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O'Connor J.

Chief Magistrate of Durban in Natal issues the warrant in that form, charging that "William A. McKelvey did commit the crime of contravening section 76 of Law 47, 1887 (Natal)."

The statement of the offence which is considered by the Attorney-General of Natal and the Chief Magistrate of Durban to be sufficient, ought to be sufficient for a Court intrusted with the duty, not of finally deciding the case, but of determining whether there is evidence of an offence coming within that Act sufficient to satisfy the magistrate that the person charged was properly apprehended.

For these reasons I am of opinion that the statement of the offence in the warrant is sufficient. I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitor, for appellant, *A. C. Secomb*, Melbourne.

Solicitor, for respondent, *Guinness*, Crown Solicitor for Victoria.

[HIGH COURT OF AUSTRALIA.]

HOLMES . . . . . APPELLANT;

AND

ANGWIN . . . . . RESPONDENT.

APPEAL FROM A COURT OF DISPUTED RETURNS IN THE STATE OF WESTERN AUSTRALIA.

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PERTH, *October* 23-24.

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

Court of Disputed Returns—Electoral Act (W.A.), (No. 20 of 1904), secs. 159-170—Final and Conclusive Jurisdiction—"Supreme Court of a State"—The Constitution, (63 & 64 Vict.), sec. 73—Special Tribunal.

Disputed elections in Western Australia are, under the *Electoral Act* 1904, heard and determined by the "Supreme Court," this tribunal being constituted by a single Judge in the special manner prescribed by the Act. By sec. 167 the decisions of the tribunal are declared final and conclusive. This

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tribunal having declared that a certain returned candidate was not properly elected, and that the election was void, the unsuccessful party appealed direct to the High Court. On motion to rescind the leave to appeal—

Held, that the Supreme Court in the exercise of its jurisdiction under the *Electoral Act* 1904 was not the "Supreme Court" of the State of Western Australia within the meaning of sec. 73 of the Constitution, but, although consisting of a Judge of the Supreme Court, was a special tribunal to whose arbitrament Parliament had delegated the power of deciding the qualifications of persons to sit in those assemblies; and that no appeal lay to the High Court from its decisions.

The substantive ground of appeal was that the Court of Disputed Returns had no power to entertain the petition, as it was not lodged within the time required by the *Electoral Act*. By sec. 164 the Court was required to inquire whether the requisites of sec. 160, which included a limit of time, had been observed.

Per Griffith C.J.:—The propriety of the decision in this point could not be disputed by way of appeal.

R. v. *Commissioners for Special Purposes of the Income Tax*, (21 Q.B.D., 313), applied.

APPEAL by special leave from a decision of the Court of Disputed Returns in Western Australia.

A petition was brought to the Court of Disputed Returns under the *Electoral Act*, (W.A.) (No. 20 of 1904), by the respondent against the return of the appellant as the elected member for the East Fremantle Electoral District in the Legislative Assembly of Western Australia. The Chief Justice of the State of Western Australia, sitting as the Court, declared the election void and the appellant not duly elected, and adjudged costs against him. Under the *Electoral Act*, sec. 159, the validity of any election or return is disputed by petition addressed to the "Supreme Court," which is given power to hear and determine the same without appeal, the tribunal being constituted by a single Judge. The appellant obtained special leave to appeal to the High Court from this decision as from a judgment decree or order of the Supreme Court of the State, under sec. 73 of the Constitution, leave being reserved to the respondent to move to rescind the special leave.

Moss K.C. (with him *Barsden*), for the appellant.

Le Mesurier (with him *Joseph*) for the respondent, moved to rescind the order for special leave. The Court of Disputed Returns had full jurisdiction to determine whether the necessary preliminaries to the lodging of the petition had been duly fulfilled: sec. 164; and decide upon the substantial merits and good conscience of the case without regard to legal forms and technicalities: sec. 165; and the decisions of the Court are made "final and conclusive without appeal and shall not be questioned in any way": sec. 165. The High Court will follow the Privy Council in refusing to entertain an appeal from such a Court: *Théberge* v. *Laudry* (1), which was decided on a similar provision in the *Quebec Controverted Elections Act* 1875.

