I am of opinion that the decision as to forfeiture is right, and that the appeal should be dismissed.

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McQUADE v. MORGAN.

Appeal dismissed with costs.

Solicitors for the appellant, *Marsland & Co.*

Solicitors for the respondents, *McElhone & McElhone.*

B. L.

[HIGH COURT OF AUSTRALIA.]

WALL . . . . . APPELLANT;

AND

THE KING; EX PARTE KING WON . . . RESPONDENTS

AND

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

[No. 1.]

ON APPEAL FROM THE SUPREME COURT OF THE NORTHERN TERRITORY.

H. C. OF A. 1927.

MELBOURNE, *Mar.* 7, 18.

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

High Court—Jurisdiction—Appeal from Supreme Court of Northern Territory—Habeas Corpus—Competent Court—Issue of writ discharging prisoner from custody—Prohibited immigrant—Prisoner held on warrant of commitment—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 73—*Supreme Court Ordinance* 1911-1922 (*N.T.*) (*No.* 9 *of* 1911—*No.* 10 *of* 1922), *secs.* 4, 21—*Supreme Court Act* 1856 (*S.A.*) (*No.* 31 *of* 1855-1856), *sec.* 7—*Immigration Act* 1901-1925 (*No.* 17 *of* 1901—*No.* 7 *of* 1925), *secs.* 3, 5.

Held, by *Knox* C.J., *Gavan Duffy*, *Powers*, *Rich* and *Starke* JJ. (*Isaacs* and *Higgins* JJ. dissenting), that sec. 21 of the *Supreme Court Ordinance* 1911-1922 (N.T.) does not confer upon the High Court jurisdiction to entertain an appeal from an order made by the Supreme Court of the Northern Territory for the issue of a writ of habeas corpus discharging a prisoner from custody.

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Held, also, by *Knox* C.J., *Gavan Duffy*, *Powers*, *Rich* and *Starke* JJ., that the Supreme Court of the Northern Territory is, by virtue of sec. 4 of the *Supreme Court Ordinance* 1911-1922 (N.T.) and sec. 7 of the *Supreme Court Act* 1856 (S.A.), a competent Court to issue writs of habeas corpus, and the fact that the Judge of that Court, on the hearing of an order nisi for habeas corpus, enters into an irrelevant inquiry, or gives insufficient or erroneous reasons for his determination, or makes the order absolute when he should discharge it, does not affect the question whether his order is the order of a competent Court.

Per Isaacs J.: Although the Supreme Court of the Northern Territory is a Court competent in some circumstances to discharge on habeas corpus, it was not a Court competent to do so in the circumstances disclosed in this case.

Per Higgins J.: Although the Supreme Court of the Northern Territory was competent to release a prisoner on habeas corpus, it was not competent to release a prisoner who (as in this case) was detained under a valid warrant of committal pending his trial.

Leave to appeal against the decisions of the Supreme Court of the Northern Territory (*Roberts* J.) rescinded.

APPEALS from the Supreme Court of the Northern Territory.

On 25th May 1926 two informations were sworn at Darwin, in the Northern Territory, by which Alfred George Wall charged King Won and Wah On respectively with being prohibited immigrants within the meaning of the *Immigration Act* 1901-1925. The informations came on for hearing at Darwin before a Special Magistrate on 26th May and, on the application of the defendants' solicitor, both were adjourned until 28th July 1926. The defendants were thereupon discharged on recognizances to appear at the adjourned hearing. On 5th July the sureties took the defendants before the Special Magistrate, who discharged the sureties and the recognizances and, by warrant, committed the defendants to the custody of the keeper of the Darwin Gaol until 28th July. On 16th July application was made to the Supreme Court of the Northern Territory on behalf of each defendant for an order nisi for the issue of a writ of habeas corpus ad subjiciendum directed to the keeper of the Gaol to have the body of each defendant before the Supreme Court, and on the same day the orders nisi were issued. On 26th July the orders nisi came on for hearing before *Roberts* J., who made them absolute and ordered the discharge from custody of both the defendants. The reason stated by *Roberts* J. was that neither of the defendants

was an immigrant within the meaning of the *Immigration Act* 1901-1925 and therefore the Special Magistrate had no jurisdiction to try them or to hold them pending trial.

From the decision in each case the informant now, by leave, appealed to the High Court.

Sir Edward Mitchell K.C. (with him *C. Gavan Duffy*), for the appellant.

Sanderson (with him *Foster*), for the respondents took preliminary objections. An appeal does not lie to this Court from the Supreme Court of the Northern Territory. In *Porter* v. *The King*; *Ex parte Yee* (1), however, it was held that an appeal does lie. No appeal lies from an order of the Supreme Court of the Northern Territory discharging a prisoner from custody upon habeas corpus proceedings. The cases in which it has been held that an appeal lies to the High Court from such an order made by the Supreme Court of a State depended on the appellate power conferred by the Constitution of the Commonwealth (*Lloyd* v. *Wallach* (2); *Attorney-General for the Commonwealth* v. *Ah Sheung* (3); *R.* v. *Snow* (4): and see *R.* v. *Macfarlane*; *Ex parte O'Flanagan and O'Kelly* (5); *Ex parte Walsh and Johnson*; *In re Yates* (6)). But in this case any right of appeal that exists is given by sec. 21 of the *Supreme Court Ordinance* (N.T.), and the general words of that section are not sufficient to take away the fundamental right of a subject that, once having been discharged from custody upon habeas corpus, the legality of that discharge can never again be brought in question (*Cox* v. *Hakes* (7); *Secretary of State for Home Affairs* v. *O'Brien* (8)).

