[HIGH COURT OF AUSTRALIA.]

THE MEDICAL BOARD OF VICTORIA . . APPELLANT; RESPONDENT,

AND

MEYER . . . . . RESPONDENT. APPELLANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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SYDNEY, *Aug.* 11, 12, 27.

Latham C.J., Rich, Starke, Dixon, Evatt and McTiernan JJ.

Medicine—Medical practitioner—Registration—Qualifications—"Course of medical and surgical study of five or more years' duration"—Universities, colleges and schools of medicine in foreign countries wherein Victorian practitioners are not entitled to practise without further examination—Recognition by Medical Board of Victoria—Course of study pursued in German university—British qualifications—Board's rejection of application—Appeal "to a judge of the Supreme Court in chambers"—Persona designata—Decision "final and without appeal"—Appeal to High Court—Competency—Special leave—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 73—*Judiciary Act* 1903-1934 (*No.* 6 *of* 1903—*No.* 45 *of* 1934), sec. 35—*Medical Act* 1928 (*Vict.*) (*No.* 3730), *secs.* 13, 14, *Fourth Schedule**—*Medical Act* 1933 (*Vict.*) (*No.* 4131), *sec.* 9*.

Under sec. 9 of the *Medical Act* 1933 (Vict.) an appeal to a judge of the Supreme Court of Victoria in chambers is given from a decision of the Medical Board of Victoria refusing an applicant registration as a legally qualified medical practitioner or erasing or removing the name of a person already registered or refusing to restore a name so erased or removed.

The *Medical Act* 1928 (Vict.) provides, in Part I. :—Sec. 13 : "Subject to the provisions of this Part every person possessed or hereafter becoming possessed of any one or more of the qualifications described in the Fourth Schedule to this Act, who proves on personal attendance to the satisfaction of the board that the testimonium diploma licence or certificate testifying to such qualification was duly obtained by him after due examination from some university college or other body duly recognised for such purpose in the country to which such university college or other body belongs shall subject to the provisions of this and the next succeeding section and of the said schedule be and be deemed to be entitled to registration as a legally qualified medical practitioner

Held, by *Latham* C.J., *Rich*, *Starke*, *Dixon* and *McTiernan* JJ. (*Evatt* J. doubting), that under the Constitution the High Court of Australia has jurisdiction to entertain an appeal from an order of a judge of the Supreme Court, made on an appeal from the Medical Board, declaring an applicant entitled to registration, and that the Medical Board may by special leave appeal from such an order.

Held, by *Latham* C.J., *Starke* and *Evatt* JJ. (*Rich*, *Dixon* and *McTiernan* JJ. *contra*), that an applicant under Part I. of the *Medical Act* 1928 (Vict.) who relies upon a British degree or diploma may satisfy the requirement of sec. 14 (1) that he must have passed through a regular course of medical or surgical study of five or more years' duration by showing that he has passed through such a course at a school of medicine, university or college in a foreign country in which legally qualified medical practitioners of Victoria are not by virtue of being so registered and without further examination entitled to practise their profession, notwithstanding the provisions of sec. 14 (2).

The court being equally divided, the decision of *Lowe* J. : *Meyer* v. *Medical Board of Victoria*, (1937) V.L.R. 237, was affirmed.

MOTION to rescind special leave to appeal, and APPEAL, from the Supreme Court of Victoria.

The respondent, Moritz Meyer, was a Doctor of Medicine of the University of Leipzig, Germany, where he obtained his degree in 1920 after passing through the regular university course of medical and surgical study of more than five years' duration. He practised in Germany for fifteen years, and in October 1935 he left Germany and went to Great Britain. From January 1936 to January 1937 he attended a post-graduate course of lectures in Scotland, and after due examination obtained the following qualifications : (*a*) Licentiate of the Royal College of Surgeons, Edinburgh ; (*b*) Licentiate of the Royal

and shall receive from the board a certificate of qualification." Sec. 14 :—"(1) No person whosoever shall be entitled to be registered as a legally qualified medical practitioner or to receive a certificate of qualification unless he has passed through a regular course of medical and surgical study of five or more years' duration. (2) No school of medicine or university or college or other body in any country other than Great Britain Ireland or any British possession shall be recognised by the Board for the purposes of this Act unless it appears to the board that registered legally qualified medical practitioners of Victoria are by virtue of being so registered and without further examination entitled to practise their profession in such country either on registration or otherwise. (3) Where any question arises as to whether any person applying for registration has complied with the requirements of this section such question shall be determined by the board."

In the Fourth Schedule mentioned in sec. 13, pars. 1 to 9 inclusive refer to the holders of various diplomas, degrees, &c., issued by well-known colleges and societies of Great Britain and Ireland ; par. 10 refers to holders of degrees in medicine or surgery of some British or colonial university ; par. 11 refers to any legally qualified medical practitioner registered in Great Britain or

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College of Physicians, Edinburgh; (*c*) Licentiate of the Royal Faculty of Physicians and Surgeons, Glasgow. He was also registered with the General Medical Council, London, as a legally qualified medical practitioner under the Medical Acts. Before he obtained these qualifications, he wrote to the Medical Board of Victoria asking whether he would be entitled to practise in Victoria, and received a reply from the secretary to the board that "provided that he is of good character and satisfies the Medical Board that he has passed through a regular course of medical and surgical study of five or more years' duration, a person who has qualified as" a licentiate of one or more of the colleges and faculty referred to in *a*, *b* and *c* above "is entitled to be registered as a medical practitioner" in Victoria. The letter concluded: "Under the 'reciprocal provisions' of the *Medical Act* a German qualification cannot be recognized by the Medical Board for the purposes of registration." (Germany is not a country in which registered legally qualified medical practitioners of Victoria are by virtue of being so registered and without further examination entitled to practise their profession.) Upon the faith of that letter, which was written by the secretary without consulting the board, the respondent came to Victoria and applied for registration, but his application was rejected by the

Ireland under the Medical Acts; par. 12 refers to medical officers duly appointed and confirmed of His Majesty's Sea or Land Service; par. 13 refers to: "Any person who proves to the satisfaction of the board that he has passed through a regular course of medical study of not less than five years' duration in a British or foreign school of medicine, and has received after due examination from some British or foreign university, college or body, duly recognised for that purpose in the country to which such university college or other body may belong, and also recognised by the Medical Board of Victoria, a medical diploma or degree certifying to his ability to practise medicine or surgery as the case may be," and then contains a special provision in favour of certain homœopathists.

The *Medical Act* 1933 (Vict.) provides:—Sec. 1; "This Act may be cited as the *Medical Act* 1933 and shall be read and construed as one with Part I. of the *Medical Act* 1928 (hereinafter called the principal Act) which Act and this Act may be cited together as the Medical Acts." Sec. 9:—"(1) If under Part I. of the Principal Act or under this Act—(*a*) any person who is or has been refused registration . . . the board shall if required by him state in writing the reason for such refusal. (2) Any person who feels aggrieved by any decision of the board under Part I. of the principal Act or under this Act in refusing to register him as a legally qualified medical practitioner . . . may appeal from the decision to a judge of the Supreme Court in chambers . . . (3) Every such appeal shall be in the nature of a rehearing; and such judge shall entertain inquire into and decide upon the appeal and for that purpose may do all such matters and things relating thereto and in the same manner and to the same extent as he is empowered to do in the exercise of his ordinary jurisdiction; and his decision shall be final and without appeal."

board on the ground that there was no evidence that he had passed through a regular course of medical and surgical study of five or more years' duration within the meaning of sec. 14 (1) of the *Medical Act* 1928 (Vict.).

Under sec. 9 (2) of the *Medical Act* 1933 the respondent appealed to a judge of the Supreme Court of Victoria in chambers. *Lowe* J. declared that he was entitled to be registered under the *Medical Act* 1928 and to receive from the board a certificate of qualification: *Meyer* v. *Medical Board of Victoria* (1).

The board was granted special leave to appeal to the High Court from the order of *Lowe* J. The respondent was not heard on the application for special leave, which was made *ex parte*, though there was evidence that he had intimated his intention of opposing the application and had asked for notice of it.

When the appeal came on for hearing the respondent moved to rescind the order granting special leave.

Herring K.C. (with him *Bavin*), for the respondent to the appeal. The order granting special leave to appeal should be rescinded. The order of *Lowe* J. is not a judgment, decree, order or sentence of the Supreme Court within the meaning of sec. 73 of the Constitution, or a judgment of the Supreme Court within the meaning of sec. 35 of the *Judiciary Act* 1903-1934 (*Holmes* v. *Angwin* (2)). The question is whether the power exercised by the judge, if it was judicial power, was the judicial power of the Supreme Court.

[DIXON J. referred to *Stewart* v. *The King* (3).]

In *C. A. MacDonald Ltd.* v. *South Australian Railways Commissioner* (4) it was held that jurisdiction was conferred, not upon the Supreme Court, but upon a judge of the Supreme Court, with a right of appeal to the Full Court of the Supreme Court, and that therefore a decision of a judge exercising that jurisdiction was not a judgment of the Supreme Court within the meaning of sec. 73 of the Constitution from which an appeal would lie as of right to the High Court (Cf. *Mutual Life and Citizens' Assurance Co. Ltd.* v. *Thiel* (5)).

(1) (1937) V.L.R. 237.
(2) (1906) 4 C.L.R. 297, at pp. 303 et seq.
(3) (1921) 29 C.L.R. 234.
(4) (1911) 12 C.L.R. 221.
(5) (1919) 27 C.L.R. 187.

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There was more in *MacDonald's Case* (1) than there is here to indicate that jurisdiction was conferred upon the Supreme Court. Under the *Medical Act* a judge of the Supreme Court is merely *persona designata* for the purpose of determining a special state of facts, and therefore no appeal lies to this court from his decision. The legislature did not intend to confer a new jurisdiction upon the Supreme Court; if it had so intended there would have been no need for sec. 9 of the *Medical Act* 1933 to confer any jurisdiction on the judge, because he already exercises that of the Supreme Court. There is an express distinction here between the ordinary jurisdiction and that exercised under sec. 9. The effort to assimilate the ordinary procedure shows that the legislature is arming the judge with powers which he would not otherwise possess. The fact that his decision is to be final indicates that the exercise of the jurisdiction is not meant to be subject to the ordinary incidents of litigation. The right to registration depends not upon the existence of certain facts but upon the board (or the judge on the appeal, which is to be by way of rehearing) being satisfied that they exist, and there can be no appeal as to that (*Architects Registration Board of Victoria* v. *Hutchison* (2)).

[DIXON J. referred to *Ex parte Mullen*; *Re Hood* (3).

[EVATT J. Suppose that a decision is made by the board and the appeal tribunal and matters of personal character come in, is the power judicial or purely administrative?]

Administrative, so that no appeal lies to this or any other court of appeal. In this case the judge is not exercising ordinary judicial functions, but has to determine special facts. All that he can do is to decide the appeal. He cannot direct a registration, but can only say that an applicant is entitled to be registered. His decision can be enforced only by applying for a writ of mandamus against the board. A judgment must be *inter partes* (*In re McCawley* (4)). Here there were no parties; the board is not a party, but was performing quasi-judicial functions. The court should not exercise its discretion in favour of the board, as there are special circumstances relating to

(1) (1911) 12 C.L.R. 221.
(2) (1925) 35 C.L.R. 404, at p. 412.
(3) (1935) 35 S.R. (N.S.W.) 289, at p. 300; 52 W.N. (N.S.W.) 84, at p. 86.
(4) (1918) 24 C.L.R. 345.

the applicant and to the conduct of the board. The matter is not one of public importance, but one only of private importance to the medical profession. The board is not a competent appellant; firstly, it is not an incorporated body, and secondly, it cannot be aggrieved in property by any decision, and is not concerned in any way with the matter.