The functions of the Court of Disputed Returns, as set out in secs. 159-170 of the *Electoral Act* 1904 show that it is not the Supreme Court of the State, but a special tribunal: *Moses* v. *Parker, Ex parte Moses* (2). An appeal to the High Court lies only when an appeal lay before the Constitution to the Queen in Council: *Parkin* v. *James* (3). An appeal in this class of case would not have lain to the Queen in Council without special leave, and that leave was always refused: *Kennedy* v. *Purcell* (4); *Valin* v. *Langlois* (5). Even if the Court of Disputed Returns did not inquire, pursuant to its power under sec. 164, into the fulfilment of the requisites of sec. 160, that does not give any right to appeal from the decision that the election was void.

[GRIFFITH C.J.—His Honor referred to *Reg.* v. *Commissioners for Special Purposes of the Income Tax* (6), cited in *Mooney* v. *Commissioners of Taxation, (N.S.W.)* (7). If a tribunal, which has final and conclusive jurisdiction, has power to decide upon the facts necessary to give it jurisdiction, a wrong decision upon those facts is not appealable].

The tribunal had evidence before it that the petition was lodged within 40 days from the return day of the writ, as required by sec. 160, and it is on this point that an appeal is sought now.

(1) 2 App. Cas., 102.
(2) (1896) A.C., 245.
(3) 2 C.L.R., 315.
(4) 59 L.T.N.S., 279.
(5) 5 App. Cas., 115.
(6) 21 Q.B.D., 313.
(7) 3 C.L.R., 221.

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The decision of disputed elections in Western Australia rested first with a committee of the Legislative Council; then this function was delegated to the Chief Justice in 1878; in 1899 two Judges of the Supreme Court were constituted a Court of Disputed Returns; in 1904 the "Supreme Court," or rather one Judge thereof. In this jurisdiction the "Supreme Court" is a special tribunal, and the words of sec. 73 of the Constitution do not apply to its decisions. It is no more the Supreme Court in the ordinary sense than a Supreme Court Judge who is appointed a special Commissioner. No power to hear appeals from this tribunal resided in the Crown, and such power of hearing appeals not existing, it could not be transferred to the High Court.

[GRIFFITH C.J.—"Power to hear appeals" in that context means only a discretion to grant leave to appeal. The power to hear appeals from the Supreme Court in any case whatever is conferred on the Court by the Constitution.

It is not the functions of the Supreme Court of the State to enforce the decision of this tribunal as to the election. The decision was required by sec. 168 to be transmitted by the tribunal to the House of Parliament concerned, and was there given effect to. The only part of the tribunal's decision that is enforced in the Supreme Court is the order as to costs, which under sec. 170 may be "entered as a judgment of the Supreme Court."

Moss K.C., for the appellant. The right of appeal exists under sec. 73 of the Constitution, and cannot be taken away by any local Act: *Parkin* v. *James* (1); *Peterswald* v. *Bartley* (2). Secs. 159 and 167 of the *Electoral Act* 1904 were enacted by the local legislature in full view of the right of appeal from the Supreme Court to the High Court given by sec. 73, and no special tribunal was intended to be set up, but only an extension of the jurisdiction of the ordinary Supreme Court of the State. In *Great Fingall Co.* v. *Sheehan* (3), the Local Court sitting with additional assessors under a special Act, was held to be the ordinary Local Court with an added jurisdiction. The power

(1) 2 C.L.R., 315. (2) 1 C.L.R., 497. (3) 3 C.L.R., 176.

