Savarkar's Application to the Court of Appeal

On June 16-17, 1910, Savarkar’s lawyers made an application to the Court of Appeal in London to overturn the ruling of the High Court, under Section 10 of Fugitive Offenders’ Act. Predictably, the British Government.objected (Savarkar Ex parte). The application was heard and dismissed, paving the way for Savarkar’s extradition to India to stand trial.

Read Below:

[IN THE COURT OF APPEAL.]

THE KING v. GOVERNOR OF HIS MAJESTY'S PRISON, BRIXTON. Ex parte SAVARKAR.

1910 June 16, 17.

VAUGHAN WILLIAMS, FLETCHER MOULTON, and BUCKLEY L.JJ.

Practice - Habeas Corpus - Appeal - Criminal Cause or Matter - Fugitive Offender - Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 47 - Application to Court of Appeal under Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69), s. 10 - Estoppel by Judgment - Res Judicata - Absence of Adjudication as of Record.

An appeal will not lie to the Court of Appeal against the refusal of a Divisional Court to issue a writ of habeas corpus in the case of a prisoner committed under the Fugitive Offenders Act, 1881.

An order nisi for a habeas corpus was obtained in the King's Bench Division on the application of a person in custody under the Fugitive Offenders Act, 1881, but was afterwards discharged. The affidavit upon which the order nisi was obtained stated (inter alia) matters material as grounds for the exercise of the power given by the Fugitive Offenders Act, 1881, s. 10, but the order nisi was in form simply for a habeas corpus, and not, in the alternative, for relief to the prisoner under s. 10. On the argument of the order nisi the matters referred to in the affidavit as aforesaid were discussed, and the Court in giving judgment pronounced them insufficient as grounds for the exercise of the powers given by s. 10 of the before-mentioned Act in favour of the prisoner. The order ultimately drawn up was, however, simply for discharge of the order nisi for a habeas corpus. An application was subsequently made to the Court of Appeal to exercise the powers given by s. 10, as having original jurisdiction in that behalf under the Act concurrently with the High Court. A preliminary objection was taken to the hearing of the application on the ground that the matter had been previously adjudicated upon by the King's Bench Division, and was therefore res judicata:-

Held by Vaughan Williams L.J., Fletcher Moulton L.J., and Buckley L.J., that inasmuch as the only matter adjudicated upon by the order of the King's Bench Division, as drawn up, was that the order nisi for a habeas corpus should be discharged, the matter of the application to the Court of Appeal was not res judicata, and (Buckley L.J. doubting) that the Court of Appeal had original jurisdiction to entertain the application.

Qu're, whether, in a case where an application for relief under s. 10 of the Fugitive Offenders Act, 1881, has been adjudicated upon, and an

order has been made dismissing the same in the High Court, it is competent for the applicant to make a similar application to the Court of Appeal.

APPEAL from an order of a Divisional Court (Lord Alverstone C.J., Pickford J., and Lord Coleridge J.) discharging an order nisi for the issue of a habeas corpus.

In this case an order nisi for a writ of habeas corpus was obtained on the application of one Venayak Damodar Savarkar, who had been committed to His Majesty's prison at Brixton by the chief magistrate at Bow Street under the Fugitive Offenders Act, 1881, for deportation to India to be tried there in respect of alleged offences under the Indian Penal Code.

The offences charged against the said Venayak Damodar Savarkar were (1.) waging, and abetting the waging of, war against the King (Indian Penal Code, 121); (2.) conspiring to wage war against the King (Indian Penal Code, 121a); (3.) collecting arms with intent to wage war against the King (Indian Penal Code, 122); (4.) sedition (Indian Penal Code, 124a); (5.) abetment of murder (Indian Penal Code, 302 and 109). It was stated by the affidavit of Savarkar, upon which the order nisi for a habeas corpus was obtained, that the alleged acts constituting the said offences, as shewn by the evidence for the Crown, were substantially the following:- (a) That from January to the end of May, 1906, in India he uttered seditious speeches; (b) that in 1908 and 1909 in England he uttered seditious speeches, circulated seditious literature, wrote letters inciting to sedition, procured arms to be taken to India for use against the Government, and abetted murder. The before-mentioned affidavit of Savarkar, after setting forth various matters relating to the question of the validity of his imprisonment under the Fugitive Offenders Act, and stating that the deponent had lived in England since 1906, and other circumstances of the case, and that he desired to be tried in England for any offences alleged to have been committed anywhere by him during his residence here, proceeded as follows: "(8.) Under the foregoing circumstances I submit that it would be unjust and oppressive to order my removal to India, and that the criminal law ought not to be strained against any subject of the Crown. The

trial in India would be oppressive, because the procedure and admissibility of evidence there differ materially from the practice in England: for instance in India the depositions of Deshpande Karwe and Kanhere, who have been executed, would be admissible under s. 512 of the Criminal Procedure Code (Act No. 5 of 1908) and also under the Indian Criminal Law Amendment Act (No. 14 of 1908), under either of which Acts my trial must take place: and because the Indian Government can afford to send here witnesses and evidence taken upon commission in India, whilst I am without means to compel my witnesses who are in England or on the Continent to go to India or to bear the expense of a defence here."