Ham K.C. (with him *Joske*), for the appellant. This court has jurisdiction to grant special leave to appeal from the decision of a single judge in chambers, provided that he is acting as a judge of the Supreme Court and not merely as *persona designata* (*Parkin* v. *James* (1); *Saunders* v. *Borthistle* (2); *O'Connor* v. *Quinn* (3)). Sec. 9 of the *Medical Act* 1933 gives an additional jurisdiction to a judge of the Supreme Court, in exercising which he is to exercise his ordinary jurisdiction, that is, his jurisdiction as a judge of the Supreme Court, and not some special jurisdiction conferred on him for a special and limited purpose. That is clearly indicated by the provisions that there shall be an appeal to a Supreme Court judge, that such appeal shall be in the nature of a rehearing, and that such judge may do all such things relating to the appeal in the same manner and to the same extent as he is empowered to do in the exercise of his ordinary jurisdiction, which in substance amounts to a provision that he shall exercise his ordinary jurisdiction. The appeal under sec. 9 is to a Supreme Court judge in chambers, and therefore, there being nothing more, it imports that a right of appeal to this court attaches (*Sweeney* v. *Fitzhardinge* (4); *National Telephone Co. Ltd.* v. *His Majesty's Postmaster-General* (5)). The principle followed by the court is that questions of administration, such as whether an applicant should be admitted, should be determined by the administrative board (*Victorian Railways Commissioners* v. *McCartney and Nicholson* (6); *Dental Board of Victoria* v. *Denison* (7)). Here, an appeal is being sought on a matter of law—the proper interpretation of the Act. In sec. 14 (1) and (2), to which sec. 13 is expressed to be subject, there is

(1) (1905) 2 C.L.R. 315.
(2) (1904) 1 C.L.R. 379.
(3) (1911) 12 C.L.R. 239.
(4) (1906) 4 C.L.R. 716.
(5) (1913) 2 K.B. 614; (1913) A.C. 546, at pp. 552, 561.
(6) (1935) 52 C.L.R. 383, at pp. 388, 395.
(7) (1928) 41 C.L.R. 102.

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no suggestion that the board must be satisfied, but there are direct legislative prohibitions against admitting an applicant who has not passed through the prescribed course of study and against recognizing certain bodies. Sec. 9 gives full jurisdiction to a Supreme Court judge; sec. 9 (3) is really unnecessary, and cannot be said to have been inserted for the purpose of cutting down that jurisdiction and making the judge merely *persona designata*. In *Holmes* v. *Angwin* (1) the decision was based on the view that the judgment of the judge was merely a report on which Parliament might or might not act, and did not affect persons or property. That is not the case here. *MacDonald's Case* (2) does not assist the court. There the whole point was whether the South Australian Act, having departed to some extent from the precedent of the English Act, had in effect transformed what had always been an arbitration as to value into a proceeding in the court. The board is a competent party. The Act provides for an appeal from the decision of the board. It is not conceivable that such appeal should be *ex parte*; the board must, for want of others, be respondent. It is immaterial that it is not incorporated (*Taff Vale Railway Co.* v. *Amalgamated Society of Railway Servants* (3)). The Act has impliedly authorized the board to be a litigant. The special circumstances suggested on behalf of the applicant may be unfortunate, but they are not a sufficient reason for the general application of the law being placed on a wrong basis. This is a matter of great public importance.

Herring K.C., in reply. It is suggested that the prohibition contained in sec. 14 (1) does not concern the board and that the question is not whether the board is satisfied but whether the existence of a fact is established. Sec. 14 (3) provides that a question arising as to compliance with sec. 14 shall be determined by the board, which indicates that the right to registration arises on the board being satisfied. The remarks of Lord *Moulton* in the *National Telephone Case* (4), which were cited, are in the applicant's favour. The expression "a judge . . . in chambers" in sec. 9 (2)

(1) (1906) 4 C.L.R. 297.
(2) (1911) 12 C.L.R. 221.
(3) (1901) A.C. 426, at pp. 427, 429, 436, 440.
(4) (1913) A.C., at p. 561.

means a judge sitting in the Practice Court, who is chosen as *persona designata*.

LATHAM C.J. The court will reserve its decision upon the application to rescind the special leave to appeal, and, subject to that reservation, will hear the appeal.

Ham K.C. The right of registration under sec. 13 of the *Medical Act* 1928 is expressed to be subject to sec. 14. Sec. 14 (1) provides that the applicant cannot be registered unless he has passed through a regular course of medical and surgical study of five or more years' duration. The applicant cannot show that he has done so without bringing in aid the course through which he passed in Germany, a non-reciprocating country. Sec. 14 (2) prohibits the board from recognizing for the purposes of the Act any school of medicine &c. in any such country. "For the purposes" means "for any of the purposes," one of which is the computation of the period of study required by sec. 14 (1). To accept a German course of study as a compliance with sec. 14 (1) involves a recognition by the board of the German school of medicine &c. in which that course was passed through. Such recognition is prohibited by sec. 14 (2). Therefore the board cannot accept such a course of study, and the applicant is not entitled to registration. A person cannot pass through a regular course of medical and surgical study as required by sec. 14 (1) in a university or other body unless it is a body which is recognized. Sec. 14 (2) was inserted to protect the public by excluding from practice a person with qualifications such as those in *Ex parte Yee Quock Ping* (1).

Herring K.C. Sec. 14 (2) is concerned only with securing reciprocal rights for Victorian practitioners, and not with an applicant's training and qualifications. It limits a power of recognition, which is to be found only in par. 13 of the Fourth Schedule. The contention that it applies to sec. 14 (1) involves inserting at the end of that sub-section the words "in a school of medicine &c. recognized by the board." It further involves the implication that the board has

(1) (1875) 1 V.L.R. (L.) 112.

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a discretion to recognize or not to recognize the schools &c. in which the course required by sec. 14 (1) was studied, which would mean that the board has arbitrary control of all admissions to the register. There is nowhere any provision authorizing the board to refuse to give credit for courses passed through in foreign schools of medicine in non-reciprocating countries.

Ham K.C., in reply. If sec. 14 (2) does not apply to sec. 14 (1), the whole purpose of the reciprocity provisions would be defeated by a practitioner of a non-reciprocating foreign country using his foreign qualification to obtain in a reciprocating country a qualification described in the schedule, which, without more, would admit him to practise in Victoria.

Cur. adv. vult.

Aug. 27. The following written judgments were delivered:—

LATHAM C.J. This is an appeal by special leave from an order made by his Honour Mr. Justice *Lowe* of the Supreme Court of Victoria declaring that the respondent Moritz Meyer is entitled to be registered as a legally qualified medical practitioner under the *Medical Act* 1928 and that he is entitled to receive from the appellant, the Medical Board of Victoria, a certificate of qualification. The respondent has moved to rescind the order granting special leave to appeal upon two grounds, namely, (1) that the order made by *Lowe* J. is not a judgment, decree, order or sentence of the Supreme Court of the State of Victoria within the meaning of sec. 73 of the Constitution of the Commonwealth and that it is not a judgment of the Supreme Court within the meaning of sec. 35 of the *Judiciary Act* 1903-1934; (2) that in the circumstances of the case special leave to appeal should not have been granted.

As to the second ground, it is not disputed that the respondent was misled by a letter written to him by the secretary of the Medical Board while he was still in England. He was led to believe that his application for registration would be accepted as a matter of course and came to Victoria in that belief. But I am unable to regard this fact as sufficient ground for rescinding special leave to appeal.

The question raised by the appeal is an important question affecting the construction of a statute which regulates the registration of medical practitioners and their right to practise. The question raised, is, in my opinion, of such a character that it was proper to grant special leave and I do not think that the order granting special leave should be rescinded.

The other contention of the respondent upon the motion to rescind raises an important question as to the jurisdiction of this court. The order of *Lowe* J. was made under the *Medical Act* 1933, sec. 9, which provides (*inter alia*) that if an applicant has been refused registration under the principal Act (*Medical Act* 1928) the board shall, if required, state in writing the reasons for the refusal. The section then goes on to provide that any person who feels aggrieved by any decision of the board in (*inter alia*) refusing to register him "may appeal from the decision to a judge of the Supreme Court in chambers." In sub-sec. 3 it is provided that "every such appeal shall be in the nature of a rehearing; and such judge shall entertain inquire into and decide upon the appeal and for that purpose may do all such matters and things relating thereto and in the same manner and to the same extent as he is empowered to do in the exercise of his ordinary jurisdiction; and his decision shall be final and without appeal."

It is not disputed that the order of a judge in chambers is an order of the court (*Parkin* v. *James* (1)), but it is contended that a judge of the Supreme Court acting under these provisions does not act in his capacity as a judge but that he is a person designated by description for the purpose of hearing the appeal so that his decision is not an order of the Supreme Court and therefore is not appealable to this court.

If a person who happens to be a judge of a court is selected to perform a particular function but that function is not judicial in character, as, for example, presiding over a board of inquiry, it is clear that a decision made by him would not be an order of that court. Again, if a judge of a court is selected to perform a function because he is a judge of that court, but it appears from the statutory provisions which provide for the appointment that it was not

(1) (1905) 2 C.L.R. 315.

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intended by virtue of his appointment for a particular purpose to give jurisdiction to the court as such over the matters with which he is authorized to deal, then any order made by him would not be an order of the Supreme Court. In *Holmes* v. *Angwin* (1) this court held that a judge of the Supreme Court in exercising functions under a Western Australian statute in relation to a disputed election was not exercising the jurisdiction of the Supreme Court. The court took the view that the statute in question only authorized the judge to make a finding upon the basis of which Parliament could act. The court considered that the order of the judge did not have any effect of its own force. Upon this view of the statute the court decided that the judge was not acting as such, but was simply a specific person designated for the purpose of performing a function which was not added as a function to the other functions of the Supreme Court. The statute being so construed, it followed that no appeal from the decision of the judge could be brought to the High Court. Similar principles have been applied to the statutory appointment of an officer of a court to perform a particular duty where it appears that he was not intended to act in his capacity of an officer of the court (*Earl of Shrewsbury* v. *Wirrall Railways Committee* (2)).

Where, however, a matter is referred by statute to a judge of a court described as a judge of that court " the prima facie and natural meaning of the language " used is that it is referred to that judge as such. There is a strong prima facie presumption that the court " will determine the matter as a court." This is almost " a necessary implication." These phrases are taken from the judgment in *National Telephone Co. Ltd.* v. *His Majesty's Postmaster-General* (3).

