[HIGH COURT OF AUSTRALIA.]

PARKIN AND COWPER . . . . . APPELLANTS;
DEFENDANTS,

AND

JAMES AND OTHERS . . . . . RESPONDENTS.
PLAINTIFF AND DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *March* 10, 13, 15; *April* 19.

Griffith C.J., Barton and O'Connor JJ.

The Constitution, secs. 71, 73, 74—*Appeal to High Court from judgment of Supreme Court of State—Judgment pronounced by single Judge in Chambers—Order on originating summons—Conditions on Appeals—Special Leave—Judiciary Act* 1903 (*No.* 6 *of* 1903) *sec.* 35—*Supreme Court Act* (*Victoria*), (*No.* 1142), *secs.* 3, 8, 37, 54, 55—*Rules of Supreme Court of Victoria* 1884, *Or. LV.*

The words "the Supreme Court of any State" in sec. 73 of the Constitution are used to designate that Court which at the time of the establishment of the Commonwealth was in any particular State known by the name of "the Supreme Court" of that State.

Held, therefore, that, subject to the conditions mentioned in that section, an appeal lies to the High Court from every judgment &c. which, according to the law of a particular State, is a judgment &c. of the Supreme Court of that State.

Saunders v. *Borthistle*, 1 C.L.R., 379, followed.

An order made by a Judge of the Supreme Court of Victoria sitting in Chambers, upon an originating summons, by which the rights of the parties under a will are finally decided is, under the Statute law of that State, an order of the Supreme Court.

Semble, an order made in Chambers by a Judge of the Supreme Court of a State, even apart from express legislation in that State, is an order of the Supreme Court of that State within the meaning of sec. 73 of the Constitution.

The provision in sec. 73 of the Constitution that "no exception or regulation prescribed by the Parliament shall prevent the High Court from hearing or determining any appeal from the Supreme Court of a State in any matter in

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which at the establishment of the Commonwealth an appeal lies . . . to the Queen in Council" includes matters in which an appeal then lay either with or without special leave of the Privy Council.

The conditions imposed by sec. 35 of the *Judiciary Act* 1903 on appeals to the High Court from judgments &c. of the Supreme Court of a State are exhaustive.

Held, therefore, that no special leave is necessary to appeal from the final judgment of the Supreme Court of a State pronounced by a Judge sitting as a Court of first instance for or in respect of any sum or matter at issue amounting to, or of the value of, £300.

APPEAL from the Supreme Court of Victoria.

An originating summons was taken out by Alfred Ernest James, one of the trustees and executors of the will of Charles Lister, deceased, to determine certain questions arising under such will. The defendants were Annie Watson Lister, May Lister, Harold Lister, Elizabeth Parkin, Frank Cowper and George Lister, and Edward Nathan Brown, assignee of the insolvent estate of Frank Lister. The summons was heard by *Hodges* J. in Chambers, and he made a certain order.

From this order Elizabeth Parkin and Frank Cowper appealed to the High Court.

As this report only deals with a preliminary objection to the jurisdiction of the High Court to entertain the appeal, it is not necessary to set out any of the facts of the case.

MacArthur and *Cussen*, for the appellants.

Higgins K.C., and *Hogan*, for the plaintiff respondent.

Irvine, for the defendants, A. W. Lister, May Lister and Harold Lister, respondents, took a preliminary objection. This Court has no jurisdiction to entertain this appeal. Assuming that the decision in *Saunders* v. *Borthistle* (1), is correct, the order made in this case is not an order of the Supreme Court within the meaning of sec. 73 of the Constitution. Whether the Judge was exercising a part of the original jurisdiction vested in the Supreme Court, or whether he was exercising an additional jurisdiction given by the Rules under the State Act, his order is, by the terms of the *Supreme Court Act* 1890, expressly excluded

(1) 1 C.L.R., 379.

from those orders which are to be deemed orders of the Supreme Court. This order might be pleaded as *res judicata*, not as by a judgment of the Supreme Court, but as by a final order of a Judge having jurisdiction to make it. [He referred to *Supreme Court Act* 1890 (V.), secs. 9, 10, 18-20, 23, 27, 32, 37, 45, 54, 55.] The last two sections define when a Judge exercising jurisdiction is the Supreme Court, and when he is not. When he sits in Court for Chamber business he is the Court. That implies that when he does not sit in Court for that business he is not the Court [He referred to Rules of the Supreme Court 1884, Or. LII. r. 1.] This application was not made in Court. Or. LV. r. 3 is the rule under which this particular jurisdiction was exercised. An order made under that Rule is not entered in the same way as an order of the Court. It may have the effect of a judgment of the Court in deciding the rights of the parties, but that does not carry the matter further. Where the Constitution says that the High Court may entertain appeals from judgments &c., of the Supreme Courts of the States, the question is what according to the local State laws is a judgment of the Supreme Court? To decide that one must look at the Acts of the State and the Rules made under those Acts. There it is found that orders of the Court are to be drawn up in a certain form, and that orders of a Judge are to be drawn up in another form; this order is drawn up in the latter form, and does not purport to be an order of the Supreme Court. It appears from *In re Fawsitt* (1), that an originating summons is an action. But that does not touch the question whether an order made on an originating summons is a judgment &c., of the Supreme Court. By Rules of the Supreme Court 1900, Or. LVIII. r. 1* different times are fixed for service of notice of appeal from a decision of a Judge in Chambers and from a decision of a Judge sitting in Court.

[GRIFFITH C.J.—A matter decided on originating summons could not be litigated again, and so to all intents and purposes it is a judgment of the Court.]

The matter may be referred to the Chief Clerk and his decision binds the parties.

(1) 30 Ch. D., 231.

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[*Cussen* referred to *In re Holloway* (1), and *Marwick* v. *Orton* (2), as to the meaning of "originating summons."]

Except that the latter case goes a little further in saying that it is practically the same as a suit in Equity, those cases throw no more light on the question under consideration here.

Higgins K.C. The trustee does not desire to take one side or the other in this discussion. There is however a question whether the affidavit filed pursuant to Rules of the High Court, 22nd August, 1904, r. 5, should not state facts from which the Court can draw the conclusion that the matter is above the appealable amount, instead of merely stating that it is above the amount.

