[HIGH COURT OF AUSTRALIA.]

C. A. MACDONALD LIMITED . . . APPELLANTS;
PLAINTIFFS,

AND

THE SOUTH AUSTRALIAN RAILWAYS COMMISSIONER . . . . } RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

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ADELAIDE, *May* 16, 17, 18, 19.

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

Jurisdiction of High Court—Appeal from Supreme Court of State—Judgment of Judge sitting as persona designata—Lands Clauses Consolidation Amendment Act 1881 (*S.A.*) (44 & 45 *Vict., No.* 202), *secs.* 5, 6, 7, 8, 9, 10—*Compensation for land taken—Special adaptability of land—Intention of owner to use land for special purpose.*

By the *Lands Clauses Consolidation Act* 1881 (S.A.) it is provided that, when land is acquired, otherwise than by agreement, for public purposes, the question of the amount of compensation, which under the *Lands Clauses Consolidation Act* 1847 (S.A.) was required to be assessed by a jury summoned by the sheriff and presided over by a Judge, commissioner or the sheriff, may on application to a Judge of the Supreme Court be ordered to be tried "in the Supreme Court" in one of the modes of trial prescribed by the *Supreme Court Act* 1878 (sec. 5); that when an order is made for the trial of a question of compensation "before the Court" the question shall be stated in the form of an issue (sec. 6); that the verdict and judgment thereon shall be "under and subject to the control and jurisdiction of the Supreme Court as in ordinary actions therein" (sec. 8); that the party claiming compensation is to be deemed the plaintiff and the promoters of the undertaking the defendants, and that each party shall have "all the rights and privileges of a plaintiff and a defendant respectively as in the case of an ordinary action tried under the provisions of the *Supreme Court Act* 1878 (sec. 9); and that "the verdict and judgment upon any issue tried under the provisions of this Act shall, as regards costs and every other matter incident to and con-

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sequent thereon, have the same operation and be entitled to the same effect as if that verdict and judgment had been the verdict of a jury and the judgment a judgment of a Judge, commissioner or sheriff upon an inquiry conducted upon a warrant to the sheriff issued by the promoters of the undertaking under the *Lands Clauses Consolidation Act*."

Held, that jurisdiction is by these sections conferred, not upon the Supreme Court, but upon a Judge of the Supreme Court as a *persona designata* with a right of appeal to the Full Court of the Supreme Court and, therefore, that a decision of a Judge exercising the jurisdiction so conferred is not a judgment of the Supreme Court within sec. 73 of the Constitution from which an appeal will lie as of right to the High Court.

In assessing the value of land compulsorily taken, the intention of the owner to put it to a use which would bring in a large profit to him is, if relevant at all, only an element in determining whether the land has a special value by reason of its special adaptability to such use.

Held, that the evidence supported the finding of the Judge that the land taken had not a special value by reason of its special adaptability to a special use, and that, even if it was specially adaptable to that use, the probability of the owner obtaining a necessary licence to use it for that special purpose was so remote as to be negligible.

APPEAL from the Supreme Court of South Australia.

The South Australian Railways Commissioner, being entitled under the *Adelaide Loopline Railway Acts* 1908 and 1909 to purchase or take a block of land about 23 acres in area at Mile End, near the City of Adelaide, of which C. A. MacDonald, Ltd., were the owners, gave that company notice pursuant to the *Lands Clauses Consolidation Amendment Act* 1881 that he required to purchase or take the land. The company thereupon gave notice to the Commissioner that they claimed the sum of £13,400 in respect of the value of their interest in the land, and the Commissioner offered £210 per acre, amounting to £4,935. On an originating summons issued by the company, *Way* C.J. made an order that the trial of the question of compensation should be had in the Supreme Court before a Judge without a jury, and the matter was heard by *Gordon* J.

The Mile-End land had belonged to C. A. MacDonald who carried on the business of freezing lambs and sheep for export in premises at Light Square in the City of Adelaide, from which the Mile-End land was about a mile distant. The company was

formed in New South Wales on 12th November 1909 and took over MacDonald's business and premises at Light Square and the Mile-End land.