The order nisi for a habeas corpus was as follows: "It is ordered that Tuesday the 31st day of May instant be peremptorily given to the governor of His Majesty's prison at Brixton in the county of London, to shew cause why a writ of habeas corpus should not issue directed to him to have the body of the said Venayak Damodar Savarkar before this Court immediately to undergo and receive all and singular such matters and things as this Court shall there and then consider of and concerning him in this behalf, upon the following grounds that is to say:- (1.) that the said Venayak Damodar Savarkar is not a fugitive offender within the meaning of the Fugitive Offenders Act 1881 (a) at all, or (b) in respect of the offences alleged to have been committed by him since May, 1906: (2.) that the depositions of witnesses used in evidence before the magistrate at Bow Street Police Court were not evidence upon which the said magistrate could lawfully act, having regard to section 112 of the Code of Indian Criminal Procedure (Act 5 of 1898) and to the fact that the said Venayak Damodar Savarkar had not absconded in respect of (a) any of the offences alleged against him, (b) those offences alleged to have been committed by him since May, 1906: (3.) that, as regards the offences alleged to have been committed by the said Venayak Damodar Savarkar in 1906, the evidence produced on behalf of the Crown did not according to the law ordinarily administered at Bow Street Police Court raise a 'strong or probable presumption that the said Venayak Damodar Savarkar had committed the offences mentioned in the

warrant': (4.) that, as regards the offences alleged to have been committed by the said Venayak Damodar Savarkar in 1906, it would be unjust, or oppressive, or too severe a punishment to return the said Venayak Damodar Savarkar to India (a) because the said alleged offences are of a trivial nature, and (b) because in respect of such offences the application is not made in good faith in the interests of justice, seeing that the said alleged offences, if committed, were committed more than four years ago, and because some time previous to the departure of the said Venayak Damodar

Savarkar from India to England his alleged commission of such offences, and his intended departure, and his whereabouts, both before and after his said departure, have always been known to the Crown, and no steps have been taken to prosecute him in respect of such offences until now, namely until four years afterwards: (5.) that, as regards the offences alleged to have been committed by the said Venayak Damodar Savarkar since July, 1906, it would be unjust, or oppressive, or too severe a punishment to return or to send the said Venayak Damodar Savarkar to India for trial, because (a) he has not been in India since May, 1906, (b) he has been in England ever since July, 1906, (c) the said Venayak Damodar Savarkar having been so resident, he has in respect of the said offences acquired the status of an ordinary British subject of His Majesty resident in England, (d) the acts alleged to have been committed by the said Venayak Damodar Savarkar, if committed, were all committed in England, and were acts constituting offences against the criminal law of England, and as such triable and punishable in this country, (e) there are witnesses whom the said Venayak Damodar Savarkar is desirous of calling in his defence, and whom it is important for him to call in his defence, and all such witnesses are in England, or on the Continent of Europe, and such witnesses will not attend to give evidence in his defence in India, whereas, so far as the evidence of the Crown is concerned, it is evidence of documents in the possession of its officers, and the oral evidence of persons every one of whom is either a servant of the Crown or a person in custody of the police, and the Crown will therefore be quite able to obtain their evidence upon a trial of the said Venayak Damodar

Savarkar in England, (f) having regard to the provisions of the Indian Criminal Law Amendment Act (No. 14 of 1908) and the Order of the Governor-General of India in Council dated January 4, 1910, the trial of the said Venayak Damodar Savarkar in India may take place in circumstances and under conditions which are unknown to the laws of England and repugnant thereto."

Upon the argument on the order nisi for a habeas corpus the Divisional Court ordered it to be discharged. The matters alleged by (4.) and (5.) of the above-mentioned grounds were discussed during the argument and in the judgments given by the judges, who arrived at the conclusion that sufficient reason was not shewn for exercising any of the powers given to the Court by ss. 10 and 35 of the Fugitive Offenders Act, 1881. The order of the Court as drawn up, however, merely ordered that the order nisi should be discharged.

The applicant appealed against the order of the Divisional Court, the grounds of appeal set forth in the notice of appeal being substantially the same as those set forth in the rule nisi for a habeas corpus. (1)

(1) By the Fugitive Offenders Act, 1881 (44 & 45 Vict. c. 69), s. 10, "Where it is made to appear to a superior Court that, by reason of the trivial nature of the case, or by reason of the application for the return of a fugitive not being made in good faith in the interests of justice or otherwise, it would, having regard to the distance, to the facilities for communication, and to all the circumstances of the case, be unjust or oppressive or too severe a punishment to return the fugitive either at all or until the expiration of a certain period, such Court may discharge the fugitive, either absolutely or on bail, or order that he shall not be returned until after the expiration of the period named in the order, or may make such other order in the premises as to the Court seems just."

Sect. 35: "Where a person accused of an offence is in custody in some part of Her Majesty's dominions, and the offence is one for or in respect of which, by reason of the nature thereof or of the place in which it was committed or otherwise, a person may under this Act or otherwise be tried in some other part of Her Majesty's dominions, in such case a superior Court, and also if such person is in the United Kingdom a Secretary of State, and if he is in a British possession the governor of that possession, if satisfied that, having regard to the place where the witnesses for the prosecution and for the defence are to be found, and to all the circumstances of the case, it would be conducive to the interests of justice so to do, may by warrant direct the removal