MacArthur. The question is whether this is a judgment &c. of the Supreme Court within sec. 73 of the Constitution. It does not affect that question that by a State Act or by Rules made under a State Act some judgments are for certain purposes called judgments of the Supreme Court, while others are called orders of a Judge. Even looking at the Victorian Acts and Rules this is a judgment of a Judge of the Supreme Court exercising the jurisdiction of the Supreme Court. For it is under Order LV. r. 8 of the Rules of the Supreme Court 1884 properly called a judgment, and sec. 55 of the *Supreme Court Act* 1890 gives to a Judge sitting in Chambers power to exercise the jurisdiction of the Supreme Court. In *Clover* v. *Adams* (3) it was held that a Judge in Chambers was a Judge before whom the particular suit was depending, although the suit had never been before him and was initiated in the Court. This case is on all fours with *Saunders* v. *Borthistle* (4). As to the meaning of the word "respectively" in sec. 55 of the *Supreme Court Act* 1890, see *Salm Kyrburg* v. *Posnanski* (5), followed in *Amstell* v. *Lesser* (6). It would be an extraordinary thing if, by calling judgments by a particular name in a State Act, the State legislature could oust the jurisdiction of the High Court. If it is in substance a judgment of the Supreme Court, though technically not so called by the State Act and Rules,

(1) (1894) 2 Q.B., 163.
(2) 20 V.L.R., 33; 16 A.L.T., 14.
(3) 6 Q.B.D., 622.
(4) 1 C.L.R., 379.
(5) 13 Q.B.D., 218.
(6) 16 Q.B.D., 187.

it is a judgment of the "Supreme Court" within the meaning of sec. 73 of the Constitution. It is the substance, and not the form, of the judgment that is to be considered. H. C. OF A. 1905. PARKIN AND COWPER v. JAMES AND OTHERS.

Irvine in reply. The State legislature has power to say what shall be, and what shall not be judgments of the Supreme Court.

[GRIFFITH, C.J.—But not by calling them by another name.]

The legislature has intentionally defined the matters in which a Judge shall constitute the Court. A Judge in Chambers has no power to punish for contempt. In *Saunders* v. *Borthistle* (1) the Act under consideration made the decision sought to be appealed from a decision of the Full Court. The Victorian legislature has expressed the distinction between orders made by a Judge in Court and those made by a Judge in Chambers.

GRIFFITH C.J. intimated that the Court desired to hear argument on the interpretation of sec. 73 of the Constitution, and especially on the question whether the term "the Supreme Court of any State" includes the case of a single Judge exercising the jurisdiction of the Court or is limited to the Supreme Court as a Court of final appeal. March 13th.

The matter was further argued, *Isaacs* K.C. appearing for the appellants in addition to the counsel already mentioned. March 15th.

Irvine. The question is whether an appeal lies to the High Court from a Judge of the Supreme Court of Victoria sitting as the Court, and the answer to this question turns upon the interpretation of sec. 73 of the Constitution. The first point to be determined in answering that question is what is the precise meaning of the words "Supreme Court" in sec. 73. There are only two alternative meanings that can be given to those words, viz.—(I.) The Supreme Court as constituted by the State legislature for the time being and so called; (II.) The highest Court of judicature in the State—the Court of final resort in the State. The broad difference between those meanings is apparent. If the first meaning is correct, the result is that the State legislature, or

(1) 1 C.L.R., 379.

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the Judges exercising authority delegated to them, may confine the jurisdiction of the Supreme Court within narrow limits and so limit the jurisdiction of the High Court, and that a continually fluctuating meaning will be given to the words "Supreme Court," and a meaning not uniform in the several States. The legislature might for instance amalgamate the jurisdictions of the Supreme Court and of the County Court in one tribunal called the Supreme Court and create a new Court, calling it the Appeal Court, and not the Supreme Court. The result would be that there could be no appeals from that Appeal Court to the High Court. If, on the other hand, "Supreme Court" in the Constitution means Court of final resort, it would be immaterial that in Victoria the local legislature has made the Courts of final resort and of first instance one Court and called it the "Supreme Court." The appeal would only lie from what is in effect the Court of Appeal.

[BARTON J.—The use of the words "Federal Supreme Court" in sec 71 assists that argument. "Supreme" must there mean "highest" Court].

In Victoria the Criminal Court is part of the Supreme Court, and if the first meaning is given to the words "Supreme Court" in sec. 73, a judgment in a criminal prosecution would be within that section and from all sentences of the Criminal Courts there would be as of right an appeal to the High Court, which certainly was not intended. It may be said that because the words "Supreme Court" in the Order in Council mean the Supreme Court as constituted by 15 Vict. No. 10, a similar limitation should be placed on the words when used in the Constitution. But that does not follow, for the Order in Council was intended to give a right of appeal for Victoria only, while the Constitution was intended to have a general application to all the States.

[O'CONNOR J.—I understand your argument to be that the word "Supreme" is adjectival.

GRIFFITH C.J.—Or that the words "Supreme Court" are not words of designation.]

Yes. As the Constitution is intended to be for all time the words mean the Court which at any particular time is the highest Court. The object of the creation of the High Court was to make

it the national Court of appeal from the ultimate Courts of the States. The only other alternative is that, to determine the extent of the appellate jurisdiction of the High Court, one must read into sec. 73 not only the State Acts but the rules of practice in the different States. The effect *might* be to destroy the appellate jurisdiction of the High Court; the effect *would* be to make the character of that jurisdiction vary according to the varying and not uniform legislation of each State. So far as this particular case is concerned it does not matter which of the two meanings is given to the words; because if it means the Supreme Court as constituted by the State laws, this order was not an order of that Court.

[GRIFFITH C.J.—If that were the meaning, this Court would be a domestic Court of appeal for every State, which would be a vast function for the Court to have.

O'CONNOR J.—In some years this Court might be the domestic Court of appeal, and in other years it might not, according to the way the Court was constituted in a particular State.]

If the words mean the ultimate Court of appeal of the State, it does not matter that the Victorian legislature says that a Judge at *nisi prius* is the Supreme Court and that the Full Court is also the Supreme Court, because the Judge at *nisi prius* has to determine matters subject to appeal to the Full Court. His jurisdiction is a jurisdiction *sub modo* : See *Supreme Court Act* 1890, sec. 37. There the distinction is drawn between civil and criminal matters. It may be that in criminal matters a discretionary appeal lies, but in civil matters a single Judge is the Supreme Court only subject to appeal to the Full Court. It was so decided in *Commercial Bank of Australia* v. *McCaskill* (1).

[GRIFFITH C.J.—I see no reason for doubting the correctness of that decision.]

The view that the words "Supreme Court" mean the highest Court is strengthened by considering the practice of the Privy Council. Where by colonial legislation a special jurisdiction is given to a Judge, in the exercise of which his decision is final, the Privy Council entertains appeals from that decision. Thus under 19 Vict. No. 13, secs. 4 and 5, the Judge in Equity was given a

(1) 23 V.L.R., 343 ; 19 A.L.T., 102.

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jurisdiction under which his judgment was to be equivalent to a judgment of the Supreme Court, and it was provided that, notwithstanding an appeal might have been had from it to the Full Court, an appeal might still be had to the Privy Council. That is no longer the law, but under it it was decided that an appeal might be had direct to the Privy Council from the decision of the Judge: *Davis* v. *The Queen* (1); *Woolley* v. *Ironstone Hill Lead G. M. Co.* (2).

[GRIFFITH C.J.—We have entertained appeals in New South Wales under similar circumstances.]

