[HIGH COURT OF AUSTRALIA.]

THE SCHUMACHER MILL FURNISHING WORKS PROPRIETARY LIMITED . } APPELLANTS;

AND

SMAIL . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1916.

MELBOURNE, *March* 9, 23.

Griffith C.J., Barton, Isaacs and Rich JJ.

High Court—Jurisdiction—Appeal from Supreme Court of State—Proceedings coram non judice—Court of Insolvency of Victoria—Case stated—No findings of fact—Insolvency Act 1915 (*Vict.*) (*No.* 2671) *sec.* 32.

Sec. 32 of the *Insolvency Act* 1915 (Vict.) authorizes the Court of Insolvency upon the request of any party to a proceeding to "transmit any question of law by way of special case to the Supreme Court which shall have full power to determine the same."

Purporting to act under that section, the Judge of the Court of Insolvency stated a case in which he set out the evidence given before him on a certain motion and asked the question what order should be made by the Court upon such motion. He also stated that it was agreed by the parties that the Supreme Court should be at liberty to draw inferences of fact from the evidence in the same manner as they might upon an appeal from the Court of Insolvency. The Supreme Court having heard the special case and answered the question,

Held, that the special case was not within sec. 32, that the proceedings before the Supreme Court were *coram non judice* except so far as the parties consented to the Court acting as arbitrators, and therefore that an appeal did not lie to the High Court from the decision of the Supreme Court.

Special leave to appeal from the decision of the Supreme Court of Victoria refused.

APPLICATION for special leave to appeal.

H. C. OF A. 1916.

SCHUMACHER MILL FURNISHING WORKS PROPRIETARY LTD. v. SMAIL.

In the Court of Insolvency at Melbourne a motion was heard whereby Edward William Smail, the trustee of a deed of assignment made by George Henry Sutherland for the benefit of his creditors, applied for an order that certain machinery was his property by virtue of the deed of assignment and formed part of the estate of the assignor, and for an order that the Schumacher Mill Furnishing Works Proprietary Ltd. should deliver the machinery up to the trustee. Certain questions of law were raised and certain evidence was given on the hearing. The learned Judge of the Court of Insolvency thereupon purported to state a case for the opinion of the Supreme Court in which he set out the evidence and, after stating that he found as a fact that Sutherland was in possession of the machinery at the material date, asked the following question:—"Upon the facts appearing in evidence what order should be made by the Court of Insolvency on such motion?" The case then stated that "As between the parties, it is agreed that the Full Court be at liberty to draw inferences of fact from the evidence and to differ from my conclusion that Sutherland was in possession at the date mentioned in the same manner as they might upon an appeal from this Court."

The Full Court answered the question by saying that the order which the Court of Insolvency should have made was an order declaring that the chattels in question were the property of the trustee and ordering them to be delivered up by the Schumacher company.

The Schumacher company now applied for special leave to appeal to the High Court from that decision.

J. R. Macfarlan, in support of the motion.

[GRIFFITH C.J. This case is not properly stated under sec. 32 of the *Insolvency Act* 1915. The facts must be found, and the Supreme Court has no power to draw inferences of fact: *Merchant Service Guild of Australasia* v. *Newcastle and Hunter River Steamship Co. Ltd.* [*No.* 1] (1).]

It has been treated by the parties and by the Supreme Court as having been properly stated. The questions of law desired to

(1) 16 C.L.R., 591.

be determined appear from it, and the parties agreed that the Supreme Court should be at liberty to draw inferences of fact from the evidence.

[GRIFFITH C.J. Then the Supreme Court were arbitrators, and no appeal lies to this Court.]

The inferences of fact which have been drawn may be disregarded, and the determination by the Supreme Court of the questions of law involved, which was not affected by these inferences, may be reviewed by this Court.

Dixon (by permission of the Court), to oppose, was not heard.

The judgment of the COURT, which was delivered by GRIFFITH C.J., was as follows:—

These proceedings seem to have been entirely misconceived. The *Insolvency Act* 1915, by sec. 32, authorizes the Court of Insolvency upon the request of any party to a proceeding to "transmit any question of law by way of special case to the Supreme Court which shall have full power to determine the same." In the present case, the learned Judge of the Court of Insolvency decided no question of fact, but sent to the Supreme Court a special case asking them to determine what judgment he ought to enter on facts which he did not find, and stating that the parties agreed that the Supreme Court might draw any inferences of fact. Such a case is not a proceeding under the section at all. The facts were not found. The proceedings before the Supreme Court were *coram non judice* except so far as the parties consented to the Court acting as arbitrators. It is impossible to grant special leave to appeal from a decision given under such circumstances.

Special leave to appeal refused.

Solicitors for the appellants, *Haden Smith & Fitchett.*

Solicitors for the respondent, *Sabelberg & Gummow.*

B. L.