[HIGH COURT OF AUSTRALIA.]

EDIE CREEK PROPRIETARY LIMITED . APPELLANT;
PLAINTIFF,

AND

SYMES . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE CENTRAL COURT OF THE TERRITORY OF NEW GUINEA.

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SYDNEY, *Nov.* 11.

Knox C.J., Isaacs, Gavan Duffy, Starke and Dixon JJ.

Appeal—Territory of New Guinea—Mining claim—Appeal from Warden's Court to Central Court of Territory—Order of Central Court "final and conclusive"—No appeal therefrom to High Court—New Guinea Act 1920-1926 (*No.* 25 *of* 1920—*No.* 15 *of* 1926)—*Judiciary Ordinance* 1921-1927 (*N.G.*) (*No.* 3 *of* 1921—*No.* 8 *of* 1927), *sec.* 24*—*Mining Ordinance* (*No.* 2) 1926 (*N.G.*) (*No.* 25 *of* 1926), *sec.* 18*—*Mining Ordinance* 1922-1926 (*N.G.*) (*No.* 19 *of* 1922—*No.* 25 *of* 1926), *sec.* 103B—*The Constitution* (63 & 64 *Vict. c.* 12), *sec.* 73.

Sec. 103B of the *Mining Ordinance* 1922-1926 (N.G.), as inserted by sec. 18 of the *Mining Ordinance* (*No.* 2) 1926, provides that on the hearing of an appeal from the Warden's Court to the Central Court "the Central Court may make an order reversing or varying the decision of the Warden's Court, or dismissing the appeal, and all such orders shall be final and conclusive on the parties."

Held, by the whole Court, that as such orders are "final and conclusive" leave to appeal therefrom to the High Court cannot be granted under sec. 24 of the *Judiciary Ordinance* 1921-1927 (N.G.).

* The *Judiciary Ordinance* 1921-1927 (Territory of New Guinea) by sec. 24 provides:—"(1) The Full Court of the High Court of Australia, consisting of at least two Judges, may grant leave to appeal to the High Court of Australia from any conviction, sentence, judgment, decree or order of the Central Court. . . . (3) The High Court sitting as a Full Court (constituted by at least two Judges) may hear the appeal, and may make such order therein as it thinks just. (4) If the High Court sees fit to permit it, an appeal under this section may be by case stated, with the legal argument (if any) attached thereto in writing, and in that case it shall not be necessary for the parties to appear on the hearing of the appeal either personally or by counsel. (5) The order of the Court on appeal shall have effect in the Territory as if it were a judgment of the Central Court of the Territory, and may be enforced by the Central Court accordingly."

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APPEAL from the Central Court of New Guinea.

In October 1927 one W. D. Morris was the owner of a certain gold-mining claim situate at Edie Creek in the Territory of New Guinea. It was agreed between Morris and John Pearson Livingstone, manager for the Edie Creek Pty. Ltd., that the Company should purchase the claim from Morris for the sum of £200, which was duly paid. The arrangement was a verbal one between the parties, and no particulars of the sale nor a transfer were registered. At that time the respondent, Matthew Symes, was a foreman in the employ of the Company, and Livingstone asked him to peg the claim out under his (Symes's) miner's right until, to use Livingstone's own words as given in evidence, " such time as I could get it safeguarded otherwise," and agreed to give him £10 for doing so. Symes pegged out the claim and it was registered in his name. It was thereafter worked for the benefit of the Company until 10th October 1928, when Symes was discharged from the Company's service. The Company then claimed possession of the claim, which Symes refused to give. A complaint was then made to the Warden's Court at Edie Creek that Symes was trespassing on the claim, and an application was also made to that Court for an injunction to restrain Symes from selling or working the claim. The Warden dismissed both the complaint and the application, giving no reasons for his decision as to the injunction, but holding, in respect to the trespass, that the agreement between Symes and Livingstone was illegal as being contrary to reg. 9 of the *Mining Regulations*, which provides that " no person shall be entitled by virtue of a miner's right to hold at the same time more than one claim." An appeal to the Central Court of the Territory of New Guinea as to whether Symes held the claim merely as trustee for the Company or whether he was entitled to it as absolute beneficial owner was dismissed in favour of Symes. When announcing his decision the Chief Judge said that " the fact that Symes effected the registration of the claim in his own name and for an undisclosed principal made him none the less the agent and servant of the Company. By the regulations such a transaction was forbidden and therefore the Company could not succeed. . . . In dismissing the appeal I do so on my own view of the Ordinance and Regulations. . . . In the Australian

States there are decisions to the effect that claims may be held in trust. In the absence of the legislation dealing with the cases and the authorities themselves I cannot say whether they may not possibly apply here. It is a matter of importance to the mining community of the Territory to have the question definitely settled, and an appeal to the High Court is the obvious method of arriving at that settlement."