In the present case the appeal given by the statute is an appeal to a judge of the Supreme Court in chambers. The natural meaning of these words is that the matter is referred to the judge as a judge, and that the judge will sit, not in court (as ordinarily), but in chambers, in order to deal with it. It has been urged that the provisions of sub-sec. 3 of sec. 9 show that it was not intended that the judge should act as a judge of the Supreme Court. In my opinion there is

(1) (1906) 4 C.L.R. 297.
(2) (1895) 2 Ch. 812.
(3) (1913) A.C., at pp. 560, 562; (1913) 2 K.B. 614.

no foundation for this argument. One begins with the prima facie presumption that the jurisdiction of the Supreme Court is extended by the provision empowering a judge of the court to deal with the appeal. Is this presumption in any way modified or rebutted by the provisions of sub-sec. 3 ? In the first place sub-sec. 3 specifically states that the appeal shall be in the nature of a rehearing. There is nothing in this provision which is inconsistent with the judge acting as a judge. There is obvious reason for the inclusion of such a provision. It makes it clear that the judge in hearing the appeal is not limited to determining whether or not the Medical Board was right, upon the evidence before it, in reaching its decision. The provision shows that the judge in hearing the appeal is not limited to correcting errors made by the board, but that he is to deal with the whole matter upon the basis of the evidence brought before him.

Sub-sec. 3 of sec. 9 also provides that " the judge shall entertain inquire into and decide upon the appeal and for that purpose may do all such matters and things relating thereto and in the same manner and to the same extent as he is empowered to do in the exercise of his ordinary jurisdiction." It is contended for the respondent that this provision would be unnecessary if the judge were sitting as a judge of the Supreme Court, because he would then, without specific provision, have all the powers which he could exercise in his ordinary jurisdiction. This contention is exactly the argument which was unsuccessful in *National Telephone Co. Ltd.* v. *His Majesty's Postmaster-General* (1). It was there argued (See particularly the dissenting judgment of *Buckley* L.J. in the Court of Appeal (2)) that a similar provision was otiose because it was a mere statement of what would have been the case in any event if the court in question were intended to act as a court. This argument was rejected by the majority in the Court of Appeal and by the House of Lords, and the reasons given apply with equal force to the present case.

Finally, sub-sec. 3 provides that the decision of the judge shall be final and without appeal. It is urged that this provision shows that an order made by the judge is not made in the exercise of his ordinary jurisdiction, because, if it were so made, it would be subject

(1) (1913) A.C. 546 ; (1913) 2 K.B. 614. (2) (1913) 2 K.B., at pp. 619, 620.

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to appeal under the *Supreme Court Act* 1928, sec. 41. On the other hand it would have been unnecessary to insert this provision unless the decision of the judge were a decision by him as a judge of the Supreme Court, from which, in the absence of express provision to the contrary, an appeal would lie to the Full Court under the section mentioned. At any rate, it cannot be said that the provision is conclusive against the prima facie presumption to which reference has been made.

Thus, in my opinion, the presumption should prevail that the order made by *Lowe* J. under the powers conferred by sec. 9 of the *Medical Act* 1933 was an order of the Supreme Court, and accordingly there is jurisdiction to grant special leave to appeal to this court. For the reasons given I am of opinion that the order of the court granting special leave to appeal should not be rescinded.

It is now necessary to consider the appeal itself. The applicant, Moritz Meyer, who is a Doctor of Medicine of the University of Leipzig, claimed registration as a legally qualified medical practitioner in Victoria upon the basis of four qualifications which were obtained in Great Britain, and of a regular course of medical and surgical study of five or more years' duration which he had passed through in Germany. The Medical Board rejected his application because he had not passed through a five years' course in a school of medicine or university or college or other body recognized by the board. The question which arises is whether the board was right in rejecting the application upon this ground. *Lowe* J. held that the board was wrong. In order to determine the question it is necessary to consider with particularity secs. 13 and 14 and the Fourth Schedule of the *Medical Act* 1928. These provisions may be summarized in the following way :—

(1) An applicant for registration must possess one or more of the qualifications described in the Fourth Schedule (sec. 13).

(2) These qualifications are divided under thirteen headings. The first twelve headings refer to qualifications which are British (in the widest sense) in character, such as (1) Fellow etc. of the Royal College of Physicians of London, and (10) Doctor or Bachelor of Medicine or Master in Surgery of some British or colonial university. The first ten qualifications are constituted by degrees or diplomas

obtained at a university, college or school of medicine or other body. Par. 13 is of a different character and requires special consideration. This paragraph contains (*inter alia*) an express reference to recognition by the board of a British as well as of a foreign university college or body. There is no such express reference in any other provision of the Act or of the schedule.

(3) The applicant must prove on personal attendance to the satisfaction of the board that his diploma &c. was duly obtained after due examination from " some university college or other body duly recognized for such purpose in the country " to which it belongs (sec. 13).

(4) Sec. 14 (1) contains a general provision applying to all persons, whatever their " qualifications " under sec. 13 may be. It is as follows : " No person whosoever shall be entitled to be registered as a legally qualified medical practitioner or to receive a certificate of qualification unless he has passed through a regular course of medical and surgical study of five or more years' duration."

(5) Sec. 14 (2) prohibits the recognition by the board of what I may call foreign schools of medicine, universities, colleges or other bodies except under condition of reciprocity. The sub-section is as follows :—" No school of medicine or university or college or other body in any country other than Great Britain Ireland or any British possession shall be recognized by the board for the purposes of this Act unless it appears to the board that registered legally qualified medical practitioners of Victoria are by virtue of being so registered and without further examination entitled to practise their profession in such country either on registration or otherwise."

I now proceed to consider how far the applicant complied with these requirements.

As to 1 *and* 2. He showed that he possessed four of the qualifications described in the Fourth Schedule to the Act. They were as follows : (*a*) Licentiate of the Royal College of Physicians of Edinburgh (par. 2 in Fourth Schedule) ; (*b*) Licentiate of the Royal College of Surgeons of Edinburgh (par. 5) ; (*c*) Licentiate of the Faculty of Physicians and Surgeons of Glasgow (par. 6) ; (*d*) legally qualified practitioner registered in Great Britain (par. 11).

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As to 3. He personally attended before the board and he proved to the satisfaction of the board that his diplomas were issued by relevant bodies duly recognized in Great Britain.

As to 4. He proved that he had passed through a regular course of medical or surgical study of five or more years' duration. This course, however, was passed through in Germany.

As to 5. German schools of medicine and universities &c. are not, and cannot, be " recognized " by the board for the purposes of the Act, because reciprocity does not exist between Germany and Victoria, as Germany does not admit registered practitioners of Victoria to practise by virtue of their Victorian registration without further examination. The applicant did not rely upon any " qualification " obtained by way of degree or diploma in any foreign school of medicine &c., and did not apply under par. 13 of the schedule, which relates to such qualifications. As already stated, he relied upon four qualifications obtained in Great Britain.

The contention of the board is that sec. 14 (2) prohibits recognition by the board for the purposes of the Act of any school of medicine &c. in non-reciprocating countries such as Germany; that acceptance of a course of study in a German school of medicine as a compliance with sec. 14 (1) amounts to or involves a recognition by the board of that school of medicine for a purpose of the Act; and that therefore the board cannot pay regard to such a course of study. If that contention be well founded the respondent has not shown that he has passed through the course of study which is required in all cases by sec. 14 (1), and therefore the board acted rightly in refusing his application.

The opposing contention for the respondent is that, though sec. 14 (1) is a general provision applying to all cases and entitling the board to refuse to register a person unless he has passed through the course of study described, the application of this sub-section does not involve any " recognition by the board " within the meaning of the Act of any school of medicine &c.; and, further, that sec. 14 (2) is only prohibitive in character, preventing recognition *by the board* of foreign schools of medicine &c. in non-reciprocating countries, but not itself operating to require recognition *by the board* of any school of medicine &c. It is conceded that where the applicant

relies for his qualification under sec. 13 upon par. 13 of the schedule, sec. 14 (2) prevents the board from recognizing degrees and diplomas granted by foreign schools of medicine in non-reciprocating countries; but it is contended that neither par. 13 nor any other provision authorizes the board to refuse to give credit for courses of study passed through in such schools of medicine.

In order to decide between these opposing contentions it is necessary to consider particularly the words of the first portion of par. 13 of the Fourth Schedule, which are as follows:—"Any person who proves to the satisfaction of the board that he has passed through a regular course of medical study of not less than five years' duration in a British or foreign school of medicine and has received after due examination from some British or foreign university, college or body, duly recognized for that purpose in the country to which such university college or other body may belong, and also recognized by the Medical Board of Victoria, a medical diploma or degree certifying to his ability to practise medicine or surgery as the case may be." Under this paragraph the applicant must show that he has passed through a regular five years' course of medical study in a British or foreign school of medicine. He must also show that he has received after due examination a diploma or degree from "*some* British or foreign university" &c. It is clear that the diploma issued need not be issued by the same school &c. as that in which he passed through the course of study. He must also show that the diploma-issuing school is the subject of a double "recognition." It must be "duly recognized for that purpose in the country" to which it belongs and it must also be "recognized by the Medical Board of Victoria." Thus in the case of par. 13 it is clear that a distinction is drawn between the school of medicine in which an applicant has passed through his course of study, and the school of medicine which has granted his diploma or degree. The former school need not be "recognized by the board" but the latter must be "recognized by the board." The contention raised for the board is that giving credit for a course of study involves recognition by the board of the school of medicine in which that course was passed through. The result would be that the former school must also be "recognized by the board" under par. 13.

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Upon this view it is impossible to understand the language used in par. 13, unless that language is regarded as very loose and careless.

The argument for the board really involves adding to the words of sec. 14 (1) a requirement that the regular course must be passed through in a school of medicine &c. recognized by the board, and it equally (as just pointed out) involves the addition of a similar requirement to that for which provision is made by the initial words of par. 13 of the schedule. But full effect can be given to the words " shall be recognized by the board " in sec. 14 (2) by regarding them as directed to the only provision, namely, that in par. 13 of the schedule, which refers to recognition of schools of medicine by the board.

The opposing view rests upon the proposition that the giving of credit for any course of study in a school of medicine necessarily involves a recognition by the board of that school of medicine within the meaning of sec. 14 (2). In a sense this is undoubtedly the case, but the argument founded upon this proposition is, in my opinion, met by the distinction drawn (see sec. 13, sec. 14, and par. 13 of the schedule) between " recognition in a country " and " recognition by the board " and the single express reference in the schedule to " recognition by the board." In a sense the board could be said to recognize every fact or circumstance of which it takes cognizance. But the board is required to act upon the basis of certain facts without determining as a separate matter whether it shall or shall not " recognize " schools of medicine &c. with which those facts are associated. For example, the Act provides that a fellowship of the Royal College of Physicians, London, shall be a " qualification " (sec. 13). When the board sees that a diploma produced is a diploma testifying to such a qualification it (in one sense) " recognizes " the Royal College of Physicians, London, but the board would surely not be at liberty to disregard the express provisions of sec. 13 as to qualifications by refusing to " recognize " the Royal College of Physicians. Upon the contention of the appellant, however, sec. 14 (2) implies that the board has a power (subject only to the prohibition contained in that sub-section and applying to non-reciprocating foreign countries) of recognizing or not recognizing any school of medicine for any purpose relevant to

the Act. Recognition of a diploma or degree granted by a school of medicine or a university involves at least as much recognition of that school or university as the recognition of a course of study pursued at that institution. If the board can refuse to recognize a school of medicine or university for the purpose of sec. 14 (1) so as to prevent credit being given for a course of study there pursued, then the board must equally be entitled to refuse to " recognize " the school of medicine or university for the purpose of the qualifications mentioned in sec. 13. Upon this view the Fourth Schedule would really mean nothing at all in the case of pars. 1 to 10 (which all refer to schools of medicine &c.) because the board would be at liberty to refuse to " recognize " any of them in respect of both " qualification " and " course of study." The position would be that the board, despite the specific provisions of the Act, would be entitled to exercise its own discretion in relation to the " recognition " even of the schools of medicine &c. expressly mentioned in the schedule. Thus applicants who had either pursued their courses of study or obtained degrees in such schools of medicine would be in exactly the same position as those who had been students in and were graduates of schools of medicine not specifically mentioned in the schedule.

