[HIGH COURT OF AUSTRALIA.]

GREEN AND OTHERS . . . . . APPELLANTS;

AND

TITMUS . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

H. C. OF A. 1927.

MELBOURNE, *June* 9.

Isaacs A.C.J., Powers and Starke JJ.

Supreme Court (Tas.)—Jurisdiction of Full Court—Appeal from single Judge—Case stated by Licensing Court heard by Judge in vacation—Supreme Court Act 1917 (*Tas.*) (8 *Geo. V. No.* 18), *secs.* 2, 3—*Licensing Act* 1902 (*Tas.*) (2 *Edw. VII. No.* 32), *secs.* 85, 89, 91.

Sec. 85 of the *Licensing Act* 1902 (Tas.) provides for the statement by a Licensing Court of a case for the opinion of the Supreme Court. Sec. 89 provides that "the Supreme Court shall hear and determine" the question arising on a case so stated "and shall thereupon reverse, affirm, or amend the determination in respect of which the case has been stated . . . and all such orders shall be final and conclusive on all parties." Sec. 91 provides that "The authority and jurisdiction vested in the Supreme Court under this Act may . . . be exercised in vacation by a Judge of such Court sitting in Chambers." Sec. 2 of the *Supreme Court Act* 1917 (Tas.) provides that "Notwithstanding any law to the contrary, the jurisdiction of the Supreme Court and all the powers and authorities of such Court in every jurisdiction thereof shall be exercisable by the Supreme Court or by a single Judge thereof." Sec. 3 provides that "(1) In the case of a single Judge exercising the jurisdiction of the Supreme Court . . . an appeal shall lie to the Supreme Court from any judgment, decree, order or decision of such Judge."

Held, that under sec. 3 (1) of the *Supreme Court Act* 1917 the Full Court of the Supreme Court has jurisdiction to entertain an appeal from the decision of a Judge sitting as the Supreme Court in vacation upon a special case stated under sec. 85 of the *Licensing Act* 1902.

Decision of the Supreme Court of Tasmania (Full Court) reversed.

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APPEAL from the Supreme Court of Tasmania.

An application was made by George Marshall Titmus to the Licensing Court for the Licensing District of Lilydale in Tasmania for the approval of that Court to his selling liquor, under a licence held by him, in a certain house in the Town of Lilydale in place of a house known as the "Golconda Hotel," situate at Golconda in the same Licensing District. Golconda was about thirteen miles distant from Lilydale and there was not in Lilydale a house licensed for the sale of liquor. A petition signed by twenty-nine ratepayers resident in the neighbourhood of the house in Lilydale, of whom Henry H. Green was one, was lodged with the clerk of the Licensing District, objecting to the application on certain grounds. On the hearing of the application the Licensing Court held that the petition was receivable in evidence and, since it was signed by a majority of the ratepayers resident in the neighbourhood, the Court was bound to refuse the application. Upon the application of Titmus the Licensing Court, pursuant to sec. 85 of the *Licensing Act* 1902 (Tas.), stated a case for the opinion of the Supreme Court; the question for determination being "Does sec. 74 (2) of the *Licensing Act* 1902, in the state of facts hereinbefore mentioned, compel the Licensing Court before which an application for removal of a licence under sec. 52 of the said Act is brought to decline to enter upon the merits of such application and refuse the same?" The case so stated came on for hearing before *Crisp* J., and was heard by him during vacation; and he made an order answering the question in the negative and remitting the matter to the Licensing Court. From that decision the petitioners appealed to the Full Court, but that Court, by a majority (*Nichols* C.J. and *Crisp* J., *Ewing* J. dissenting), held that it had no jurisdiction to entertain the appeal, being of opinion that sec. 89 of the *Licensing Act* 1902 precluded an appeal and that sec. 3 of the *Supreme Court Act* 1917 (Tas.) did not give an appeal in respect of matters to which sec. 89 applied.

The petitioners obtained special leave to appeal from the decision of the Full Court and, alternatively, from the decision of *Crisp* J.

Keating, for the appellants. An appeal lay to the Full Court from the decision of *Crisp* J. by inherent right under the general

supervisory authority of the Court over decisions of a Judge in Chambers and also by virtue of sec. 3 of the *Supreme Court Act* 1917. As to the inherent right, in Tasmania, as in New South Wales also, the Common Law Procedure Acts still apply and English practice prior to the *Judicature Act* is in point. Under that practice, even where power was given to a Judge to finally determine a matter, an appeal lay from his decision (*Chitty's Archbold*, 12th ed., pp. 1608, 1609; *Teggin* v. *Langford* (1); *Shortridge* v. *Young* (2); *Fowler* v. *Churchill* (3); *Brown* v. *Bamford* (4); *In re Stretton* (5)). In *Warner* v. *Fischer* (6) the general principle that an appeal lay from a single Judge to the Supreme Court was plainly laid down, without limiting it to cases concerning the Court's own process and procedure. In subsequent cases there was a tendency to limit the principle in that way (see *Banks* v. *Norris* (7); *In re Knight* (8); *Macintosh* v. *Dun* (9); *Ex parte Yates* (10); *Ex parte Jones* (11)), but that limitation is not justified. The order of *Crisp* J. is in terms and on its face an order of a Judge in Chambers and the orders which by sec. 89 are made "final and conclusive" are orders of the Court. If there were any doubt as to the inherent right of appeal from a single Judge to the Full Court, it is removed by secs. 2 and 3 of the *Supreme Court Act* 1917. The words "notwithstanding any law to the contrary" and "in every jurisdiction" in sec. 2 clearly express the intention of the Legislature to repeal any prior inconsistent legislation, including that in sec. 89 of the *Licensing Act* 1902. The result was that the jurisdiction of the Supreme Court might thenceforward be exercised by a single Judge either in or out of vacation or in Chambers or in Court, subject in all cases to appeal to the Full Court. Those provisions of the *Supreme Court Act* 1917 are remedial and should be construed accordingly. [Counsel was stopped.]