Sir Edward Mitchell K.C. The Supreme Court of the Northern Territory was not a "competent Court" within the rule laid down in *Secretary of State for Home Affairs v. O'Brien* (8) and the order discharging each of the respondents from custody was a nullity. Assuming that the Supreme Court of South Australia had jurisdiction to issue writs of habeas corpus, the Judge of the Supreme Court

(1) (1926) 37 C.L.R. 432.
(2) (1915) 20 C.L.R. 299.
(3) (1906) 4 C.L.R. 949.
(4) (1915) 20 C.L.R. 315.
(5) (1923) 32 C.L.R. 518, at p. 568.
(6) (1925) 37 C.L.R. 36, at pp. 77, 78.
(7) (1890) 15 App. Cas. 506.
(8) (1923) A.C. 603.

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of the Northern Territory determined to discharge the respondents upon the ground that they were not immigrants and therefore that the Magistrate had no jurisdiction to commit them to custody. That determination involved a question of the limits *inter se* of the constitutional powers of the Commonwealth and of a State. In such a case the jurisdiction of the Supreme Court of South Australia would have been taken away by sec. 38A of the *Judiciary Act*, and therefore the Supreme Court of the Northern Territory had no jurisdiction to determine the matter (see *Jones* v. *Commonwealth Court of Conciliation and Arbitration* (1)). The Supreme Court of the Northern Territory is not a competent Court on the ground also that, since the Magistrate had jurisdiction under the *Immigration Act* to deal with the charges before him (*Williamson* v. *Ah On* (2)) and to commit the respondents to custody pending the hearing, the Supreme Court of the Northern Territory had no jurisdiction to intervene and prevent the Magistrate from determining the very question which was left to him (*United States of America* v. *Gaynor* (3)).

[ISAACS J. referred to *Barraclough* v. *Brown* (4).]

The warrant of commitment was authorized by the *Northern Territory (Administration) Act* 1910, sec. 12, and Ordinance No. 6 of 1850 (S.A.), secs. XV., XLV. The words of sec. 21 of the *Supreme Court Ordinance* (N.T.) are sufficiently definite to give the High Court jurisdiction to entertain an appeal from an order of the Supreme Court of the Northern Territory discharging a person from custody on habeas corpus. The section uses the same words as are used in sec. 73 of the Constitution, and the added words do not cut down the power. The use of the same words indicates that it was intended to give to the High Court in respect of the Supreme Court of the Northern Territory the same power as might under sec. 73 of the Constitution be given to the High Court in respect of the Supreme Courts of the States. [Counsel also referred to *Attorney-General of New South Wales* v. *Jackson* (5); *R.* v. *Mount and Morris* (6).]

(1) (1917) A.C. 528, at p. 531; 24 C.L.R. 396.
(2) (1926) 39 C.L.R. 95.
(3) (1905) A.C. 128.
(4) (1897) A.C. 615.
(5) (1906) 3 C.L.R. 730.
(6) (1875) L.R. 6 P.C. 283.

Sanderson, in reply. A " competent Court " is a Court which has power to entertain applications for the issue of prerogative writs including writs of habeas corpus.

[HIGGINS J. referred to *Washer* v. *Elliott* (1).]

In *United States of America* v. *Gaynor* (2) the only question dealt with was whether habeas corpus would or would not lie. Nothing was said as to whether an appeal would lie to the Privy Council. No question as to the constitutional rights *inter se* arose in this case. The Judge found that the respondents were not immigrants and held that therefore the *Immigration Act* did not apply to them. [Counsel also referred to *Ah Sheung* v. *Lindberg* (3).]

[KNOX C.J. referred to *In re Castioni* (4).]

Cur. adv. vult.

Mar. 18.

KNOX C.J., GAVAN DUFFY, POWERS, RICH AND STARKE JJ. On 25th May 1926 Alfred George Wall swore an information charging the respondent King Won with being a prohibited immigrant within the meaning of the *Immigration Act* 1901-1925. The case came on for hearing in the Police Court at Darwin in the Northern Territory, and on the application of the respondent's solicitor was adjourned until 28th July 1926. The respondent was discharged on recognizance to appear at the adjourned hearing, but on 5th July the recognizance was discharged and the respondent was committed to His Majesty's gaol at Darwin until 28th July. On 16th July application was made to the Supreme Court of the Northern Territory for an order nisi for the issue of a writ of habeas corpus ad subjiciendum directed to the keeper of the said gaol to have the body of the respondent before the Supreme Court. On 26th July the order was made absolute and the respondent was discharged out of custody. 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.

(1) (1876) 1 C.P.D. 169, at p. 176.
(2) (1905) A.C. 128.
(3) (1906) V.L.R. 323; 27 A.L.T. 189.
(4) (1891) 1 Q.B. 149.