given to the tribunal by sec. 163 to award costs was merely put in to save doubts as to its ordinary powers in that behalf; it still remains the ordinary Supreme Court. The power under sec. 164 to "inquire" whether the requisites of sec. 160 have been fulfilled is merely a power of inquiry; it is not final and conclusive as it would be if there were a power to "hear and determine," or to "decide," as in *Local Courts Regulation Act* 1904, (No. 51), sec. 154. This is only a directory legislative instruction to the tribunal not to proceed until it deems that the requisites have been satisfied. No inquiry can lawfully be held into the election unless all the requisites of sec. 160 have been satisfied. There is a want of jurisdiction, not a mere error in decision. In *Moses* v. *Parker*, *Ex parte Moses* (1), the tribunal appealed from was an administrative, not a judicial, body. This elections tribunal is purely judicial, with jurisdiction to "hear and determine"; it is not a *persona designata* to whose arbitrament the election is submitted. The order of this Court is "entered as a judgment of the Supreme Court" (sec. 170). Where a tribunal is given cognizance of matters of considerable difficulty, involving questions of law, that tribunal is to be treated as a judicial tribunal: *Great Fingall Co.* v. *Sheehan* (2). On the merits of the appeal: There was no evidence that the requirements of sec. 160 were observed. The petition had to be lodged within forty days of the "return day of the writ"; not the day appointed for its return, but the actual day of return, which may in fact have been any day between the election day and the appointed day for return, eight days later. The requirements not being satisfied, the Court had no jurisdiction to pronounce judgment upon this election.

Le Mesurier in reply. The provisions of the *Electoral Act* 1899 are practically identical with those of the Act of 1904 on this matter, except that the "Supreme Court" is inserted in place of "two Judges of the Supreme Court." The only substantial change is that one Judge is substituted for two. The whole history of the legislation, giving these Courts final and con-

(1) (1896) A.C., 245.

(2) 3 C.L.R., 176.

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clusive jurisdiction over election petitions, is that the Courts thus constituted are special tribunals; and the High Court should follow the view expressed by the Privy Council that the legislature in establishing this kind of tribunal intended that their decisions should be immediate and effective without any appeal: *Kennedy* v. *Purcell* (1), explaining the effect of *Théberge* v *Laudry* (2).

[GRIFFITH C.J.—Referred to *In re Stronach* (3)].

The right of membership in a House of Parliament has no money value; hence there can be no appeal as of right. This is not a judgment of the Supreme Court of the State, and appeal by special leave is not competent.

Oct. 24.

GRIFFITH C.J. This is an appeal from an order which is in form an order of the Supreme Court of Western Australia. It is intituled "In the Supreme Court of Western Australia," and after reciting that the petition of the respondent had been tried by the Chief Justice of Western Australia, it adjudges and declares that the appellant was not duly elected as a member of the Legislative Assembly of Western Australia for the East Fremantle Electoral District, at the election held on 27th November 1905, and that the said election was absolutely void. *Primâ facie*, then, it is a judgment of the Supreme Court of Western Australia, and it comes, *primâ facie* again, within the words of sec. 73 of the Constitution, which provides that the High Court shall have jurisdiction, subject to certain regulations and restrictions, to hear and determine appeals from all judgments, decrees, orders and sentences of the Supreme Court of any State. This is an absolute right of appeal given to suitors, and no State legislation can deprive them of that right. The order was made by the Chief Justice in the exercise of the jurisdiction conferred by the *Electoral Act* 1904, which provides by sec. 159 that the validity of any election or return may be disputed by petition addressed to the Supreme Court, and that the Supreme Court shall have jurisdiction to hear and determine the same. The appeal is objected to as incompetent, on the ground that, notwithstanding these words

(1) 59 L.T.N.S., 279. (2) 2 App. Cas., 102.
(3) 2 Moo. P.C.C., 311, at p. 316.