In *Australian Smelting Co.* v. *British Broken Hill Proprietary Co.* (3), it appears to have been overlooked that in the two cases above mentioned the application was made within the fourteen days limited for appealing to the Full Court. That fact, however, is immaterial to this argument. In *Garden Gully United Quartz Mining Co.* v. *McLister* (4), the appeal was direct from a single Judge in Equity. With the exception of those cases there is not in the history of the Supreme Court of Victoria any case in which an appeal has been admitted to the Privy Council from a single Judge. It is the practice of the Privy Council not to allow appeals until the whole jurisdiction of the particular colony is exhausted. This point, however, is not very important, because there is no doubt that the King in Council has a prerogative right to entertain appeals from any Court except in so far as that right is given up by Imperial Statute or by Orders in Council.

[*Isaacs* K.C.—In *Henty* v. *The Queen* (5) an appeal to the Privy Council from a single Judge was entertained. It was however by consent of the parties.]

Suppose that on a trial evidence was improperly admitted or there was other ground for a new trial, and that the Judge entered judgment on the findings of the jury or of himself, the ordinary course would be to ask the Full Court for a new trial, or to appeal to the Full Court and also ask for a new trial. If, instead

(1) 1 V.R. (E.), 33
(2) 1 V.L.R. (E.), 237.
(3) 23 V.L.R., 643; 20 A.L.T., 46.
(4) 1 App. Cas., 39; Mews' Digest, vol. 3, col. 605.
(5) (1896) A.C., 567.

of doing that, the appellant should appeal to the High Court and ask for a new trial, according to the view that the "Supreme Court" means the Supreme Court as constituted by the State legislature, the High Court must entertain the application. That is the logical result. The Privy Council has decided that it will not entertain appeals of that kind: See *Dagnino* v. *Bellotti* (1). Before the Act 7 & 8 Vict. c. 69, the Privy Council would not entertain an appeal unless the Courts of intermediate resort were exhausted: *In re Assignees of Manning & Co.* (2); *In re Cambridge* (3); *Bunny* v. *Judges of Supreme Court of New Zealand* (4). These authorities show the general practice of the Privy Council, and make it much more difficult to put on sec. 73 of the Constitution a meaning which would impose upon this Court such a wide jurisdiction.

Higgins K.C. (with him *Hogan*) for the plaintiff respondent. From the point of view of the trustee it is desirable to have an end of litigation, and therefore he supports the view of the other respondents. The matter depends on sec. 73 of the Constitution. The word "other" in the phrase "any other Court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council," is very important. Its effect is that the words "Supreme Court" mean the Supreme Court from which an appeal lies to the Privy Council. The next question then is, at the establishment of the Commonwealth did an appeal lie from a single Judge to the Privy Council? If there is any doubt as to the meaning of the words "from which . . . . an appeal lies to the Queen in Council," sec. 74 shows what is meant. There can be no appeal to the Privy Council unless an Order in Council says that it lies, or unless special leave is granted. The preamble to 7 & 8 Vict. c. 69 states that its intention is to enable the Queen in Council to provide for the admission of appeals from Courts other than Courts of error or appeal. But, if one looks at the Order in Council, one sees that no provision is made for appeal except from a final order of the Supreme Court. There is in it no indication of any intention to give a right of appeal from a single Judge where an appeal lies to the Full Court.

(1) 11 App. Cas., 604.
(2) 3 Moo. P.C.C., 154 at p. 163.
(3) 3 Moo. P.C.C., 175.
(4) 15 Moo. P.C.C., 164 at p. 170.

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[*Isaacs* K.C.—At the time the Order in Council was made one Judge could sit in Banco. See 19 Vict. No. 13, sec. 3.]

Even if that be so, the intention is to allow an appeal only from the final determination—the last word that the Supreme Court of Victoria can say. The onus is on those who have an ample right of appeal to the Full Court to show that they can go to the Privy Council, and if they cannot go there they cannot go direct to the High Court.

Isaacs K.C. (*MacArthur* and *Cussen* with him), for the appellants. Before the *Judicature Act* 1883 the only case in which a single Judge could give a judgment was in the Court of Equity. At common law and under the *Common Law Procedure Statute* 1865 the jury's verdict was followed after the lapse of the first four days of term by the judgment of the Court unless a *rule nisi* were granted. Where there were special findings, the Judge would direct a verdict to be entered, but he would not give judgment. *Saunders* v. *Borthistle* (1) is a distinct decision of this Court that an appeal lies to this Court from a single Judge, and that it is immaterial that an appeal might have been, but was not, had to the Full Court. This is not a question of grace but of right.

[GRIFFITH C.J.—The observations on this point in that case were unnecessary to the decision.]

The judgment in that case rested on this, that the judgment from which leave to appeal was sought was a judgment of the Supreme Court.

[O'CONNOR J.—That case does not settle the question one way or the other.

GRIFFITH C.J.—Suppose the decision was wrong, should we adhere to it?]

When the reason is essential to the judgment this Court should adhere to it: *London Tramways Co.* v. *London County Council* (2). The view taken in *Saunders* v. *Borthistle* (1) is correct. There is only one Supreme Court in Victoria, and the judgment of that Court may be given in more ways than one. But in whatever way it is given it is a judgment of the Supreme Court. The primary and natural meaning of the words in the Constitution

(1) 1 C.L.R., 379. (2) (1898) A.C., 375.

should be adhered to. The words "Supreme Court" are not ambiguous on their face. The words "from which . . . an appeal lies to the Queen in Council" mean from which an appeal lies as of right to the Queen in Council.

[GRIFFITH C.J.—I have great doubt about that. How can you say that an appeal lies as of right to the Privy Council? Leave must be given in some way or another. The words suggest that appeals lie from other Courts than the Supreme Court, and would apparently include an appeal from an inferior Court from which appeal does not lie to the Supreme Court. Clearly an appeal would lie from such a Court to the Privy Council by special leave.]

To say that an appeal lies as of right to the Privy Council merely means that the matter is one as to which under the Order in Council or under the Statute an appeal is allowed. Under sec. 73 of the Constitution this Court is to have unlimited jurisdiction to hear appeals from certain specified Courts, subject only to any exceptions of a certain kind that Parliament may make. The second clause of that section is intended to indicate the matters as to which Parliament is not to have the power to make regulations. If the words "an appeal lies to the Queen in Council" in that clause included an appeal as of grace, they would impose no limitation on the word "matter," and the words "in which an appeal lies . . . . to the Queen in Council" would be superfluous. The clause would be a very roundabout way of saying that Parliament might make no exception or regulation which would prevent the High Court from entertaining any appeals from the Supreme Court.

[GRIFFITH C.J.—The clause means that no subject matter of appeal can be excluded altogether, but it does not prevent regulations, as to the appealable amount for instance.]

But an exception or regulation fixing the appealable amount at £1000 would transgress against the clause, because an appeal lies to the Privy Council where the amount exceeds £500.

[*Irvine.*—That is not an "exception or regulation," but one of the well known "conditions of and restrictions on" appeals to the Privy Council referred to in the third clause of sec. 73.]

[GRIFFITH C.J.—That clause may mean that an appeal from the decision of a single Judge to the High Court shall be subject

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to the same conditions and restrictions as those applying to appeals from a single Judge to the Privy Council.]