MacDonald was the Managing Director of the company and held about one-half of the shares, and he and his son held all but five of the shares. MacDonald had slaughtered the animals treated at the Light Square works at Knoxville, distant about three and one half miles, and the company continued to do so. Evidence was given that MacDonald had intended to erect abattoirs on portion of the Mile-End land and to do the slaughtering there, and that that was also the intention of the company. Evidence was also given that the Mile-End land was suitable for abattoirs and that there was no other suitable land within the same distance of Light Square as Knoxville. The amount of the claim was made up as follows:—It was alleged that by slaughtering at Mile-End instead of at Knoxville a saving of £540 a year would be made, which capitalized at 6 per cent. would amount to £9000; that there would be 15 acres of land left which was worth £200 an acre for building purposes, amounting to £3000; and that the rental for an abattoir site elsewhere would be £70 a year, which capitalized at 6 per cent would amount to £1400.

Gordon J. awarded the company £5,995 as compensation. In giving his reasons he stated that the land was undoubtedly suitable for abattoirs, but had no special adaptability as a site therefor more than for any other building for business purposes in connection with which a site having a natural fall of ten feet within an area of from five to eight acres would be an advantage; that he did not think the intentions of MacDonald before he sold to the company had any relevancy to the case; that he found that the company when it bought the land from MacDonald must have known that the land was essential to a Government scheme, which was already begun, and was bound to be compulsorily acquired very soon; and he continued:—"But quite apart from that fact, I am of opinion that the company would never have been allowed to erect abattoirs on the land. When in the year 1903 the Adelaide Corporation promoted a Bill in Parliament to allow it to erect abattoirs on the park lands, the measure aroused a storm of opposition on two grounds, namely, (1) objection to the

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use of the park lands for an offensive trade, and (2) objection to an offensive trade of this kind so near the city. In that case the proposed site was further away from any houses than the land in this case, and no houses could, of course, have been built on the park lands surrounding it. When the Bill came before Parliament, notwithstanding official corporation reports that abattoirs could be conducted without becoming a nuisance, Parliament only gave the corporation permission to erect abattoirs on the condition that they were erected at least three miles from the city boundaries. See Act No. 957 of 1908. The objection to abattoirs is not a question of internal cleanliness only. The spectacle of thousands of animals being led to the shambles, and their presence while waiting for the knife, is highly objectionable. Mr. MacDonald himself estimated that, if abattoirs were erected on part of the land in question, it would depreciate the value of the rest of it for building purposes by one-half. In the face of these facts I am convinced that any request to be allowed to erect abattoirs (which fall within the statutory definition of an offensive trade) on the land in question, which is situated within a district declared to be under the protection of the *Health Act* 1898, and is almost within a stone's throw of the city boundaries and near the ends of some of the principal streets, would have been promptly refused by the authorities, whose permission is required by the *Health Act* 1898 before such an offensive trade is begun. The promise of the West Torrens District Council in 1901 to grant a slaughtering licence was quite irregular. The Council had no authority to give any such permission except subject to section 83 of the *Health Act* 1898 which requires public notification in the *Government Gazette*, and in one daily newspaper of the intention to apply for consent to commence an offensive trade; and gives every person a right of objection before the Local Board and a further right to state his objections to the Central Board of Health. The land was therefore of no value to the claimant company for abattoirs, because it never could have been used for that purpose. That being so, it is unnecessary to enter into the question of what future profits the company might have made, if it had erected abattoirs on the land. What the claimant company could not have done with the

land cannot be made a basis of estimating profits for the purpose of compensation. On this point I refer to the case of *City and South London Railway Co.* v. *United Parishes of St. Mary Woolnoth and St. Mary Woolchurch Haw* (1). The result is that the claimant company is only entitled to the market value of the land for building purposes as on 15th December 1908."

The judgment of *Gordon* J. was drawn up as a judgment of the Supreme Court, and from it the company appealed to the High Court.

Murray K.C. and *A. J. McLachlan*, (*P. E. Johnstone* with them), for the appellants.