June 16. **Sir Rufus Isaacs, S.-G**. (**Bodkin** and **Rowlatt** with him), for the respondent. There is a preliminary objection to the hearing of this appeal. The application for the writ of habeas corpus was made in a criminal cause or matter, and therefore under s. 47 of the Judicature Act, 1873 (1), no appeal lies from the decision of the Divisional Court. No doubt an appeal lies from the refusal of a writ of habeas corpus where the matters out of which the application arises are of a civil nature, but prima facie there is no right of appeal in a criminal cause or matter. In Ex parte Alice Woodhall (2) it was held that no appeal lay from the refusal of a Divisional Court to grant a writ of habeas corpus in the case of a person committed to prison under the Extradition Act, 1870, as a person accused of an extradition crime, the reason being the prohibition in s. 47 against an appeal in a criminal cause or matter. In Reg. v. Young (3) the same reasoning was applied in the case of an appeal from the refusal to make absolute a rule nisi for a mandamus to hear and determine a summons under the Weights and Measures Act, 1878. The present case, it is true, arises under the Fugitive Offenders Act, 1881, under which the appellant has been committed to prison in this country to take his trial in another part of His Majesty's dominions, but no trace is to be found in that Act of an appellate jurisdiction being given to this Court, and the principle of the decision in Ex parte Alice Woodhall (2) is decisive of the present case.

Arthur Powell, K.C. (**Parikh** with him), for the appellant. This Court has jurisdiction to hear this appeal. It is clear that

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of such offender to some other part of Her Majesty's dominions in which he can be tried, and the offender may be returned, and, if not prosecuted or acquitted, sent back free of cost in like manner as if he were a fugitive returned in pursuance of Part One of this Act, and the warrant were a warrant for the return of such fugitive, and the provisions of this Act shall apply accordingly."

Sect. 39: "In this Act, unless the context otherwise requires, ... the expression 'superior court' means (1.) In England, Her Majesty's Court of Appeal and High Court of Justice. ...."

(1) By s. 47 of the Judicature Act, 1873 (36 & 37 Vict. c. 66), ".... no appeal shall lie from any judgment of the High Court in any criminal cause or matter, save for some error of law apparent upon the record ...."

(2) (1888) 20 Q. B. D. 832.

(3) (1891) 66 L. T. 16.

prior to the Judicature Act, 1873, the common law right to apply for a writ of habeas corpus was not exhausted by a single application, but that the application, if unsuccessful, might be renewed before each Court and judge in succession: Ex parte Partington. (1) That Act, however, consolidated the Courts, and it then became possible to make only a single application to the High Court; if, therefore, the decision in Ex parte Alice Woodhall (2) is good law, the Act of 1873 has had the effect of seriously cutting down the safeguards for the liberty of the subject. Moreover, a right of appeal to the Court of Appeal is given by the Fugitive Offenders Act, 1881. By ss. 10 and 35 certain powers are given to a "superior Court," which expression is by s. 39 defined to mean "In England, Her Majesty's Court of Appeal and High Court of Justice." It must be inferred from this that it was the intention of the Legislature to confer upon the Court of Appeal an appellate jurisdiction in the case of applications made under the Act, as the present application was made; there was no other reason for including it in the definition of a superior Court. It is further submitted that under the Act of 1881 the Court of Appeal has both an original and an appellate jurisdiction, and, if necessary, the Court is asked to hear the application under the Fugitive Offenders Act, 1881, in the exercise of its original jurisdiction.

June 17. VAUGHAN WILLIAMS L.J. read the following judgment:- As this case is one of some importance, I think it desirable to set out in some detail the steps in the application to the Divisional Court and in the appeal to this Court. Venayak Damodar Savarkar moves by his counsel that the judgment of the King's Bench Division made in the matter of the Fugitive Offenders Act, 1881, and in the matter of the Habeas Corpus Acts and in the matter of The King v. Governor of His Majesty's Prison, Brixton, Ex parte Venayak Damodar Savarkar, dated June 3, whereby it was ordered that the rule nisi dated May 24 to the said governor of the said prison to shew cause why a writ of habeas corpus ad subjiciendum should not issue directed to the said governor to have the body of the said Venayak

(1) (1845) 13 M. & W. 679.

(2) 20 Q. B. D. 832.

Damodar Savarkar before the said Court immediately to undergo and receive all and singular such matters and things as the said Court should then and there consider of and concerning him should be discharged, may be reversed, and that the said rule may issue upon the following grounds. [His Lordship read grounds 1 to 5 in the notice of appeal previously set out.] Having regard to the fact that a preliminary objection is made by the Crown that no appeal lies in the present case and that we are going to deal with that objection, it is not necessary that I should say more of these grounds than that, although the grounds, some of them, refer to the powers of superior Courts under the Fugitive Offenders Act, 1881, including amongst others the power of superior Courts to discharge a fugitive where it is made to appear to the Court that it is just that such order should be made upon any of the grounds mentioned in that Act, yet the appeal which it is sought to bring before us is nothing else than an appeal in respect of the refusal by the Court of the King's Bench Division to make absolute a rule nisi for a writ of habeas corpus issued in respect of the body of the appellant, who under a warrant of the magistrate at Bow Street Police Court is detained in Brixton prison charged with certain criminal offences, and the preliminary objection is that no appeal can be had in such a case having regard to the words of s. 47 of the Judicature Act, 1873, which enacts, inter alia, that "no appeal shall lie from any judgment of the High Court in any criminal cause or matter save for some error of law apparent upon the record."

There can be no manner of doubt, having regard to the decision of this Court in the case of Ex parte Alice Woodhall (1), that the decision of the King's Bench Division refusing to make absolute the order nisi for issue of a writ of habeas corpus in this case is a decision in a criminal cause or matter within the meaning of s. 47 of the Judicature Act, 1873; and it follows that, as this appeal relates to the said decision and nothing else, this preliminary objection is a good objection and must prevail.

