[HIGH COURT OF AUSTRALIA.]

KAHN . . . . . APPLICANT;

AND

THE BOARD OF EXAMINERS (VICT.) . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *May* 15, 16; *July* 21.

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

Barrister and Solicitor—Admission to practise in Victoria—Alien—British practitioner—Rules of Council of Legal Education—Certificate that applicant is natural-born or naturalized British subject required—Validity of rule—Discretion of judges of Supreme Court—Oath of allegiance, Whether alien can take—Jurisdiction of High Court to entertain appeal—Legal Profession Practice Act 1928 (*Vict.*) (*No.* 3715), *secs.* 5 (2), 21—*Rules of the Council of Legal Education* 1932-1937 (*Vict.*), *rr.* 36, 42; *Schedule G.*

The *Legal Profession Practice Act* 1928 (Vict.) provides, by sec. 5 (2), that "every person shall before he is admitted and enrolled as a barrister and solicitor take the oath of allegiance," and, by sec. 21, that the Council of Legal Education constituted under the Act "shall have power . . . to make . . . rules regulating the admission to practise in Victoria as barristers and solicitors of persons duly admitted and entitled to practise as . . . legal practitioners . . . of the superior courts of England, Scotland, or Ireland . . . subject to any conditions (either general or applicable to particular places or persons only) that seem expedient."

Rule 36 of the *Rules of the Council of Legal Education* 1932-1937 (Vict.) requires that any person duly admitted and qualified to practise as a legal practitioner of the superior courts of England, Scotland, Northern Ireland or the Irish Free State who applies to be admitted to practise in Victoria as a barrister and solicitor shall cause to be delivered to the secretary of the Board of Examiners a certificate signed by two barristers and solicitors of the Supreme Court stating (*inter alia*) that they believe him to be a natural-born or naturalized British subject. The applicant was a German national who had been admitted to practice as an English barrister but who failed to produce to the Board of Examiners the certificate required by rule 36.

Held, by *Latham* C.J., *Rich*, *Starke* and *McTiernan* JJ. (*Evatt* J. dissenting), that the rule was *intra vires* of the Council of Legal Education and that the judges of the Supreme Court were justified in the exercise of their discretion in refusing to dispense with compliance with the rule.

The jurisdiction of the High Court to hear and determine an appeal from a decision of the judges of the Supreme Court of Victoria on an appeal from the Board of Examiners under rule 40 of the *Rules of the Council of Legal Education* 1932-1937 considered.

Capacity of an alien to take the oath of allegiance considered.

Special leave to appeal from decisions of the Supreme Court of Victoria and the judges thereof: *In re Kahn*, (1939) V.L.R. 273, refused.

APPLICATION for special leave to appeal from the Supreme Court of Victoria.

The applicant, Rudolf Ernst Kahn, who was a person duly admitted and entitled to practise as a barrister in the Superior Courts of England applied for admission to practise as a barrister and solicitor of the Supreme Court of Victoria. The applicant was a German national, and the Board of Examiners constituted under the *Rules of the Council of Legal Education* (Vict.) refused to grant him a certificate that he had complied with the rules, which, by rule 36, require a British practitioner who applies to be admitted to practise in Victoria to cause to be delivered to the secretary of the Board of Examiners a certificate signed by two barristers and solicitors in a form which includes the following statement:—"(2) We believe that he is a natural-born (or naturalized) British subject of the age of years." A "British practitioner" includes a practitioner of the Superior Courts of England, Scotland, Northern Ireland or the Irish Free State (rule 9). The applicant produced a certificate signed by two barristers and solicitors which in other respects complied with the requirements of the rules, but the certificate did not include the statement above quoted. On this ground the Board of Examiners refused to grant the certificate. The applicant appealed under rule 40 of the *Rules of the Council of Legal Education* to the judges of the Supreme Court, who dismissed the appeal and declined to dispense with the requirements of rule 36: *In re Kahn* (1).

From that decision the applicant sought special leave to appeal to the High Court.

(1) (1939) V.L.R. 273.

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Wilbur Ham K.C. (with him *Sholl*), for the applicant. Under sec. 21 the whole qualification of a British practitioner is set out, and all that is left to the Council of Legal Education is to provide some rules as to how he can give effect to his qualification by becoming admitted. The council could require proper evidence of qualification. But to limit the number of British practitioners who can successfully apply to those who are of British nationality is just as inconsistent with the *Legal Profession Practice Act* and *ultra vires* as it would be to limit it to those who obtained honours in a law course, or those who were married men, or had red hair, or were not of British nationality. That part of rule 36 (*b*) which requires a British practitioner to deliver a certificate in the form in schedule G, clause 2, is *ultra vires*. *In re Atkinson* (1) is distinguishable. The position of British practitioners is comparable with that of practitioners from other States who, under secs. 15 and 18, are entitled to be admitted. Sec. 21, plus the making of rules contemplated by that section, makes a British practitioner entitled to admission also. If anything, the position under sec. 15 as regards practitioners from other States is clearer still, because it says that on proof being made of their admission in another State they shall "be entitled to be admitted" in Victoria, yet rule 35 (*b*) requires clause 2 of schedule G to be certified to as to them. If, contrary to this view, rule 36 (*b*), in so far as it requires by clause 2 of schedule G a certificate, is valid, the applicant desires a dispensation from the obligation to include that clause under rule 42. At common law aliens may be admitted to be barristers or solicitors (*Halsbury, Laws of England*, 1st ed., vol. 26, p. 710; 2nd ed., vol. 1, p. 452; vol. 31, p. 47; *Bebb* v. *Law Society* (2); *In re Heyting* (3); *Co. Litt.* 128 (a); *Saddington, Legal Practitioners Act* (1937), p. 3; *Act of Settlement* 1700, sec. 3; *Halsbury's Statutes*, vol. 3, p. 159; *Legal Profession Practice Act* 1928, sec. 8). Aliens are capable of taking the oath of allegiance required by sec. 5 (2) of the *Legal Profession Practice Act* (*Blackstone's Commentaries*, 3rd ed. (1768), vol. I., pp. 368-370; *Comyns' Digest*, 5th ed. (1822), vol. I., tit. Alien (A), p. 541; *Hale's Pleas of the Crown* (1800), vol. I., pp. 60, 64; 2 *Co. Inst.*, cap. 10, p. 121;

(1) (1905) V.L.R. 408; 26 A.L.T. 223.
(2) (1914) 1 Ch. 286.
(3) (1928) N.Z.L.R. 233.

Viner's Abridgment (1791), vol. II., p. 265, clause 1). There is also implied authority for such a proposition (*De Jager* v. *Attorney-General of Natal* (1); *Markwald* v. *Attorney-General* (2); *Johnstone* v. *Pedlar* (3); *Nationality Act* 1920-1930 (Cth.); *Army Acts* (Eng.), sec. 80 (4) &c.; *Halsbury's Statutes*, vol. 17, pp. 171, 180, 353). *Comyns' Digest*, 5th ed. (1822), vol. I., p. 554, tit. Allegiance (B) (1), and *Godfrey and Dixon's Case* (4); *Halsbury, Laws of England*, 2nd ed., vol. II., p. 479, note *r*; and *Saddington, Legal Practitioners Act* (1937), pp. 3, 4, are not to the contrary. *In re Heyting* (5) wrongly decided that aliens could not be admitted to practise as solicitors. [He referred also to *Stephen's Commentaries*, 10th ed. (1886), vol. II., p. 434; *Berriedale Keith, The King and the Imperial Crown* (1936), p. 376; *Kramer* v. *Attorney-General* (6); *Westlake's Private International Law*, 7th ed. (1925), p. 378.]