E. E. Cleland, for the respondent. The appeal is incompetent. The judgment sought to be appealed from is not a judgment of the Supreme Court, but is merely an assessment of compensation. The judgment and verdict are in the same position as under the *Regulations of Railways Act* 1868 (31 & 32 Vict. c. 119), secs. 41, 43, upon which secs. 5, 6, 7, 8 and 10 of the *Lands Clauses Consolidation Amendment Act* 1881 are founded. Under the English Act the remedy is by *certiorari* to quash the verdict for excess of jurisdiction : *Cowper Essex* v. *Local Board for Acton* (2), and a new trial cannot be granted : *Birmingham and District Land Co.* v. *London and North Western Railway Co.* (3); *In re East London Railway Co.*; *Oliver's Claim* (4). Whatever may be the meaning of secs. 7, 8 and 9 of the *Land Clauses Consolidation Amendment Act* 1881, that of sec. 10 is clear, and it leaves the verdict and judgment in the same position as under the *Lands Clauses Consolidation Act* 1847. Under the latter Act the jury had only to decide the amount of compensation and could not decide who was entitled to it, nor could the person in charge of the proceedings make an order for payment of the amount. He referred to *Browne and Allan's Law of Compensation*, 2nd ed., p. 84; *R.* v. *Eastern Counties Railway Co.* (5); *R.* v. *London and North Western Railway Co.* (6). The Judge of the Supreme Court is a *persona designata*. Even if that be not so,

(1) (1905) A.C., 1.
(2) 14 App. Cas., 153, at p. 160.
(3) 22 Q.B.D., 435.
(4) (1890) W.N., 24; 24 Q.B.D., 507.
(5) 3 Ry. Cas., 466; 12 L.J.Q.B., 271.
(6) 3 El. & Bl., 443, at p. 475.

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the utmost effect of secs. 7, 8 and 9 is to make the judgment enforceable, and give a right of appeal from it, as if it were a judgment of the Supreme Court. If this is a judgment of the Supreme Court, it is not one from which an appeal will lie to this Court under sec. 73 of the Constitution. Until the verdict is set aside the judgment is good: *Musgrove* v. *McDonald* (1). He also referred to *Holmes* v. *Angwin* (2); *Moses* v. *Parker*; *Ex parte Moses* (3).

Murray K.C. Jurisdiction is by the Act of 1881 conferred upon the Supreme Court as such. That Act was passed after the Judicature system had been introduced into South Australia, whereas the *Regulation of Railways Act* 1868 was passed before that system was introduced into England. The provisions of sec. 5 of the Act of 1881 therefore do not occur in the English Act of 1868. The whole matter is dealt with under secs. 5 to 9 as an ordinary action, and the verdict and judgment spoken of in sec. 10 refers to the final verdict and judgment after all the rights of appeal &c., in the Supreme Court have been exhausted. The jurisdiction is not a special one conferred upon a Judge of the Supreme Court, but it is an additional jurisdiction conferred upon the Supreme Court: *Great Fingall Consolidated Ltd.* v. *Sheehan* (4); *Lawrence* v. *Comptroller-General of Patents* (5); *Spencer* v. *The Commonwealth* (6). The decision is within sec. 73 of the Constitution.

Cleland, in reply.

Argument then proceeded upon the merits.

Murray K.C. and *McLachlan*. The Judge should have taken into consideration that the land was specially suitable for abattoirs, that there was no other site equally fitted for that purpose within the same radius of Adelaide as Knoxville, that the land was acquired by MacDonald and by the company for the purpose of erecting abattoirs on it, and that the company could have applied

(1) 3 C.L.R., 132, at p. 149.
(2) 4 C.L.R., 297.
(3) (1896) A.C., 245.
(4) 3 C.L.R., 176, at p. 182.
(5) (1910) Sess. Cas., 683.
(6) 5 C.L.R., 418.