This Court is given a very large jurisdiction as to appeals, and it is left to Parliament to say to what extent it shall be cut down. The second clause puts certain limitations on that power of Parliament, but if the clause is not limited to appeals as of right to the Privy Council, it would, as to the Supreme Court, take away altogether the power to impose limitations on appeals to the High Court.

As to the term "appeal as of right," see *Stafford and Wheeler on the Practice of the Privy Council*, p. 708, where the two modes of appealing are called "appeals by right of grant" and "appeals by special leave." In the third clause of sec. 74 (3) a distinction is clearly drawn between an appeal lying to the Privy Council, and an appeal for which special leave must be granted. The general Order in Council is a standing permission to suitors to appeal. It is hard to see why a judgment of a single Judge sitting in Court is not a judgment of the Supreme Court within the meaning of section 73. The section does not say those judgments of the Supreme Court from which an appeal lies to the Privy Council.

[GRIFFITH C.J.—Would not "sentence" there include a criminal matter?]

It apparently would. This Court ought not to consider the present inconvenience arising from a particular interpretation of the Constitution. But it is of the highest moment that this Court should not put such an interpretation on the Constitution as to denude itself of some jurisdiction apparently conferred upon it. To interpret sec. 73 in the way suggested would be to limit the power not only of this Court but also of Parliament, for Parliament will be denied the power to legislate as to appeals from a single Judge. The words "Supreme Court" needed no definition, they had a well known meaning. A curious result would follow from interpreting "Supreme Court" as highest Court, that is the Full Court. Under sec. 74, in the matters there referred to, by parity of reasoning, no appeal would be permissible from the Full Court of the High Court to the Privy Council without the certificate of the High Court mentioned in the section; but there would

be no prohibition against an appeal to the Privy Council from a decision of one of the Justices of the High Court exercising the jurisdiction of the High Court. If a judgment of a single Judge of the Supreme Court of the State sitting in Court be not a judgment of the Supreme Court, it must follow that a judgment of a Judge of this Court is not a judgment of the High Court.

Sec. 35 of the *Judiciary Act* 1903 fixes the conditions and restrictions, which are different from those fixed as to appeals to the Privy Council, and are the only conditions and restrictions on appeals. That section shows that the widest meaning is given to the words "Supreme Court." The whole of the Judges of the Supreme Court might have sat to hear this case. It is the one Court. [He referred to the *Supreme Court Act* 1890, secs. 9, 10, 36, 37, 54, 55 as to the meaning of "Supreme Court."] The meaning of the latter portion of sec. 3 of 19 Vict. No. 13 is that where there had been an appeal to the Full Court from the decision of a Judge in Equity, there might nevertheless be an appeal to the Privy Council, although the appellant might, if he had chosen, have appealed direct to the Privy Council from the decision of the Judge in Equity. There is not by any means certainty of opinion as to whether under the Order in Council appeals are limited to decisions of the ultimate Court of resort. [He referred to *Dean* v. *Dawson* (1), *Attorney-General* v. *Municipal Council of Sydney* (2).] Notice of appeal to the Full Court should have been given within seven days of the order, and, as no such notice was given, according to the argument for the respondent, the order then became an order of the Supreme Court and an appeal then lay to the High Court.

[GRIFFITH C.J.—Assuming that the Order in Council would not apply to an appeal from a single Judge, the conditions and restrictions of the Order in Council would not apply to an appeal from a single Judge to the High Court.]

Then special leave to appeal would have to be obtained. Apart from the *Judiciary Act* 1903 the question then would be, what would be the conditions of, and restrictions on, an appeal in this case to the Privy Council? But sec. 35 of the *Judiciary Act* 1903 lays down exhaustively all the conditions of, and restrictions

(1) 9 N.S.W. L.R. (E.), 27. (2) 13 N.S.W. L.R. (E.), 151.

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on, appeals to the High Court. Parliament has "otherwise provided" within the meaning of sec. 73 of the Constitution. The appellants may therefore appeal as of right, provided they comply with sec. 35 of the *Judiciary Act* 1903. At any rate they are entitled to ask for special leave to appeal. [He also referred to *Giles* v. *Wooldridge* (1), and *Angas* v. *Cowan* (2).]

Irvine in reply. If the words "Supreme Court" in sec. 73 had the meaning that it is what the legislature of each State says is the Supreme Court, the result would be subversive of the constitutional right of appeal given to this Court. For, instead of the Parliament of the Commonwealth having the control as to what matters shall be appealable, that control would be left in the Parliaments of the States. The question is not whether the Parliaments of the States are likely to deprive the Supreme Courts of their jurisdiction, but whether they have power to do so. The use of the words "a Supreme Court called the High Court," is very significant as to the meaning of "Supreme Court" in the following sections. It must mean the Court of last resort. In that view this Court would have jurisdiction to hear appeals from all judgments which a State legislature said were to be final and conclusive. If the other view is taken then this particular order is not an order of the Supreme Court. The conditions of, and restrictions on, appeals to the High Court still apply, except to the extent that they are altered by sec. 35 of the *Judiciary Act* 1903.

Cur. adv. vult.

Sydney, April 19.

The judgment of the Court was read by

GRIFFITH C.J. This is an appeal from a decision of *Hodges* J. in Chambers upon the hearing of an originating summons by which the rights of the parties under a will were finally determined. A preliminary objection was taken to the hearing of the appeal on the ground that a decision of a Judge in Chambers on an originating summons, although having the effect of a final adjudication of the rights of the parties, is not a judgment or order of the Supreme Court of Victoria within the meaning of the Constitu-

(1) 13 S.A. L.R., 185. (2) 17 S.A. L.R., 110.

tion. We asked for further argument on the question whether in any case a judgment of a single Judge of the Supreme Court acting as a Court of first instance, from which an appeal lies to the Full Court of the State, is such a judgment, and we are much indebted to counsel for the assistance which they have given us. We will deal first with the larger aspect of the question, which is one of great importance to litigants, not only in Victoria but throughout the Commonwealth, and might, if decided in favour of the appellant, have the effect of casting an unexpected burden of work upon this Court. This, however, cannot of course in any way influence our decision.

The appellate jurisdiction of the High Court is conferred by the Constitution, not by the *Judiciary Act*. Sec. 73 of the former provides that 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 federal Courts, or "of the Supreme Court of any State, or of any other Court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council," and proceeds: "But no exception or regulation prescribed by the Parliament shall prevent the High Court from hearing and determining any appeal from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lies . . . to the Queen in Council. Until the Parliament otherwise provides, the conditions of and restrictions on appeals to the Queen in Council from the Supreme Courts of the several States shall be applicable to appeals from them to the High Court."