It is desired on the part of the appellant to make to this Court an original motion or application asking for the exercise

(1) 20 Q. B. D. 832.

by this Court as a superior Court within the meaning of the Fugitive Offenders Act, 1881, of certain powers given to superior Courts by that Act. This is a motion or application which can be made as of right without any leave from us, but a difficulty arises by reason of the limit of time during which the appellant can remain in England under the orders which have been made respecting his return to India, but the Solicitor-General on behalf of the Crown has thought it right to remove this difficulty by stating that these orders, so far as they relate to the time of the return of the appellant to India, shall be suspended in operation so as to enable the appellant to make this application to us under the

Fugitive Offenders Act, 1881, and appeal (if he is allowed so to do and does it promptly) both in respect of the order of the King's Bench Division refusing to make absolute the rule nisi for a writ of habeas corpus and our decision on the preliminary objection, and also in respect of any order which this Court may make on the appellant's application to us under the Fugitive Offenders Act, 1881 - which application we will hear at once this morning, if due notice of the grounds was given last night as arranged.

FLETCHER MOULTON L.J. I am of the same opinion. I might rest my decision on the simple ground that the judgment in Ex parte Alice Woodhall (1) is binding upon us and that it can only be reviewed in the House of Lords. But, looking to the importance of the present case, I think it desirable to state the grounds on which I have come to the conclusion that this appeal should be dismissed, independently altogether of the authority of that decision.

By s. 47 of the Judicature Act, 1873, it is provided (inter alia) that "no appeal shall lie from any judgment of the High Court in any criminal cause or matter, save for some error of law apparent upon the record, as to which no question shall have been reserved ...." I ask myself therefore whether the present appeal is an appeal in a criminal cause or matter. It is an appeal from the refusal of the Divisional Court to make absolute a rule nisi for a habeas corpus obtained on behalf of

(1) 20 Q. B. D. 832.

one Savarkar, who has been committed to prison upon certain charges under the Fugitive Offenders Act, 1881. The fact that it is an appeal from a refusal to make absolute a rule nisi for a writ of habeas corpus is not decisive; many cases of habeas corpus have nothing to do with anything of a criminal character. For the purpose of deciding whether it is in a criminal cause or matter I look at the grounds of appeal contained in the notice of appeal and in the original application to the Divisional Court. It will be sufficient for this purpose to read the second and fifth grounds. [His Lordship read the second and fifth grounds.] It seems to me impossible to contend that those grounds do not arise out of a criminal cause or matter, and if any portion of an application or order involves the consideration of a criminal cause or matter, it arises out of it, and in such a case this Court is not competent to entertain an appeal. Therefore, without reference to the decision of this Court in Ex parte Alice Woodhall (1), I come to the conclusion that this is an appeal from the High Court of Justice in a criminal cause or matter.

I must add, however, that I respectfully agree with the reasons given by the learned judges in their judgments in Ex parte Alice Woodhall. (1) The present case comes within the reasons given in each of those judgments. Lord Esher M.R. says (2), quoting from his own judgment in Reg. v. Fletcher (3), "I should read the clause as meaning 'no appeal shall lie from any decision of the High Court by way of judgment in any criminal cause or matter.' In the present case, I think I must try to express my meaning in other words. I think that the clause of s. 47 in question applies to a decision by way of judicial determination, of any question raised in or with regard to proceedings the subject-matter of which is criminal, at whatever stage of the proceedings the question arises." That language precisely fits the present case. Lindley L.J. says (4), "Can we say that the application in the present case is not an application in a criminal cause or matter? I think that in substance it certainly is. Its whole object is to enable the

(1) 20 Q. B. D. 832.

(2) 20 Q. B. D. at p. 836.

(3) (1876) 2 Q. B. D. 43.

(4) 20 Q. B. D. at p. 837.

person in custody to escape being sent for trial in America upon a charge of forgery." Altering the nature of the charge, and substituting India for America, that language fits the present case just as well as it did the case of Ex parte Alice Woodhall. (1) Finally, Bowen L.J. said (2), "How can the matter be other than criminal from first to last? It is a matter to be dealt with from first to last by persons conversant with criminal law, and competent to decide what is sufficient evidence to justify a committal. The questions upon which the application for a writ of habeas corpus depends, are whether or not there was evidence before the magistrate of a crime, which would be a crime according to English law, having been committed in a foreign country, and whether or not that evidence was sufficient to justify him in committing the accused for trial if the crime had been committed in England. These must be questions arising in a criminal matter; and it follows that the judgment given upon the application for a writ of habeas corpus is a judgment in a criminal matter." This language does not apply to all the grounds of appeal in this case with equal aptitude, but it certainly applies to some of them, and, as I have already said, if some of the grounds of appeal arise out of a criminal cause or matter, this Court is not competent to entertain an appeal from the Divisional Court.

BUCKLEY L.J. In the case of a person detained or imprisoned under an order made by a Court in the exercise of its criminal jurisdiction, an application for a writ of habeas corpus challenges the validity of the detention. The appellant is detained, under an order made by the chief magistrate at Bow Street, in Brixton prison prior to being sent to India for trial under the Fugitive Offenders Act, 1881. An order nisi for a habeas corpus was obtained on his behalf, but an application to make it absolute was refused, and the rule nisi was discharged. The present appeal is simply an appeal from that order; it is an appeal from the refusal of the habeas corpus, and it is nothing more. If that is so, this case comes within the principles of two prior decisions of the Court of Appeal, Ex parte Alice Woodhall (1)

(1) 20 Q. B. D. 832.