for, and would probably have been granted a licence for slaughtering sheep and lambs for export there. The value to be assessed is the value to the owner and not to a purchaser: *Stebbing* v. *Metropolitan Board of Works* (1). The value to the owner is to be taken independently of whether the land has been put to its potential use: *Trent-Stoughton* v. *Barbados Water Supply Co. Ltd.* (2); *R.* v. *Brown* (3); *Spencer* v. *The Commonwealth* (4); *In re Gough and Aspatria, Silloth and District Joint Water Board* (5); *Ossalinsky* v. *Corporation of Manchester* (6); *In re Lucas and Chesterfield Gas and Water Board* (7); *City and South London Railway* v. *United Parishes of St. Mary Woolnoth and St. Mary Woolchurch Haw* (8); *Ripley* v. *Great Northern Railway Co.* (9). The intention of the owner is relevant as to the special adaptability of the land: *Bailey* v. *Isle of Thanet Light Railways Co.* (10); *White* v. *Commissioners of Her Majesty's Board of Works and Public Buildings* (11). The compensation to be paid is the value to the claimant whether diminished or increased by any circumstances peculiar to him, whether the claim is for land taken or for land injuriously affected. And the question for the jury is—what price would a willing purchaser at the date in question have had to pay a vendor in the same position as the claimant who was willing but not anxious to sell? Parliament, in the *Metropolitan Abattoirs Act* 1910, secs. 54, 55, expressly reserved the power to grant licences for slaughtering sheep, &c., for export within the metropolitan area, and it was probable under the circumstances that a licence would have been granted. [They also referred to *Adelaide Loopline Railway Acts* 1908 and 1909; *Lands Clauses Consolidation Act* 1847, sec. 21; *Lands Clauses Consolidation Amendment Act* 1881, sec. 13; *Slaughtering Act* 1840, sec. 3; *District Councils Act* 1887, secs. 239, 258; *Health Act* 1898, sec. 23; *Maxwell on Statutes*, 3rd ed., p. 172.]

Cleland. There is no claim here for land injuriously affected,

(1) L.R. 6 Q.B., 37.
(2) (1893) A.C., 502.
(3) L.R. 2 Q.B., 630.
(4) 5 C.L.R., 418.
(5) (1904) 1 K.B., 417.
(6) Reported only in *Browne and Allan on Compensation*, 2nd ed., p. 718.
(7) (1909) 1 K.B., 16.
(8) (1903) 2 K.B., 728; (1905) A.C., 1.
(9) L.R. 10 Ch., 435.
(10) (1900) 1 Q.B., 722.
(11) 22 L.T., 591.

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but solely for land taken. As to the claim for the land as adapted for building purposes too much has been awarded, for the actual realized value has been given and not the value of the possibility which should have been given. The claimant is entitled to put to the assessor every argument he could put to a purchaser. If the assessor thinks them sound he will give them weight. Special adaptability is a quality which is inherent in the land itself and has nothing to do with the intention of the owner. The intention is only relevant to show that the potentiality of the land may soon be taken advantage of. The Judge's mind has been directed to all the probabilities, and he has found that they come to nothing.

Murray K.C., in reply.

Cur. adv. vult.

May 19.

GRIFFITH C.J. The judgment appealed from as drawn up is in form a judgment of the Supreme Court, but the objection is taken that it is not in law such a judgment. By the *Lands Clauses Consolidation Act* 1847, which is substantially a transcript of the English Act of 1845, the purchase money and compensation in respect of land taken or injuriously affected was to be assessed by a jury summoned by the sheriff under a warrant issued by the promoter of the undertaking and presided over by a Judge or commissioner of the Supreme Court or by the sheriff himself. The presiding officer was required to give judgment for the amount assessed by the jury. The verdict and judgment were to be signed by him and kept by the proper officer among the records of the Supreme Court, and were to be deemed records, but it was not said that they were to be regarded as records of the Supreme Court (sec. 50). If costs were awarded against the promoter they were not recoverable by proceedings issued from the Supreme Court, but by distress under a justice's warrant. It is clear that those proceedings were *extra curiam.*

By the *Lands Clauses Consolidation Amendment Act* 1881, which was based upon, but did not in all respects follow, the English *Regulation of Railways Act* 1868 (31 & 32 Vict. c. 119), it was provided by sec. 5 that whenever any question of compen-

sation in the case of lands purchased otherwise than by agreement, or in respect of lands injuriously affected, is to be settled by the verdict of a jury, either party may apply to a Judge of the Supreme Court for an order for trial of the question "in the Supreme Court" in one of the modes of trial prescribed by the *Supreme Court Act* 1878—generally called the *Judicature Act*—*i.e.*, before a Judge alone or a Judge with assessors. The corresponding provision of sec. 41 of the English Act uses the words "in one of the superior Courts."

