is not an inapt instance. Reference to *Holdsworth's History of English Law*, vol. IX., p. 144 and subsequent pages, will elucidate this subject. It is sufficient here to say, in confirmation and further illustration of the learned author's exposition of the advancing application of this doctrine of the Courts, that there is signal evidence of the advance in the judgments of the Privy Council. Much of its modern adaptation to the growing activities of the community the law owes to the decisions of that tribunal in recent years. And the cause of justice has, in my humble judgment, never been more conspicuously served than in the common-sense rulings of the Privy Council with respect to the available sources for discovering whether or not an issue arising in a case has been already litigated and decided. I shall cite some of those rulings. In *Maharaja Jagatit Singh* v. *Rajah Sarabjit Singh* (2) Lord *Hobhouse*

(1) (1837) 6 A. & E. 469.

(2) (1891) L.R. 18 Ind. App. 176.

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for the Privy Council says: "When a decree simply dismisses a suit, it is necessary to look at the pleadings *and judgment* to see what were the points actually heard and decided." In *Sri Raja Rao* v. *Sri Raja Inuganti* (1) it was said: "The decree declares the plaintiff entitled to the substantial relief claimed in the plaint; and although it does not contain a declaration that the plaintiff is the nearest reversioner, the judgment may be and ought to be looked at to see what was decided." Then their Lordships refer to a contention that the plaintiff's title had not been declared, and add the following:—"And if only the decree could be looked at, there might be some reason for it, but it would be wrong to look only at the decree. In *Kali Krishna Tagore* v. *Secretary of State for India* (2) the High Court did this, saying: 'We cannot look to the judgment as we were asked to do in order to qualify the effect of the decree,' and then their Lordships on appeal held that in order to see what was in issue in a writ, or what has been heard and decided, the judgment must be looked at. They said:—'The decree according to the code of procedure is only to state the relief granted or other determination of the suit. The determination may be on various grounds, but the decree does not shown on what ground, and does not afford any information as to the matters which were in issue or have been decided.'" In *Hook* v. *Administrator-General of Bengal* (3) Lord *Buckmaster* for the Judicial Committee examined the judgment of the Calcutta Court as pronounced, to ascertain what points were decided, and held that on those points there was estoppel. In *Hoysted* v. *Commissioner of Taxation* (4) the Judicial Committee, speaking by Lord *Shaw*, held that a question which was not formally stated in an earlier judgment was foreclosed for the purposes of a later case, because on examination of the law their Lordships found "it was fundamental to the earlier decision." I take leave to say that, when the habeas proceedings and judgment are examined as I have above examined them, nothing could be more properly said to be "fundamental" to the habeas decision than the declared incompetency of the Magistrate's Court, because of Wah On's

(1) (1898) L.R. 25 Ind. App. 102, at p. 107.
(2) (1888) L.R. 15 Ind. App. 186, at pp. 192, 193.
(3) (1921) L.R. 48 Ind. App. 187.
(4) (1926) A.C. 155, at p. 171; (1925) 37 C.L.R. 290, at p. 304.

Australian status. It is perfectly obvious that if recourse for this purpose to the terms of the judgment were not permissible, the basic principle of *res judicata* would be defeated in perhaps the most essential class of cases.

4. *Conclusiveness of Decision.*—The Supreme Court, as already appears, decided: (1) that Wah On has an Australian status; (2) that the Magistrate's Court has no jurisdiction to try him on a charge of being a prohibited immigrant. What is the effect of that decision? That decision operates in a twofold way. It is a judgment *in rem* and conclusive on all the world. It is also, as being rendered between the present appellant and the present respondent, and in relation to the pending charge, binding upon the appellant personally (see, for instance, *Spencer Bower on Res Judicata*, pars. 42, 216).

In *O'Brien's Case* (1) Lord *Dunedin* says it is "a cardinal principle of the English law, that a person once found *entitled to liberty* should not be liable to have that determination again called in question." The meaning of that, his Lordship was careful to state, was quite irrespective of actual discharge—that is, actual order of discharge; consequently "found entitled to liberty" must mean a decision that the cause alleged for his detention is illegal. That, as I have said, is the essence of *O'Brien's Case*, and marks it as the highest point yet reached in the judicial development of individual liberty, a point which the Crown asks this Court to abandon. I am not willing to take a retrogressive step—a step that would not only be contrary to *O'Brien's Case*, but would be far behind the enlightened view taken over 300 years ago in *Search's Case* (2). It would further be contrary certainly to the spirit, and, in my opinion, to the letter of sec. 6 of the *Habeas Corpus Act*, as interpreted in *Kwok-a-Sing's Case* (3).