From that decision the Edie Creek Pty. Ltd. now, by special leave, appealed to the High Court.

E. M. Mitchell K.C. (with him *Badham*), for the appellant. Since the granting of the special leave to appeal it has been found that by sec. 18 of the *Mining Ordinance* (*No.* 2) 1926 (*N.G.*) a new section, 103B, has been introduced into the principal Mining Ordinance of the Territory of New Guinea, which provides that decisions of the Central Court in respect of appeals from the Warden's Court shall be " final and conclusive."

H. V. Evatt K.C. (with him *C. Evatt*), for the respondent. The *Mining Ordinance* does not give any right of appeal other than from the Warden's Court to the Central Court; it does not confer a right of appeal to the High Court. The appeal in this matter was granted under sec. 24 of the *Judiciary Ordinance* 1921-1927 of the Territory of New Guinea, but a fair construction of that section is that the power to grant leave to appeal applies to decisions of the Central Court on matters of original jurisdiction and appellate matters from the District Courts, but not in respect of appeals from the Warden's Court. The use of the words " final and conclusive" in sec. 103B as inserted in the principal Mining Ordinance by *Mining Ordinance* (*No.* 2) 1926, sec. 18, precludes any appeal from the decision of the Central Court in this matter except an appeal to the Judicial Committee as of grace.

E. M. Mitchell K.C., in reply. It is entirely a matter of construction as to whether the words " final and conclusive " in sec. 103B of the *Mining Ordinance* are sufficiently clear to constitute an

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exception to sec. 24 of the *Judiciary Ordinance* 1921-1927 (*Commonwealth* v. *Limerick Steamship Co. and Kidman* (1)). The words "final and conclusive" as appearing in sec. 103B, in their context mean no more than "conclusive." In the circumstances the meaning of the words used must be clear, distinct and unmistakable.

KNOX C.J. In this case leave to appeal was granted in Brisbane relying on the provisions of sec. 24 of the *Judiciary Ordinance* 1921-1927 of the Territory of New Guinea, and the appeal is now before us in pursuance of the leave so granted. It now appears that since the making of that Ordinance, *Mining Ordinance* (*No.* 2) 1926 for the same Territory has been made, by sec. 18 of which sec. 103B is introduced into the principal *Mining Ordinance*. Sec. 103B provides that "Upon the hearing of the appeal" (i.e., from the Warden) "the Central Court may make an order reversing or varying the decision of the Warden's Court, or dismissing the appeal, and all such orders shall be final and conclusive on the parties and the Judge shall (if necessary) order payment of money or the delivery of the possession of any land, mining tenement, water, gold, mineral, or other property to the person who was the complainant before the Warden's Court, or restitution of any land, mining tenement, water, gold, mineral, or other property, as the case may require, and may make such order with respect to the costs of the appeal, and of the proceeding appealed from, as the Court thinks fit." This alteration of the law was not brought under the notice of this Court when leave to appeal was granted. The present appeal is from an order of the Central Court of New Guinea dismissing an appeal from the decision of the Warden's Court, and it now appears that, whatever was the position before the passing of sec. 103B, the right of appeal in such a case from the Central Court to this Court has been taken away by that section. It follows that the leave purported to have been granted under sec. 24 of the *Judiciary Ordinance* 1921-1927 in this case is ineffective. It may be urged that power to grant leave to appeal from a decision of the Central Court is contained in the general provisions of sec. 73 of the Constitution, but that contention fails because the Central

(1) (1924) 35 C.L.R. 69, at p. 88.

Court is not a Federal Court within the meaning of that section, and, if it were, it is not properly constituted, the Judge not having the necessary tenure of office. For these reasons the appeal is incompetent and the leave to appeal ought to be rescinded.

ISAACS J. I agree. I base my decision on the words " final and conclusive " as appearing in sec. 103B of the *Mining Ordinance (No. 2)* 1926.

GAVAN DUFFY J. I agree.

STARKE J. I agree that the leave to appeal should be rescinded because, by the *Mining Ordinance* which is in force in the Territory of New Guinea, the order of the Central Court in this matter is " final and conclusive."

DIXON J. I agree.

Leave to appeal rescinded. No order as to costs.

Solicitors for the appellant, *Fred. C. Emanuel & Pearce.*
Solicitors for the respondent, *John Williamson & Son.*

J. B.