and their *primâ facie* meaning, the decision appealed from in this case is not a decision of the Supreme Court in the sense in which that term is used in the Constitution. That is really the question which we have to determine. Before dealing with the *Electoral Act* 1904 on the meaning of which, to a great extent, the question must depend, I will refer to some considerations which have a general bearing on the matter. The Supreme Court of Western Australia was originally constituted under a Statute of Will. IV., but its constitution is now defined in the *Supreme Court Ordinance* of 1861. By that Ordinance it was provided that there shall be established in the Colony a Court of Judicature which shall be a Court of record under the style and title of the Supreme Court, and the Court was invested with and empowered to exercise in the Colony and its dependencies all the powers and jurisdiction of the Courts of Queen's Bench, Common Pleas and Exchequer at Westminster; and also all the powers and jurisdiction of the Lord Chancellor and of the Ecclesiastical Courts as they then existed in England as well as of Courts of Oyer and Terminer and general gaol delivery. The Supreme Court of this State therefore was a Court originally created to administer justice between suitors in respect to all kinds of civil rights, that is, all rights that could be enforced by legal procedure in any of the Courts of England, and also to administer the criminal law. The constitution of the Supreme Courts of all the other States was practically the same. These were the Courts which the framers of the Constitution had in view when the right of appeal was given from every decision of the Supreme Court of a State to the High Court; and I think that, *primâ facie*, sec. 73 should be construed as referring to Supreme Courts exercising jurisdiction of that kind. No doubt, if by Statute some new right was created, which would be enforceable in the Supreme Court if no other provision were made, an appeal from a decision with respect to it would lie to this Court. On the other hand, it must be borne in mind that it is always competent for a legislature of plenary jurisdiction to create a new tribunal for any purpose it thinks fit, and to declare that its decision shall be final and without appeal; subject, of course, to the prerogative of the Sovereign and to any over-riding statutory right

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of appeal. It is a general rule that when a new Court is created, whatever jurisdiction is conferred upon it, there is no appeal from the decision of that Court unless it is conferred by Statute. In that respect the case may be considered as analogous—it is not, of course, a perfect analogy—to the case of a domestic tribunal created by contract between parties, of which a familiar instance is afforded by a fire insurance policy in which the right to recover is made dependent upon a preliminary determination of fact by a tribunal chosen by the parties. So the new right conferred by a Statute may have attached to it as an incident that a necessary fact on which the right depends shall be determined by a designated tribunal, and, if so, there is no appeal from the decision of that tribunal unless given by Statute. In the case of an inferior Court to which new jurisdiction is given, the Supreme Court can, in the exercise of its general powers, control it if it exceeds or refuses to exercise its jurisdiction.

This, then, being the general rule, can a State legislature confer a new jurisdiction upon the Supreme Court subject to a similar limitation that there shall be no appeal from it to any outside jurisdiction? The answer to that question depends upon the Constitution. If the legislature merely conferred a new jurisdiction upon the Supreme Court, as intended by the Supreme Court Ordinance and contemplated by the Commonwealth Constitution, there might be considerable difficulty in saying that any words could deprive this Court of its jurisdiction to entertain an appeal from a decision made in the exercise of the new jurisdiction. It is necessary, therefore, to see what is the real effect and meaning of what the legislature has done in the present case. Did it merely create a new civil right to be administered by the Supreme Court with the ordinary incidents of litigation, including the consequent right of appeal, or did it in substance create a new and separate tribunal, consisting of a Judge of the Supreme Court as a *persona designata?* In answering that question regard must be had to the substance rather than to the mere verbiage of the Statute. Before the Act of 1904 there was an Act in force, passed in 1899, by which a Court of Disputed Returns was constituted. That Court consisted of two Judges of the Supreme Court, but it was not the