It was suggested that the term "the Supreme Court of any State" was capable of meaning the Court of ultimate appeal in the State, as distinguished from the Court actually designated by that name, in other words, that the word "Supreme" is used as an adjective of quality and not of designation; and it is pointed out that in sec. 71 the High Court is called a Federal Supreme Court. We all know that at the time of the establishment of the Commonwealth the designation of the highest Court of Judicature in each State was the "Supreme Court," and that appeals then lay from those Courts to the Queen in Council. If the suggested

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meaning were accepted, the mention of the Supreme Court by name would be unnecessary, since the words "any . . Court of any State from which . . . . an appeal lies," would have been sufficient to include the Supreme Court. These words are, however, clearly used to designate Courts other than the Supreme Court, and as distinguished from it. It is a matter of common knowledge that the immediate purpose of their insertion was to include the appellate tribunal of South Australia consisting of the Governor in Council, although it by no means follows that in their application they are confined to that tribunal. Applying, then, the ordinary canons of construction, we cannot entertain any doubt that the term "Supreme Court" is used in the Constitution to designate the Courts which at the time of the establishment of the Commonwealth were known by that name. It may be that the term would also include Courts established under another name in substitution for them, but with similar functions.

An appeal to the High Court is, therefore, given from all judgments, decrees, orders and sentences of the Supreme Courts, but, until the Parliament otherwise provided, the existing conditions and restrictions on appeals to the Queen in Council were to be applicable to such appeals, while Parliament had power to make exceptions from the right of appeal, and to prescribe regulations as to its exercise, subject to the condition that the power of this Court to hear and determine an appeal, in any matter in which an appeal then lay to the Sovereign in Council, should not be denied.

It will be convenient to consider: (1) What was the law applicable to appeals from the Courts of a State to the Sovereign in Council at the time of the establishment of the Commonwealth? (2) What were the existing conditions of and restrictions on appeals from the Supreme Courts? and (3) What exceptions and regulations have been prescribed by the Parliament as to such appeals?

The preamble to the Act 3 & 4 Wm. IV. c. 41 (1833), entitled "an Act for the better administration of justice in His Majesty's Privy Council," which made provision for the constitution of the Judicial Committee, contains a recital that "from the decisions of various Courts of Judicature in the East Indies, and in the plantations, colonies, and other dominions of His Majesty abroad, an appeal lies to His Majesty in Council." It is unneces-

sary to discuss the origin of the right of appeal, which clearly existed. It appears, however, that in several cases the right of appeal had been limited by the instrument regulating its exercise to decisions of the Court of last resort in the colony or possession which, in many instances, consisted of the Governor. The Act 7 & 8 Vict. c. 69, which is an Act to amend the Act 3 & 4 Wm. IV. c. 41, and to extend the jurisdiction and powers of the Privy Council, recites that "by the laws now in force in certain of Her Majesty's colonies and possessions abroad no appeals can be brought to Her Majesty in Council, for the reversal of the judgments sentences decrees and orders of any Courts of Justice within such colonies, save only of the Courts of Error or Courts of Appeal within the same; and it is expedient that Her Majesty in Council should be authorized to provide for the admission of appeals from other Courts of Justice within such colonies or possessions." It then enacts that "it shall be lawful for Her Majesty by any order or orders to be from time to time made with the advice of the Privy Council to provide for the admission of any appeal to Her Majesty in Council from any judgments sentences decrees or orders of any Court of Justice within any British colony or possession although such Court shall not be a Court of Error or a Court of Appeal within the colony or possession and also by such order or orders to make such provisions as may seem meet for instituting and prosecuting such appeals." Then follows a proviso in these words: "Provided also that any such order as aforesaid may be either general and extending to all appeals to be brought from any such Court of Justice as aforesaid or special and extending only to any appeal to be brought in any particular case."

Under this Statute it has been the practice to make Orders in Council applicable to all appeals from the Supreme Court of a colony or possession, and containing specific restrictions as to the right of appeal and conditions as to its exercise, and also to make special orders giving leave to appeal in cases not falling within the general order applicable to the particular Court. There can be no doubt that under this Statute the Sovereign in Council can give leave to a suitor to appeal from any decision of any Court whatever in a colony or possession, and as little that the Sovereign can grant such leave in respect of a decision of a Judge

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of a Supreme Court acting as a Court of first instance, whether the general Order in Council applicable to that Supreme Court includes such a decision or not. In *Harrison* v. *Scott* (1) an appeal was heard from a Judge of the Supreme Court of Jamaica upon a bill of exceptions to his direction to a jury, without an intermediate appeal to the Court of Appeal in the Island. Lord *Brougham* said (2): "It was clearly the meaning of the legislature in passing the 7th and 8th Vict. c. 69 to favour appeals of this nature." (The learned Lord was himself the author of the Act). The same course was adopted under the same circumstances in *Attorney-General of Jamaica* v. *Manderson* (3). A recent instance of a similar application which was entertained by the Judicial Committee without objection is afforded by the case of *Mitchell* v. *New Zealand Loan and Mercantile Agency Co.* (4). In all cases, therefore, an appeal lay to the Sovereign in Council, but in all cases leave to appeal had to be obtained, either from the Court appealed from or from the Privy Council. The general Orders in Council prescribed the conditions on which the Court appealed from was bound to grant such leave, while in all other cases a special order for leave by the Sovereign in Council was necessary.

It was contended for the respondents that the words "in which . . . . an appeal lies," as used in the second paragraph of sec. 73 of the Constitution, mean "in which an appeal lies as of right," or "by right of grant," as it is called by text writers, using those as synonymous with the term "without special leave." The words "an appeal lies" are twice used in that section. In the first paragraph the words "from which . . . . an appeal lies to the Queen in Council" are used as words of description to designate the Courts referred to. In the second paragraph the words "any matter in which . . . . . an appeal lies to the Queen in Council" are used in the same way to designate certain matters with respect to which the Parliament is to have no power of making exceptions. It is clear that in the first paragraph the words "an appeal lies" cannot be limited in the manner suggested. The Supreme Court was a Court from which an appeal lay to the

(1) 5 Moo. P.C.C., 357.
(2) 5 Moo. P.C.C., at p. 370.
(3) 6 Moo. P.C.C., 239.
(4) (1904) A.C., 149.

Queen in Council, in the sense in which the words are there used, quite irrespective of the question whether special leave was or was not necessary in any particular case. And it is not easy to suggest a valid reason consistent with the usual rules of interpretation of Statutes for putting a different construction upon the same words in the second paragraph. On consideration, moreover, it will be seen that the argument is based on the fallacy that the term "as of right" is synonymous with "as of course," so that an appeal could not be said to lie as of right unless it lay "as of course." But the words "as of right" and "as of course" are not synonymous. For instance, a writ of prohibition is said to be a writ of right but not of course: *Mayor of London* v. *Cox* (1). We cannot see any sufficient reason for interpolating either form of words after the words "an appeal lies."

In one sense, and we think the truer sense, every appeal lay as of right. In some cases it lay as of course upon compliance with conditions prescribed in advance by a general Order in Council, in others only on compliance with the condition of obtaining special leave. But every suitor was entitled as of right to ask the aid of the Sovereign in Council, which might be granted or withheld. In our opinion, the words "any matter in which . . . . an appeal lies" are words of qualification or description having reference to classes of cases as differentiated by the nature of the decision or right affected, *e.g.*, a decision of the Court sitting as a tribunal to decide disputed elections (see, for instance, *Théberge* v. *Laudry*) (2), and do not refer to the differentiation imposed by the general Orders in Council as between decisions in cases of the same class.