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An appeal is now brought to this Court from the order of the Supreme Court, and the respondent, by way of preliminary objection, has argued that an appeal does not lie to this Court from such an order. A recent case in the House of Lords, *Secretary of State for Home Affairs* v. *O'Brien* (1), in which the previous authorities are cited and examined, establishes the proposition that, according to the law of England, no appeal lies from an order of a competent Court for the issue of a writ of habeas corpus discharging a prisoner from custody unless an appeal is specifically given by the Legislature, and that the Courts should not hold that such an appeal is given merely because of general words in their natural meaning sufficient for such a purpose. By virtue of the *Supreme Court Ordinance* 1911, as amended by Ordinance No. 10 of 1922, appeal from the Supreme Court of the Northern Territory to this Court will lie by leave of this Court from any conviction, sentence, judgment, decree or order of the Supreme Court of the Northern Territory, whether in Chambers or in Court, including also any refusal of such Judge to make any order (*Porter* v. *The King* (2)). Applying to the present case the rule laid down by the House of Lords, we think we are bound to say, in the words of the Earl of *Birkenhead* L.C., that an enactment couched in terms so general does not avail to deprive the subject of an ancient and universally recognized constitutional right. The appellant denied the existence of the rule which we have stated, and relied in the first place on the case of *United States of America* v. *Gaynor* (3). In that case the Privy Council allowed an appeal from an order of a Judge made in circumstances not unlike those in the present case. The Privy Council had given special leave to appeal, and we were not furnished with any report of the proceedings when the leave was given. On the appeal itself no argument was made with respect to the validity of the appeal, and indeed none could well be made in view of the leave already given. It may very well be too, that the right of appeal to the Privy Council by special leave is by its very nature outside the rule laid down in *O'Brien's Case*, but it is unnecessary to discuss that question further. In the next place the appellant relied on a case in this Court,

(1) (1923) A.C. 603.
(2) (1926) 37 C.L.R. 432.
(3) (1905) A.C. 128.

Attorney-General v. *Ah Sheung* (1). This case was followed without argument in *Lloyd* v. *Wallach* (2), and approved of by our brother *Isaacs* in subsequent cases, but that approval rested on the nature and function of the Constitution of the Commonwealth. It is enough to say that *Ah Sheung's Case* dealt with the judicial power of this Court under Chapter III. of the Constitution, and with that power only.

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On the assumption that the rule which we have stated does exist, the appellant presented an alternative argument. He said that in this case the Supreme Court of the Northern Territory was not a competent Court within the meaning of the rule. He alleged this for two reasons. In the first place, he argued that in determining that the respondent was not an immigrant within the meaning of the *Immigration Act* 1901-1925 the learned Judge of the Supreme Court exercised a jurisdiction which belonged to this Court alone, either because his decision involved an interpretation of the Constitution, or, alternatively, because it involved a decision on a question as to the limits *inter se* of the constitutional powers of the Commonwealth and of a State. In the second place, he urged that, in assuming to determine the question as to whether the respondent was or was not an immigrant, the learned Judge of the Supreme Court had usurped a faculty which belonged to and was being exercised by the Police Court at Darwin. We cannot allow the validity of either of these contentions. With respect to the first contention, we think that the learned Judge did no more than determine for himself the meaning of the word "immigrant" in the *Immigration Act* 1901-1925, the relevant portions of which he assumed to be within the powers of the Constitution, as indeed this Court has determined them to be in a catena of cases ending with *Williamson* v. *Ah On* (3). With respect to the second contention, it may well be that the learned Judge should have discharged the order after having ascertained that the proceedings were properly before the Police Court and that in the course of those proceedings the order for commitment was one authorized by law. There was no doubt that the Police Court was not only authorized, but was bound, to

(1) (1906) 4 C.L.R. 949. (2) (1915) 20 C.L.R. 299.
(3) (1926) 39 C.L.R. 95.

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proceed on the information sworn against the respondent by Mr. Wall, and it was no less clear that the Police Magistrate was at liberty to commit the respondent to gaol when his sureties desired to be free from their undertaking, but the mere fact that the learned Judge entered into an irrelevant inquiry or gave insufficient or erroneous reasons for his determination or made the order absolute when he should have discharged it does not affect the question as to whether his order was the order of a competent Court. It was a competent Court, because it had cognizance of all pleas, civil, criminal and mixed, and jurisdiction in all cases whatsoever as freely and amply in the Northern Territory as the Court of King's Bench, Common Pleas and Exchequer or either of them lawfully had in England (*Supreme Court Ordinance* 1911-1922 (N.T.), sec. 4; *Supreme Court Act* 1856 (S.A.), sec. 7), and therefore had authority to make the very order which it did make; it had jurisdiction to come to a right or to a wrong conclusion on the questions submitted for its determination, namely, whether the writ of habeas should or should not issue, and to make an order consequential on that determination.

In our opinion the preliminary objection ought to succeed, and we should refuse to hear the appeal and also, for the same reasons, the appeal in Wah On's case.

ISAACS J. In my opinion this appeal lies. The issue is clear cut. It is whether the Supreme Court of the Northern Territory, though a Court competent in some circumstances to discharge on habeas corpus, was a Court competent to do what it did in this case, namely, to discharge Wah On by intercepting the prescribed course of justice and usurping the original jurisdiction exclusively conferred by Parliament on the Magistrate's Court. With all respect for the opposite view, I am clearly of opinion that it was not legally competent so to do, that its order has in law no binding effect, and that there is no constitutional sanctuary for an act which, though it wears the garb of legality, is in truth, when examined, one of unauthorized force.