Supreme Court, and did not exercise the jurisdiction of the Supreme Court. The two members of the Supreme Court were personally designated to exercise the powers of the new Court, which were conferred in language almost verbally identical with that of Part XV. of the Act of 1904 now under consideration. Now, it is to be remembered that the jurisdiction to determine the validity of an election to a legislative body, is a matter not originally pertaining to the judiciary. According to our system of government the powers of the State are regarded as divided into the legislative, the executive, and the judicial branches, which are kept apart as far as practicable. The legislative branch always asserted the right to determine of whom its members should consist, and whenever they have thought fit to delegate a part of that duty to another tribunal, as they have done from time to time, they have nevertheless retained control to a certain extent. In all legislatures, since we have first known of them in Europe, one of the first duties of a body newly called together has been to verify the credentials of the persons claiming to be members of it. That is a matter very different from the kind of matters which the Supreme Courts of this and the other States were primarily constituted to deal with. Bearing these principles in mind, I will proceed to examine briefly Part XV. of the *Electoral Act* 1904. Sec. 159 provides that the validity of an election or return may be disputed by petition addressed to the Supreme Court, and not otherwise, and that the Supreme Court shall have jurisdiction to hear and determine the same. Sec. 160 directs what the petition is to contain, and sec. 161 requires the deposit of a sum of £50 as security for costs. Sec. 162 enacts that no proceedings shall be had on the petition unless the requirements of the preceding sections have been complied with. By sec. 163 it is enacted that the Court shall be constituted by "a Judge sitting in open Court," who shall have power to declare that any person who was returned as elected was not duly elected; to declare any candidate duly elected who was not returned as elected; to declare any election absolutely void; to dismiss or uphold any petition in whole or in part; and to award costs. The Court is required by sec. 164 to inquire whether or not the requisites of sec. 160 have been observed, and to inquire

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into the identity of persons, and whether their votes were improperly admitted or rejected; but the Court is not to have power to inquire into the correctness of any roll. Sec. 165 directs that the Court shall be guided by the substantial merits and good conscience of each case without regard to legal forms and technicalities. This provision of itself suggests that it was not intended that an appeal should lie to a Court bound by legal rules. Then we come to sec. 167, which says: "All decisions of the Court shall be final and conclusive without appeal, and shall not be questioned in any way." Sec. 168 directs that the Master of the Supreme Court shall forthwith, after the filing of the petition, forward to the Clerk of the House of Parliament affected by the petition a copy thereof, and after the trial of the petition shall forthwith forward to such Clerk a copy of the order of the Court. Costs may be awarded, and the order certified by the Court may be entered as a judgment of the Supreme Court and enforced accordingly. Sec. 171 provides that if any person returned is declared by the Court not to have been duly elected he shall cease to be a member of the Council or Assembly; and if any person not returned is declared to have been duly elected, he may take his seat accordingly; and if any election is declared absolutely void a new election shall be held. The necessary steps for that purpose are taken, not by the Supreme Court as incident to the execution of its judgment, but by the House to which the result of the investigation is certified. Upon consideration of the whole of these sections it appears to me that the inquiry directed to be held by a Judge of the Supreme Court is an inquiry merely incidental to and for the purpose of the determination of the right of a particular person to sit in the House of Parliament. It is an inquiry and determination for the information of that House, and effect is given to it by the House as it was before, but not until after it is informed of the result of the inquiry made by the Judge. I think, therefore, that, although sec. 159 says that the Supreme Court shall have jurisdiction, yet in substance it is not the Supreme Court, in the sense in which that term is used in the Constitution, that has jurisdiction, but that the real tribunal is a new tribunal consisting of a Judge of