Norris presented the views of the Board of Examiners. The Supreme Court is not acting in deciding this matter, but the judges of the Supreme Court are acting as *personae designatae*. The composition of the tribunal shows this. An appeal to a judge in Chambers is well recognized in law (*Supreme Court Act* 1928, secs. 42, 43). Sec. 34 provides for the business to be disposed of by the Full Court, but no provision is made for any body of judges sitting otherwise than as the Full Court. Sec. 25 refers to the judges as *personae designatae* in their rule-making capacity. The *Rules of the Council of Legal Education* draw a sharp distinction between the judges and the court: See, e.g., rules 38, 39, 40, 42.

[LATHAM C.J. referred to *Medical Board of Victoria* v. *Meyer* (7).]

The High Court should be reluctant to interfere with the decision of the judges of the Supreme Court on a matter of admission (*In re Byrne* (8)). Rule 36, in requiring a British practitioner to comply with schedule G, is not *ultra vires*. A power to regulate may and, in this case, does include a power to prohibit to some extent (*Williams* v. *Melbourne Corporation* (9)). An alien cannot be admitted as

(1) (1907) A.C. 326, at p. 328.
(2) (1920) 1 Ch. 348, at pp. 363, 371.
(3) (1921) 2 A.C. 262, at p. 272.
(4) (1619) Palm. 13, at p. 14 [81 E.R. 955].
(5) (1928) N.Z.L.R. 233.
(6) (1923) A.C. 528.
(7) (1937) 58 C.L.R. 62, at pp. 71, 72.
(8) (1913) 17 C.L.R. 52, at p. 54.
(9) (1933) 49 C.L.R. 142, at p. 157.

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a solicitor at common law. [He referred to *Bebb* v. *Law Society* (1); *In re Heyting* (2); *Saddington, Legal Practitioners Act* (1937), p. 155.] Whatever the reasons given for these decisions, they evidence a settled practice not to admit aliens, which has always been adhered to in Victoria.

Wilbur Ham K.C., in reply.

Cur. adv. vult.

July 21.

LATHAM C.J. Rudolf Ernst Kahn, a member of the Honourable Society of Gray's Inn and a person duly admitted and entitled to practise as a barrister in the superior courts of England, applies for special leave to appeal from a decision of the judges of the Supreme Court pronounced in the exercise of a function delegated to the judges under rule 40 of the *Rules of the Council of Legal Education* (Vict.) 1932 as amended. The applicant is of German nationality and is a Doctor of Laws and Political Science of the University of Wurtzburg. He applied for admission as a barrister and solicitor of the Supreme Court of Victoria. The Board of Examiners constituted under the *Rules of the Council of Legal Education* refused to grant to him a certificate that he had complied with the rules, and he appealed to the judges of the Supreme Court, who dismissed the appeal.

The applicant is a British practitioner within the meaning of the rules. Rule 36 requires that such an applicant shall cause to be delivered to the secretary of the Board of Examiners a certificate signed by two barristers and solicitors in a form (Schedule G) which includes the following statement: "(2) We believe that he is a natural-born (or naturalized) British subject of the age of . . . years." The applicant produced a certificate signed by two barristers and solicitors which in other respects complied with the requirements of the rules, but the certificate did not include the statement which I have quoted. It could not be said that the certificate was either in the form or to the effect (rule 37) required by the rules. Accordingly, the applicant did not comply with the rules which were applicable in his case. The board of examiners, therefore, refused to grant the certificate.

(1) (1914) 1 Ch. 286.

(2) (1928) N.Z.L.R. 233.

Under rule 42 as amended in 1936 the Supreme Court or a judge thereof may dispense with the performance or observance of any requirement of the rules. An application was made to the judges to exercise this power, and the application was refused. The applicant now seeks special leave to appeal to this court from the order dismissing his appeal and refusing to dispense with the requirement of rule 36 which causes the difficulty.

It is impossible to hold that the applicant has complied with the rules. The certificate which he has produced is neither in the form nor to the effect of the prescribed schedule. He can therefore succeed upon his application only if the dispensing power is exercised in his favour or if it were held that the rule requiring the production of the certificate were *ultra vires* in relation to the particular requirement with which the applicant has failed to comply.

There are obvious reasons why the learned judges of the Supreme Court might be indisposed to dispense with the requirement in question. Local applicants for admission who have satisfied the necessary educational requirements in Victoria are required to prove that they are natural-born or naturalized British subjects: See rule 35, schedule E. This requirement has existed for many years. It exists also in other States of the Commonwealth. My brother *Rich* refers to the relevant provisions. For a very long period the rule was the same in England. In a matter affecting the admission of practitioners in the Supreme Court of a State this court should, whatever its own view might be, be reluctant to substitute its discretion for that of the Supreme Court or the judges thereof unless it were evident that the discretion had been exercised upon a wrong basis or upon no ascertainable basis.

It is urged for the applicant that rule 36, at least in so far as it requires the production of a certificate containing a statement of the belief of two practitioners as to the nationality of the applicant, is *ultra vires*. The rule was made by the Council of Legal Education under powers conferred by sec. 14 and sec. 21 of the *Legal Profession Practice Act* 1928. Under these sections the council has power to make rules regulating the admission to practice in Victoria as barristers and solicitors of persons duly admitted and entitled to practise as barristers of the superior courts of England " subject to

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any conditions (either general or applicable to particular places or persons only) that seem expedient." The Act does not contain any provision which confers a right upon such persons to be admitted. Sec. 15 does provide that practitioners of the Supreme Courts of other States of the Commonwealth shall be entitled to be admitted in accordance with rules made by the council. But there is no such provision applying to persons referred to in sec. 21 of the Act. Thus the applicant must rely solely upon the rules in order to support his claim to be admitted.

It is urged that the rule-making power is not sufficiently wide to justify a rule requiring any information as to the nationality of the applicant. It may be observed that the rules do not require in the case of British practitioners that they shall be British subjects. They require only that a certificate signed by two practitioners shall state that those practitioners believe that the applicant is a British subject.

I have had some difficulty in following the arguments that such a requirement is *ultra vires*. The rule-making power is expressed in very wide terms. The conditions which may be prescribed by the council are " any conditions that seem expedient." It is difficult to suggest a wider general phrase. In order to emphasize the wide extent of the power, sec. 21 also provides that conditions to be prescribed may be " either general or applicable to particular places or persons only." I have already referred to the fact that nationality of the applicant is or has been regarded as a relevant element in other cases in Victoria, in other States and in England. These facts show that the nationality of the applicant cannot be regarded as an entirely irrelevant matter so as not to be within the scope of the rule-making power. Apart from these considerations, however, I am of opinion that the rule-making power is expressed in such wide terms that even if there were no evidence that the nationality of an applicant for admission to the legal profession had in any place or at any time been regarded as of importance, the council has full power to prescribe a condition relating to nationality. Accordingly, in my opinion, the rule is valid.