(2) 20 Q. B. D. at p. 838.

and Reg. v. Young. (1) I do not criticize those decisions; they are binding upon us. They decide that such an appeal as the present will not lie. Mr. Powell does not deny this, but he says these decisions are open to review by the House of Lords, and he seeks to maintain his right to a habeas corpus upon certain provisions in s. 10 and s. 35 of the Fugitive Offenders Act, 1881, which I do not now stay to read, for they are of this nature only: that, whereas the writ of habeas corpus attacks the validity of the order of detention, these sections assume its validity but give nevertheless a power of mitigation to the superior Courts. On the present appeal we can express no opinion on this contention. The Act of 1881 gives to fugitive offenders certain statutory rights which have nothing to do with habeas corpus. The present matter is habeas corpus simpliciter, and this appeal must fail.

Appeal dismissed.

W. J. B.

Application was thereupon made by Savarkar's counsel to the Court of Appeal, as having original jurisdiction in the matter under the provisions of ss. 10 and 35 of the Fugitive Offenders Act, 1881, that Savarkar should not be sent or returned to India under that Act or at all, and for an order that he should be discharged either absolutely or on bail, or that the Court should make such other order in the premises as to the Court seemed just. The grounds stated in the notice of the application were substantially the same as grounds 1, 4, and 5 of those which have been set forth above.

Sir Rufus Isaacs, S.-G. (Bodkin and Rowlatt with him), for the respondent, took the preliminary objection that, the subject-matter of the application having been already adjudicated upon in the King's Bench Division, it was not competent for the applicant to make a similar application to the Court of Appeal. It is true that the application made, and refused, in the King's Bench Division was in form for a habeas corpus, but it involved a decision of the matters arising under ss. 10

(1) 66 L. T. 16.

and 35 of the Fugitive Offenders Act, 1881. Under that Act, it is contemplated that there may be an application for a habeas corpus, and ss. 10 and 35 of the Act give power to a "superior Court," to which the application for a habeas corpus is made, although they are of opinion that the imprisonment of the applicant is legal, to do what they otherwise would be unable to do by way of relief to the applicant, if they think the circumstances require it. It has hitherto been the practice that any application for the exercise of the jurisdiction under those sections should be made, and disposed of, upon the application for a habeas corpus. The Act apparently contemplates that the matter should be dealt with in that way. An application such as is now made was really involved in the application for a habeas corpus. Ordinarily all that could be considered upon an application for a habeas corpus would be the question whether the prisoner was lawfully imprisoned, but under this Act the Court, apparently, must, on the application for a habeas corpus, consider any circumstances which may entitle the prisoner to relief under s. 10 or s. 35. It appears from the affidavit on which the rule nisi for a habeas corpus was moved, and from the arguments and the judgments of the learned judges, that an application under these sections was made upon the proceedings for a habeas corpus, and disposed of in the judgments.

[VAUGHAN WILLIAMS L.J. It does not appear that the application under these sections of the Fugitive Offenders Act, 1881, must necessarily be made upon an application for a habeas corpus.

FLETCHER MOULTON L.J. Apparently circumstances such as are contemplated by these sections as grounds for relief under them might in some cases arise after the application for a habeas corpus has been dismissed.]

In such case, an application could be made to a Secretary of State. The cases seem to shew that the practice hitherto has been that such applications should be made upon proceedings for habeas corpus. But, assuming for the purposes of the present case that such an application may be made otherwise than upon the proceedings for a habeas corpus, and that the Court of Appeal has jurisdiction in the matter as a Court of first

instance, it is submitted that there cannot be an application to the Court of Appeal as such a Court, after the matter has been heard and determined in another Court of first instance, as was the case here.

[VAUGHAN WILLIAMS L.J. In order to support that contention, it would be necessary to shew that the matter was res judicata, but, apparently, that could only be so if there were a judgment of the Court refusing relief asked for under ss. 10 and 35.]

The order discharging the rule for a habeas corpus, having regard to the terms of the affidavits, really imports a refusal of relief under ss. 10 and 35. It is submitted that the Act, on the construction now assumed to be correct, means that there may be an application either to the High Court or the Court of Appeal, but not to one after the other. If it were otherwise, the applicant might, in the first instance, apply to the Court of Appeal, and, after that application had been refused, apply to the

High Court, which could not have been the intention. [He also cited Rex v. Vyner (1); Reg. v. Spilsbury.(2)]

Powell, K.C., and **Parikh** were not called upon to argue against the preliminary objection.

VAUGHAN WILLIAMS L.J. Having regard to the nature of this case and to the points which have been raised and argued in reference to it, I think it is desirable to state somewhat fully the reasons why, in my opinion, we have jurisdiction to entertain this application. I start with the assumption that, under the Fugitive Offenders Act, 1881, there is concurrent jurisdiction to deal with such an application in each Court which comes within the definition of a "superior Court" given by the Act, and therefore we have power to deal with such an application as a Court of first instance. I do not think that it is necessary to state at any length the reasons which have induced me to come to this conclusion. It is sufficient to say that the statute gives to a "superior Court" power to entertain such an application under the Act; and, by the definition given in the Act, the expression "superior Court" means in England "Her Majesty's Court of Appeal and High Court of Justice." This being so,

(1) (1903) 68 J. P. 142.