the Supreme Court as a *persona designata*, to whose arbitrament the necessary questions of fact are to be referred for the assistance of the House of Parliament. For these reasons I am of opinion that this decision is not a decision of the Supreme Court within the meaning of sec. 73 of the Constitution. So regarded, this appeal is not competent, and we have no jurisdiction to entertain it. The point upon which the special leave was given was that the Judge of the Supreme Court who undertook the inquiry had no jurisdiction to hear the petition, by reason of the failure to comply with the imperative condition of sec. 160 of the Local Act, which prescribes that the petition shall be filed within forty days of the return of the writ. It was said that the petition had not in fact been filed within that time (or that it did not appear that it had) and that this defect ousted the jurisdiction of the Judge. If that really was a defect in jurisdiction, possibly there might have been some remedy by way of application to the Supreme Court to prevent this new tribunal from proceeding in a matter in which it had no jurisdiction. I say possibly; but I do not suggest that the Supreme Court should be asked to assume such a jurisdiction. This suggested point of jurisdiction appears to me to be a matter that is left by the Statute to the designated Judge to determine for himself, and I think that his decision on this point is not reviewable by any other Court on the ground that he made a mistake in his determination. I think the case falls within the rule stated by Lord *Esher* M.R., in *The Queen* v. *Commissioners for Special Purposes of the Income Tax* (1). I am of opinion, therefore, that the decision of the learned Chief Justice is not reviewable by the High Court, and that the appeal must be dismissed on that ground.

BARTON J. I am in agreement with His Honor on all the questions formally before the Court which are necessary for the determination of the competency of this appeal. I will add a few words with regard to the character of the jurisdiction with which we are dealing. The validity of elections, and kindred questions, such as that of membership, were, until the passing of

(1) 21 Q.B.D., 313).

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recent statutory law, within the exclusive privilege of elective Houses of legislature. They had the right to determine, by their own domestic tribunals, questions of that kind as they arose, and had always asserted that right, so far as the House of Commons was concerned, and the legislative bodies of Australian and other Colonies were in fact given power to assert it by the various Constitution Acts, and used to assert it by such tribunals as their own Committees of Elections and Qnalifications composed respectively of members of the House concerned. It was found, no doubt, that the feeling of partisanship which necessarily arose from such a method of determination tinged that method with disadvantages outweighing the advantage of keeping in the hands of Parliament the right of determining these questions. Parliament has therefore in many instances (and, as one instance, in this State), transferred the right to a separate tribunal, not on the ground that it wished to deal with these questions as matters of litigation; but, as I judge, on the ground that it wished to remit such matters to men of experience and known fairness of mind, who should merely declare their findings upon the questions involved, and any enforcement of such decision by the substituted tribunal itself was, in the absence of clear legislative authority, quite out of the question. Thus the Act of this State makes provisions as to the effect to be given to the decision of the Court, but it does not make the decision of the Court enforceable in the ordinary way as a judgment. There is a provision in sec. 170 which enables such action to be taken with regard to costs —that is, for the purpose of allowing civil execution for costs to issue if it becomes necessary—but there is a striking difference between that section and the remaining sections of the Act with respect to the enforcement of the determination of the Court on the merits. So far as the direction of the Statute does not ensure enforcement independently of the Court, then it remains for the Houses to enforce the determination themselves. Now, that is not, in my view, the thing which was in contemplation by the framers of the Federal Constitution when they provided in the 73rd section of that instrument that the High Court should have jurisdiction to hear and determine appeals from "all judgments, decrees, orders, and sentences" of the Supreme Courts of the

several States. It is my opinion that the appellant must bring himself within those words before he can sustain his right to have his appeal heard by this Court. The character of the jurisdiction which has been exercised by Parliaments as to election petitions is purely incidental to the legislative power; it has nothing to do with the ordinary determination of the rights of parties who are litigants. It is that domestic jurisdiction which in this State has been transferred first to the Court of Disputed Returns, afterwards to the Supreme Court, but in the latter case with the retention of provisions which of themselves show that the character of the tribunal and the method of procedure are such as did not characterise the ordinary tribunals of justice. The legislation is marked in the difference which it constitutes in that respect, not merely as to the enforcement of the decisions, but as to questions of procedure. But, although there is power to make rules for the purpose of procedure, nevertheless upon reference to the 156th section, it appears that it is not in the character of lawyers, but in the character of men whose arbitrament would be fair and should be final that the power is committed to the Supreme Court whether designated as Judges or collectively designated as the Court. If then, as my opinion is, this is not the creation of a new jurisdiction but the transfer of an incident to the legislative and deliberative power to the Court for special purposes—the legislature being capable of course of the resumption of the jurisdiction at any moment—then it seems to me that there is a clear line drawn between the decision of the Supreme Court upon an election petition and that judgment, decree, order, or sentence, which is the object of the provision in the Constitution. Therefore I again express my concurrence with the view that this appeal should be dismissed for want of competency.