Sec. 10 of the Act of 1881, corresponding to sec. 43 of the English Act, provides that "the verdict and judgment upon any issue tried under the provisions of this Act shall, as regards costs and every other matter incident to or consequent thereon, have the same operation and be entitled to the same effect as if that verdict and judgment had been the verdict of a jury and the judgment of a Judge, commissioner, or sheriff upon an inquiry conducted upon a warrant to the sheriff issued by the promoters of the undertaking under the *Lands Clauses Consolidation Act*." Now on this section it has been held in England that the proceedings are still *extra curiam* and that an application for a new trial could not be made: *Birmingham and District Land Co.* v. *London and North Western Railway Co.* (1), approved of in *In re East London Railway Co.*; *Oliver's Claim* (2). But the South Australian Act, as I have already said, is not a mere transcript of the English Act. Sec. 6 provides that, when a Judge orders a question of compensation to be tried "before the Court," the question shall be stated in the form of an issue. When the legislature speaks of a trial "before the Court" it is not a great step to infer that they regarded the judgment which is to be the result of the trial before the Court as a judgment of the Court. Sec. 8 provides that the verdict and judgment shall be "under and subject to the control and jurisdiction of the Supreme Court as in ordinary actions therein"—a provision not contained in the English Act. I think that it is clear that under that provision the verdict and judgment may be reviewed by the Full Court just as any other judgment given in the Supreme Court after verdict.

(1) 22 Q.B.D., 435. (2) (1890) W.N., 24; 24 Q.B.D., 507.

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Sec. 9 provides that "in any such issue the party claiming compensation shall be deemed to be the plaintiff, and the promoters of the undertaking, the defendants, and shall be so described in all proceedings, and each party shall have all the rights and privileges of a plaintiff or defendant respectively as in the case of an ordinary action tried under the provisions of the *Supreme Court Act* 1878."

But the Act contains no provision for enforcing the judgment as a judgment of the Court, and under sec. 10, already quoted, it would appear that an order for costs must still be enforced by a justice's warrant—a provision which is, *primâ facie* at least, inconsistent with the notion that the judgment is a judgment of the Court.

On the whole I come to the conclusion that the words "before the Court" in sec. 6, when read in conjunction with the other provisions to which I have referred, are not sufficient to show that the jurisdiction to assess compensation is intended to be conferred upon the Supreme Court as the Supreme Court. I think the jurisdiction is conferred upon a Judge of the Supreme Court as *persona designata* with a right of appeal to the Full Court, but I think that the jurisdiction of the Supreme Court only arises after the judgment has been given.

The case is, therefore, not within the rule laid down in *Parkin* v. *James* (1), that, where the jurisdiction of the Supreme Court of a State may be, and is, exercised by a single Judge, an appeal lies direct to this Court. Whether an appeal would lie by special leave is a question we left open in the case of *Kamarooka Gold Mining Co., No Liability* v. *Kerr* (2). Whether it would or not, this is not a case for giving such leave. In my opinion, therefore, the appeal is incompetent, but, as the case was fully argued on the merits, it may be desirable, and it is not inconsistent with the practice of the Judicial Committee, to express briefly an opinion upon them.

The appellants claim that compensation for the land taken should be assessed on the basis that Macdonald, from whom they bought their business as a going concern, had contemplated, or intended, using the land as a site for a slaughter house in con-

(1) 2 C.L.R., 315. (2) 6 C.L.R., 255.

nection with his freezing works at Light Square. It appeared that he had at one time entertained such an intention, but the land taken was vacant land and had never been actually used in connection with those works. Assuming the appellants to be in this respect in the same position as MacDonald was, the real question to be determined in this view is, not whether he intended, or hoped to be able, to use this land as a site for a slaughter house, but whether the land had a special value by reason of its special adaptability for such use. MacDonald's intention, if relevant at all, was only an element to be taken into consideration in determining that question, which is one of fact.

Under the law of South Australia, the land could not be used as a site for a slaughter house without a licence from the Local Board of Health. *Gordon* J. was of opinion that, by reason of the situation of the land and its proximity to the City of Adelaide, the probability of such a licence being granted was so remote as to be negligible, or, as he put it, the granting of a licence was practically impossible. This was a pure question of fact depending largely upon local conditions upon which the learned Judge is more competent to form an opinion than we are. If there was any evidence upon which he might come to that conclusion, a Court of Appeal cannot say that he was wrong. In my opinion there was ample evidence to justify his conclusion.