Wah On was in charge of the Darwin Summary Jurisdiction Court, on a charge of being a prohibited immigrant. The statute confers on that Court jurisdiction, and, as the law stands, exclusive jurisdiction, to determine whether Wah On is a prohibited immigrant.

Prohibition, therefore, would not lie to restrain the Magistrate from deciding the case (*Amalgamated Society of Carpenters and Joiners v. Haberfield Pty. Ltd.* (1)). The Magistrate adjourned the hearing, and in the meantime ordered the detention of the accused. The questions of fact necessary to ascertain whether the accused fell within the Act or not were the very questions committed by law to the Magistrate, and to him alone, at that stage. The habeas proceedings were based solely on the applicant's contention that those facts did not exist. And it was only on his interception of the Magistrate's duty, and on his own determination of the issues of fact, that the learned Judge of the Supreme Court of the Territory based his order of discharge.

It must be borne in mind that this is not an appeal under the *Judiciary Act*, involving the amplitude of the ordinary constitutional power of the Commonwealth in such a case, the exercise of which Parliament may limit at its discretion, or involving the legislative power contained in sec. 122. It is simply whether in the *Supreme Court Ordinance* 1911-1922 the Governor-General in Council, by sec. 21, included an appeal from the Supreme Court from a decision discharging a person upon habeas corpus.

Constitutional considerations and principles are of the utmost relevance in construing legislative instruments and, when these are taken into account and applied to the general language of sec. 21, I am constrained to follow the precedents of *Cox* v. *Hakes* (2) and *O'Brien's Case* (3) by holding that the general words of sec. 21 do not include an appeal from the determination of a competent Court upon habeas that a person was entitled to be liberated. I refer to *O'Brien's Case*, per Lord *Birkenhead* (4), per Lord *Dunedin* (5), per Lord *Shaw* (6); together with the various passages adopted from *Cox* v. *Hakes*. If the discharge was ordered by a Court not "competent," the whole foundation of the objection fails, and an appeal lies to correct the wrong. Everything in this case then turns on what is meant by the House of Lords' using the expression "competent Court." If the Supreme Court was

(1) (1907) 5 C.L.R. 33.
(2) (1890) 15 App. Cas. 506.
(3) (1923) A.C. 603.
(4) (1923) A.C., at pp. 609, 610.
(5) (1923) A.C., at pp. 620, 621.
(6) (1923) A.C., at pp. 640, 641.

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competent to discharge the respondent, this appeal does not lie; if that Court was not so competent, not only does this appeal lie, but it at once succeeds. If that Court had no jurisdiction to determine the issues left by law to the Magistrate, our only duty is to say so and leave the Magistrate to deal with the case that has been forcibly taken out of his hands.

The respondent contends that any Court competent to issue a writ of habeas corpus under any circumstances, and to entertain an application for release, is always a "competent" Court for this purpose, whatever be the grounds of the application and whatever be the nature of the issue considered and determined. It would follow from that proposition that the Supreme Court of a Territory might, by way of short cut, whenever a prisoner is detained for trial by some other Court on any charge whatever, or even after conviction, compel his production, try the charge without a jury, find him not guilty; and that would be the end of it. What would be the effect of a finding by this supposedly "competent" Court that the accused was guilty, we were not informed. Would the Court charged with his trial be bound by the finding, or what other effect would it have? The truth is that the proposition relied on is not only unsustainable, but is in patent opposition to well-established principles and undoubted authority. "A competent Court" in the relevant sense is a Court having jurisdiction to determine the issues of law or of fact on which depend the legality or illegality of the person's detention.

It was urged that the only matter to be decided was whether the applicant was to be liberated or not, and that the questions involved in that were only "reasons" for the decision. That view cannot, in my opinion, be sustained for a moment. If A sues B for £500, it might with equal force be said that the only question is whether B is bound to pay A £500, and that whether it is for debt, or damages, or trespass, or assault, is only a "reason" and not a substantive issue. And so it would, I suppose, be contended that a Court competent to try an action of contract where £500 was claimed, would therefore be competent in the necessary sense for the same amount for tort. The same reason applied to mandamus and injunction would create new spheres of curial competency.

But the expression "competent Court" is not left unexplained by the highest authorities. It is regarded as synonymous with "Court of competent jurisdiction" (see *Cox* v. *Hakes* (1), per Lord *Halsbury* (2) and per Lord *Herschell* (3); and also *O'Brien's Case* (4), per Lord *Dunedin* (5) and Lord *Shaw* (6), adopting Lord *Herschell*).

The prevailing judgments in both those cases are instinct with the principle that, where on habeas the necessary issues are once and competently determined in favour of liberty, either rightly or wrongly, that determination is final under a general procedure section, unless clearly made appealable. But I can find no trace of any opinion by any of the learned Lords, and I will not attribute to any of them the opinion, that, if the discharging Court, though having in proper cases ample jurisdiction, *usurps the exclusive jurisdiction of some other Court* in determining the very matter in dispute, that determination is within the legal competency of the discharging Court. I should have thought the case of *United States* v. *Gaynor* (7) a short and conclusive answer to such a proposition. The essence of that Privy Council decision is that *Caron* J. was not competent to intervene for the purpose of determining the very issues that the law in its normal course left to the sole determination of the Extradition Commission—that is, when the nature of the case was presented to him his duty was to say he had no jurisdiction to issue a writ of habeas for that purpose. In the circumstances, however, the subject calls for more radical examination.