The applicant has not complied with the rule. The order dismissing the appeal was therefore rightly made, and, for reasons which

I have already stated, I would not think it proper to vary the decision of the judges of the Supreme Court upon the application to dispense with observance of the rule.

I have expressed my opinion upon the merits of the case without reference to a preliminary objection raised by the respondent. It is objected that the decision of three judges of the Supreme Court given under rule 40 is not a decision of the Supreme Court and that therefore this court has no jurisdiction to grant special leave to appeal or to entertain an appeal if such leave were granted.

The terms of the rules are such as to create difficulties in this connection. In certain rules powers are given to "a judge of the Supreme Court": See rules 16 (2) (*a*) and 3 (*a*), 27, 32 and 35. Rule 42 confers a power upon "one of the judges of the Supreme Court." Rules 18, 19 and 21 (*b*) vest power in "the Full Court of the Supreme Court." Rule 39 refers to "the judges," rule 40 to "the judges of the Supreme Court," and rule 42 to "the Supreme Court or a judge thereof."

If I thought it necessary to decide the question I should be inclined to attach some weight to the distinction recognized by the rules between "the Full Court of the Supreme Court" and "the judges of the Supreme Court." But it is not, I think, necessary in this case to decide the question which is raised by the preliminary objection.

Under rule 42 applications for dispensation can be dealt with only by "the Supreme Court or a judge thereof." The appellant's application for dispensation was dealt with and was refused. In hearing and determining the application the judges must be taken to have acted as the Supreme Court. Thus the order refusing dispensation is an order of the Supreme Court from which it would be possible for this court to give leave to appeal. Upon an appeal from that order it would be possible to give the appellant effective relief. It is therefore not essential in this case to decide whether the order dismissing the appeal from the decision of the Board of Examiners is also an order of the Supreme Court.

What I have said is sufficient to dispose of the case, but the court has heard interesting arguments upon two other matters which were relied upon by the Board of Examiners as grounds for

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refusing the certificates. The board was of opinion that an alien could not be admitted as a barrister and solicitor and that an alien could not take the oath of allegiance which is required by sec. 5 (2) of the *Legal Profession Practice Act* 1928.

The former proposition has been regarded as depending upon the latter: See, for example, *Halsbury, Laws of England*, 2nd ed., vol. 2, p. 479, note *r*:—"It is not now necessary that a person should be a British subject in order to be admitted a student or to be called to the Bar. Up to July 31, 1868, all persons who were called to the Bar had to take the oath of allegiance to the Sovereign in the Court of King's Bench or in some court of quarter sessions (Stat. 1 Will. & Mar. c. 8), but the obligation for barristers to take the oath of allegiance was abolished by the *Promissory Oaths Act* 1868 (31 & 32 Vict. c. 72), sec. 9. See 23 *Law Quarterly Review*, 438. The indirect result of this Act has been to admit aliens to the English Bar."

But it is by no means clear that an alien cannot take the oath of allegiance. For the position in earlier law, see *Hale's Pleas of the Crown* (1800), vol. I., pp. 60, 64, and *Blackstone's Commentaries*, vol. I., c. 10, p. 368. These passages show, not only that an alien might take the oath, but that he might be under a duty to take it. For the position in more modern times, see the *Army Act* 1881 (44 & 45 Vict. c. 58), sec. 95, which provides that, with the consent of the Crown, an alien may enlist in the army. In order to do so, he must take the oath (sec. 80). The Act does not provide that he may take the oath. It assumes that he can take it. Persons who, being subjects of one prince, take an oath of allegiance to another prince, may entangle themselves in difficulties (*Hale's Pleas of the Crown* (1800), vol. I., p. 67; *Blackstone's Commentaries*, vol. I., c. 10, p. 368). The recognition of the existence of these difficulties is not consistent with an incapacity of an alien to take the oath. The difficulties which are discussed in the authorities cited do not depend upon the proposition that it is inconsistent with existing allegiance to one prince to attempt or to purport to take (though ineffectually) an oath of allegiance to another prince. They are derived from the actual existence of a double allegiance. But the question of the capacity of an alien to take the oath was not completely argued upon the

hearing of this appeal, and I think it is sufficient to say that, as at present advised, I am not prepared to hold that an alien cannot take the oath of allegiance or that he cannot be a barrister and solicitor.

For the reasons which I have given I am of opinion that the application for special leave to appeal should be refused. In my opinion, there should be no order as to costs.

RICH J. The applicant has been refused by the Board of Examiners a certificate upon which he can apply to the court for admission to practise as a barrister and solicitor in the State of Victoria.

The first contention in this matter was that no appeal lay to this court because the Supreme Court of Victoria was not sitting as a court, but that the judges composing it were *personae designatae*.

When the *Charter of Justice* (13th October 1823) erected and established the first Supreme Court in Australia, clause X. of that charter authorized and empowered the Supreme Court so constituted to *approve*, admit and enrol barristers, proctors, attorneys and solicitors and to remove them upon reasonable cause. There are not now and never have been in Australia Inns of Court which deal with calls, but the power of admission and removal was vested in the Supreme Court as such and has since been exercised by the Supreme Courts of each of the States comprising the Commonwealth of Australia. It will be noted that practitioners of Great Britain, Scotland and Ireland were not admitted as of course. They had to be approved by the court and could be removed upon reasonable cause (*Charter of Justice*, clause X.). In Victoria the position is quite clear. Whatever may be the formalities which intending practitioners must observe, it is ultimately the duty of the Supreme Court to decide whether or not a person should be admitted to practise. This is clearly recognized by sec. 2 of the *Legal Profession Practice Act* 1928, which provides that the repeal of certain Acts shall not affect the power of the Supreme Court to admit persons entitled to be admitted to practise as barristers and solicitors.

Rules formulated by the Council of Legal Education provide that a person applying for admission to practise in the State of Victoria

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must furnish to the Board of Examiners a certificate to the effect that he is a natural-born or a naturalized British subject. The applicant in this case has been unable to do so. The applicant was called to the Bar in England by Gray's Inn and is, therefore, a British practitioner within the meaning of those words in the *Legal Profession Practice Act* 1928, and he therefore contends that he is entitled to be admitted in Victoria without complying with those rules of the Council of Legal Education which require a certificate that he is a natural-born or a naturalized British subject. Sec. 21 of the *Legal Profession Practice Act* 1928 confers upon the Council of Legal Education in the case of practitioners of England the power to make and alter rules regulating the admission to practise in Victoria as barristers and solicitors of persons duly admitted and entitled to practise as barristers in England, and the question which arises for decision is whether the applicant as a person duly admitted and entitled to practise as a barrister in England can be lawfully required to furnish the Board of Examiners with a certificate that he is a natural-born or a naturalized British subject.