We find then that at the time of the establishment of the Commonwealth special leave to appeal was necessary in two classes of cases:—(1) Cases in which the appeal was not from the Court of last resort in the colony or possession; (2) Cases which, although the appeal was from such a Court, were not within the general Order in Council applicable to the colony or possession. This might be for either of two reasons: (*a*) That the nature of the question involved in the decision did not bring it within the

(1) L.R. 2 H.L., at p. 283. (2) 2 App. Cas., 102.

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Order in Council, or (*b*) That the pecuniary value of the civil right involved did not bring it within the Order. But in all cases an appeal lay, if not without, then with, special leave.

This being the state of the law applicable to appeals, the Constitution came into force, by which an appeal is given to the High Court from all judgments of the Supreme Court of any State or of any other Court of a State from which Court an appeal then lay to the Queen in Council. The latter words are not material on the point now under consideration. They do not qualify the words "all judgments . . . . of the Supreme Court of any State," and it is in our opinion impossible to limit these words to cases in which an appeal lay as of course or without special leave. It is clear, therefore, that an appeal lies to this Court from every judgment of the Supreme Court of a State, unless it has been taken away or qualified by some exception or regulation made by the Parliament of the Commonwealth. The power of the Parliament in this respect is limited by the provision that no such exception or regulation shall prevent the High Court from hearing and determining any appeal from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lay to the Queen in Council. We have already pointed out that these words, in our judgment, are intended to create a *discrimen* depending upon the nature of the decision and not upon the terms of the particular Order in Council. If, however, the latter view were accepted, the only effect of this proviso would be that the Parliament could not by any exception or regulation take away the right of appeal in any case within the Order in Council applicable to the State, but would be free to do so in any case that did not fall within the Order. In this view the question for decision in each case would be whether the Parliament has in fact made such an exception.

Full effect can, indeed, be given to the words empowering the Parliament to make "exceptions" by holding them to be applicable to appeals from the other judgments mentioned in sec. 73, namely, judgments of Justices exercising the original jurisdiction of the High Court, judgments of any other Federal Court or Court exercising Federal jurisdiction, and judgments of any other Court from which an appeal lay to the Sovereign in Council.

The term "regulation" in the first and second paragraphs of sec. 73 appears to be used as synonymous with the terms "conditions and restrictions" in the third paragraph. It is an apt word as applied to appeals under a right of appeal from which there could be no absolute exception, while the words "conditions and restrictions" were equally apt as applied to appeals regulated by the Order in Council, and the Statute of 7 & 8 Vict. It will be seen, when we come to consider the third point, that the Parliament has not attempted to except any judgment of the Supreme Courts absolutely from appeal.

We proceed to consider the conditions of and restrictions on appeals which existed at the establishment of the Commonwealth. These were, in part, contained in the general Orders in Council, which, in the case of Victoria, required the Supreme Court to grant leave to appeal from final judgments in certain specified cases, including cases in which a civil right of the value of £500 was involved, and empowered them in their discretion to grant leave to appeal from interlocutory judgments of the same class. In either case it was a condition of the appeal that the appellant should give security to an amount to be fixed by the Supreme Court not exceeding £500. This Order in Council prescribed both restrictions and conditions. With regard to cases not falling within the terms of the Order in Council, there was no restriction, but it was a condition of the appeal that special leave should be granted by the Sovereign in Council. Except, therefore, so far as the Parliament has prescribed other conditions and restrictions, those which we have stated still apply.

We come now to the third point: What regulations has the Parliament prescribed? To answer this question reference must be made to the *Judiciary Act* 1903. Sec. 35 of that Act so far as material is as follows:—

"The appellate jurisdiction of the High Court with respect to judgments of the Supreme Court of a State, or of any other Court of a State from which at the establishment of the Commonwealth an appeal lay to the Queen in Council, shall extend to the following judgments whether given or pronounced in the exercise of federal jurisdiction or otherwise and to no others, namely:

"(*a*) Every judgment, whether final or interlocutory, which—

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(1) is given or pronounced for or in respect of any sum or matter at issue amounting to or of the value of Three hundred pounds; or

(2) involves directly or indirectly any claim, demand, or question, to or respecting any property or any civil right amounting to or of the value of Three hundred pounds; or

(3) affects the status of any person under the laws relating to aliens, marriage, divorce, bankruptcy, or insolvency;

but so that an appeal may not be brought from an interlocutory judgment except by leave of the Supreme Court or the High Court.

"(*b*) any judgment, whether final or interlocutory, and whether in a civil or criminal matter, with respect to which the High Court thinks fit to give special leave to appeal."

This section in one sense imposes restrictions upon appeals, but the restrictions are not absolute, since in all cases an appeal may be brought by leave of the High Court. The term "judgment" includes any judgment decree order or sentence (sec. 2), words which must bear the same meaning as they bear in sec. 73 of the Constitution. If the cases in which appeals might be brought had been rigidly limited to those enumerated in paragraph (*a*), the *Judiciary Act* would have offended against the concluding enactment of sec. 73 of the Constitution, but paragraph (*b*) removes this difficulty. It follows that, by the combined operation of sec. 73 of the Constitution and sec. 35 of the *Judiciary Act*, an appeal lies to the High Court from every judgment of the Supreme Court of a State, subject to the regulations prescribed by the Parliament. One of these regulations is that except in the specified cases, 1, 2, and 3, and in the case of all interlocutory judgments, the leave of the High Court must be first obtained. Other conditions are contained in the *High Court Procedure Act* 1903 and the Rules in the Schedule to that Act. With these latter we are not now concerned. The question then arises whether the conditions thus imposed are exhaustive, covering all cases of appeals to the High Court from a Supreme Court, or whether the supposed former condition that, in the case of a decision of a

Supreme Court as a Court of first instance, special leave must be obtained, still remains in force as a condition cumulative upon the provisions as to special leave specified in paragraph (*b*). It cannot in our judgment be successfully contended that a decision of a Judge of the Supreme Court, exercising the jurisdiction of that Court, is any the less a decision of the Court because it was exercised by him as a Court of first instance. The jurisdiction of the Court may, according to its constitution, be exercised by one, two or more Judges, but the judgment when pronounced is the judgment of the Court, and would be properly described as such in any proceeding taken for the purpose of enforcing it, or in any case in which it is relied on by way of estoppel.