For the reasons which I have stated I am unable to accept this interpretation of the relevant provisions. I am of opinion that *Lowe* J. was right in his decision that the board should have granted the application of the respondent.

The order made by the learned judge takes the form of a declaration of right. In order to give effect to the order it would be necessary to obtain a further order in proceedings by way of mandamus. In my opinion the Act does not contemplate such further proceedings. Sec. 9 gives a right of appeal from the decisions of the board. The board was entitled either to register the applicant or to refuse to register him. If the board had directed that he be registered it would have been acting within the scope of its authority. The general provision for an appeal to a judge entitles the judge to make any order which the board might have made, and, in my opinion, there is authority for the judge of the Supreme Court upon an appeal to make an order directing the Medical Board to register the applicant.

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I think that the appeal should be dismissed and an order made as stated.

The court, however, is equally divided in opinion, and the result, therefore, is, under the provisions of the *Judiciary Act* 1903-1934, sec. 23 (2) (*a*), that the order of the Supreme Court is affirmed.

RICH J. One approaches this case with reluctance owing to the unfortunate circumstances in which the applicant has been placed. But these circumstances are not germane to the question we are called upon to decide and should not, in my opinion, affect their decision. It was contended on behalf of the applicant that, if the court had been informed of the circumstances which led to the applicant coming to Victoria in the belief that he would be placed on the list of medical practitioners, special leave would not have been granted, special leave being in the nature of an indulgence. I have already said that these circumstances are not relevant to the questions for decision. Special leave, a matter of statutory discretion, is granted if the case presents special circumstances, as, for example, the proper construction of a statute which is of general importance. Examples of an indulgence, on the other hand, are the granting or extension of time or leniency in orders for costs. I was not a member of the court which granted special leave in this case and can only consider the question in the light of the present circumstances. So regarded, the case is concerned with the interpretation of an Act of very general importance which concerns the welfare of the community and the well-being of one of the most important bodies—the medical profession. I am, therefore, of opinion that the court was justified in granting special leave and that it should not be rescinded.

It was next contended that the primary judge was a *persona designata* and that leave did not lie to this court. I am unable to agree with this contention. Sec. 9 (2), (3), confers a new jurisdiction on the Supreme Court in the person of a single judge, who is to sit in chambers and " shall entertain inquire into and decide upon the appeal and for that purpose may do all such matters and things relating thereto and in the same manner and to the same extent as he is empowered to do in the exercise of his ordinary jurisdiction "

(*National Telephone Co. Ltd.* v. *His Majesty's Postmaster-General* (1)). The section, in conferring jurisdiction over a subject matter not before exercised, differs from legislation which selects or designates a person to settle, in case of difference, some question which may arise between parties, and who does not act *ex officio* (*Owen* v. *London and North-Western Railway Co.* (2); *In re Durham County Permanent Benefit Building Society*; *Ex parte Wilson* (3); *Sandback Charity Trustees* v. *North Staffordshire Railway Co.* (4); *Earl of Shrewsbury* v. *Wirral Railways Committee* (5); *Hoare & Co.* v. *Morshead* (6)). It follows that the judge's decision is appealable to this court (*Parkin* v. *James* (7)).

The last and most substantial question is whether the judge has construed the Act aright. With great respect I think he has not. The learned judge propounds for himself a question whether sub-sec. 14 (2) of the *Medical Act* 1928 clearly intends to include all cases. For a variety of reasons he decides it does not but includes only, as I understand it, the recognition of the university, college or other body issuing the actual diploma relied upon. The answer, to my mind, is that sec. 14 (2) is expressed in universal terms and not in limited terms, and, moreover, refers not only to a university, college or body, as does sec. 13, but also to schools of medicine. Sec. 14 (1) requires a regular course of medicine and surgical study of five or more years' duration. No one can conceive of such a course outside a school of medicine, whether the school is in a university, college or other body or not. I am unable to understand how effect can be given to the applicant's regular course in Germany without recognizing the German school through which he passed in doing so, and this sec. 14 (2) forbids.

In the circumstances the applicant's costs should be paid by the Medical Board.

STARKE J. I concur in the opinion of the Chief Justice, but I would add that the qualifications relied upon by Dr. Meyer would have entitled him at any time from the year 1865 to the year 1906

(1) (1913) 2 K.B., at p. 625; (1913) A.C., at pp. 555, 561.
(2) (1867) L.R. 3 Q.B. 54, at p. 62.
(3) (1871) 7 Ch. App., at p. 47.
(4) (1877) 3 Q.B.D. 1, at p. 4.
(5) (1895) 2 Ch., at p. 818.
(6) (1903) 2 K.B. 359, at p. 361.
(7) (1905) 2 C.L.R. 315.

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to registration as a legally qualified medical practitioner in Victoria. It was not until the *Medical Act* 1906 (No. 2069) that the legislature required five years' regular course of medical and surgical study before registration and reciprocity between the schools of medicine of countries other than the United Kingdom or British possessions and Victoria. It is this provision, which has been carried into the *Medical Act* 1928, which falls for consideration in this case.

The provisions of sec. 14 (1) do not expressly require a regular course of medical and surgical study of five or more years' duration in any school of medicine, university or college or other body recognized by the Medical Board of Victoria, but it is contended that the reciprocity provision compels the regular course of medical and surgical study for five years or more to be in a school of medicine, university or college or other body recognized by the board. It is said that the acceptance of a course of medical and surgical study in a school of medicine necessarily involves its recognition by the board, which, in countries other than Great Britain, Ireland or British possessions, is prohibited unless they reciprocate with Victoria. In my opinion this argument is erroneous. In the first place, the provision for reciprocity naturally attaches itself to the thirteenth qualification of the Fourth Schedule and to the recognition required by that clause, and, in the second place, recognition means the acknowledgment of the status or qualification granted by schools of medicine or other bodies to practise medicine or surgery and is not fulfilled by accepting a course of study in such school of medicine or other body.

DIXON J. Germany is not a country in which legally qualified medical practitioners of the State of Victoria are entitled in virtue of their Victorian qualification and without further examination to practise their profession.

Sec. 14 (2) of the *Medical Act* 1928 of Victoria provides that no school of medicine or university or college or other body in any country other than Great Britain, Ireland, or any British possession shall be recognized by the Medical Board of Victoria for the purposes of that Act unless it appears to the board that registered legally qualified medical practitioners of Victoria are by virtue of being so

registered and without further examination entitled to practise their profession in such country either on registration or otherwise.

The respondent, Moritz Meyer, a doctor of medicine in the University of Leipzig, practised medicine in Germany for some fifteen years and then went to Great Britain, where, after a post-graduate course extending over twelve months, be became a licentiate of the Royal College of Surgeons, Edinburgh, of the Royal College of Physicians, Edinburgh, and of the Royal Faculty of Physicians and Surgeons, Glasgow. He was then registered with the General Medical Council in London as a legally qualified medical practitioner in Great Britain. Subject to the other provisions of Part I. of the *Medical Act* of Victoria, which is the part dealing with medical practitioners, a licentiate of any of the bodies mentioned or a legally qualified practitioner registered in Great Britain is entitled to registration by the Medical Board of Victoria. Relying accordingly on his British qualifications, the respondent, Moritz Meyer, applied for registration in Victoria. But one of the other provisions to which his title to registration is subject is a general and overriding prohibition against registering anyone unless he has passed through a regular course of medical and surgical study of five or more years' duration. For the fulfilment of this requirement his course of twelve months' study in Britain will not suffice. He must depend upon the original course he passed through in Germany, a course the duration of which was five years or more. But his claim that his German course of medical and surgical study is enough to satisfy the overriding statutory condition encounters the difficulty that no school of medicine in Germany can be recognized by the Medical Board of Victoria for the purposes of the *Medical Act*. The Medical Board says that to accept a German medical course as fulfilling the requirement of a regular course of medical and surgical study of five years' duration is to recognize a school of medicine or university or college or other body in Germany contrary to the prohibition.

To this very simple proposition many answers have been proposed, but none of them appears to me to have any real foundation. On the other hand, there is a number of considerations which, in my opinion, confirm the view that for the purpose of compliance with the conditions of registration prescribed as indispensable the Act

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means that no recognition shall be given either to a course of study or to a degree, diploma, licence or certificate of a foreign country which does not reciprocally recognize the Victorian medical qualification as sufficient for the purpose of authorizing the holder to practise in that country.

The provision against registering persons who have not passed through a regular course of medical and surgical study of five or more years' duration and the provision against recognizing schools of medicine, universities, colleges and other bodies in such foreign countries are placed one after another as sub-sections of the one section, viz., sec. 14. Before dealing with the substance of the provisions this formal structure is worth attention. For the arrangement of the provisions as consecutive sub-sections raises an expectation that a connection will be found between them. The expectation increases if the third sub-section is next read. It provides that where any question arises as to whether any person applying for registration has complied with the requirements of this section such question shall be determined by the board. Thus it treats the whole section as expressing requirements with which the applicant for registration must comply, a natural way to regard sub-sec. 2, if it operates, so to speak, as a qualification upon sub-sec. 1. It is less natural so to regard it, if it is an entirely unconnected provision operating only as a fetter upon the board's discretionary power of affording, independently of a particular application for registration, a general recognition to a university, college, or some other body in another country.

The substance of the provisions appears to me to show that the operation of sub-sec. 2 is not limited in such a way and that it does affect the application of sub-sec. 1 of sec. 14. Sec. 13 confers a right to registration upon persons possessing any of the qualifications described in a schedule. But the right is expressly made subject to the provisions of the Part and, apparently by way of further emphasis, subject to the provisions of sec. 13 itself and of sec. 14.

The first nine qualifications stated in the schedule consist in the fellowship, the membership or the licence of well-known colleges and societies of Great Britain and Ireland. The tenth qualification is a degree in medicine or surgery of some British or colonial university.

The eleventh category covers all legally qualified medical practitioners registered in Great Britain and Ireland. The twelfth, medical officers duly appointed and confirmed of His Majesty's sea or land service. The thirteenth category, omitting a special provision in favour of homœopathists with which it ends, is expressed in general terms. The following is the description it contains:—"Any person who proves to the satisfaction of the board that he has passed through a regular course of medical study of not less than five years' duration in a British or foreign school of medicine and has received after due examination from some British or foreign university, college or body, duly recognized for that purpose in the country to which such university college or other body may belong, and also recognized by the Medical Board of Victoria, a medical diploma or degree certifying to his ability to practise medicine or surgery as the case may be."