Owen Dixon K.C. and *Tait*, for the respondent. Sec. 3 (1) of the *Supreme Court Act* 1917, in so far as it gives a right of appeal to the

(1) (1842) 10 M. & W. 556.
(2) (1843) 12 M. & W. 5, at p. 7.
(3) (1842) 2 Dowl. (N.S.) 562.
(4) (1841) 1 Dowl. (N.S.) 361.
(5) (1845) 14 M. & W. 806.
(6) (1875) 13 S.C.R. (N.S.W.) (L.) 346, at pp. 359, 360.
(7) (1890) 11 N.S.W.L.R. 77.
(8) (1897) 18 N.S.W.L.R. 315.
(9) (1905) 5 S.R. (N.S.W.) 99.
(10) (1907) 7 S.R. (N.S.W.) 217.
(11) (1874) 12 S.C.R. (N.S.W.) (L.) 284.

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Full Court from a decision of a single Judge exercising the jurisdiction given by sec. 2, does not override the provisions of sec. 89 of the *Licensing Act* 1902. The words "notwithstanding any law to the contrary" only apply to the provisions of sec. 2, in which they occur, and have no application to sec. 3. Under the *Charter of Justice* the Supreme Court was constituted by two Judges. From time to time power was given to a single Judge to sit as the Court in specific cases (see 2 Will. IV. No. 1, sec. v.; 7 Vict. No. 10, sec. II.; 7 Vict. No. 19, sec. II.; 19 Vict. No. 23, sec. 1; 50 Vict. No. 36, sec. 9). On the history of the legislation the *Supreme Court Act* 1917 was a general as distinguished from a special statute, and therefore does not derogate from the provisions of the *Licensing Act* 1902, which was a special statute. The functions of the Licensing Court are administrative and not judicial, and therefore when the appellate provisions of sec. 89 are brought into operation the Supreme Court—whether it be the Full Court or a single Judge—in making a determination is acting in an advisory and not a judicial capacity and no appeal lies (*In re Knight and Tabernacle Permanent Building Society* (1)).

PER CURIAM. We entertain no doubt that under the Act of 1917, 8 Geo. V. No. 18, of Tasmania, an appeal lay from the decision of *Crisp* J. to the Full Court. That Act is one in which the Tasmanian Legislature directed its attention to a specific subject, namely, the administration of justice in the Supreme Court, and laid down provisions in very sweeping terms. In order to make it quite clear that no previous legislation should stand in the way of this new provision, it prefaced the first operative section by the words "notwithstanding any law to the contrary." In the presence of those words the presumption which primarily is entertained by a Court when it meets general provisions in one Act, and special provisions in other Acts, of the Legislature on a given subject, cannot exist. You cannot have a presumption of intention contrary to an express statement to the contrary; and that exists in the present case. So that by sec. 2, whatever may be found in prior enactments of the Tasmanian Legislature to the contrary, the jurisdiction of the Supreme Court and all the powers and authorities of

(1) (1892) 2 Q.B. 613.

that Court in every jurisdiction thereof are exercisable by the Supreme Court or by a single Judge of that Court. Sec. 3 is complementary of sec. 2, and under it wherever a single Judge does exercise the jurisdiction of the Supreme Court, then an appeal lies to the Supreme Court itself from the decision of that Judge. Those two sections apply to the present case because the provisions in the *Licensing Act* with regard to the exercise of the jurisdiction of the Supreme Court created functions and jurisdiction of a strictly judicial nature—not a mere opinion, but a decision in the strict sense—and therefore the case falls within the provisions of the Act of 1917, even though it should be (and we do not decide the point) that an opinion would not fall within sec. 3 of the Act of 1917.

For these reasons we think that the decision of the Full Court that it had no jurisdiction to entertain the appeal from *Crisp* J. was erroneous.

The resultant order we make is that the appeal from *Crisp* J. be remitted to the Full Court of the Supreme Court for hearing and determination. The alternative leave given by this Court to appeal from the decision of *Crisp* J. was by way of precaution only, and is now unnecessary. We therefore rescind the special leave to appeal from the order of *Crisp* J.

Appeal from the order of the Full Court allowed. Order of the Full Court discharged. Appeal from Crisp J. remitted to the Full Court for hearing and determination. Special leave to appeal from the decision of Crisp J. rescinded. Respondent to pay costs of this appeal, not including costs in relation to the appeal from Crisp J.

Solicitors for the appellants, *Martin & Hobkirk, Shields & Heritage*, Launceston, by *Maddock, Jamieson & Lonie.*

Solicitor for the respondent, *Harold Bushby*, Launceston, by *Rylah & Anderson.*

B. L.