The cases relied upon by Mr. *Murray* were cases of compensation in respect of land injuriously affected by taking other land, the land injuriously affected being either a part of the same block or having been actually dealt with for use with the land taken, and do not govern such a case as the present, in which the claim is for the value of the land taken, and in which the suggested *nexus* between the two pieces of land was in contemplation only. In my judgment the learned Judge was justified on the evidence in coming to the conclusion that a purchaser of the land would not have given a greater price by reason of any special adaptability of the land for the purpose of a slaughter house: see *Spencer* v. *Commonwealth* (1). The doctrine that the compensation to be paid is the value to the owner has no application to a case where the alleged enhanced value merely depends upon dis-

(1) 5 C.L.R., 418.

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appointed hope. I am of opinion, therefore, that the appeal must be dismissed.

BARTON J. I am of the same opinion. The appellants rely upon the provisions of secs. 5 to 9 of the *Lands Clauses Consolidation Amendment Act* 1881 and their effect upon the relevant sections of the *Lands Clauses Consolidation Act* 1847. The respondent, besides contending that those sections have not the effect ascribed to them by the appellants, objects that, even if they *primâ facie* have that effect, nevertheless sec. 10 of the Amending Act of 1881, which must be read with them, shows that they must be read in the limited sense for which he contends. If the appellants' view is right this appeal is competent, the judgment sought to be appealed from being a judgment of the Supreme Court. If the respondent's view is right, the appeal fails, because the verdict and judgment, as was admittedly the case before the amendment, are merely an ascertainment of the value to which the appellants are entitled as compensation for the taking, which, indeed, is a matter of record, but which, as a matter of record, cannot have the force of a judgment of the Supreme Court until a successful action is brought upon it and the sum so assessed is recovered, as the Act does not provide any specific means for its recovery.

The effect of the provisions of the Act of 1847 which are not repealed being admitted, it is only necessary to inquire what is the effect upon them of the Amending Act of 1881. By sec. 5 a Judge of the Supreme Court, if applied to before the issue by the promoters of a warrant to the sheriff for an assessment, may order the trial of the question of compensation "in the Supreme Court," in one of the "modes of trial" prescribed by the *Supreme Court Act* 1878, such mode of trial to be in lieu of, and in substitution for, any other mode of settling that question. It may be noted that in the absence of such an application the warrant to the sheriff is to issue, and the whole of the proceedings, including verdict and judgment, must be taken under the Act of 1847, and that the claimant, in order to be entitled to payment, must sue for the sum assessed. The expressions most relied upon in the address of counsel for the appellants—and Mr. *Murray* urged

with much force the considerations which support his view—are the expressions "in the Supreme Court," referring to the trial, in sec. 5, "before the said Court," referring also to the trial, in sec. 6, and "at the Supreme Court," referring to the issues when made up, in sec. 7, and the provision in sec. 8 that the judgment as well as the proceedings are to be "under and subject to the control and jurisdiction of the Supreme Court as in ordinary actions therein." There is no doubt that those expressions, if not separately, at least taken altogether, would cause difficulty but for the provisions of sec. 10. I agree that the provision, that the verdict and judgment are to be under and subject to the control and jurisdiction of the Supreme Court as in ordinary actions therein, does not necessarily go further than to prescribe that proceedings in relation to the verdict and judgment—as, for instance, proceedings by way of appeal or new trial—may be dealt with by the Supreme Court as they would be in ordinary actions. But that, speaking for myself, is not sufficient, if the remaining provisions are not sufficient, to convert what at the time of the passing of these amendments was a proceeding not resulting in a judgment of the Supreme Court, into one which had that result. It seems to me that Mr. *Cleland's* argument is correct, namely, that the whole of these provisions, especially taken in conjunction with sec. 10, are provisions for machinery to be substituted, upon application to the Supreme Court provided for in sec. 5, for the other mode of proceeding which in the absence of such an application must still be resorted to, and that the substitution is not intended to have the effect upon the judgment of converting it into anything of different force from a finding by assessors, in which state it is left by the earlier Act.