It should be noticed that this provision is expressed to make recognition by the board necessary for the British or foreign university, college or other body from which an applicant for registration has received his medical diploma or degree but it does not attach the same condition of recognition to the British or foreign school of medicine in which an applicant has passed through his regular course of medical study of not less than five years' duration. The expression in this paragraph of the schedule, "and also recognized by the Medical Board of Victoria," enables the board to recognize or not to recognize a university, college, or other body giving degrees or diplomas as the board thinks proper. But I cannot adopt the view that in doing so it gives the word "recognize" any special or peculiar meaning or establishes recognition as a particular procedure or exercise of power necessarily involving a discretion. If effect is given to a status or to credentials obtained elsewhere, they are necessarily accepted or acted upon and the ordinary word to describe such an acceptance is recognition. The meaning of par. 13 would not be in any way affected by substituting "accepted" by the Medical Board for "recognized." Before leaving this paragraph, it is perhaps worth noticing that it speaks of medical study and not as sec. 14 (1) does of medical and surgical study. Throughout the schedule either a medical or surgical

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qualification is treated as enough, but sec. 14 (1), which is of a much later date, adds a condition which looks not only to the adequacy of the period of the course passed through but also to the need for both medical and surgical training.

Enough has been said to explain the nature of the qualifications for registration which sec. 14 is designed to control. Whatever else may be said about that section, its purpose clearly is to impose paramount conditions which must be fulfilled in addition to those arising under sec. 13 and the schedule before an applicant is entitled to registration. Both sub-secs. 1 and 2 of sec. 14 are expressed as prohibitions to which no exception is admitted. The condition imposed by sub-sec. 1 is described in terms which deserve attention. The applicant must have " passed through " a course. The course must be " regular." It must be a " course of study " and it must have a " duration," of which the minimum is specified. This language appears to me to connote an established course or system of organized study under constituted authority. An established course or system of organized medical and surgical study under authority is a school of medicine. In par. 13 of the schedule the words " in a British or foreign school of medicine " are added to the analogous expressions there occurring. Their omission in sec. 14 (1) was relied upon as pointing a difference of meaning. The reason for the use of the words in par. 13 lies in the desire not, I think, to insist that it must be in a school of medicine, but to make it clear that the school of medicine might be British or foreign. Because sec. 14 (1) is negative and general no such words were considered necessary.

Sub-sec. 2 of sec. 14 has for its purpose the exclusion from registration in Victoria of persons who otherwise would be entitled to it, because their qualification or title to registration is acquired in a country which will not reciprocally give effect to qualifications in Victoria. The conditions entitling an applicant to registration in Victoria now consist in the requirements of sec. 14 (1) as well as sec. 13 and one or other paragraphs of the schedule. There is no antecedent reason why such a provision as sub-sec. 2 should select some or one only of those conditions and provide that it must have been fulfilled in a reciprocating country and leave open the fulfilment

anywhere of the remaining condition or conditions. On the contrary, there is good reason why it should not do so. Among the foreign countries which do not accept qualification in Victoria as a title to registration or licence to practise medicine within their boundaries, there must be many whose practitioners are admitted in Great Britain or elsewhere to one or other of the qualifications mentioned in the schedule without pursuing the full course otherwise demanded. The requirements of sub-sec. 2 would be readily avoided and its policy defeated, if it were left sufficient for a practitioner of a foreign country falling under its exclusion to use his qualification in that country as a ground for obtaining in another country one of the qualifications described in the schedule, supposing that without more it would entitle him to registration in Victoria.

In my opinion sec. 14 (2) covers the whole ground and says, in effect, that whenever an applicant depends or relies upon a foreign school of medicine or university or college or other body the board shall not accept it for the purposes of the Act, that is, for the purpose of the fulfilment of the conditions entitling the applicant to registration unless reciprocal concession to Victoria is made by the foreign country in question. Thus, if to satisfy the condition prescribed by sub-sec. 1, namely, that he shall have passed through a regular course of medical and surgical study of five or more years, the applicant shows only that he has passed through such a course in a German school of medicine, he cannot be registered. For under sub-sec. 2 the board must not recognize or accept a school of medicine in that country for the purpose. In the same way sub-sec. 2 applies to the first portion of par. 13 of the schedule. That portion, as has already been said, expresses the condition that the person claiming under the paragraph shall have passed through a regular course of medical study of not less than five years' duration in a British or foreign school of medicine. Indeed, unless sec. 14 (2) applies to exclude for this purpose schools in a foreign country making no reciprocal concession, no application whatever can be found for so much of sec. 14 (2) as refers to schools of medicine as distinguished from the universities, colleges or other bodies which it also mentions. For the latter words only are contained in the second portion of par. 13 to which are attached the words " and also recognized by

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the Medical Board." In exactly the same way as to accept a course in a German school of medicine for the purpose of the thirteenth paragraph of the schedule would be to contravene sec. 14 (2) and, in defiance of its prohibition, to "recognize" the school, so to accept passing through a course in a German school of medicine as a compliance with sub-sec. 1 would infringe upon sub-sec. 2 of sec. 14.

So far I have dealt with the considerations that, as I think, confirm the correctness of what I have ventured to call the simple proposition relied upon by the Medical Board.

In the Supreme Court, *Lowe* J. adopted a different interpretation of sec. 14, particularly of sub-sec. 1, and his judgment contains a full statement of the matters which led him to do so. In the consideration of the case I have not found it easy to define for myself the exact point at which our respective paths of reasoning diverge. But, speaking generally, I attach less weight than he did to some matters and more to others which point in an opposite direction. Indeed in some cases my mind is affected in a contrary way by the same consideration. For instance, his Honour says that, if the board's contention is correct, no matter what qualification the applicant holds, even if it be a medical or surgical degree of the University of Melbourne and otherwise he satisfies the requirements of the Act, he may be refused registration. He then notices that that University may admit students *ad eundem statum* and continues:—"It is at least conceivable that work done for which credit is given, or a course of study pursued upon which the degree is granted to a person admitted *ad eundem statum*, has been in a country such as Germany which does not give reciprocal rights to Victorian practitioners. If Parliament has clearly expressed the intention to include all cases I must give effect to this intention: and I must now consider whether this be the true reading of sec 14 (2)" (1). To my mind the considerations embodied in this passage operate rather for than against the conclusion that commends itself to me. For it must be remembered that sec. 14 (2) is not concerning itself with the excellence or otherwise of the applicant's training and qualifications but with the policy of conceding to foreigners privileges

(1) (1937) V.L.R., at pp. 241, 242.

denied to Victorians by the country whence they come. If a British school of medicine, even that at the Melbourne University, gives its degree in respect of a period of foreign training in such a country, to give unqualified effect to the degree or diploma of that university without investigating further how and where compliance with sub-sec. 1 of sec. 14 was made, would tend to defeat the policy of sub-sec. 2. It is not a question of approval or disapproval of the policy but of recognizing its implications and, so far as such general considerations may legitimately influence interpretation, of allowing full effect to the expression of that policy. Further, as at present advised, I am not prepared to agree that sub-sec. 1 is complied with by a period of study made up of two portions, one of a course of study in one place and the other portion part of a different course of study in another place. To me it appears that " Parliament has clearly expressed the intention to include all cases." That is to say, it has clearly said that no school of medicine shall, for any purpose of the Act, be recognized, unless it belongs to a reciprocating country. If to accept passing through a course of medical and surgical study at a German university or school of medicine as fulfilment of the requirements of sec. 14 (1) involves, as I think it does, recognizing the school of medicine or university, then nothing but a necessary implication can restrict the application of the prohibition contained in sub-sec. 2. For my part, I can find nothing to support such an implication. It is no doubt true that some of the words in sub-sec. 2 are repeated from sec. 13 ; though it is to be noticed that " school of medicine " is not. It is true that they occur in par. 13 of the schedule. It is, therefore, in a sense correct to say, as *Lowe* J. does, that they refer back to sec. 13 and it is correct in the same way that they refer to the schedule. But this only means that they include all cases covered by those words in the schedule. It appears to me to give no support to the conclusion that nothing arising under sub-sec. 1 can be affected by sub-sec. 2 of sec. 14. The central point of the interpretation opposed to mine is, I think, the conception of " recognition " as some act done in the exercise of a purely discretionary authority. If it does bear this peculiar meaning I can understand the necessity of confining the application of sub-sec. 2 to the thirteenth paragraph of the schedule. But, in that case, it

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would be necessary to confine it still further and to read it as applicable only to the recognition of foreign universities, colleges and other bodies issuing degrees mentioned in the second portion of the paragraph and to exclude even the schools of medicine providing the necessary five years' course. For the terms of the paragraph limit the discretionary power of recognition to the degree-issuing body. But to attach such an interpretation to the word "recognition" to the exclusion of its ordinary English meaning appears to me not only to be unnecessary and unwarranted but to result in a failure at one point of the policy expressed in sec. 14 (2).

In my opinion the decision appealed from is erroneous.

The decision was given by *Lowe* J. in the exercise of the jurisdiction or authority conferred upon a judge of the Supreme Court by sec. 9 of the *Medical Act* 1933 (Act No. 4131). The respondent objects that no appeal lies to the High Court from a decision given under that provision because such a decision does not amount to a judgment, decree, order or sentence of the Supreme Court of a State within the meaning of sec. 73 of the Constitution. As I am unable to agree in the conclusion of *Lowe* J., it becomes necessary for me to state my opinion upon the constitutional question thus raised by the respondent's objection. Sec. 9 of the *Medical Act* 1933 does not in terms vest in the Supreme Court as a court the authority which it gives. In terms it confers it upon a judge of the Supreme Court in chambers. The authority that it so gives to the judge is to entertain, inquire into and decide upon appeals from the Medical Board, an administrative body. The acts of the board made subject to appeal to the judge are its decisions refusing registration to a legally qualified medical practitioner, erasing or removing the name of a practitioner from the register, or refusing to restore to the register a name erased or removed therefrom.

The Constitution gives jurisdiction to the High Court to hear and determine appeals from judgments, decrees, orders or sentences of the Supreme Court of a State. The respondent's objection that this jurisdiction does not enable us to entertain an appeal from a decision given by a judge under sec. 9 of the *Medical Act* 1933 may be resolved into three grounds or regarded in three aspects. For in support of the objection it may be contended (*a*) that the

judge so acting is not the Supreme Court; (*b*) that his decision is not a judicial order; and (*c*) that it does not adversely affect any right or interest of the Medical Board so as to give the board a *locus standi* as appellant.

The Medical Board of Victoria is an unincorporated statutory body the members of which are appointed by the Governor in Council. Fees payable under Part I. of the *Medical Act* go into the consolidated revenue of Victoria, and the cost of administration therefore appears to be treated as part of the ordinary service of government. The board is charged with the duty of registering the names of legally qualified medical practitioners. Persons who fulfil the required conditions are entitled to registration (Cf. sec. 13 and *R.* v. *General Council of Medical Education* (1), per *Crompton* J.)) But primarily it is the function of the board to decide whether the conditions entitling an a pplicant to registration are in fact satisfied I have already described the nature of the qualification for registration. But, in addition, it is provided that the board may refuse registration to a person who has been convicted of a felony or misdemeanour or who elsewhere has been removed from a similar register of medical practitioners and that no person shall be registered unless the board is satisfied that he is of good character (secs. 7 and 8 of Act No. 4131). The board is empowered to erase or remove from the register the name of a person convicted of felony or misdemeanour or of a person found by it to have been guilty of infamous conduct in a professional respect or to be an inebriate. Infamous conduct is not to include any conduct which, either from its trivial nature or from the surrounding circumstances, does not in the public interest disqualify a person from practising his profession (sec. 4 of Act No. 4131). The board is given power to take evidence on oath and to compel the attendance of witnesses.