(2) [1898] 2 Q. B. 615; 19 Cox, C. C. 160.

in the absence of anything to qualify the effect of this provision in the rest of the Act, it necessarily gives to each of the Courts which come within the category of a "superior court," as defined by the interpretation clause, jurisdiction to deal with such matters on the same basis, not on the basis that one is a Court of first instance and the other is a Court of Appeal. It appears to me that it cannot be that the Court of Appeal, having regard to the provisions of s. 47 of the Judicature Act, 1873, was intended to exercise appellate jurisdiction in respect of matters arising under an Act dealing entirely with procedure in a certain class of criminal prosecutions.

Having said this much, I will say only a few words on the question whether or not, under the system of law existing under the Judicature Act, 1873, or the terms of this particular statute, it would be competent for one Court after another to deal with successive applications for a habeas corpus, as it was according to the old practice. I think that, with reference to that question, one must divide applications for a habeas corpus into two classes. There are applications for a habeas corpus which form part of the proceedings in a criminal matter; and there are applications for a habeas corpus which are purely civil proceedings, and have no relation whatever to criminal matters. The prohibition of an appeal to the Court of Appeal applies to one category, and not to the other. The decision of the King's Bench Division as to the issue of a writ of habeas corpus is not final, unless the application for the habeas corpus forms part of the proceedings in a criminal case. The exception by s. 47 of a criminal cause or matter from the general right of appeal given by the Judicature Act, 1873, does not, as I understand it, apply to an application for a habeas corpus in a civil proceeding. Under the circumstances of the present case I do not think that it is necessary for us to decide anything on the question whether the right, which existed before the Judicature Acts, of going to each judge or Court of competent jurisdiction, one after the other, for the purpose of attempting to procure the liberty of a person detained by application for a habeas corpus, still exists. That right certainly existed prior to the Judicature Act. Whether there is anything in that Act to take it away, or whether, hearing

in mind the nature of the Fugitive Offenders Act, 1881, s. 47 of the Judicature Act, 1873, would apply to the question in a case of this kind, I do not feel bound to decide in this case, though I am disposed to think that there might be some ground for arguing that the decision in the case of Ex parte Alice Woodhall (1) looks as if, in principle, it would be equally applicable to any other decision in criminal

proceedings which would have the result of an appeal. I do not think it is necessary to go into that question in the present case, because upon the materials before us it does not seem to me to arise.

It is argued here, by way of preliminary objection, that, whatever the law may now be in respect of the right to apply for a habeas corpus to one Court after another, it was not competent, under the present procedure, or indeed under any prior procedure, in a case like the present for an applicant to come to this Court after the matter has previously been disposed of, and so become res judicata, in another Court. It is suggested that, not only was there an application by the applicant to the High Court to have the question of his claim to certain relief of the nature contemplated by ss. 10 and 35 of the Fugitive Offenders Act, 1881, disposed of, but that this application was heard and disposed of, and that the matter is therefore under these circumstances res judicata, and he is estopped from making any application that is inconsistent with the judgment which he so applied for and obtained. In my opinion this preliminary objection fails, because we are not in a position to say that he asked for and did obtain an adjudication in respect of the matters now in question in the King's Bench Division. So far as the form of the procedure is concerned, it does not appear that he made any such application as the present in the Divisional Court. He obtained a rule nisi for a habeas corpus. The only question on that was whether or not the rule for the issue of a writ of habeas corpus should be made absolute or discharged. I look at the judgment - I do not mean the words spoken by the judges, but the actual order drawn up as of record. That does not refer in any way to the matters involved in the present application. It is urged that, if we look

(1) 20 Q. B. D. 832.

at the argument and at the affidavit upon which the rule was moved, and the words of the judgments, in the sense of the words spoken by the judges, it will appear that these matters were discussed and disposed of in the King's Bench Division. There seems to be ground for saying that these matters were discussed in the oral judgments, but I think that for the present purpose we can only look at the matters which not only were discussed, but were dealt with by the order of the Court as drawn up. I look at that order, and find nothing adjudged therein concerning the matters with which the present application is concerned. There has been a good deal said about the practice of the Court in relation to matters of this kind. I need not, I think, discuss the question whether the application to obtain the benefit of s. 10 or s. 35 of the Fugitive Offenders Act, 1881, cannot be made at a time other than that at which the application for a habeas corpus takes place, because in the course of the argument it became obvious, as it appeared to me, that it could be so made, seeing that many of the circumstances which might entitle a fugitive offender to make the application are circumstances which manifestly might arise subsequently to the time at which the question of making absolute or discharging the rule nisi for a habeas corpus had been decided. I mention this point because the Solicitor-General, though he did not argue it for the purposes of the present case, said that he could not abandon the point as regards the future, no doubt because of the view taken in the Crown Office as to the practice.

The ultimate conclusion at which I arrive is that the applicant is entitled to make this application to us, first, because an application such as this may be made to any Court which comes within the definition of a "superior Court" given by the Fugitive Offenders Act, 1881; and secondly because, assuming that no such application could be entertained after the matter had once been adjudicated upon by a superior Court, in my opinion, we must look for such an adjudication in the record of the Court, and not only does that record not shew any application by the applicant for relief under s. 10 or s. 35 of the Act, but there is no order of the Court shewing that such an application was ever adjudicated upon in this case.

FLETCHER MOULTON L.J. In this case application is made to this Court to exercise the jurisdiction given by the Fugitive Offenders Act, 1881, s. 10. The preliminary objection is taken that it is not competent for us to entertain the application. In my opinion that objection fails.