The basic principle is found in the famous opinion of *Willes* J. in *Corporation of London* v. *Cox* on prohibition (8):—"All lawful jurisdiction is derived from and must be traced to the royal authority. Any exercise, however fitting it may appear, of jurisdiction not so authorized, is an usurpation of the prerogative, *and a resort to force unwarranted by law.*" That principle applies even to superior Courts, as shown by p. 261, in cases where there is a local limit of jurisdiction. Cases of divorce where the domicile is foreign furnish another

(1) (1890) 15 App. Cas. 506.
(2) (1890) 15 App. Cas., at p. 521.
(3) (1890) 15 App. Cas., at pp. 531, 532, 533.
(4) (1923) A.C. 603.
(5) (1923) A.C., at p. 621.
(6) (1923) A.C., at p. 640, 641.
(7) (1905) A.C. 128.
(8) (1867) L.R. 2 H.L. 239, at p. 254.

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instance. It may be safely assumed that the learned Lords in the recent cases cited did not support a resort "to force unwarranted by law."

In the application of the principle to varying circumstances, the case of *Colonial Bank of Australasia* v. *Willan* (1) is valuable. There by a statute the "power" to remove the proceedings from the Court of Mines into the Supreme Court had been taken away (2). This on authority meant not a deprivation of all power, but a control or limitation of power. The Supreme Court still had *power* to examine whether there had been a manifest want of jurisdiction in the Court below, or manifest fraud in the party procuring the order challenged. This led in *Willan's Case* to an examination of the term "want of jurisdiction," and the conclusions are as apposite to a superior Court limited by statute as to an inferior Court limited by statute. A State Supreme Court would be clearly limited by sec. 38A of the *Judiciary Act*. The jurisdiction—that is, the competency—of the Supreme Court in *Willan's Case* was, to the extent of the legislation, taken away. (See, for instance, per *Williams* J. in *R.* v. *Sheffield Railway Co.* (3) and per *Cave* J. in *R.* v. *Bradley* (4).) Four classes of cases of want of jurisdiction are stated by their Lordships, of which the third is important here, where the Court, "having legitimately commenced the inquiry, is met by some fact which, if established, would *oust his jurisdiction and place the subject matter of the inquiry beyond it*" (5). That principle had been recognized constantly in habeas corpus proceedings wherever some circumstance appeared which the Court was not empowered to investigate; for never, so far as I know, has the self-contradictory proposition been upheld that any Court, however high, is "competent" to exceed its own jurisdiction.

The writ of habeas applied for here was not a writ of course, though a writ of right. It had to be moved for, and a proper case had to be shown. No writ was ever issued, but where a writ may be issued, the Court, under the rules, may act promptly as if the writ had been issued, the issue of the writ being treated as an unnecessary

(1) (1874) L.R. 5 P.C. 417.
(2) (1874) L.R. 5 P.C., at p. 442.
(3) (1839) 11 A. & E. 194, at p. 201.
(4) (1894) 70 L.T. 379, at p. 381.
(5) (1874) L.R. 5 P.C., at p. 444.

formality. In order, however, to see whether the Court had jurisdiction to issue the writ, the nature of the case as it appears before the Court has to be examined. That is so, because, as stated by Lord Chief Justice *Wilmot* in his opinion to the House of Lords (1), on the writ of habeas the Court "inquires after the cause of his imprisonment." If on the application—and it may be *ex parte*—the right is clear or even probable, the writ may issue. The return, however, may set up facts which, if true, show that the person brought up must not be discharged, because, *inter alia*, the matter relied on cannot be inquired into by the Court. But if, as here, no writ is issued, but an order nisi is granted, and on its return it clearly appears on the inquiry into the cause of imprisonment that the matter relied on is not within the competency of the Court to determine, the Court has no legal power to issue the writ, and its decision to the contrary is unauthorized and appealable. It is, in that case, a misuse of language to call it a "competent Court." The very *condition* stated in the House of Lords cases referred to, namely, that the discharging Court must be "competent" in order to prevent appeal under the general power of appeal, shows that its own view as to its competency does not, if that be challenged, finally determine the matter, but is examinable by an appellate tribunal. That is the vital factor in this problem, and the respondent's argument entirely overlooks it. But whether the want of jurisdiction appears at once or only at a later stage, the moment it does appear the Court dealing with the habeas application is incompetent to discharge the applicant, and must hold its hand. Lord Chief Justice *Wilmot* laid down the law on this point, with illustrations, in the most lucid manner. At p. 122 of the work quoted, in exemplification of the principle that the Court in habeas has no jurisdiction to substitute its own determination of the governing facts and law for the different method prescribed by law for their determination, whatever that other method may be, the Lord Chief Justice says:—"Suppose an action brought upon a bond for any given sum of money, and the party is arrested upon it, and he pleads that he never executed the bond; suppose he could show by affidavits ever so clearly, that he did not execute the bond, or, by a copy of the Register, that

(1) (1758) Wilm., at p. 88.