Before dealing with the scope and effect of sec. 21 it is not unimportant to observe that in the States of the Commonwealth candidates for admission to practise must take an oath of allegiance and that in South Australia and in Western Australia it is also provided that no person shall be admitted to practise as a barrister and solicitor unless he be a natural-born or naturalized British subject. In England up to 1868 persons called to the Bar were required to take an oath of allegiance, but as a result of the passing of the *Promissory Oaths Act* 1868 this was no longer necessary, with the result that aliens were enabled to be called to the Bar. In Australia the Supreme Court of New South Wales by virtue of the *Charter of Justice*, clause X., was authorized to provide for the admission of fit and proper persons to appear and act as barristers " according to such general rules and qualifications as the said court shall for that purpose make and establish." The statute 7 & 8 Will. III. c. 24 obliged barristers to take the oath of allegiance. This Act has always been regarded as applicable in New South Wales and is so recognized by the Act 20 Vict. No. 9 (N.S.W.), the preamble to which recites that persons applying to the court for admission as

barristers must take the oath of allegiance. In Victoria by sec. 5 of the *Legal Profession Practice Act* 1928 every person except so far as may otherwise be enacted shall before he is admitted as a barrister and solicitor take the oath of allegiance.

I turn now to the validity of the rule which requires the certificate which the applicant is unable to supply. The council has power to make rules regulating the admission to practise in Victoria of those persons compendiously described as British practitioners. " The power of regulation may, and almost necessarily does, involve some restriction or prohibition. The body entrusted with the power to regulate must in some sufficient way mark out whatever limits of prohibition are to exist " (*Country Roads Board* v. *Neale Ads Pty. Ltd.* (1), per *Isaacs* J.). The council, in making rules regulating the admission of British practitioners to practise in Victoria, while not having power to prohibit, has the power in the course of regulating to mark out such limits of prohibition as are to exist. It cannot, I think, be said that a rule requiring that British practitioners intending to apply for admission in Victoria should be fit and proper persons was not a proper exercise of the power to make rules under sec. 21, and, in my opinion, it is a reasonable exercise of this power to require that a British practitioner who seeks to be admitted to practise in Victoria should establish that he is a natural-born or a naturalized British subject. In so doing the rule-making body in exercising its power to regulate is imposing some restriction or prohibition. The restriction which is objected to by the applicant is clearly justified as a means of securing that the person seeking to be admitted to practise in Victoria should at least have that tie which is connoted by the word allegiance.

This is all the more necessary in view of the uncertainty which appears to exist upon the question of whether or not an alien can take the oath of allegiance. As I have already mentioned, in Western Australia it is provided by the *Legal Practitioners Act* 1893, Part III., sec. 14, that no person shall be admitted as a practitioner unless he is a natural-born or naturalized British subject, and in South Australia by rules of court (*Supreme Court*

(1) (1930) 43 C.L.R. 126, at p. 139.

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Rules 1936, rule 10) a similar provision is made. If the language of sec. 21 upon its proper construction enables, as I think it does, the rule in question to be made, it is not an unimportant consideration that other States of the Commonwealth consider it material that their legal practitioners should be natural-born or naturalized British subjects. Another material consideration in testing whether the rule in question is a reasonable exercise of the power conferred on the council is that the judges of the courts of the States of the Commonwealth and the High Court are chosen from legal practitioners who have been duly admitted to practise in their respective States and have been practising for a prescribed number of years.

For these reasons I am of opinion that special leave should be refused.

I prefer to base my judgment on these reasons rather than on the inability of an alien taking the oath of allegiance. As at present advised I incline to the opinion that an alien within the realm may take such an oath. According to *Hale's Pleas of the Crown* (1800), vol. I., p. 64, the oath of allegiance formerly had to be taken by all persons above the age of twelve, whether denizens or aliens; and, according to *Coke* (*Institutes*, book 2, c. 3, sec. 94, note), everyone over the age of twelve had to swear it in the tourne, unless he was within some leet, and then in the leet. *W. Sheppard* in *The Court-Keepers Guide* (1649), p. 10, writing of a court leete, says: "In this court a steward might and ought to have given the oath of allegiance, when it was in use"; but the author does not deal with the swearing of aliens. His remarks suggest that the administration of the oath had become obsolete in his day. *Coke*, in his note (68*b*), seems to suggest that this law was instituted by King Arthur for the purpose of consolidating his realm in England and ensuring the loyalty of residents. "*Hujus legis authoritate expulit Arthurus praedictus Saracenos et inimicos a regno.*" *Hale* says, vol. I., p. 68, that there may be due from the same person subordinate allegiances which are not without an exception of fidelity due to the superior prince, but there cannot, or at least should not, be two or more co-ordinate absolute ligeances by one person to several independent or absolute princes. *Holdsworth*, vol. IX. (1926), p. 92, mentions some remarks by *Hankford* J. in 1413: "Though

an alien be sworn in the leet or elsewhere, that does not make him a liege subject of the king, for neither the steward of a lord nor any one else, save the king himself, is able to convert an alien into a subject." The law would appear to be that an alien owes a local allegiance whilst he is within the realm whether he has sworn allegiance or not. Under the old law, when everybody on attaining the age of twelve had to swear allegiance, the requirement extended to everybody within the realm whether alien or denizen ; and taking the oath appears to have been a condition of the alien being allowed to remain. I cannot see any objection in principle to an alien who is within the realm affirming by oath that allegiance which he in fact owes so long as he remains within the realm.

In my opinion the motion for special leave should be dismissed.

STARKE J. Motion for special leave to appeal on behalf of Rudolf Ernst Kahn.

In 1926 Kahn was admitted as a member of the Honourable Society of Gray's Inn and in 1929 was called by the society to the degree of Utter Barrister. He has also signed the roll of barristers of the High Court of Justice in England. In 1938 he came to Australia and in 1939 applied, under the *Rules of the Council of Legal Education* purporting to be made pursuant to the *Legal Profession Practice Act* 1928, to the Board of Examiners therein mentioned for a certificate that he had complied with all the rules and the Act so far as it was obligatory upon him so to do in order to entitle him to be admitted as a barrister and solicitor of the Supreme Court of Victoria and that he was a fit and proper person so to be admitted. The board refused the certificate inasmuch as the applicant had not filed a certificate signed by two barristers and solicitors setting forth that they believed the applicant was a natural-born (or naturalized) British subject in conformity with rule 36 (*b*) and schedule G. In fact it is conceded that the applicant is an alien born in Germany, as I gather from his affidavit, and has not yet been naturalized. The applicant appealed to judges of the Supreme Court under rule 40. On this appeal the Board of Examiners also suggested that an alien is incapable of being admitted as a barrister and solicitor and further that he was incapable of

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taking the oath of allegiance required by sec. 5 (2) of the *Legal Profession Practice Act*. The learned judges dismissed the appeal. "The applicant in this case," said the Chief Justice, "has not become naturalized and is unable, therefore, to bring himself within the terms of the rule as it stands. It follows that the Board of Examiners were right in refusing the desired certificate" (1). Further, the learned judges refused to dispense with the performance or observance of the requirement of the rules under rule 42.