I apply the principle stated by Lord *Dunedin* to this case. And I do so by reason not only of the high authority of the decision itself, but also because I regard it as merely the fullest extension of a well-known doctrine of *res judicata*, which, in the case of discharge upon habeas is *in favorem libertatis*, carried one step further than in

(1) (1923) A.C., at p. 622. (2) (1587) 1 Leon. 70.
(3) (1873) L.R. 5 P.C. 179.

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other cases. It is, in such cases as this, carried so far as to exclude appeals unless competent legislation distinctly permits them. But the doctrine itself is that in the public interest there should be an end of litigation where a competent Court once and finally determines an issue. It is quite immaterial whether the same issue has been determined in the same suit or in a former suit between the same parties, "the principle which prevents the same cause being twice litigated is of general application. This was so held by Lord *Buckmaster* for the Privy Council in *Ramachandra Rao* v. *Ramachandra Rao* (1). See also *Spread* v. *Morgan* (2).

The great Chief Justice *Marshall* in *Ex parte Watkins* (3) made some valuable observations very relevant to the present case. I quote some of them, but only for the purpose of indicating how the learned Chief Justice regarded (1) the ground covered by a habeas application and (2) the effect of the judgment of a competent Court. Speaking of the common law writ of habeas corpus, he said:—"This writ is, as has been said, in the nature of a writ of error, which brings up the body of the prisoner with the cause of commitment. The Court can undoubtedly *inquire into the sufficiency of that cause*; but if it be the judgment of a Court of competent jurisdiction, especially a judgment withdrawn by law from the revision of this Court, *is not that judgment in itself sufficient cause*? Can the Court, upon this writ, look beyond the judgment, and re-examine the charges on which it was rendered. A judgment, in its nature, concludes the subject on which it is rendered, and *pronounces the law of the case. The judgment of a Court of record whose jurisdiction is final, is as conclusive on all the world as the judgment of this Court would be. It is as conclusive on this Court as it is on other Courts. It puts an end to inquiry concerning the fact, by deciding it.*" That opinion stands in the same position as Lord *Cottenham's* opinion in *In re Baines* (4); that is, I may still regard the principles enunciated as applicable to the decision of the Supreme Court regarded as a competent Court, having decided that the Magistrate's Court has no jurisdiction. To use the words of *Marshall*

(1) (1922) L.R. 4 Ind. App. 129, at p. 138, citing prior cases.
(2) (1864) 11 H.L.C. 588, at p. 607.
(3) (1830) 3 Peters 193, at pp. 202, 203.
(4) (1840) Cr. & Ph. 31.

C.J., that decision pronounced "the law of the case" and is as conclusive as the judgment of this Court, and puts an end to any inquiry as to whether the Magistrate's Court has jurisdiction in the present case or not.

Therefore the contention that the Magistrate's Court is a competent Court, and is the proper Court to determine for itself whether or not the habeas decision has determined that the Magistrate's Court has no jurisdiction, is not only wrong, but absurdly wrong. The Supreme Court on the prohibition motion was the proper Court, and this Court on the present appeal is now the proper Court, and this is the proper occasion to determine that question. How can we avoid determining it when the point is taken and is open to us? And the question seems to me, unless all guiding principles and authorities that so far have protected individual liberty, are thrown to the winds, to be capable of but one solution, namely, that in view of the habeas decision the Magistrate's Court must be held to be without jurisdiction in the present case.

5. *Ex parte Order.*—As an alternative objection, that is, if the substantial matters already dealt with are decided adversely to the Crown, it takes an objection that the prohibition order was made absolute *ex parte*. That is, that though the Magistrate's Court, the tribunal to be prohibited, was notified, the prosecutor was not. At best, the objection issued would be the refinement of triviality. Every substantial question is here open on the main objection. If the Crown succeeds on that, the *ex parte* point is needless; if it fails on that main case, of what earthly use is the *ex parte* point? But it has not even the merit of technical accuracy. The English Crown Office rule 71 is repeated by rule 13 of the *Northern Territory Rules*. That gives the Court a discretion in special circumstances to make the order absolute, even *ex parte*. The power is plainly a necessary one. Where, as here, a man has been by the Court itself declared free from a pending charge, and it had been determined that the Magistrate's Court had no jurisdiction to try and punish him upon it, and where the next day the Magistrate's Court was to sit for the purpose of doing the judicially declared illegal act, the special circumstances were conspicuous. Every *ex parte* order may, if wrong, be discharged on the application of any party

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interested (see *Halsbury's Laws of England*, vol. XVIII., par. 548). The question raised by this objection is a mere matter of Court practice and hardly worthy of as much consideration as I have given to it.