In the first place I am satisfied that under ss. 10 and 35 of the Fugitive Offenders Act, 1881, jurisdiction is given to this Court to hear an application of this kind, and that this jurisdiction is a jurisdiction concurrent with that of the High Court, both this Court and the High Court being included in the designation "superior Court" by virtue of the definition of that expression in s. 39 of the Act.

That being so, the objection taken to our hearing this application must be, not that the Court would have no power to entertain an application of this kind, if it were res nova and were made to it in the first instance, but that by reason of events which have happened the Court no longer has that power. For the purpose of establishing this counsel for the respondent relied upon the following facts, namely, that a rule nisi for a habeas corpus was obtained in the King's Bench Division on the application of the prisoner upon a certain affidavit, which is part of the material on which this application is made; that subsequently, after an argument in that Court, that rule was discharged; and that the judgments pronounced by the judges upon that occasion dealt with the various points which will be raised upon the present application to this Court. It is contended that, under these circumstances, we are bound by what was then decided, and that the matter is res judicata as between the Crown and the prisoner.

I do not propose to base the conclusion at which I have arrived, namely, that, in spite of the events which I have mentioned, we have jurisdiction to deal with the application, upon any decision on the question whether it would be competent for a prisoner under the provisions of the Act of 1881 to apply to one Court after another as used to be done in applications for a habeas corpus. I express no opinion upon that question. I base my conclusion that this Court is competent to entertain this application solely upon the ground that the

proceedings in the King's Bench Division have resulted in no adjudication upon the matter of this application, so that it remains res integra for the purposes of the present application to this Court.

It is desirable here to say a few words as to the practice with regard to the writ of habeas corpus, the proceedings upon the application for which in the King's Bench Division are alleged to be a bar to the present application. Of old the writ seems to have been issued as of right upon an ex parte application, and it was upon the return to the writ that the question as to whether the prisoner's detention was legal or not was discussed, and adjudicated upon by the Court. After a time the Courts ceased to grant the writ as a matter of right on a mere unsupported application, and it became the practice to require that an affidavit should be made, setting forth the facts upon which the application for the writ was based. For a long time nothing beyond such an affidavit appears to have been required. In later times the practice was adopted of granting only a rule nisi for the issue of the writ in the first instance as being the more convenient course. The application for that rule nisi was on affidavit, and, if prima facie grounds for the issue of the writ were shewn, the rule nisi was granted. The argument took place upon the motion to make it absolute, and, according to the result of that argument, the Court made the rule absolute or discharged it, as the case might be. But it was open to the party called upon by the rule to shew cause not to oppose the issue of the writ, in which case the rule would be made absolute, and a writ of habeas corpus would then issue, and an answer might be made to it upon the return. After the passing of the Extradition Act, 1870, a change appears to have been made for convenience' sake in the practice which had previously prevailed in extradition matters, and in the report of the case of Reg. v. Ganz (1) the Attorney-General of that day is stated in a note to have pointed out that since 1873 the practice in such cases had been to obtain a rule nisi for a habeas corpus, and to argue the case on the rule, and that such practice was far more convenient. I believe that in subsequent cases of the same kind the practice usually followed has

(1) (1882) 9 Q. B. D. 93.

accordingly been that, if on the argument of the rule it is made absolute, the case is treated as having been disposed of on the rule, and no question is raised on the return to the writ. The result appears to have been that a practice has arisen, for which I can find no justification, by which questions of relief (having nothing in truth to do with the right to the issue of the writ of habeas corpus) have been discussed upon the argument of the rule for the habeas corpus. That practice was followed in the present case; and, on reference to the actual rules in Reg. v. Spilsbury (1), it appears to have been followed in that case also, although by the report in the Law Reports it is made to appear as if there had been in that case an alternative application for relief under the Fugitive Offenders Act, 1881. In that case, a rule nisi for a habeas corpus or for an order to admit the prisoner to bail having been obtained, an argument took place on the motion to make that rule absolute. The Court discharged the original rule nisi, but gave judgment granting certain relief under the provisions of the Fugitive Offenders Act. I do not know whether or not this was done by virtue of some consent that the case should be treated as if the rule included an application for such relief, but I am satisfied that, so far as the argument on the rule nisi was concerned, the only matter properly before the Court was whether that rule should be made absolute or discharged, and any matters beyond that could only have been brought in by consent. In the interests of justice, it is not desirable that the practice of introducing such matters by consent in an informal way should be adopted in a case where the liberty of the subject is involved. In my opinion, the relief which the Court is empowered to give under ss. 10 and 35 of the Fugitive Offenders Act, 1881, ought to be made the subject of a substantive application to the Court. Such relief has in reality nothing to do with relief by habeas corpus; it can be obtained by an independent application to the Court; and I think it was the intention of the statute that it should be so. But, if an application for such relief is intended to be made to the Court in conjunction with an

(1) [1898] 2 Q. B. 615.

application for a writ of habeas corpus, the rule nisi ought to be moved for in an alternative form.

In the present case many of the points which will be raised on the present application were argued before the Divisional Court and were raised by the affidavit filed on behalf of the applicant; but, when I look at the record of the proceedings, I find nothing beyond the fact that a rule nisi for a habeas corpus was obtained, and that the judgment of the Court on the argument of the rule was that it should be discharged. Upon the records of the Court nothing appears to have been adjudicated upon but the right of the applicant to a writ of habeas corpus. The application now made to this Court is not for any relief which could be given by way of habeas corpus. We have not to decide whether the King's Bench Division were right or wrong in refusing to grant that writ. Therefore it must be taken that the questions raised by the present application have not been heard and decided in proceedings properly raising them before a Court of concurrent jurisdiction; and consequently, without deciding whether, if they had been so heard and adjudicated upon, it would have prevented us from hearing this application, it is open to us to treat the matter as res nova, and not res judicata.