Special leave to appeal to this court is sought from the dismissal by the judges of the Supreme Court of the appeal from the Board of Examiners. But the leave sought should not be granted unless it appears that this court has jurisdiction to hear the appeal. The Constitution, sec. 73, gives jurisdiction to this court to hear and determine appeals from all judgments, decrees, orders and sentences of the Supreme Court of any State. And it has been held that an order of a judge in Chambers is a judgment or order of the Supreme Court within the meaning of the Constitution (*Parkin and Cowper* v. *James* (2)). The provisions of rule 40 are as follows: "Any person dissatisfied with any decision of the Board of Examiners shall be at liberty to appeal against such decision to the judges of the Supreme Court, and such appeal shall be heard by three or more of the judges at such time as they shall appoint, and upon the hearing thereof they may dismiss or allow such appeal, or make such other order as to them may seem fit." Notice of every such appeal in a prescribed form must be delivered to each of the judges and to the secretary of the board (rule 41). The question is whether the "judges of the Supreme Court" exercise, under rule 40, the jurisdiction of the Supreme Court or an independent and supervisory authority over the Board of Examiners.

The Supreme Court of Victoria was established in 1852 (15 Vict. No. 10). Sittings at nisi prius, as they were called, were held before single judges with or without juries for the trial of issues of fact and inquiries of damage. Otherwise the court sat *in banc* in term, and it was authorized to so sit in vacation: See *Common Law Procedure Statute* 1865, secs. 77-79. But the *Judicature Act* of 1883 (No. 761) reorganized the sittings and distribution of business of the court.

(1) (1939) V.L.R., at p. 277. (2) (1905) 2 C.L.R. 315.

Any single judge sitting in court might, subject to appeal, hear and determine all causes, matters and proceedings not required to be heard by the Full Court. The Full Court, which meant all the judges or not less than three of them or where expressly so provided any two of them, in each case sitting as a court, was required to hear and determine, *inter alia*, motions for new trial and appeals from a single judge whether sitting in court or in chambers.

Rule 40, as already mentioned, gives an appeal to the "judges of the Supreme Court." It is contained in Part IV. of the rules, which is entitled "Appeals and Applications to Supreme Court." But that is not decisive, for rule 42 gives the Supreme Court or a judge thereof authority to enlarge or abridge time appointed under the rules or to dispense with performance or observance of any requirement of the rules. Other rules provide for application to the Full Court of the Supreme Court (rules 18, 19, 21 (*b*)) and others again for application to a judge of the Supreme Court (rules 16 (3), 26, 27, 32, 35), whilst applications for admission must be made to the court (rule 38). All the forms in the schedules to the rules are entitled "In the Supreme Court." The cause of all this confusion is due, I think, to the fact that the rules have their origin in different sources. The provisions of rule 40 may be found as far back as the *Regulae Generales* of 1865, when the Supreme Court sat only in term or in vacation. So the appeal was given to the judges of the Supreme Court, to be heard at such time as they should appoint. Curiously enough, the *Regulae Generales* of 1872, which repealed the rules of 1865, gave the appeal "to the . . . court" and directed that such appeal should be heard "by the . . . court." But the *Regulae Generales* of 1885, which repealed the *Regulae Generales* of 1872, reverted to the expression "the judges of the" Supreme Court, and so it has remained.

The procedure governing appeals to the Supreme Court has never, I think, been followed in relation to appeals such as are provided for in rule 40, and they have never been set down nor listed as appeals for hearing. Still, the matters the subject of appeals under rule 40 are justiciable questions, that is, they are capable of being resolved according to legal standards and by legal methods and they are remitted to the order of judicial officers. Originally

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it may be that the authority of the judges was expressed in the terms appearing in rule 40 in order that appeals from the Board of Examiners might be heard at any time and not be confined to such times as the court sat *in banc*. The *Regulae Generales* of 1872 and the reversion to the older form in the *Regulae Generales* of 1885 suggest some such explanation. And in the present organization of the Supreme Court the direction that the appeals under rule 40 shall be heard by three or more of the judges at such times as they shall appoint indicates that the appeals may be taken at any time and are not confined to a time when the court is sitting in Full Court. In my opinion a decision or order of the judges of the Supreme Court under rule 40 is a decision or order of the Supreme Court within the meaning of the Constitution. An appeal to this court is, therefore, competent. It is for the legislative power in the State or perhaps the Council of Legal Education under their rule-making power to make other provision if the result be deemed inconvenient.

Medical Board of Victoria v. *Meyer* (1) was much relied upon in support of the jurisdiction of this court, but I have not found it of much assistance, for the words in question there and the setting in which they are found are different.

The merits of the motion for special leave must, therefore, be considered.

It was contended that rule 36 in requiring a certificate signed by two barristers and solicitors stating their belief that the applicant was a natural-born or naturalized British subject was *ultra vires*. The authority of the Council of Legal Education is contained in sec. 21 of the *Legal Profession Practice Act* 1928 and is as follows : " Subject to the provisions of this Act the council shall have power from time to time to make and alter rules regulating the admission to practise in Victoria as barristers and solicitors of persons duly admitted and entitled to practise as barristers advocates counsel attorneys writers to the signet or legal practitioners howsoever styled of the superior courts of England, Scotland, or Ireland or any part of His Majesty's dominions beyond the Commonwealth subject to any conditions (either general or applicable to particular

(1) (1937) 58 C.L.R. 62.

places or persons only) that seem expedient." The rules relevant to the present case are :—

10. " Any British practitioner may subject to the payment of the fees . . . prescribed . . . and to compliance with such of of these rules as are applicable to his case be admitted to practise as a barrister and solicitor of the Supreme Court."

9. " British practitioner " means any person duly admitted and qualified to practise as a barrister, advocate, counsel, attorney, writer to the signet, or legal practitioner howsoever styled of the superior courts of England, Scotland, Northern Ireland, or the Irish Free State.

36. " Every British practitioner so applying " (to be admitted to practise as a barrister and solicitor) " shall . . . (*b*) cause to be delivered to the secretary of the Board of Examiners a statement signed by himself in the form or to the effect of clauses 1, 2. 3, and 5 of Schedule F hereto and a certificate signed by two barristers and solicitors of the Supreme Court in the form or to the effect of clauses 1, 2, 4 and 5 of Schedule G hereto and shall . . . make and file . . . an affidavit in the form or to the effect of Schedule H hereto so far as the same may be applicable to his case."

The form of statement of the applicant for admission (schedule F) does not require the applicant to state whether he is or is not a natural-born or naturalized British subject nor does the form of affidavit (schedule H) required of him. But one of the clauses, 2, in the form of certificate given in schedule G to be signed by two barristers and solicitors is : " We believe that he " (the applicant) " is a natural-born (or naturalized) British subject of the age of years." It is said that this clause is appropriate enough in the case of a candidate under rule 4, that is, a candidate acquiring qualification in Victoria, for he must be a natural-born or naturalized British subject of not less than twenty-one years of age (See rule 35 (*a*)), but that it is quite inappropriate and beyond power when required in relation to British practitioners whose qualification, it is claimed, depends upon their admission in England, Scotland, Northern Ireland or the Irish Free State and not upon their status as British subjects.