Although these duties are entrusted to the board as an administrative body, the board is under the necessity of acting judicially in performing them. In nearly every respect the board's decision must depend upon determinations of fact as opposed to an exercise of discretion. Under par. 13 of the schedule, the board has a discretion to "recognize" a university &c. That is a purely

(1) (1861) 3 E. & E. 525, at p. 533; 121 E.R. 539, at p. 542.

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administrative function. But, on the construction of the Act, I think that it sufficiently appears that, where an applicant's right depends upon the discretionary recognition of a university &c. under par. 13 of the schedule, the question whether a university &c. ought so to be recognized is not reviewable by the court on appeal. In exercising its power to remove or erase a name from the register, it must determine as a matter of fact whether the conduct or conditions exposing the practitioner to removal from the register have been established. Apparently the board then has a discretion whether it will remove or erase his name. But that discretion, which must depend upon the nature and seriousness of the case, is of a judicial description. In judging whether an applicant for registration is of good character, the board is dealing with an indefinite or vague standard, but nevertheless it is a matter of fact to be determined judicially. Except for the particular discretion given by par. 13 of the schedule, there is, in my opinion, nothing in the board's decision which might not be determined as an exercise of judicial power, if the legislature had thought proper to confide its determination to the courts in the first instance. In other words, a person seeking registration or resisting removal from the register is asserting a right depending upon the existence of facts that fulfil conditions prescribed by law, and the determination and enforcement of such a right is a thing not necessarily falling outside judicial power. The appeal given by sec. 9 of Act No. 4131 is no more than a statutory proceeding for submitting such a question for judicial review by the exercise of judicial power or authority. We have grown familiar with provisions in laws relating to taxation which make an administrative determination conclusive of liability subject to judicial review by some statutory proceeding. The right to a grant of letters patent or registration of a trade mark or design is dealt with in a similar way. In such cases the right derived by or liability imposed upon the subject under statute is ascertained and enforced or declared as an exercise of original jurisdiction according to a special mode of procedure.

In giving authority to a judge of the Supreme Court to hear appeals from the decisions of the board, sec. 9 directs him to " decide upon the appeal " and authorizes him for that purpose to do all

such matters and things relating thereto and in the same manner and to the same extent as he is empowered to do in the exercise of his ordinary jurisdiction. It provides that his decision shall be final and without appeal. I regard this as conferring upon the judge jurisdiction to determine by ordinary judicial process the right of an applicant to be registered or the liability of a practitioner to removal. In the latter case, the judge may be called upon to review the discretionary decision of the board that, the necessary conditions being found to exist, the case was a proper one for the exercise of the power of removal, but this also the judge must do as an exercise of jurisdiction. To give effect to his conclusion he may make whatever order is appropriate to the case. His power, I think, extends to directing the board to register or restore a name. The board has control of the register, and the object of the proceeding is not the declaration of abstract rights but the final establishment of an appellant's status as a registered practitioner, a status which *ex hypothesi* the board has denied to him. Whether the judge's order is, like that now under appeal, declaratory in form or is mandatory, its operation must be to impose upon the board the duty of registration. The board, being an administrative body, is not in the same position as a court from which an appeal lies to another court. The power given to the judge is coercive, and the board would be liable in all the ordinary consequences for disobedience of a judicial order if it failed to comply with a curial direction contained in an order made under sec. 9.

From all this, it appears to me to follow that a decision allowing an appeal from the board and declaring that an applicant is entitled to be registered is an exercise of judicial power or jurisdiction amounting to an order within the meaning of the Constitution and so affecting the board as to give it a *locus standi* as appellant.

There remains the question whether the jurisdiction is conferred upon the judge in such a way as to make his order that of the Supreme Court within the meaning of the Constitution. Sec. 9 describes the tribunal to which the appeal is to lie as "a judge of the Supreme Court in chambers." This expression amounts almost to a term of art. By a practice the origin of which has not been traced, single judges of the common-law courts sitting out of court

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exercised the power of the court in making interlocutory orders and indeed a very large part of the powers of the court were exercisable in this way. "There does not appear to be any statute directly creating such jurisdiction, which probably originated in custom, and grew in proportion to a gradually increasing demand for its exercise. The inconvenience and injustice occasioned by closing the courts during the intervals between the legal terms appear to have induced the judges to make orders for time to plead, or to stay proceedings and other interlocutory orders, at times when the courts were not sitting. These orders were made by the judges either at their own houses or in their chambers, and the practice must have existed as far back as the seventeenth century for Lord *Coke* in 1669" [*sic* 1629 ?] "expressed his disapproval of it, and even appears to have doubted the validity of the orders so made. He says (2 *Inst.* 103): 'The judges are not judges of chambers but of courts, and therefore in open court, where parties' counsel and attornies attend, ought orders, rules, awards, and judgments to be made and given, and not in chambers and other private places.' Seeing, however, that at that time no one but a judge had power to make any order in a cause, and that the courts remained closed for a considerable part of the year, it is not surprising that, in spite of Lord *Coke's* disapproval, the practice was retained and gradually developed to meet the growing requirements of increasing litigation" (*F. A. Stringer, Encyclopædia of the Laws of England*, 1st ed., vol. 2, p. 429).

In *R.* v. *Almon* (1) Sir *Eardley Wilmot*, speaking of the pamphlet attacking Lord *Mansfield* C.J., for which an attachment for contempt of court was sought, refers to a passage relating to a proceeding before the Chief Justice out of court. He says:—"The objection to granting the attachment upon this passage is, that it respects the Chief Justice only, and neither reflects upon the court, nor the process of the court; that orders made by judges at their chambers cannot be enforced by attachment, till they are made orders of the court; and that the disobedience must be subsequent to their being made orders of the court; and a doubt has been rather hinted at than made, as to the legality of orders made by judges

(1) (1765) Wilm. 243, at pp. 263, 264; 97 E.R. 94, at p. 103.

at their houses or chambers. And the passage, in 2 *Inst.* 103, was mentioned as condemning this practice. When the practice first began I cannot find out; my search and inquiries have been as fruitless and ineffectual in that respect as Mr. Dunning's. *Popham*, 180.—One hundred and forty years ago, an order was made by two judges in vacation, to stay a judgment:—a very extraordinary interposition, but no complaint of it is illegal. But whenever it began, it stands upon too firm a basis now to be shaken; constant immemorial usage, sanctified and recognized by the Courts of Westminster Hall, and in many instances by the legislature; and it is now become as much a part of the law of the land, as any other course of practice which custom has introduced and established: but though difficult to find out when it was introduced, yet it is very easy to see why it was introduced—for the ease and convenience of the suitors of the court; to accommodate them at a much easier expense, and with less trouble, in a great variety of cases, and especially in vacation time, when they could not have access to the court; and when there was a great multiplicity of business, the saving of the time of the court in adjusting trifling matters, which might be so much better employed in momentous ones, was no inconsiderable motive towards establishing it. And still, it is the business of the court, which is done at chambers that is, it is business which must be done in court, if it could not be done in chambers."

As time went on, the authority of judges sitting out of court, that is, at or in chambers, has been confirmed and increased by statute and by practice (See 11 Geo. IV. and 1 Will. IV. c. 70; *Chitty's Archbold*, 12th ed. (1866), vol. 2, pp. 1598 et seq.; *Bowen* v. *Evans* (1); *Hartmont* v. *Foster* (2)). It has become a familiar feature of the judicature system.

On the chancery side, the foundation of the modern jurisdiction in chambers is probably the *Court of Chancery Act* 1852 (15 & 16 Vict. c. 80).

In *Parkin* v. *James* (3), in delivering the judgment of the court, *Griffith* C.J. said:—"Apart from the express provisions of the

(1) (1848) 18 L.J. Ex. 38; 3 Ex. 111; 154 E.R. 778.

(2) (1881) 8 Q.B.D. 82.

(3) (1905) 2 C.L.R. 315, at pp. 343, 344.

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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 *Stephen*, 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 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."

It appears to me to follow from the considerations disclosed by these authorities that when the Constitution speaks of orders of the Supreme Court, it includes all orders made by a judge of the

(1) (1847) 1 Ex. 457; 154 E.R. 194.

Supreme Court in that capacity. When sec. 9 of the *Medical Act* 1933 speaks of a judge in chambers, it refers to a well-understood mode of exercising the judicial authority belonging to a judge in virtue of his office as a judge of the Supreme Court. The argument to the contrary was, in effect, that sec. 9 gave the power to the judge in chambers, not in his character of judge of the Supreme Court, but as a person filling that description. The argument appeared to me to rely upon distinctions without differences. In many branches of the law instances occur where written instruments refer to persons answering a given legal description in order to identify them and then proceed to confer rights or powers upon them which do not arise out of the description or character by which they are identified. Thus, next of kin or heirs at law are made the objects of gifts which they must take as purchasers and not by intestate distribution or descent. But, in my opinion, this distinction cannot be maintained where a statutory power or jurisdiction is added to the powers and jurisdiction belonging to a court or judge and is made exercisable in virtue of that very character. It is true that there are many observations to be found in *Holmes* v. *Angwin* (1) which give support to similar reasoning. But, without casting any doubt on the conclusion reached in that case, I venture to suggest that the more metaphysical parts of the judgments are difficult to follow and import unreal distinctions.

A substantive application for the rescission of the order granting special leave to appeal was made on the part of the respondent. Besides relying upon the ground with which I have dealt, namely, that the appeal by the board does not lie from the order in question, the respondent based his application on the ground that special circumstances existed making it unjust to disturb the order of *Lowe* J. Stated very briefly, the circumstances set up are that, before leaving England, the respondent made every inquiry he could in proper official quarters in order to be sure that he was entitled to registration in Victoria, and expended somewhat slender resources in coming to Australia upon the faith of obtaining registration on his arrival, a faith into which he was misled by official assurances based on a letter from the secretary of the Medical Board of Victoria. The

(1) (1906) 4 C.L.R. 297.

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secretary, who wrote without consulting the board, sent the letter in answer to an inquiry that called for a careful explanation of the objection now relied upon by the board, but, instead of stating the objection, he expressed in language, taken from sec. 14 (1), the requirement of a five years' course and added that under the "reciprocal provisions" of the *Medical Act*, a German qualification could not be recognized for purposes of registration. The result was that the respondent and the officials in London whom he consulted understood that he was in a position to obtain registration in Victoria by means of his British qualifications.

The respondent was not heard on the application for special leave, which was made *ex parte*. He had requested notice, but, owing apparently to some misunderstanding or mischance, he was not informed of the date when the application was to be made. There is no reason to suppose that the solicitor acting for the board in the application for special leave was aware of the respondent's request, but in the circumstances we ought not to allow the failure to give the respondent notice to operate to his prejudice. It would be right to rescind our order for special leave if we consider that on the materials now before us special leave would not be granted and to impose terms if we think it would be granted only on terms. In exercising the discretion to grant special leave to appeal, we are entitled to take into account much besides the general importance of the decision from which it is desired to appeal and our opinion of its correctness. But hard as it may be upon the respondent if he is denied registration after coming to this country in the belief that he was assured of obtaining it, I think that it is going some distance to refuse on that ground to give special leave to appeal from a decision that he should be registered although we think it wrong in law and regard it as of general importance. We are not in the same position as the Privy Council considering a petition to the Sovereign's grace. We are exercising a statutory discretion to permit an appeal to this court in cases which are special. I think that it can hardly be disputed that the present case is of a kind in which we would ordinarily grant special leave. The fact that the State Act is expressed to make the decision final and conclusive affords no legal obstacle, but it should be taken into account as an element

going to discretion. In a case like this however, where the meaning of the Act itself is involved and the question is of much importance, it is an element that can have but little weight. But, while I do not think that special leave should be rescinded, I think that, as a term of special leave, the Medical Board should bear the cost of the proceedings, which should be paid as other expenses of administering the Act out of the funds made available by parliamentary appropriation.