BUCKLEY L.J. Sects. 10 and 35 of the Fugitive Offenders Act, 1881, confer upon a "superior Court" under certain circumstances certain powers. They are sections addressed to the case in which the detention or imprisonment of the fugitive offender is legal, and in which, if a rule nisi for a habeas corpus has been obtained, the rule must be discharged. It by no means follows, in my opinion, that applications under these two sections cannot or ought not to be adjudicated upon on the habeas corpus application; on the contrary, I think that they both can and ought to be so adjudicated upon. The order of the magistrate under the Fugitive Offenders Act, 1881, has a double operation; it commits the fugitive to prison; and then, as the result of that, by operation of the statute, the man is

deported and returned to another place. The question which is raised upon the application for a habeas corpus is whether the fugitive is

validly imprisoned or detained, and that which is raised under ss. 10 and 35 is whether, it having been found that he is lawfully detained, he ought or ought not to be deported.

Under s. 10, the application, so far as I see, would always be made by the prisoner; it is an application which is for his benefit. The application under s. 35 might, I think, be made either by the prisoner or by the Crown. I do not suggest that it would often be made by the Crown. The Crown has it in its power to give effect to the section without application to any Court, because the order under that section may be made by a Secretary of State; but, on the other hand, it might very well be that, upon the application for the habeas corpus, the Crown would say that it would be more convenient that the prisoner should be tried in one place than in another. In any case, it seems to me that the questions as to whether those sections should be applied, and how they should be applied, can very well be adjudicated upon concurrently with the application for a habeas corpus.

Looking now to see what is exactly the application which the prisoner in this case has made, the materials appear to be as follows. When application is made for the rule nisi, there is no notice of motion, the application being ex parte. Then the rule nisi is obtained in a certain form; it is returnable as a matter of course; and there is no notice of motion on the return. Thus far, therefore, there are no materials for ascertaining what the prisoner has asked for beyond that which is contained in the rule nisi itself. I think I am entitled to read the rule nisi as, in fact, shewing that the prisoner has asked for, and the Court has thought proper to grant, that which is found in the rule nisi. Then further, I am, I think, entitled to consider what was in fact asked for at the Bar on behalf of the prisoner, when his application came on for hearing. In order to see what the Court has done, I am, of course, entitled to read the judgments of the judges to see what contentions they have accepted, and with respect to what subject-matters they have given their reasons. But, after all, when all is said and done, the conclusion of the whole matter is the order which the Court has ultimately made, and the only matter which, in my opinion, can be treated

as adjudicated upon is that which is contained in the order of the Court.

Using the materials which I have mentioned, it seems to me that the prisoner here did apply to the Court to consider what ought to be done for his relief under s. 10 of the Act. Part of the materials available is his own affidavit, which clearly points to such an application. I am also entitled to gather from the arguments which were addressed to the King's Bench Division, and the judgments which were delivered by the learned judges in that Court, what order he asked for and what they considered. On looking at those judgments I cannot doubt myself that the King's Bench Division were invited to consider what should be done for the relief of the prisoner under s. 10; and it seems to me that the judges gave reasons as to what they ought to do or ought not to do under s. 10. I regret very much that under those circumstances I do not find myself in a position to say that the King's Bench Division adjudicated upon this matter. I am, I think, precluded from so saying by the fact that their order as drawn up is an order which does nothing whatever beyond discharging the rule nisi. Whatever the judges may have said, there has been no adjudication except upon that matter.

Under these circumstances it appears to me that the application, although it was made to the Court, as I think it could be, upon the application for the habeas corpus, has unfortunately not resulted in an order of which the Solicitor-General can avail himself for the present purpose. I do not know that the difficulty is one which need arise in every case. It seems to me that this order ought to have been

drawn up in a different form; and, if the parties had been, as I believe in the King's Bench Division they are not, before an official of the Court when the order was drawn up, it seems to me that those who represented the Crown would have been entitled to have inserted in the order an adjudication on this question, and in that way in future cases the difficulty which has arisen in this case may be avoided. But there is nothing of the kind in this order, and under those circumstances there is no order of the Court, so far as I can see, adjudicating upon the matter.

There is one other point upon which I wish to say a word. It is this: it would be another possible objection to the original motion which, as the result of this judgment, we are going to hear that, where the Act of 1881 refers to the "Court of Appeal" as a "superior Court," it means that Court sitting as a Court of Appeal. The learned Solicitor-General has not thought fit to argue that point. I agree with what Vaughan Williams L.J. has said to the effect that we must for ourselves determine that point in order to hear this motion. As my two brothers think that that point is to be resolved in favour of our hearing the motion, of course that decides the matter. For my own part, I have not heard the matter argued, and will only say that I think it a question of very considerable difficulty whether, when this Act speaks of the "Court of Appeal," it does not mean the Court of Appeal sitting as a Court of Appeal. It is unnecessary for me to say more as to this point, because the other members of the Court do not think that is the meaning. Under these circumstances I do not think that the preliminary objection can be upheld.

The application was then heard and ultimately was dismissed.

Application dismissed.

Solicitor for applicant: R. Vaughan.

Solicitor for the Crown: Director of Public Prosecutions.