The *Legal Profession Practice Act* 1928 gives no right to British practitioners to admission in Victoria. The power conferred upon

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the Council of Legal Education is so expressed that it can impose such conditions upon the right to admission of British practitioners as seem expedient to it. This construction has long been acted upon by the Supreme Court of Victoria, and I entirely agree with it (*In re Atkinson* (1); *In re Pirani* (2)). Thus, I see no reason why the Council of Legal Education should not require British practitioners to be natural-born or naturalized British subjects, as is expressly prescribed in the case of local candidates. It would be equally within the power of the council if this be so to require that a British practitioner should state whether he is or is not a British subject and to lodge certificates or other verification of the fact. The certificate required in schedule G is but an instance of the sort of verification that the council might require and might therefore be within power. It was assumed, I should think, that all British practitioners were British subjects: in any case they now, like every other applicant for admission, must take the oath of allegiance: See *Legal Profession Practice Act* 1928, sec. 5 (2).

Next it was contended that the *Rules of the Council* do not impose upon British practitioners the condition that they should be British subjects. It is true that there is no such express condition as is contained in rule 4. But the only right conferred upon a British practitioner is that he may be admitted as a barrister and solicitor in Victoria if he pays the prescribed fees and complies with such of the rules as are applicable to his case. A British practitioner is not entitled to admission merely because he has been admitted in England, Scotland or Ireland. He is not entitled merely because he has paid the fees prescribed and complied with the rules. He must still be a fit and proper person, which no doubt would cover good fame and character and other objections, such as age and alienage, if aliens are eligible as barristers and solicitors of the Supreme Court. Any person may show cause to the Board of Examiners, the judges or the court against the admission of any applicant (rule 39). One of the requirements or conditions of the board's rules is that the applicant shall lodge a certificate by two barristers and solicitors in a prescribed form. The matters required to be stated in the certificate are not arbitrary nor capricious, for all are relevant (including

(1) (1905) V.L.R. 408; 26 A.L.T. 223. (2) (1907) V.L.R. 310; 29 A.L.T. 66.

the question of status) to the ultimate conclusion that the board must certify that the applicant, in addition to paying fees and complying with the rules so far as the same are obligatory upon him, is a fit and proper person to be admitted as a barrister and solicitor. Admittedly the applicant has not filed a certificate in the prescribed form. The board did not exercise the discretion conferred upon it by rule 37A if the applicant comes within its terms and was therefore justified in refusing him the certificate for which he applied pursuant to rule 37. The learned judges were also right in dismissing his appeal unless they acted pursuant to rule 37A, a power they did not exercise, or dispensed with performance or observance of rule 36 (*b*), a power also which they refused to exercise in the case of an alien. Such a refusal is entirely a matter for their discretion with which this court ought not to interfere.

It is also desirable, I think, as the matter has been fully argued, to consider the case upon the broader objections suggested by the Board of Examiners, namely, that an alien is not eligible for admission as a barrister and solicitor and is incapable of taking the oath of allegiance required by the *Legal Profession Practice Act* 1928, sec. 5 (2). Gray's Inn and, I assume, all the English Inns of Court admit aliens as members of their societies and call them to the degree of Utter Barristers upon compliance with their rules. And it is not necessary for barristers when they sign the roll in the High Court of Justice in England to take the oath of allegiance: See *Law Quarterly Review*, vol. 23, p. 438; *Promissory Oaths Act* 1868, 31 & 32 Vict. c. 72. By the common law, however, "an alien had none of the capacities to hold official positions, and none of the franchises of the subject. A case decided in 1413 is in effect an application of this principle. In that case a juror was challenged because he was a Fleming and born out of the King's allegiance. It was admitted that this was the fact; but it was said that he ought to be sworn because he lived all his life in England, and had sworn allegiance—it would seem, in the leet. But it was held that this did not make him competent. 'Though,' said *Hankford* J., 'an alien be sworn in the leet or elsewhere, that does not make him a liege subject of the king for neither the steward of a lord nor anyone else, save the king himself, is able to convert an alien into a subject.'"

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He was at common law almost, if not wholly, rightless (*Holdsworth, History of English Law*, vol. IX., pp. 72, 91, 92; *Johnstone* v. *Pedlar* (1); *Rodriguez* v. *Speyer Brothers* (2)). A resident alien was within the protection of the King and owed him what is described as a local and temporary allegiance, or, to use an expression reported in *Bacon* v. *Bacon* (3) in another connection, he was "quasi under the allegiance of our King." But he was still an alien and by abandoning his residence might release himself from the obligation (*Calvin's Case* (4); *De Jager* v. *Attorney-General of Natal* (5); *Johnstone* v. *Pedlar* (6)). According to the old books the oath of allegiance was taken by all persons above the age of twelve years "whether denizens or aliens (2 *Co. Inst.*, p. 212), except women, earls, prelates, barons and men of religion according to Britton, cap. 12, which exception is not to be absolutely or universally understood; for all persons above the age of twelve years are bound to take oath of alligeance except women, as shall be shown, but not in the same manner or place as others; but because regularly this oath was to be taken in the leet, or at least in the sheriff's turn, which is in nature of a leet, where earls, barons, prelates, and men of religion were not bound to do their suit therefore by the *Statute of Marlbr.*, cap. 10, is this exception added: but yet at other times and in other places men of religion and noblemen were to take it, as shall be shown" (*Hale, Pleas of the Crown* (1800), vol. I, p. 63; *Co. Litt.*, 68 *b*; 2 *Co. Inst.*, cap. 10, p. 120; *Halsbury, Laws of England*, 2nd ed. (1931), vol. I., p. 464, and *Westlake, International Law* (1910), Part I., Peace p. 236; *Blackstone's Commentaries*, 3rd ed. (1768), vol. I, p. 374, as to "denizens." A description of the leet and sheriff's tourn may be found in *Pollock and Maitland*, 2nd ed. (1923), vol. I, pp. 530, 580. But it is clear that this oath, whether it is called an oath of fealty or of allegiance, did not change the status of an alien; he could only obtain the full status of a subject under the sanction of an Act of Parliament. (*Holdsworth, History of English Law*, vol. IX., p. 76). Many of the common-law disabilities of aliens

(1) (1921) 2 A.C., at pp. 276, 283.
(2) (1919) A.C. 59, at pp. 115 et seq.
(3) (1641) Cro. Car. 601, at p. 602 [79 E.R. 1117, at p. 1118].
(4) (1608) 7 Co. Rep. 5*b* [77 E.R. 383].
(5) (1907) A.C. 326.
(6) (1921) 2 A.C. 262.

have been removed by modern Acts relating to property and naturalization and more enlightened views. The *Act of Settlement* excluded naturalized aliens from public offices, a disability that continued until the *Naturalization Act* of 1870: See also *British Nationality and Status of Aliens Act* 1914-1918; Commonwealth *Nationality Act* 1920-1930; *Report of Naturalisation Laws Committee*, cited in *Foote, Private International Jurisprudence*, 4th ed. (1914), at pp. 28, 29; *Promissory Oaths Act* 1868, 31 & 32 Vict. c. 72; *R.* v. *Speyer and Cassel* (1); *Forsyth, Cases and Opinions on Constitutional Law* (1869), at p. 325—Dignities, p. 330—Offices of trust under legislative sanction; alien soldiers pursuant to *Army Act*, 44 & 45 Vict. c. 58, secs. 80 and 95; *Keir and Lawson, Cases in Constitutional Law* (1928), at p. 288. But even now an alien has no right to enter British territory (*Musgrove* v. *Chun Teeong Toy* (2)).