In my opinion the appeal should be allowed and the order of *Lowe* J. discharged.

EVATT J. The respondent, Dr. Meyer, is a Doctor of Medicine of the University of Leipzig, Germany. He is also a licentiate of the Royal College of Surgeons, Edinburgh, a licentiate of the Royal College of Physicians, Edinburgh and a licentiate of the Faculty of Physicians and Surgeons, Glasgow. He obtained his degree at Leipzig, more than seventeen years ago, having previously passed through the regular university course of medical and surgical study of more than five years' duration. He practised his profession in Germany for fifteen years and, then, because of restrictions imposed by the German Government on the practice of medicine by persons whose descent was not wholly Aryan, and of organized propaganda against such persons, he left Germany in October 1935. He then obtained the three British licentiate qualifications mentioned above.

Before coming to Australia, Dr. Meyer made a special inquiry from the Medical Board of Victoria as to whether he would be entitled to practise his profession in that State. In December of last year he received a letter from the board which clearly intimated that no objection could or would be raised to his becoming registered and practising in Victoria. Upon the faith of the letter he embarked for Australia with the intention of practising in the State of Victoria.

But the Medical Board repented of its earlier opinion and refused Mr. Meyer's application for registration upon the ground that he had not satisfied the provisions of sec. 14 (1) of the *Medical Act* 1928. In the board's opinion sec. 14 (1), which precludes the registration of an applicant unless " he has passed through a regular course of medical and surgical study of five or more years' duration,"

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also requires that such course must have been pursued at a school of medicine or other body in a country which will admit to practice without further examination Victorian medical practitioners.

Germany is not a country which thus reciprocates with Victoria, so the board felt it was entitled, and indeed bound, to reject the application. The correctness of the board's view depends upon the true meaning of sec. 14 (2), which provides thus :

> " No school of medicine or university or college or other body in any country other than Great Britain Ireland or any British possession shall be recognized by the board for the purposes of this Act unless it appears to the board that registered legally qualified medical practitioners of Victoria are by virtue of being so registered and without further examination entitled to practise their profession in such country either on registration or otherwise."

If the board's decision is sound, it has the incidental result that, if a country which does not grant the right of practice to Victorian registered practitioners happens to be engaged in a systematic campaign of persecuting or expelling its citizens or subjects, including medical practitioners, it will hardly be induced to alter its policy *vis-à-vis* Victoria ; for the only result of such alteration would be to confer rights within Victoria to medical practitioners whom *ex hypothesi* the foreign country wishes to injure or persecute. In such circumstances, the recognition of a Victorian qualification by a country which favours the repression of non-Aryans is the last thing to be expected.

Lowe J. rejected the board's argument, and in my opinion he was right. The substance of sec. 14 (2) is that no school of medicine &c. in any non-reciprocating country (other than Great Britain, Ireland or a British possession) shall be " recognized by the board for the purposes of this Act." It is clear that sec. 14 (2) does not confer upon the board any power to " recognize " any school of medicine &c. It merely precludes the board from exercising a power to " recognize." Sec. 14 (2) is thus a limitation or qualification upon the board's power " to recognize."

The power to " recognize " impliedly referred to in sec. 14 (2) must be sought elsewhere. Where does it exist ? The answer is at once discoverable by reference to par. 13 of the Fourth Schedule of the Act. That paragraph refers, not only to British and foreign universities &c. " duly recognized . . . in the country to which

such university . . . may belong," but also to such universities &c. as being " also recognized by the Medical Board of Victoria."

Par. 13 sets out qualifications more generally than in the case of pars. 1 to 12 inclusive. It allows the graduate of any British or foreign school of medicine to obtain registration in Victoria subject to the twofold condition that the degree-conferring body is " recognized " in its own country and is also accorded " recognition " by the Medical Board of Victoria. Thus under par. 13, the Medical Board of Victoria is given authority to recognize a university &c. and no restriction whatever is placed upon such power to " recognize." No condition of reciprocity is suggested or contemplated.

In order to protect what the legislature believed to be the interests of Victorian practitioners, sec. 14 (2) was inserted for the one purpose of preventing the board from according " recognition " under par. 13 to bodies which, being situate in countries other than Great Britain, Ireland or any British possession, refuse to " recognize " Victorian registration as being of itself sufficient to confer a right to practice in such countries. For instance, under par. 13, the board might have accepted Dr. Meyer's qualification at Leipzig and given " recognition " to the university at Leipzig. But sec. 14 (2) intervenes to prevent the board from according such recognition. Therefore, Dr. Meyer had to base his application to be registered upon one or more of the qualifications described in pars. 1 to 12 of the Fourth Schedule. Dr. Meyer did so. But then, it is said, sec. 14 (2), which prevents the board from recognizing schools of medicine &c. in foreign non-reciprocating countries, must also be applied to sec. 14 (1). The argument is that Dr. Meyer did not pass " through a regular course of medical and surgical study of five or more years' duration " because such study was at a school in a non-reciprocating country.

In my opinion sec. 14 (1) has nothing to do with the board's power to " recognize " schools of medicine as specified in par. 13 of the Fourth Schedule. On the contrary, I regard sec. 14 (1) as a general provision governing all applications and all applicants. Whatever qualifications the applicant may otherwise have, sec. 14 (1) ensures that in no case shall there be registration unless a five years' systematic course of study has been gone through. Thus,

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while sec. 13, operating in conjunction with the Fourth Schedule, would entitle the holder of one of a large number of qualifications to be registered, sec. 14 (1) steps in to protect the public and lays down an absolute rule that a minimum and regular course shall have been gone through.

This view of sec. 14 (1) is strengthened by a reference to sec. 14 (3), which requires the board to determine whether a regular course of five years has been gone through. In making such determination the board has to decide the objective fact whether the applicant has passed through a regular course of the required duration. It must do so in every case which is disputed. For instance, it cannot say that it "recognizes" a course of study at some British or colonial university as sufficient and stop at that. It must satisfy itself in every case that the *individual applicant* has done the necessary study, the words being "unless *he* has passed through" &c. Equally the board cannot refuse to "recognize" a course of study. Indeed to speak of a course of study as being "recognized" or "not recognized" seems to me to be a meaningless conception. An applicant has either done the course or he has not. The sub-section is not concerned with the question, where has he done it?

The result is that, if an applicant who is otherwise qualified to be registered has gone through a regular course of study for the statutory period, the board must under sec. 14 (3) determine in the applicant's favour the issue under sec. 14 (1).

For the above reasons I am clearly of opinion that Dr. Meyer proved his case under sec. 14 (1), for it is not disputed that, except for the fact that he studied in Leipzig, he fully satisfied the provisions of sec. 14 (1). Accordingly the Medical Board wrongly refused his application for registration and Mr. Justice *Lowe* was right in allowing the appeal.

In view of the fact that Dr. Meyer will succeed in obtaining registration as a result of the affirmance of Mr. Justice *Lowe's* judgment, I do not think it is necessary to elaborate my opinion upon the other aspects of the case. Nevertheless they cannot be ignored.

The first question is whether, an appeal to this court being assumed to be competent, special leave should be rescinded. I think that, if the circumstances now known to the court had been brought to its attention upon the original application of the Medical Board, special leave should have been refused, and for more than one reason. Having made a specific inquiry as to his right to practise in Victoria, Dr. Meyer received a favourable answer from the board, on the faith of which he came to this country to begin life afresh. Intervention by special leave in the case of so unmeritorious an application is difficult to justify. Further, by sec. 9 (3) of the Act of 1933 the decision of the judge in chambers is made final and conclusive. The Medical Board was not directly represented before Mr. Justice *Lowe*, but the Crown appeared and argued in support of the opinion which the Medical Board had reached. Of course the fact that the decision of *Lowe* J. was made final by the law of Victoria does not preclude the granting of special leave to this court. But it is a matter to be considered because in the special circumstances of Dr. Meyer's case the board should have abided by the decision of the special appellate tribunal. The board's function and its very existence derive from the very Act which evidences the policy that the appeal tribunal shall deal finally and conclusively with any decisions of the board. The result of granting special leave is to create an anomalous position. Under the Act the board is empowered to collect certain fees, but all such fees must be paid at once into the consolidated revenue and they are then subject to Parliament's sole control. Thus the board has no funds of its own with which to promote litigation. Further, after Mr. Justice *Lowe's* decision, the Crown declined to prosecute any appeal to this court. I do not think that where there is a special tribunal which is intended to deal with all matters as a quasi-judicial body and the decision of such tribunal has been reversed by the statutory appeal authority, this court should encourage the overruled tribunal to assume before it the role of party appellant, solely for the purpose of having its own original decision restored.

In my opinion Meyer's application to rescind special leave should have been granted.

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As to whether an appeal is competent at all I have grave doubts. Under sec. 9 (2) of the Act of 1933 the appeal tribunal reviews the board's decisions as to registration, removal from the register and applications to restore to the register. The appeal lies " to a judge of the Supreme Court in chambers." The appeal is in the nature of a rehearing and the judge is invested with similar powers and authorities as he would possess in the " exercise of his ordinary jurisdiction." And his decision is final.

It is clear that the functions of the judge in chambers to whom I have referred as a " special appeal tribunal " are assimilated to those of the board itself. The board itself has a jurisdiction which covers, not merely questions of fact and incidentally of law, but, and more often, important discretionary powers of an administrative character. It has to determine delicate matters of professional conduct and misconduct and questions of medical and public policy must frequently be involved in its determination. The judge in chambers is also required to deal with all such matters, although, no doubt, he pays great attention to the board's opinion thereon.

Is the order made by the appellate tribunal an order from which an appeal lies to this court under the Constitution and the *Judiciary Act* ? Does the " judge in chambers " exercise " judicial power " ? This case differs *toto coelo* from that of *Parkin* v. *James* (1). There a judge in chambers of the Supreme Court of Victoria decided a question of law as to the construction of a will, the process being that of originating summons. Obviously the case was heard by " the Supreme Court of Victoria," the ordinary jurisdiction thereof being exercised in chambers. As *Griffith* C.J. said,

> " 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 " (2).

The obvious distinction between *Parkin* v. *James* (1) and this case is brought into bold relief by two decisions of the Supreme Court of New South Wales in 1874 (*Ex parte Jones* (3) and *Siddons* v. *New South Wales Shale and Oil Co. Ltd.* (4)). There the Supreme

(1) (1905) 2 C.L.R. 315.
(2) (1905) 2 C.L.R., at p. 342.
(3) (1874) 12 S.C.R. (N.S.W.) 284.
(4) (1874) 12 S.C.R. (N.S.W.) 364.

Court emphasized that, where a statute gave power to a "judge of the Supreme Court," the judge was not acting for the court and that no appeal lay to the court itself as would be the case where a judge in chambers ordinarily exercises a jurisdiction which belongs to or is invested in "the court."