Now, sec. 10 provides that the verdict and judgment, as regards costs and every other matter incidental to and consequent thereon, shall "have the same operation and be entitled to the same effect as if that verdict and judgment had been the verdict of a jury and the judgment of a Judge, commissioner, or sheriff upon an inquiry conducted upon a warrant to the sheriff issued by the promoters of the undertaking under the *Lands Clauses Consolidation Act.*" I do not think there is enough upon the face of these sections to show that the intention was that, where

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a Supreme Court Judge was applied to for the order referred to in sec. 5, the judgment was to have the effect of a judgment of the Supreme Court instead of being left as it would be in the case of the alternative proceedings being taken. In the latter case, an action would have to be brought in a Court of competent jurisdiction as upon a matter of record. In fact the provisions of sec. 10 seem to me to go far to put the matter beyond doubt, because the Act of 1847 provides sufficiently clearly what would be the effect of a verdict and judgment upon an inquiry conducted upon a warrant to the sheriff. We know that there is no judgment of the Supreme Court consequent thereupon, and, when sec. 10 provides that the effect of its operation is to be the same, it seems to me that it must have the result of preventing any implication inconsistent with that section which might possibly have been drawn from the previous sections. Without sec. 10 secs. 5 to 9 would probably have raised an ambiguity. But sec. 10 seems to me to prevent the ambiguity and to bring the several sections into harmony. I am therefore of opinion that the appeal is not competent.

With regard to the other question which is raised in the case, it is not absolutely necessary, in view of this opinion, to express one's view of the correctness or otherwise of the judgment of the Judge who tried the case. But I think that it is only fair to the parties that one should express an opinion upon the merits. I am clearly of opinion that this matter was one so entirely for the determination of the learned Judge as a Judge and jury that, in the absence of anything in the nature of a misdirection, it would be extremely difficult for this Court, acting upon the principles which guide a Court of Appeal in dealing with the findings of fact of a Court below, to say that this finding of *Gordon* J. should be interfered with. So far as one who did not hear the evidence given can pronounce an opinion, I add that in my view that finding was clearly right. The matters which have been referred to as amounting to misdirection, or as showing that the learned Judge as a Judge and jury has not properly applied the law to the facts, seem to me to be in effect trivial. His Honor has found upon the broad issue before him, and has found, in

my opinion, in consonance with reason and consistently with authority.

I agree that the appeal should be dismissed.

O'CONNOR J. read the following judgment:—The respondent has raised a preliminary objection of some importance which in my opinion is fatal. Mr. *Cleland* put his point in two ways, first, that though the judgment might be attacked by way of *certiorari* issued out of the Supreme Court, there was not in the Supreme Court jurisdiction to hear an appeal from the judgment or grant a new trial. On that part of the case he relied upon *Birmingham and District Land Co.* v. *London and North Western Railway Co.* (1), in which the Court held that, under the *Regulation of Railways Act* 1868, it had no power to grant a new trial of an issue to determine the right of compensation for lands taken for the purposes of a railway. The section there under consideration no doubt is substantially to the same effect as secs. 5 to 8 of the South Australian *Lands Clauses Consolidation Amendment Act* 1881. But there is one essential difference namely, that sec. 8 of the South Australian Act places "the verdict and judgment thereon . . . under and subject to the control and jurisdiction of the Supreme Court as in ordinary actions therein." The English *Regulation of Railways Act* 1868 has no such provision. If any meaning is to be given to these words, it appears to me we must hold that the Supreme Court has jurisdiction to entertain an application for a new trial in which may be discussed and settled the principles upon which compensation is to be allowed. That is a very substantial difference, and one which makes the case to which I have referred inapplicable in the construction of the South Australian Act. I am therefore of opinion that the Supreme Court was competent to entertain the motion now before this Court. That does not, of course, settle the question of the competency of the Court to hear this appeal. If the appellants had taken the preliminary step of moving the Supreme Court in the first instance, then, whether that Court had jurisdiction or not, and whatever order it had made, there would have been an appeal to this Court.

(1) 22 Q.B.D., 435.

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But the appellants have not done that. They have brought an appeal direct from the judgment of the learned Judge of the Supreme Court to this Court, and the question is whether that judgment is a judgment of the Supreme Court within the meaning of sec. 73 of the Constitution, as expounded by this Court in *Parkin* v. *James* (1).

There is no doubt that the judgment of a single Judge may be, under certain circumstances, a judgment of the Supreme Court. The question in this case is whether, in giving judgment, the Judge exercised the jurisdiction of the Supreme Court or acted simply as a *persona designata* in a matter outside the general jurisdiction of the Supreme Court.