The *Legal Profession Practice Act* 1928, sec. 5, however, requires barristers and solicitors admitted by the Supreme Court of Victoria to take the oath of allegiance. What is the implication of that requirement? Allegiance is the duty owed by the subject to the King—the tie which binds him to the King. At common law it was indissoluble and permanent, but is now subject to the provisions of the *Naturalization Acts*. The oath did not create the duty: it only embodied the duty: See *Holdsworth, History of English Law*, vol. IX., pp. 72, 78; *Stubbs, Constitutional History of England*, vol. 3 (1880), p. 555. An alien owes no such duty, and taking the oath will involve him in no such duty. And, in my opinion, when an Act of Parliament requires an oath of allegiance to be taken before a person is admitted to a public office or into a public profession the presumption is that such a person is one who owes the duty of allegiance, not quasi-allegiance, to the Crown—in other words, is a subject of the King—and should embody his duty in the oath. Otherwise, might the judges of the Supreme Court of Victoria all be aliens? (Cf. *Supreme Court Act* 1928, sec. 7) or is the office of such a judge a public office for which an alien is ineligible?

Again, no instance is known of an alien being admitted to practise in the Supreme Court of Victoria. This inveterate practice supports the view that an alien is not entitled to be admitted as a barrister

(1) (1916) 1 K.B. 595. (2) (1891) A.C. 272.

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and solicitor of the Supreme Court of Victoria (*Bebb* v. *Law Society* (1); *Viscountess Rhondda's Claim* (2)).

Further, the Supreme Court of New Zealand has denied the eligibility of an alien to be admitted as a solicitor in that court (*In re Heyting* (3)).

For these reasons, in my judgment, the motion for special leave to appeal should be refused.

EVATT J. This is an application by Dr. R. E. Kahn for special leave to appeal to this court from two separate decisions pronounced by the learned judges of the Supreme Court of Victoria. In the first decision they dismissed the applicant's appeal under rule 40 of the *Rules of the Council of Legal Education* from a decision of the Board of Examiners. The board had refused to certify that the applicant had complied with the rules. In their second decision, pronounced in conjunction with the first, the judges, under rule 42, refused to dispense with the appellant's assumed non-compliance with rule 36.

The applicant is of German nationality. He is a British practitioner and a lawyer of considerable distinction. He based his claim to be admitted on sec. 21 of the *Legal Profession Practice Act* and the rules made thereunder dealing with the admission to practise in Victoria of persons duly admitted and entitled to practise as barristers of the superior courts of England, &c.

In the first place the respondent disputes the jurisdiction of this court to grant special leave and entertain an appeal. The question of jurisdiction depends upon whether it was the Supreme Court of Victoria which (*a*) dismissed the appeal under rule 40 and (*b*) refused to exercise the power conferred by new rule 42 to dispense with the observance of any requirement of the rules.

As to the latter point, the jurisdiction exercised was undoubtedly that of the Supreme Court, for rule 42 confers the dispensing power upon "the Supreme Court or a judge thereof." Therefore the four judges who dealt with the application for dispensation must have done so as the Supreme Court and not otherwise.

(1) (1914) 1 Ch. 286. (2) (1922) 2 A.C. 339.
(3) (1928) N.Z.L.R. 233.

As to the dismissal of the appeal brought under rule 40 " to the judges of the Supreme Court " (three of whom at least must hear the appeal) the heading to Part IV. of the rules, which is " Appeals and Applications to Supreme Court," strongly suggests that the jurisdiction exercised under rule 40 is also that of the Supreme Court. But the recent decision of this court in *Medical Board of Victoria* v. *Meyer* (1) seems to be conclusive on the point. It entirely deserts the theory that where jurisdiction is conferred upon " a judge of the Supreme Court " such jurisdiction is distinguishable from that of the Supreme Court. The same general reasoning as prevailed in that case indicates that, where jurisdiction is conferred upon " the judges of the Supreme Court," it is the " Supreme Court " which is acting. I am unable to appreciate why a statutory insistence that an appellate jurisdiction should be exercised by three judges instead of only one, should convert jurisdiction (which if exercised by a single judge would admittedly be that of the " Supreme Court ") into that of a tribunal which is separate and distinct from the " Supreme Court."

I still think that on the point of jurisdiction *Meyer's Case* (1) was wrongly decided ; but, so long as it stands, the decision should not be whittled down : in principle it covers the case of an appeal under rule 40.

For reasons which appear in the course of this opinion, I think that special leave should be granted to appeal from the judgment of the Supreme Court both under rule 40 and rule 42. Special leave was granted to the Medical Board in *Medical Board of Victoria* v. *Meyer* (1), and the reasons for granting it here are at least as cogent.

One requirement of the rules is that specified in rule 36 (*b*), by which any British practitioner applying to be admitted in Victoria has to deliver to the secretary to the Board of Examiners, *inter alia*, a certificate signed by two barristers and solicitors in the form or to the effect of clauses 1, 2, 4 and 5 of schedule G.

Before this court it was admitted that, except in relation to clause 2 of the certificate, the applicant had complied with all the rules of the council. But, it was said, he failed to produce a certificate signed by two barristers and solicitors of the Supreme Court to the effect of clause 2 of schedule G, which runs as follows : " We believe

(1) (1937) 58 C.L.R. 62.

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that he is a natural-born (or naturalized) British subject of the age of years."

The decision of the Supreme Court was that, by requiring such a certificate, the rule-making authority intended to lay down a rigid rule that every British practitioner applying to be admitted must be a natural-born or naturalized British subject.

Sec. 21 of the *Legal Profession Practice Act* confers upon the council power to make rules relating to the admission to practice in Victoria of barristers &c. of England, Scotland, Ireland or His Majesty's Dominions beyond the Commonwealth. The rules regulating such admission may be "subject to any conditions (either general or applicable to particular places or persons only) that seem expedient." The precise extent of this power need not be examined. However wide it is, the principle laid down by the Supreme Court of Victoria in *In re Atkinson* (1) applies: "If for any reason it is desirable that some restraint should be imposed upon, or some special qualification exacted from, these persons, then the legislature intended that such restraint or qualification should be imposed or exacted by a rule made by the Council of Legal Education."