It will be seen that Parliament dealt with the existing conditions and restrictions—(I.) By reducing the appealable amount (*i.e.*, appealable without special leave); (II.) By extending the class of appealable cases; and (III.) By providing that in all other cases an appeal might be brought by special leave. They further said that the appellate jurisdiction of this Court should extend to all the judgments specified, "and to no others." It is clear, in our opinion that they intended that the regulations contained in sec. 35, as distinguished from the conditions prescribed by the *High Court Procedure Act* 1903 as to the procedure on appeals properly brought, should be exhaustive, and that the right of appeal must consequently be determined by a consideration of that section alone. The section applies in terms to every judgment of the "Supreme Court," whether final or interlocutory, that falls within the enumerated classes. We find ourselves unable to read into these words the implied proviso that, in cases of appeal from decisions of the Court given by a Judge sitting as a Court of first instance, special leave shall be required.

We have, so far, assumed that this was a condition of appeals from such judgments to the Sovereign in Council. But it is by no means clear that this is so. By the Victorian Act, 19 Vict. No. 13, sec. 4, it was provided that a single Judge of the Court sitting alone might hear causes in the equitable jurisdiction of the Court, and that his judgment, unless appealed from, should be as effectual as if made by two or more Judges sitting in Banco. Sec. 5 gave an appeal from such judgments to the Full Court in Banco. The

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case of *Garden Gully G.M. Co.* v. *McLister* (1) was an appeal direct to the Queen in Council, without special leave, from a decision of *Molesworth* J., exercising the jurisdiction conferred by that Statute. Objection was taken before the Judicial Committee that an appeal did not lie direct to the Queen in Council, but that the appellant should have appealed to the Full Court. The objection was overruled. This was clearly a case where the appeal was held to be from the judgment of the Supreme Court, although *Molesworth* J. sat as a Court of first instance, and not as the Court of final appeal within the Colony.

In New South Wales a precisely similar Statute has been in force for very many years, and it has been the settled and accepted practice for the Judicial Committee to entertain appeals direct from the Chief Judge in Equity (as he is there called) without special leave. We have ourselves heard several such appeals in that State. We are unable to distinguish these cases in principle from any other case in which a Judge of the Supreme Court sitting as a Court of first instance pronounces the judgment of the Court.

Under the *Judicature Act* 1883 of Victoria (now included in the *Supreme Court Act* 1890 [No. 1142]) the distinction in this respect between the several jurisdictions of the Court no longer exists. It appears that in one case since that Act (*Henty* v. *The Queen*) (2), a direct appeal from a single Judge sitting as a Court of first instance was heard by the Judicial Committee without objection. We are told, however, that, on reference to the papers in the case in the Supreme Court, it appears that the order for leave to appeal was drawn up by consent. On the other hand, the Supreme Court of Victoria in *Australian Smelting Co.* v. *The British Broken Hill Proprietary Co.* (3) (*Madden* C.J. doubting) refused to allow an appeal to the Queen in Council from a judgment of a Judge sitting as a Court of first instance.

Having regard to the terms of sec. 35 of the *Judiciary Act*, and to the decision of the Judicial Committee in *Garden Gully G.M. Co.* v. *McLister* (1), supported by the long course of practice on appeals from the Chief Judge in Equity of New South Wales,

(1) 1 App. Cas., 39.
(2) (1896) A.C., 567; 20 A.L.T., 46.
(3) 23 V.L.R., 643.

we are of opinion that an appeal lies to this Court from every judgment of the Supreme Court of a State, whether it is pronounced by a single Judge sitting as a Court of first instance, or by the Full Court sitting as a Court of Appeal, subject of course in every case to the conditions and restrictions prescribed by the *Judiciary Act* 1903. It was objected that this view, if adopted, would apply to cases decided by a jury. This objection is disposed of by the cases of *Nathoobhoy Ramdass* v. *Mooljee Madowdass* (1); and *Tronson* v *Dent* (2), in which it was pointed out that a judgment founded on a verdict of a jury can only be assailed on appeal on the ground that, on the facts found by the jury it is erroneous, and further that the verdict of a jury is not the judgment of the Court. In the case of *Saunders* v. *Borthistle* (3), this Court held that an appeal lay direct to it from a decision of a single Judge of the Supreme Court of New South Wales sitting in Chambers and exercising the jurisdiction of the Court. It was said in that case that no appeal lay from his decision to the Full Court. But, for the reasons above given, we think that that distinction, if well asserted, was immaterial.

In the present case, the amount involved is above the limit of £300, so that special leave is not required if the order appealed from is a judgment of the Court. We proceed to consider this point, which is said to depend upon the construction of several sections of the Victorian Act No. 1142.

Sec. 9 of that Act provides that a Court shall be holden in and for Victoria and its dependencies, which shall be styled the Supreme Court of Victoria, and by sec. 10, is to consist of not more than six Judges. Sec. 18 confers on the Court all the jurisdiction of the former Courts of Queen's Bench, Common Pleas, and Exchequer in England. Sec. 19 confers on it the equitable jurisdiction of the Lord Chancellor before 6th January, 1852. Sec. 20 confers on it probate jurisdiction, and sec. 22 jurisdiction in matrimonial causes.

Sec. 23 empowers the Court to make rules, amongst other things, for regulating the practice and procedure of the Court in its various jurisdictions, "and the initiating actions and proceedings therein."

(1) 3 Moo. P.C.C., 87. (2) 8 Moo. P.C.C., 419.
(3) 1 C.L.R., 379.

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Sec. 36 provides that the Full Court (which means all the Judges or not less than any three of them, sec. 3) shall hear and determine all appeals from a single Judge, whether sitting in Court or Chambers. Sec. 37 empowers a single Judge sitting in Court, subject to appeal in civil or mixed matters to the Full Court, to hear and determine all motions, causes, actions, matters, and proceedings not required under any Act or Rule of Court to be heard and determined by the Full Court. Sec. 54 provides that any Judge of the Court sitting for the trial of causes and issues shall be deemed to constitute the Court. Pausing here, we are unable to see any substantial difference between the provisions of sec. 37 and those of the Act 19 Vict. No. 13, already referred to, except that the provisions of sec. 37 extend to all cases in which a single Judge exercises the powers of the Court, while those of the earlier Act were limited to the case of a Judge exercising the equitable jurisdiction of the Court. The fact that an appeal lay to the Full Court is common to judgments under both Statutes. Sec. 55, which is, with the exception of one word, practically a transcript of sec. 39 of the English *Judicature Act* of 1873, provides that any Judge of the Court may, subject to any Rules of Court, exercise in Court or in Chambers all the jurisdiction vested in the Court in all such causes or matters and in all such proceedings in any causes or matters as before the passing of the *Judicature Act* 1883, might have been heard in Court or in Chambers respectively by a single Judge, or as may be directed or authorized to be so heard by any Rules of Court to be hereafter made or for the time being in force. It concludes with the words "in all such cases any Judge sitting in Court shall be deemed to constitute the Court." The corresponding English section says "shall be deemed to constitute a Court," words which were obviously used to signify that a single Judge sitting in Court should have all the powers conferred on the Court as distinguished from those conferred on a Judge sitting in Chambers. If the words of the Victorian Statute do not bear the same meaning, it is difficult to assign a definite meaning to them. There is nothing in the Act to suggest that they had any reference to a possible right of appeal to the Full Court, for an appeal is given by secs. 36 and 37 equally from all decisions of a single Judge, whether

sitting in Court or Chambers. Nor can we see any reason for suggesting that the words "the Court" have any reference to the right of appeal to the Sovereign in Council which the Statute purports to give in sec. 231.