Further, the nature of the functions committed to a body is of very great significance in determining whether "judicial power," properly so called, has been exercised by it. This principle is well illustrated by *Holmes* v. *Angwin* (1), a case dealing with the determination of disputed returns by the Supreme Court of a State. I have heard nothing to convince me that this case was wrongly decided. Indeed it finds support in the Privy Council decision of *Strickland* v. *Grima* (2).

In *Federal Commissioner of Taxation* v. *Munro* (3) *Isaacs* J. gave some instances of tribunals which had been set up for administrative purposes, which had been empowered to decide questions of fact as between contestants, and the decisions of which were binding. He referred to the jurisdiction of the registrar and the law officer under the *Trade Marks Act*, to administrative bodies set up under the *Patents Act*, the Commonwealth *Public Service Act* and the *Commonwealth Bank Act*. The opinion of *Isaacs* J. was that none of such tribunals exercise judicial power strictly so called.

It is well known that there are Acts of Parliament which confer jurisdiction of a very special character upon a judge of a superior court. For instance, under sec. 29 (5) of the *Post and Telegraph Act*, if a newspaper has been removed from the register of newspapers, an appeal lies to a justice of the High Court or to a judge of the Supreme Court of a State by summons or petition in a summary manner.

In the case of the appeal tribunal set up under the *Medical Act* the significant features are :—

(*a*) That the revisory jurisdiction is not conferred upon "the Supreme Court" as a court or by that name.

(*b*) That the jurisdiction is conferred upon a judge as judge.

(1) (1906) 4 C.L.R. 297.
(2) (1930) A.C. 285.
(3) (1926) 38 C.L.R. 153.

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(*c*) That, for the purposes of the appeal, the legislature has taken pains to confer such powers as would exist if the judge was exercising "his ordinary jurisdiction."

(*d*) That the functions of appeal may and usually will involve questions of discretion and policy which are quite foreign to the realm of ordinary judicial functions and which are essentially administrative in character.

(*e*) That the appeal tribunal's decisions are stamped with the character of finality.

(*f*) That, if an appeal lies, the Medical Board would be placed in an anomalous position by assuming the role of party either before the appeal tribunal or upon a further appeal.

The Privy Council's decision in *Shell Co. of Australia Ltd.* v. *Federal Commissioner of Taxation* (1), affirming *Federal Commissioner of Taxation* v. *Munro* (2), shows that, even within the framework of the Federal Constitution, there is ample room for the creation of bodies which, either in the first instance or upon appeal, may incidentally decide important questions of fact or law but which do not exercise judicial power strictly so called. Under the State Constitutions, where there is no provision which suggests any separation of powers between executive and judiciary, there is no reason why judges of the Supreme Court or any other court cannot be employed for the purpose of exercising administrative functions although such judges usually exercise judicial power. Often the State Parliaments select a judge as a special tribunal only because they repose confidence in the individual holding the office and not at all because they are intending to resort to the court as the executants of judicial power so as to lay the ground for permitting further appeal and the delay and possible mischief thereby occasioned.

However, without dealing further with the question of general importance, I agree that the appeal should be dismissed upon the ground that Mr. Justice *Lowe's* decision as to the construction of the *Medical Act* was right.

McTIERNAN J. The possession of one or more of the qualifications described in the Fourth Schedule to the *Medical Act* 1928 of Victoria is by sec. 13 of the Act made the foundation of the right to be registered as a legally qualified medical practitioner and to receive a certificate of qualification from the Medical Board. The

(1) (1931) A.C. 275; 44 C.L.R. 530. (2) (1926) 38 C.L.R. 153.

respondent possesses four of these qualifications, the genuineness of which he established in the manner provided by sec. 13 of the Act. He is in possession of the following qualifications: Licentiate of the Royal College of Physicians of Edinburgh, of the Royal College of Surgeons of Edinburgh, of the Faculty of Physicians and Surgeons of Glasgow, and a legally qualified practitioner registered in Great Britain. None of these qualifications is sufficient to complete the respondent's title to be registered or to receive a certificate of qualification under the Act. An additional qualification is demanded by sec. 14. This section, to which sec. 13 is expressed to be subject, says in its first part that no person whosoever shall be entitled to be registered as a legally qualified medical practitioner or to receive a certificate of qualification unless he has passed through a regular course of medical and surgical study of five or more years' duration. In Great Britain the respondent studied medicine and surgery only for one year. As this course of study was less than the minimum period of study required by the first part of the section, he was compelled to put forward the fact that he had, prior to going to Great Britain, completed a regular course of medical and surgical study of five or more years' duration in the University of Leipzig in Germany. The Medical Board of Victoria did not recognize that as an accomplishment qualifying the respondent for the purposes of the Act. They applied sec. 14, which, in its second part, says that no school of medicine or university or college or other body in any country other than Great Britain, Ireland or any British possession shall be recognized by the Medical Board of Victoria for the purposes of this Act unless it appears to it that legally qualified medical practitioners of Victoria are by virtue of being so registered and without further examination entitled to practise their profession in such country either on registration or otherwise. Victorian legally qualified practitioners are not entitled to practise their profession in Germany by virtue of their Victorian status. It is clear that the respondent cannot be admitted to that status by the Medical Board unless it takes notice of the medical and surgical curriculum of the University of Leipzig and accords it recognition as a regular course of medical and surgical study proper to satisfy the requirements of sec. 14.

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The dismissal of the respondent's application is based on the view that if the board accepted this curriculum its action would be equivalent to recognizing the University of Leipzig itself, and that it would contravene the section. The opposing contention is that sec. 14 prohibits recognition only of the diplomas or certificates of universities in foreign countries where the Victorian status of a legally qualified medical practitioner is not accepted, but does not prohibit the recognition of any regular course of study of five years or of longer duration, that is done in one of these countries. The assumption upon which this contention is based is that the first and second parts of sec. 14 are two separate enactments applying to different subjects. What is assumed is that the first part defines the nature and period of study which an applicant must have done even if he is to be regarded as qualified under the Fourth Schedule to the Act, and that nothing is prohibited by the second part except the recognition of diplomas or certificates granted by universities or other bodies in countries out of the British Empire which ignore the status of practitioners registered in Victoria. Upon this assumption sec. 14 has nothing to say to the question in what place the regular course of medical and surgical study which is a condition precedent to registration in Victoria should be done, and it would follow that the board would be bound to give credit to and recognize for the purposes of the Act any regular course of study which an applicant passed through, even if it were the medical and surgical course of a university in a foreign country where the Victorian status is not recognised. But the implication in the phrase "passed through a regular course of medical and surgical study" and the category "school of medicine or university or college or other body" in the second part of the section plainly indicate an interrelation between the two parts of the section. Upon a consideration of the three parts into which the section is divided it is clear that they were all intended to be read together. A regular course of medical and surgical study imports a curriculum of an institution exercising the function of giving instruction and training in medical and surgical science. A person could hardly be held to have "passed through a regular course of medical and surgical study" unless the training and instruction which he received were governed by the medical and

surgical curriculum of one of the bodies mentioned in sec. 14. The legislature, for the purposes of sec. 14, has adopted a category so wide that any person applying to be registered would inevitably fail to prove that he had passed through a regular course of medical and surgical study unless his pursuit of knowledge and skill in these sciences had been governed by the rules of an institution like one in that category. It may be observed that "school of medicine" is omitted from the list of bodies mentioned in sec. 13. A more comprehensive list is contained in part two of sec. 14 because of the enactment in part one of that section that the character of the study to which the applicant for registation should have applied himself is a regular course of medical and surgical study. In sec. 13, the legislature was referring to the testimonium, diploma, or certificate given by a university, college or other body. The addition in part two of sec. 14 of "school of medicine" to that list makes it manifest that in this section the legislature was concerned with the question in what circumstances a foreign school of medicine, university, or college, or other body to which an applicant owed his medical and surgical training or from which he received a testimonium, diploma, or certificate or upon which he otherwise depended to support his claim to be registered, should be recognized for the purposes of the Act.

If the board accepted the course of study done by the respondent in the University of Leipzig as a qualification which was sufficient to support his claim to be registered and to receive a certificate of qualification under the Act, the board would in my opinion in the ordinary sense of the word thereby "recognize," that university for the purposes of the Act. But it is said that sec. 14 is to be read subject to an implied limitation that is supplied by the thirteenth clause of the Fourth Schedule. This clause in part provides that a person is qualified under sec. 13 who proves to the satisfaction of the board that he has passed through a regular course of medical study of not less than five years' duration in a British or foreign school of medicine, and has received after due examination from some British or foreign university, college, or body duly recognized for that purpose in the country to which such university, college, or other body may belong and also recognized by the Medical Board of Victoria a medical diploma or degree certifying to his

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ability to practise medicine or surgery, as the case may be. It may be conceded that this context appears to acknowledge that the board has a discretion to recognize the diplomas and certificate of universities, colleges, and other bodies, and, if the provisions of sec. 14 were not in the Act, it would be within the discretion of the board to recognize the diploma or certificate of one of those bodies for the purposes of the Act even if it were in a foreign country where Victorian legally qualified practitioners as such have no *locus standi*. But I cannot agree that, when the provisions of sec. 14 are read with the thirteenth clause of the Fourth Schedule, any legislative intention appears that sec. 14 was intended only to restrain the discretion of the board to recognize a diploma or certificate granted in a foreign country where the status which the Act confers on medical practitioners in Victoria is not recognized. The legislative intention which appears when sec. 14 and the thirteenth clause of the Fourth Schedule are read together is to debar the board from recognizing any school of medicine, university, college, or other body in a country where the Victorian registration is not accepted, the board however retaining a discretion under the clause either to recognize or to decline to recognize a diploma or certificate as a qualification for the purposes of clause 13, although it was granted in a country which may not ignore the status acquired by registration in Victoria. Presumably it would refuse to recognize the diploma or certificate emanating from any such country if it were not satisfied that it was evidence of a requisite degree of proficiency. The plain intention of the general provisions of sec. 14 is to prohibit the board from recognizing any body comprised within the category mentioned in the section unless it is excepted from its operation. Perhaps the prohibition does not apply to any body specified by name in clause thirteen of the Fourth Schedule as to which special provisions are introduced. Sec. 14 is expressed in language wide enough to extend to the recognition of the curriculum as well as the diploma of any school, university, college or other body which is not in Great Britain or Ireland or a British possession and is not excepted by the Act, and the section furnishes as the criterion of the scope of its prohibitory intention the wide words "for the purposes of the Act." The recognition by the board of the respondent's course of study in the

University of Leipzig as a qualification supplementing the qualifications on which he relied to constitute a title to be registered and to receive a certificate of qualification under sec. 13 would, in my opinion, have been a clear contravention of sec. 14 of the Act. The board was, in my opinion, bound by the Act to reject the respondent's application.

I do not wish to add anything to the reasons which have been given why the application to rescind special leave should be refused. In all the circumstances of the case, which are not without an aspect which should naturally evoke sympathy for the respondent if he came to Victoria under a misapprehension as to his rights, I think that, even if he were unsuccessful in this appeal, his costs should be borne by the funds appropriated by Parliament for the services of the Medical Board.

In my opinion the appeal should be allowed.

Motion to rescind special leave to appeal dismissed. Appeal dismissed.

Solicitors for the appellant, *Seton Williams & Heathfield*, Melbourne, by *Villeneuve-Smith & Dawes*.

Solicitors for the respondent, *A. Robinson & Co.*, Melbourne, by *Minter, Simpson & Co.*

J. B.