In my opinion there is nothing to be found in the rules as at present framed which imposes or exacts any restraint or special qualification as to the nationality of an applicant who bases his claim to admission in Victoria upon his British qualification. Had it been intended to lay down that British nationality was to be a condition of admission, presumably the rule-making authority would say so, and say so without equivocation.

In the case of the ordinary application of a candidate under rule 34, the applicant must make an affidavit that (*inter alia*) he is a British subject (rule 35 (*a*), schedule E, clause 4). Further, such evidence must be corroborated by the certificate of two barristers and solicitors in accordance with clause 2 of schedule G—i.e., the requirement sought to be applied to the present applicant (rule 35 (*b*)).

The only evidence which is required from Commonwealth and British practitioners applying under rule 36 is an affidavit of the applicant to the effect of schedule H so far as that form may be applicable. But there is not the slightest hint in schedule H that evidence on the question of British nationality is required; the

(1) (1905) V.L.R., at p. 414; 26 A.L.T., at p. 224.

omission of all reference to nationality in schedule H is inexplicable except upon the hypothesis that the matter is irrelevant.

And there is a very good reason why, under the *Legal Profession Practice Act* 1928, the question of nationality should be deemed irrelevant in the case of practitioners of the other States of the Commonwealth who are applying for Victorian admission. Sec. 15 of the Act declares that such applicants are "entitled to be admitted . . . in accordance with rules made . . . by the Council of Legal Education." This right is subject to a reciprocal right of admission of Victorian barristers and solicitors by the Supreme Court of the State to which the applicant belongs.

Could the rules of the council provide that (for example) a practitioner of any State (in respect of which a reciprocal right of admission exists) cannot be admitted unless he is of British nationality? In my opinion the answer is: No. Such a rule would conflict with the right expressly granted by sec. 15 of the Act. If so, the rule-making authority acted correctly in point of law by not requiring the Commonwealth practitioner to produce evidence of British nationality. It follows that the extension to such a case of the requirement of a corroborative certificate of belief of nationality (rule 36 (*b*)) is unauthorized by law: it seems to be an error in the expression of the intention of the rule-making authority.

The omission to require from the Commonwealth practitioner any direct evidence of British nationality is repeated in the case of the British practitioner. *Ex hypothesi* he is entitled to practise as a lawyer in England or in one of His Majesty's Dominions. It seems to be assumed that within each territorial unit the question of the relevance of nationality to the right to practise as a legal practitioner will already have been dealt with, and dealt with upon a just and satisfactory basis. In England, for instance, it is not considered necessary that a member of the Bar should be a British subject, so that Victoria, adhering perhaps to the maxim *Nolumus leges Angliæ mutare*, might properly—in the opinion of the rule-making authority—adopt a similar view. If Victoria is to concern itself with the matter of nationality, it will, no doubt, do so by express rule and lay down the requirement clearly and directly; but one should not impute to it the adoption of so furtive a method as is here suggested.

I do not think that the council had any intention of exacting the requirement of British nationality: if so, the extension of the

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certificate requirement to the British (as to the Commonwealth) practitioner was a mere error: Cf. *Bridge* v. *Great Western Portland Cement and Lime Ltd.* (1).

In its judgment, the Supreme Court said that "the effect of rule 36 may be stated shortly as follows. It is a rule which imposes upon those persons who, though practitioners of the superior courts of England, Scotland or Ireland, are aliens, a condition that they shall become naturalized British subjects as a condition precedent to being allowed to practise in this court" (2).

In my opinion, rule 36 should not be interpreted as laying down such a requirement. Perhaps the opinion of the Supreme Court was affected by sec. 5 (2) of the Act, which lays down a general rule that before admission a Victorian barrister and solicitor shall take the oath of allegiance: and also by rule 4, which requires that the ordinary Victorian candidate shall be a British subject. The former rule can be complied with by a resident alien, who owes a duty of allegiance to his Majesty and who may solemnly promise to perform such duty. The latter requirement assists the applicant because there is no similarly drafted rule which requires persons applying as British practitioners to be of British nationality.

It follows that the Supreme Court should have allowed the appeal under rule 40. Inasmuch as it was admitted that the applicant complied with the rules in every respect except in relation to the certificate of belief, the court should have admitted the applicant to practise.

The jurisdiction under rule 42, involving questions of nice discretion, is of a more delicate character. But an important principle is involved, and as to that also, I think that special leave is justified.

The question of principle is upon what grounds should the court be prepared to waive the requirement of a certificate of British nationality—the legal existence of such a requirement being admitted for present purposes?

In the case of the legal profession, one of the relevant circumstances to be considered would certainly be any special qualification or experience of the applicant. In the present case they would be of value both to the legal profession and to the public: there is no evidence that they have been given any consideration.

(1) (1932) 48 C.L.R. 522.

(2) (1939) V.L.R., at p. 277.

The Supreme Court seems to have thought that the "personal needs" of the applicant were of no importance. I am unable to agree. I much prefer the principle of approach laid down by the present Chief Justice of the United States in *Truax* v. *Raich* (1) :—

> "The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government. . . . The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the State would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work. And, if such a policy were permissible, the practical result would be that those lawfully admitted to the country under the authority of the Acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission, would be segregated in such of the States as chose to offer hospitality."

Commenting on certain State legislation as to resident aliens in the United States, the distinguished jurist, Thomas Reed Powell, says : "It would of course be monstrous for a State to withhold all means of livelihood from aliens whom Congress chooses to admit, as the Supreme Court has fully recognized" (*Californian Law Review*, vol. 12, p. 259).

I think with great respect that the Supreme Court failed to pay sufficient regard to these weighty considerations. The court has no power to prevent an increase in the number of Victorian practitioners merely because it fears "overcrowding of the profession." Despite his alienage, the Federal authorities have admitted the applicant to reside in the Commonwealth. He is not only a British practitioner, but has rendered valuable service as a legal adviser to the British Embassy at Berlin. He cannot practise his profession in Germany because he is of the Jewish faith or race. So far, the Federal Government, while imposing severe restrictions upon entry, have refused to accentuate the consequences of the policy of persecuting Jews which unfortunately has been adopted by a great European nation. No doubt the Supreme Court, if it decided to allow British practitioners of alien nationality to practise in Victoria, would do so only under proper assurances as to character, learning and behaviour ; but a general embargo might turn out to be dangerous even to Victorian interests, especially in cases like the present, where the claim is based upon a British qualification. England itself admits aliens

(1) (1915) 239 U.S. 33, at p. 42 ; 60 Law. Ed. 131, at p. 135.

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to practise as barristers: should Victoria, *plus Royaliste que le roi*, impose an absolute embargo? In the end a liberal and humane policy is likely to turn out to be wise as well as just.

I think that, in the special circumstances, the Supreme Court should have dispensed with the requirement of sec. 36, if such requirement is deemed to apply to the applicant.

In my opinion special leave should be granted, the appeal allowed and the matter remitted to the Supreme Court to admit the applicant to practise.

McTIERNAN J. I concur in the judgment of my brother *Rich*.

Special leave to appeal refused.

Solicitors for the appellant, *Walter Kemp & Townsend*.
Solicitor for the respondent, *J. H. S. Campbell*.

H. D. W.