In execution of the powers conferred by the *Judicature Act* 1883, re-enacted in sec. 23 of this Act, the Judges made Rules of Court, analogous in many respects to the Rules of the Supreme Court in force in England. Order LV. of the Rules of 1884 is headed "Chambers in matters heretofore within the cognizance of the Court in its equitable jurisdiction." By Rule 3 of that Order it is provided that the executors or administrators of a deceased person or any of them, and the trustees under any deed or instrument or any of them, and any person claiming to be interested in the relief sought as creditor, devisee, legatee, next-of-kin, or heir-at-law of a deceased person, or as *cestui que trust* under the trusts of any deed or instrument, or as claiming by assignment or otherwise under any such creditor or other person as aforesaid, may take out, as of course, an originating summons returnable in the Chambers of a Judge of the Court for such relief of the nature or kind following as may by the summons be specified, and as the circumstances of the case may require, that is to say, the determination, without an administration of the estate or trust, of any of the following questions or matters:—(*a*) Any question affecting the rights or interests of the person claiming to be creditor, devisee, legatee, next-of-kin, or heir-at-law or *cestui que trust*; and various other matters. Rule 4 of the same Order provides that:—Any of the persons named in the last preceding Rule may in like manner apply for and obtain an order for—(*a*) The administration of the personal estate of the deceased: (*b*) The administration of the real estate of the deceased: (*c*) The administration of the trust. Rule 5 prescribes the persons to be served with the summons.

Rule 7 prescribes that the application shall be supported by such evidence as the Court or Judge may require, and that directions may be given as they or he may think just for the trial of any question arising thereout. Rule 8 provides that it shall be lawful for the Court or a Judge upon such summons to pronounce such judgment as the nature of the case may require.

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These Rules, as to the validity of which no question is raised, are manifestly made in execution of the power of the Court to make Rules for initiating actions and proceedings in the Court. The term "action" is defined by sec. 3 of the *Supreme Court Act* 1890 to mean "a civil proceeding commenced by writ or in such other manner as may be prescribed by Rules of Court." A proceeding by originating summons is manifestly a civil proceeding between parties which is commenced otherwise than by writ but in a manner prescribed by Rules of Court. It is therefore an "action," and by r. 8 of Order LV. it is to result in a judgment, which however, if made in Chambers, is drawn up as an order. There can be no doubt that the order so made, if not appealed from, has all the attributes of a judgment. The order may, but need not, be pronounced in Court. (Or. LIV. r. 9). It finally determines the rights of the parties, it may be enforced in the same manner as a judgment (Or. XLII. r. 24), and it may be pleaded in estoppel as a judgment. The term "judgment" in the Constitution and in the *Judiciary Act*, as already pointed out, includes orders. Reliance was, however, placed by the learned counsel for the respondent on the concluding words of sec. 55 of the *Supreme Court Act* 1890:—"Shall be deemed to be the Court," and on the diversity between these words and those of sec. 39 of the English Statute.

It was contended that the legislature of Victoria has by these words in effect declared that a Judge in Chambers is not the Court, and that consequently an order made by a Judge in Chambers is not an order of the Supreme Court. But, if a Judge sitting in Chambers is empowered to exercise and does exercise a jurisdiction vested only in the Court, how can his order be regarded otherwise than as an order of the Court? It has admittedly the effect of a final adjudication upon the rights of the parties in a controversy which can only be determined by the exercise of the jurisdiction of the Court. If it is not the order of the Court, from what tribunal does it emanate? Is the Judge to be regarded as an inferior tribunal, distinct from and subordinate to the Court? There is no doubt, as we have already shown, that an appeal would lie from such an order to the Sovereign in Council, with leave, if not without it. But how? Would it be regarded

as an appeal from a subordinate tribunal, or as an appeal from the Supreme Court? Can one suppose an appeal entitled "On appeal from a Judge of the Supreme Court of Victoria?" We cannot see any satisfactory answer to these questions which would admit the view that the order is not the order of the Court. The proceeding by originating summons introduced under the English *Judicature Act* by the Rules of 1883 was in substitution for the proceedings by summons in Chambers under the Act called Sir G. Turner's Act (13 & 14 Vict. c. 35), as amended by 23 & 24 Vict. c. 38 s. 14. Under the former Act the decree was made on motion. So far as we know, it was never suggested that a decree of a Judge made on an originating summons under the old practice was in any way distinguishable in its quality or effects from any other administration decree. The only difference was that, if the hearing took place in Chambers, the disciplinary powers of the Court *quâ* Court could not be exercised pending the hearing. And, so far as we have been able to discover, the same incidents have always been held to attach to judgments pronounced upon originating summonses under the *Judicature Acts*.

Apart from the express provisions of the Victorian Statute, we should feel great difficulty in holding that any order of a Judge in Chambers is not in substance an order of the Court, within the meaning of the Constitution and the *Judiciary Act*. In *Lush's Practice* (2nd ed., by *Stephens*, p. 668) it is said that "the Common Law appears to vest in a single Judge, the same equitable jurisdiction over the proceedings in a cause which it vests in the Court of which he is a constituent member. His act therein is potentially the act of the Court; for, although he cannot directly enforce the orders he makes nor exercise any of what may be termed the prerogative powers of the Court, yet the Court will adopt his orders and for disobedience thereto when so adopted will issue process of attachment as if the matter had been originally ordered by the Court itself." Accordingly, it has been held by Judges of great authority that when a Statute confers powers upon the Court in general terms, and without any limitation either express or to be inferred from the context, they are to be exercised in the ordinary and usual way in which the Court is

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accustomed to exercise powers of an analogous nature, and that, if the powers in question are such as are ordinarily exercised in Chambers, they may be so exercised: *Smeeton* v. *Collier*(1). In such a case the order is potentially the order of the Court. The powers of Judges in Chambers were confined within well known limits, and technical rules prevented the enforcement of a Judge's order by execution or attachment until it had been made a Rule of Court, but these rules are now abolished in Victoria, and there is, as already stated, no difference in the mode of enforcement between orders pronounced in Court and orders pronounced in Chambers. It would indeed be strange if, although the effect of a judgment as a final determination of the rights of parties is the same whether the Judge sits in an open or in a closed room, yet the right of the parties to appeal to this Court from the judgment should be dependent upon that circumstance, which the legislature has in express terms declared to be immaterial for all other purposes.

We are unable for these reasons to entertain any doubt that the order of *Hodges* J. under appeal is a judgment of the Supreme Court of Victoria within the meaning of the Constitution and of sec. 37 of the *Judiciary Act*. The objection is therefore overruled, and the case will remain on the list for hearing.

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Solicitors for respondents, *E. E. Dillon*; *Crawford, Ussher & Thompson*, Melbourne.

B. L.

(1) 1 Ex. 457.