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he was not born when it is dated. *The Court could not interpose*: why? Because the law says, the fact must be tried by a jury: *the Judges have no more cognizance or power to try it than if they were not Judges.*" Yet the applicant here would say that the Judges, if they disregarded the law and ordered the discharge, were for that purpose "a competent Court"! And be it noted, the Lord Chief Justice was speaking of the Court of King's Bench and the other English superior Courts, whose authority the Supreme Court of the Territory inherits. *Wilmot* C.J. gives another instance (1):—"If a man is arrested and in custody, in a civil action, . . . the Court will not, even for the purpose of discharging him out of custody, enter into any examination of the reality of the debt, though there is the most clear and undoubted proof laid before the Court of the falsity of the demand; it *must be tried by a jury. The Court cannot look at it.*" With reference to the case of a recruit claiming release from habeas when about to be sent abroad for service, the Lord Chief Justice observes (2): "If the case was ever so remediless, I think we *are not warranted* to impeach, by affidavits, the truth of the return of an officer, acting under an Act of Parliament, *which the law says ought to be impeached by a verdict.*"

It seems to me impossible consistently with those principles to say that the only issue is discharge or no discharge. The issue is as to the *cause* of the imprisonment, and the question always is as to the Court's jurisdiction to determine the legality of that. Some decided cases will illustrate how this position has been maintained by the Courts.

In *Ex parte Andrews* (3) an application on habeas corpus for discharge from alleged illegal detention was made on the ground of a second imprisonment on the same judgment. On habeas it appeared that the detention was on chancery process. *Coltman* J. said: "This Court has *no power to enter into an inquiry* as to the regularity of process issuing out of the Court of Chancery." *Cresswell* J. and *V. Williams* J. agreed. That case shows very plainly that the real subject matter for a Court in such a case is *the matter alleged* as constituting the illegality of detention, and not the general unqualified

(1) (1758) Wilm., at p. 122. (2) (1758) Wilm., at p. 123.
(3) (1847) 4 C.B. 226.

alternative of imprisonment or liberty, irrespective of reasons. So in *In re Newton* (1) it was held that the Court could not entertain the application for a habeas on the ground that a person was convicted without jurisdiction at the Central Criminal Court, inasmuch as it had been wrongfully found there that the offence charged had been committed within its jurisdiction. That, held *Jervis* C.J. and the other Judges, was a matter for the Central Criminal Court to investigate and determine, and not a matter for habeas. And see *In re Smith* (2) and *Attorney-General* v. *Hunt* (3). Obviously it is immaterial for present purposes whether or not the habeas in such a case is applied for before or after trial. If the applicant is immune from the inferior Court before trial, he is immune afterwards —a nullity remains a nullity, however it is attempted to act on it. Judgment and execution would not make the inferior Court competent. In *Carus Wilson's Case* (4) Lord *Denman* C.J. said: "we may decide the question before us by considering the principle of *the exception that runs through the whole law of habeas corpus*, whether under common law or statute, namely, that our form of writ does not apply where a party is in execution under the judgment of a competent Court." The whole of the judgment is worth perusal. Its real significance is that the superior Court cannot arrogate to itself functions which the law denies it and confers on some other of the King's Courts.

This view has received confirmation in several recent cases. In 1883 in *R.* v. *Maurer* (5), a case under the *Extradition Act*, the Court held that so long as there was any reasonable evidence to act on the Magistrate had jurisdiction and the Court of King's Bench could not interfere in habeas. This followed *Ex parte Huguet* (6). *R.* v. *Morn Hill Camp Commanding Officer*; *Ex parte Ferguson* (7), is distinct; it is founded on the same principle, and it was there held that the principle of *R.* v. *Bolton* (8) is applicable also to habeas corpus. Lord *Reading* C.J. said (9): "In my opinion we have *no jurisdiction* to interfere in such a case as the present." Lord

(1) (1855) 16 C.B. 97.
(2) (1858) 3 H. & N. 227.
(3) (1821) 9 Price 147.
(4) (1845) 7 Q.B. 984, at p. 1008.
(5) (1883) 10 Q.B.D. 513.
(6) (1873) 12 Cox C.C. 551.
(7) (1917) 1 K.B. 176.
(8) (1841) 1 Q.B. 66.
(9) (1917) 1 K.B., at p. 179.

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ISAACS J.

Darling (then *Darling* J.) expressed the same view (1). *Atkin* L.J. (then *Atkin* J.) agreed. See also per *Avory* J. in *R.* v. *Governor of Lewes Prison*; *Ex parte Doyle* (2).

It is very clearly settled that, where the Legislature creates a new jurisdiction, dependent on the existence of stated facts, and confers the jurisdiction of finding the existence or non-existence of those facts on a named and selected tribunal, it is not within the competency of another tribunal, however high, to arrogate to itself the inquiry as to whether those facts exist or not, unless in some way authorized by the Legislature. No authority for this could be clearer and more authoritative than *Barraclough* v. *Brown* (3), which is precisely in line with the cases already cited. And, reading with that authority the case of *United States* v. *Gaynor* (4), the whole ground appears to me to be covered. I have already stated its essential point. In that case also are found some very apposite words of Lord *Halsbury* L.C., which—substituting "immigration" for "extradition"—apply exactly to the present case; and I would take the liberty of emphasizing them. The Lord Chancellor said (5):—"Their Lordships do not mean to suggest that the writ of habeas corpus is not applicable when there is a preliminary proceeding. Each case must depend upon its own merits. But where a prisoner is brought before a competent tribunal, and is charged with an extradition offence and remanded for the express purpose of affording the prosecution the opportunity of bringing forward the evidence by which that accusation is to be supported; if, in such a case, upon a writ of habeas corpus, a learned Judge treats the remand warrant as a nullity, and proceeds to adjudicate upon the case as though the whole evidence were before him, it would paralyze the administration of justice and render it impossible for the proceedings in extradition to be effective." In my humble opinion it is a new doctrine that paralysis of the administration of justice is a recognized part of the competency of a Court.