On the whole case I am of opinion that the appeals should be dismissed with costs.

Higgins J.

HIGGINS J. In my opinion, this appeal should be allowed, in the case of each of the respondents.

The mere fact that the alleged Chinaman has been released from custody pending his trial on the information is not a ground for prohibiting the Court of Summary Jurisdiction from proceeding with the trial.

The writ of prohibition is based on wrong grounds, on its face. It recites, in substance, the information of the 25th May 1926, charging King Won with being a prohibited immigrant; and it recites that the Court of Summary Jurisdiction has no jurisdiction to hear and determine the information because King Won is *not an immigrant*, and therefore is not liable to the dictation test which might make him a prohibited immigrant. But this issue, was he an immigrant, was not a matter for the Supreme Court of the Northern Territory to decide; it was a matter for the Court of Summary Jurisdiction to decide, as an issue arising on the information.

But it is urged for King Won that the prosecutor is now estopped by the decision of the Supreme Court from alleging or proving that King Won was an immigrant. The decision of the majority of this Court that an appeal does not lie to this Court from the order discharging the prisoner, under the circumstances, is binding on me; but that decision merely established that this Court cannot entertain an appeal from the Supreme Court where the Supreme Court has discharged a prisoner under a writ of habeas corpus; it does not decide that the Court of Summary Jurisdiction has no longer any jurisdiction to hear the information, or that the Supreme Court was justified in deciding that King Won was not an immigrant. This Court merely held that, on the principles laid down in *Cox*

v. *Hakes* (1) and in *Secretary of State for Home Affairs* v. *O'Brien* (2), when a prisoner has been once discharged by a Court competent to discharge him there is no appeal from that Court to this Court from the order discharging him; even if the Supreme Court made the order on wrong grounds, on an issue which it was not for the Supreme Court to entertain. This Court had to close its eyes to the grounds for discharge; there was a discharge, and that was sufficient. Personally, I was of opinion that the Supreme Court was not competent to deal with the application for release on the ground that King Won was not an immigrant; but it is quite consistent with the view taken by the majority of the Court for us now to decide that the ground ought not to have been entertained by the Supreme Court, either on the application for a prohibition or on the application for a writ of habeas corpus.

The recent decision in *Hoysted* v. *Commissioner of Taxation* (3), applies where there has been a previous finding (or admission) on a specific issue "fundamental to the decision" between the same parties, in a Court whose duty it was to decide that issue. But in this case, the Supreme Court had no duty or function to decide the issue as to immigration. The issue, was the man an immigrant or not, was not fundamental, even relevant, to the decision as to the man's right to liberty. According to most of my learned colleagues, the Supreme Court was "competent," as a Court, in the abstract, to make an order for habeas absolute and to release the prisoner without appeal; and that ended the matter.

I recognize fully the principle that a prisoner released under a habeas corpus cannot be tried or imprisoned "for the same cause"; but the cause for which this man was imprisoned *before* his trial until he could be tried, is not the same cause as that for which he may be imprisoned *after* his trial should he be convicted of being a prohibited immigrant. I fail to see how, in coming to this conclusion, I am party to any infringement of the venerable principle of British law. A man who has been released on the charge of stealing a turkey may be tried and convicted on a charge of manslaughter.

(1) (1890) 15 App. Cas. 506. (2) (1923) A.C. 603.
(3) (1926) A.C. 155; (1925) 37 C.L.R. 290.

H. C. OF A. 1927. WALL v. THE KING; EX PARTE KING WON AND WAH ON [No. 2].

Although I have expressed my view on the point of estoppel, I do not see the answer to the point taken by my brother *Starke* during the argument, that if estoppel is to be raised it should be raised on the trial of the information, not on this appeal from the order for prohibition.

GAVAN DUFFY J. agreed that the appeals should be allowed.

Appeals allowed. Orders of Supreme Court of Northern Territory and writs of prohibition issued thereon discharged. Appellant to pay costs of appeals pursuant to his undertaking.

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

Solicitor for the respondents, *R. I. D. Mallam*, Darwin, by *McCay & Thwaites*.

B. L.