HIGGINS J. I have come to the same conclusion. It is not easy to define the exact boundary of the class of cases referred to in sec. 73 of the Constitution as "judgments, decrees, orders, and sentences . . . . of the Supreme Court of any State"; but it is easy to see clearly that a decision as to an election appeal does not come within the class; and I think that the High Court is not at present under any obligation to go further.

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As has been stated, election appeals were originally within the competence of the House as to which the return was disputed. They were originally decided by the whole House of Commons. Afterwards, in 1770, *Grenville's Act* was passed which left the decision to a Committee of the House; and there was an Act passed in 1839 modifying the provisions as to committees; and then in 1868 (as regards the House of Commons) the decision of disputed elections was left to two Judges selected from the Queen's Bench Division of the High Court of Justice—the Court of Disputed Returns. The course of legislation in Western Australia appears to be similar; and in 1899 the local legislature delegated their powers to a Court of Disputed Returns, consisting of two Judges. I do not think it is disputed that there would be no appeal from a decision of that Court of Disputed Returns, as then constituted; and the only distinction that has been made since is that by the *Electoral Act* 1904, in place of two Judges of the Supreme Court, there has been substituted one Judge of the Supreme Court. This decision of the Judge of the Supreme Court is not subject, like ordinary judgments of the Supreme Court, to an appeal to the Full Court. It is not a judgment of the Supreme Court as to person or as to property; if it were, there would be no need for the special provisions which are contained in part XV. of the *Electoral Act* 1904, giving power to award costs, &c. If it were an ordinary judgment of the Supreme Court, that power would follow without express words; but, according to sec. 170, the costs awarded are to be recoverable *as if* the order of the Court were a judgment of the Supreme Court. From the very form of the words it is clear that it is not a judgment of the Supreme Court, but that these costs are to be recoverable as if it were a judgment of the Supreme Court. The substance of the position then is, that under the *Electoral Act* 1904 the return of the returning officer decides who is to be the member. Under sec. 131 the returning officer has to ascertain the total number of votes polled for each candidate, and the candidate who receives the greatest number of votes shall be elected. That return is final, subject to only one condition—a finding by a Judge of the Supreme Court. It seems to me that the nearest analogy in the practice of the Courts to the position

in this case is the finding of a Master in Chancery, or, under more recent procedure, a Chief Clerk of the Court. It is referred to him to make inquiry and report. Then we find under Part XV., again, that in analogy to that procedure the Supreme Court forwards to the Clerk of the House of Representatives a copy of the decision of the Judge. Then, as my colleagues have stated, effect is given to the decision, not by the Court (except as regards costs awarded by the Court), but by Parliament. If an election be declared absolutely void, effect is to be given to that decision of the Court (according to sec. 171), by the holding of a new election. It is not the Court that holds the election—it is Parliament that causes it to be held. For these reasons I concur in the decision that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors, for the applicant, *Moss & Barsden.*
Solicitors, for the respondent, *Le Mesurier.*

N. G. P.

Cons *Clark v NZI Life Ltd* [1991] 2 QdR 11

[HIGH COURT OF AUSTRALIA.]

MUTUAL LIFE INSURANCE CO. OF NEW YORK . . . . . APPELLANTS;
DEFENDANTS,

AND

MORRIE MELVILLE MOSS, OFFICIAL RECEIVER IN BANKRUPTCY AND TRUSTEE OF THE ESTATE OF H. I. BLAKE DECEASED . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

Life Assurance—Warranty not to die by own hand, sane or insane—Circumstantial Evidence — Suicide — Motive, evidence of, when admissible — New trial — Misdirection.