I have only to add that in face of the considerations above stated, verified by such cases as *R.* v. *Governor of Holloway Prison*; *In re Siletti* (6), and *R.* v. *Governor of Brixton Prison*; *Ex parte Servini*

(1) (1917) 1 K.B., at p. 180.
(2) (1917) 2 K.B. 254, at p. 274.
(3) (1897) A.C. 615.
(4) (1905) A.C. 128.
(5) (1905) A.C., at pp. 137, 138.
(6) (1902) 71 L.J. K.B. 935.

(1), and the citations there found, no reliance can be placed on the *obiter dicta* to the contrary in *In re Castioni* (2).

The preliminary objection should, therefore, be overruled in each case.

HIGGINS J. An appeal is brought to the High Court, by an officer of the Trade and Customs Department, from an order of the Supreme Court of the Northern Territory. The order made absolute an order nisi for a writ of habeas corpus, and released from custody an alleged prohibited immigrant. The appeal is brought by leave of this Court (7th October 1926); but it is objected that this Court is not competent to hear the appeal. Briefly stated, the question is whether this Court is bound, by the decision in the House of Lords in *Cox* v. *Hakes* (3), and in *Secretary of State for Home Affairs* v. *O'Brien* (4), to hold that no appeal will lie from an order made by a competent Court under a habeas corpus writ discharging a prisoner from custody.

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No application has been made to set aside the order giving leave; but we frequently rescind such orders without application.

It might be sufficient to say that there are two decisions at least of this Court against the respondent, and in favour of an appeal lying even where the prisoner has been discharged: *Attorney-General of New South Wales* v. *Jackson* (5); *Collis* v. *Smith* (6) In each of these cases, the applicant for the habeas corpus writ had been released by the Supreme Court, and yet the High Court decided that it could entertain an appeal. This Court evidently relied on the strong language of sec. 73 of the Constitution: "The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from *all* judgments, decrees, orders, and sentences . . . of . . . *any* . . . *Court exercising Federal jurisdiction*; *or of* the Supreme Court of any State." Here, we have to deal with an order made by the Supreme Court of a Territory, not of a State; but the Supreme Court of the Territory was "exercising Federal

(1) (1914) 1 K.B. 77.
(2) (1891) 1 Q.B. 149.
(3) (1890) 15 App. Cas. 506.
(4) (1923) A.C. 603.
(5) (1906) 3 C.L.R., at pp. 735, 736.
(6) (1909) 9 C.L.R. 490, at pp. 492, 493.

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jurisdiction." It was invested with Federal jurisdiction, not by sec. 77 (III.) of the Constitution, which applies to State Courts only, but by force of sec. 122 and the unrestricted power therein contained to make laws as to territories (see *Porter* v. *The King*; *Ex parte Yee* (1)).

I ought to add the cases of *Attorney-General* v. *Ah Sheung* (2) and *Lloyd* v. *Wallach* (3); but in the latter case there was no appearance for the respondent, and the point was not argued that there could be no appeal from an order releasing on a habeas.

According to the language used in sec. 73, it would appear that no exceptions of or regulations of the power can be recognized unless they are made by Parliament; that no time-honoured practice of the English Law Courts will be sufficient to prevent an appeal. So, in sec. 21 of the Ordinance for the Territory there seems to be no room for any implied exception: "The Full Court of the High Court of Australia, constituted by at least two Judges, may grant leave to appeal to the High Court of Australia from *any* conviction, sentence, judgment, decree, or order of the Supreme Court of the Northern Territory, including any order or direction made by the Judge of the Northern Territory whether in Chambers or in Court and including also any refusal of such Judge to make any order."

It ought to be added that in two cases at least before the Judicial Committee of the Privy Council, the tribunal to which this Court is subject, orders have been made reversing orders of release made by a colonial Court: *Attorney-General for Hong Kong* v. *Kwok-a-Sing* (4); *R.* v. *Mount* (5). But the point in question does not seem to have been argued; and in *Cox* v. *Hakes* (6) the Lord Chancellor (Lord *Halsbury*) treats these cases as having no "relevancy to the true construction of the 19th section of the *Judicature Act*."

It is, of course, our duty to accept meekly the construction of that sec. 19 as laid down in *Cox* v. *Hakes* (7)—after two arguments—by the House of Lords; but it does not follow that the construction of that Act is directly binding on us in construing the Constitution

(1) (1926) 37 C.L.R. 432.
(2) (1906) 4 C.L.R. 949.
(3) (1915) 20 C.L.R. 299.
(4) (1873) L.R. 5 P.C. 179.
(5) (1875) L.R. 6 P.C. 283.
(6) (1890) 15 App. Cas., at p. 521.
(7) (1890) 15 App. Cas. 506.