In each case it is necessary to look at the Statute conferring the jurisdiction. Mr. *Murray* very properly admitted that, apart from the provisions of the *Lands Clauses Consolidation Amendment Act* 1881, it would be impossible to contend that the finding by the Judge of the amount of compensation payable under the circumstances of this case could be brought on appeal before the Supreme Court, or before this Court, but he contends that that Act has entirely altered the nature and effect of a judgment assessing compensation, and that now, by virtue of the provisions of that Act, it has become a judgment of the Supreme Court, with all the incidents of such a judgment. The argument is founded entirely upon the construction of a number of sections of the Act which have been already referred to by my learned brothers, and which I do not wish to mention in detail. The contention is that the operation of those sections, taken together, is to vest the jurisdiction of assessing the compensation in the Supreme Court, and not in a Judge of the Supreme Court as a *persona designata*. There is no part of the sections to which we have been referred which, to my mind, is capable of having that effect, unless it is the words of sec. 6, which provide that "whenever a Judge of the Supreme Court shall, under the preceding section, order any question of compensation to be tried before the said Court, the question between the party claiming compensation and the promoters of the undertaking shall be stated in an issue to be settled, in case of difference, by the Judge."

(1) 2 C.L.R., 315.

No doubt the words "before the said Court" are capable of the meaning that the legislature contemplated that the proceedings would be heard by the Supreme Court. But the section must be read in conjunction with other material sections. The most important of those is sec. 10, which provides that "the verdict and judgment upon any issue tried under the provisions of this Act shall, as regards costs and every other matter incident to or consequent thereon, have the same operation and be entitled to the same effect as if that verdict and judgment had been the verdict of a jury and the judgment of a Judge, commissioner, or sheriff upon an inquiry conducted upon a warrant to the sheriff issued by the promoters of the undertaking under the *Lands Clauses Consolidation Act*."

The effect of that section is broadly this. The judgment is not capable of enforcement in the ordinary way in which a judgment of the Supreme Court may be enforced. The fruits of it can be obtained only by bringing an action upon it. Again, the costs of the judgment can be enforced only by a special proceeding before a magistrate. It does, indeed, seem a contradiction in terms to say that a completed judgment is a judgment of the Supreme Court, but yet is not to be enforced by the processes of that Court. That being the case, sec. 10 indicates quite clearly to my mind that it was the intention of the legislature, by the Act of 1881, to afford to litigants, in cases of compensation coming within the meaning of that Act, all the benefit of proceedings in the Supreme Court—the benefit of the guidance of the Supreme Court in settling the issues, and in laying down the principles on which compensation should be assessed. Those are substantial benefits, and it seems to me that the legislature has expressed no intention to take the further step of altering the whole nature and effect of the judgment from being a determination of a special tribunal to becoming a judgment of the Supreme Court. Under these circumstances it appears to me that the words to which I have referred in sec. 6 cannot be interpreted in the way in which Mr. *Murray* contends, but must be given another meaning more in consonance with the other provisions of the Act. The words "before the Supreme Court" are capable of being interpreted as meaning "in the Supreme Court." That is the only meaning

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which is consistent with the Act as a whole and with the nature and purpose of the alterations in the procedure which the legislature intended to effect by the Act of 1881.

For these reasons I am of opinion that the judgment now appealed from was a judgment of a Judge of the Supreme Court, sitting as a *persona designata* appointed by the *Lands Consolidation Amendment Act* 1881 for the purpose of assessing compensation, and that, although he determined the amount of compensation under and in accordance with the procedure of the Supreme Court, his judgment was not a judgment of the Supreme Court, and therefore not within the category of judgments from which an appeal will lie to this Court.

As to the merits, they were very fully and clearly put before the Court in the arguments of Mr. *Murray* and Mr. *McLachlan*. All I think it necessary to say on that part of the case is that, having listened to everything which was put forward on behalf of the appellants, I found at the end of the argument that I had come to the opinion that the learned Judge in the Court below had arrived at a right conclusion. For these reasons I agree that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitor, for the appellants, *J. M. Napier*.

Solicitor, for the respondent, *C. T. Dashwood*, Crown Solicitor for South Australia.

B. L.