Act of 1900, or the Federal Ordinance of 1911-1922 (secs. 4 and 21). Yet in the construction of provisions so analogous, the reasoning of the members of the House of Lords must have great weight. According to sec. 19 "the Court of Appeal shall have jurisdiction and power to hear and determine appeals from *any* judgment or order, save as hereinafter mentioned, of Her Majesty's High Court, or of any Judges or Judge thereof, subject to the provisions of this Act, and to such rules and orders of Court for regulating the terms and conditions on which such appeals shall be allowed, as may be made pursuant to this Act." There were no exceptions, no regulations, in the other parts of the Act or rules—I mean exceptions or regulations in favour of the time-honoured practice of allowing no appeal from an order releasing the person detained. So, by sec. 3 of the *Appellate Jurisdiction Act* of 1876—which was discussed in *O'Brien's Case* (1)—"subject as in this act mentioned, an appeal shall lie to the House of Lords from any order or judgment of any of the Courts following; that is to say, (1) of Her Majesty's Court of Appeal in England." But the House of Lords, one member dissenting, followed, and even extended, *Cox* v. *Hakes* (2).

However, even if it were our duty to treat the principle of the cases in the House of Lords as applicable to our Constitution and the Acts and Ordinances thereunder, it is my opinion that the order made by the learned Judge of the Supreme Court was made without jurisdiction. It is true that he had jurisdiction to release the prisoner if he were detained without legal justification; but he had no jurisdiction to release the prisoner on any other ground; and here he ordered the release on the express and sole ground that the prisoner was not an immigrant. That fact the Judge had no jurisdiction to try; that fact was for the Special Magistrate to try. What the Judge had to try was the question whether the warrant of committal for safe custody during an adjournment of the hearing before the Special Magistrate was a valid ground for detention; and the Judge did not apply himself to the consideration of that warrant at all. No doubt, the Supreme Court of the Territory was competent to release a prisoner on habeas corpus; but it was not competent to release a prisoner who was lawfully detained; and he

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

(2) (1890) 15 App. Cas. 506.

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was lawfully detained unless the warrant of committal pending trial was invalid. The learned Judge had no power, no jurisdiction, to release the accused unless the warrant was unlawful; and yet he releases him because he is not, in the opinion of the Judge, an immigrant. We must not be misled by the word "competent," as used in *O'Brien's Case* (1)—as a young Magistrate in East Africa was some years ago, when in an action for the price of a cow sold and delivered, he sentenced the *plaintiff* to three months' imprisonment for fraud. Moreover, a Judge cannot take a case, or the issues of a case, from another tribunal which has to try the case and the issues (*R.* v. *Bolton* (2); *Ex parte Huguet* (3); *R.* v. *Maurer* (4); *R.* v. *Morn Hill Camp Commanding Officer*; *Ex parte Ferguson* (5)). The case of *In re Castioni* (6) is an exception which proves the rule. Under the *Extradition Act* the fugitive was not to be surrendered if the offence charged were one of a political character. Castioni was arrested and committed in England as for the offence of murder committed in the Ticino. He moved for a writ of habeas, and was released on the ground that the offence was of a political character, although the Magistrate had held that it was not. But in that case the Act specifically provided for such an interposition of the Court on a writ of habeas (sec. 11, and see *R.* v. *Morn Hill Camp Commanding Officer*; *Ex parte Ferguson* (7)). The view taken of the Act by the Judges of the Queen's Bench Division was that they had power under sec. 11 to decide whether it was or was not a political offence.

The information, sworn 25th May 1926, stated that King Won, in the Northern Territory, was a prohibited immigrant in that within three years after he had entered the Commonwealth he was required to pass the dictation test within the meaning of the *Immigration Act* 1901-1925, and failed to do so, and was found within the Commonwealth. This Act applies to immigrants and immigration only; and if the prosecution failed to prove King Won to be an immigrant, the prosecution would fail. It was to this question, immigrant or not, that the learned Judge directed

(1) (1923) A.C. 603.
(2) (1841) 1 Q.B. 66.
(3) (1873) 29 L.T. (N.S.) 41.
(4) (1883) 10 Q.B.D. 513.
(5) (1917) 1 K.B. 176.
(6) (1891) 1 Q.B. 149.
(7) (1917) 1 K.B., at p. 181.

his attention, and to no other question; and this question he had no power to entertain. His Honor states, in his reasons for judgment, that the prosecutor did not really enter into the contest as to immigration or not, because he considered the weighing of the evidence on this subject to be a matter which the Judge should not undertake, but should leave it for the Magistrate on the trial of the information. In my opinion, the prosecutor was perfectly right: the questions of immigrant and immigration were really decided *coram non judice*, before a person who had no jurisdiction to entertain them; and as there is no suggestion that the warrant of committal, for safe custody during the adjournment until 28th May 1926, was not a legal justification for detention, the order for release was made without jurisdiction. As stated in the case of *United States* v. *Gaynor* (1), the defect of the order of release was a defect of jurisdiction—"The only question which the learned Judge had to determine was whether the accused were at the time of the issue of the writ . . . in lawful custody. If they were, he had no *jurisdiction* to release them." There, the Judicial Committee advised that the orders for release should be reversed, although the prisoners had been at liberty for three years.

I understand that Dr. *Sanderson* does not contend that the order for release was justified in itself; and, in my opinion, the appeal should be allowed, and the order set aside.

Leave to appeal rescinded. Appeals struck out.

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.

(1) (1905) A.C., at p. 134.