ENTERPRISE GOLDMINES N.L. v MINERAL HORIZONS N.L.: IN THE MATTER OF A REFERENCE TO THE FULL COURT OF THE SUPREME COURT

Supreme Court of the Northern Territory of Australia (Full Court)

Asche C.J., Nader and Kearney JJ.

22 October 1987; 18 February 1988, at Darwin

Appeal - Mining Act - whether system of appeal under s.159 equated to system of appeal under Local Courts Act - whether appeal lies only from a "decision".

Appeal - Local Courts Act, Part VI - principles applicable to appeal from Local Court - whether appeal is stricto sensu or by way of rehearing - distinction between the two types of appeal - application of authorities on corresponding provision in Local Courts Act 1926 (S.A.).

Courts and Judges - Mining Act - whether warden's court has both civil and criminal jurisdiction - distinction between "warden" and "warden's court".

Mines - Mining Act - distinction between "warden" and "warden's court".

Statute - Mining Act - interpretation of s.58 - nature of appeal under s.159 - meaning in s.159 of "decision of a warden's court or of a warden".

Cases applied:

Attorney-General v Sillem (1864) 10 HL Cas. 704
Greater Adelaide Land Development Company Ltd v Hamilton (1930) SASR 114
Bagshaw v Taylor (1977) 18 SASR 564
Duralla Pty Ltd v Plant (1984) 54 ALR 29

Cases referred to:

Grundt v Great Boulder Gold Mines Pty Ltd (1937) 59 CLR 641
Hazlett and Soblich v Rassmussen (1973) WAR 141
Cheesman v Launer (1972) 3 SASR 573
Cross v Reilly (1979) 21 SASR 553
Da Costa v Cockburn Salvage & Trading Pty Ltd (1970) 124 CLR 192
Commissioner for Railways (NSW) v Cavanough (1935) 53 CLR 220
Quilter v Mapleson (1882) 9 QBD 672
Powell v Streatham Manor Nursing Home (1935) AC 243
McCullin v Crawford (1921) 29 CLR 186
Edwards v Noble (1971) 125 CLR 296

Turnbull v New South Wales Medical Board (1976) 2 NSWLR 281
Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan (1931) 46 CLR 73
Ronald v Harper (1910) 11 CLR 63
Davies and Cody v R (1937) 57 CLR 170
Freeman v Rabinov (1981) VR 539
Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd (1976) 135 CLR 616
Ponnamma v Arumogam (1905) AC 383
Orr v Holmes (1948) 76 CLR 632
Orchard v Orchard (1972) 3 SASR 89
McGregor v Rowley (1928) SASR 67
Paterson v Paterson (1953) 89 CLR 212
Dearman v Dearman (1908) 7 CLR 549
Chambers v Jobling (1986) 7 NSWLR 1
Warren v Coombes (1979) 142 CLR 531
Pacminex (Operations) Pty Ltd v Australia (Nephrite) Jade Mines Pty Ltd (1974) SASR 401

Statutes:

Local Courts Act, ss.54 and 59
Local Courts Act, 1926 (SA), s.63
Mining Act, ss.58, 145, 152, 155 and 159
Mining Act 1904 (WA), ss.257-266
Mining Act 1978 (WA), ss.147-151
Mining Act 1939) (NT), ss.205-214
Supreme Court Act, s.21

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ORDER OF THE COURT

The questions raised by this Reference are answered as follows:-

> "An appeal from the warden's court is regulated by the provisions for the institution, hearing and determination of appeals from the Local Court. In its essence it is an appeal in the strict sense and the question for decision by the Supreme Court is: "Subject to s.59(2) of the Local Courts Act, has the decision of the warden's court been shown to have been incorrect when it was given, on the evidence before that Court, or on that evidence together with any further evidence properly admitted on the hearing of the appeal; and if so, what should that decision have been, on the date it was given?"

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IN THE FULL COURT

OF THE SUPREME COURT

OF THE NORTHERN TERRITORY

OF AUSTRALIA

No. 456 of 1987

IN THE MATTER OF THE SUPREME COURT ACT

AND IN THE MATTER OF AN APPEAL FROM THE WARDEN'S COURT TO THE SUPREME COURT

BETWEEN:

ENTERPRISE GOLD MINES N.L.

Appellant

AND:

MINERAL HORIZONS N.L.

Respondent

AND IN THE MATTER OF A REFERENCE TO THE FULL COURT UNDER SECTION 21 OF THE SUPREME COURT ACT

CORAM: ASCHE C.J., NADER and KEARNEY JJ.

REASONS FOR JUDGMENT
(Delivered the 18th day of February 1988)

ASCHE C.J.: This is a reference to the Full Court pursuant to section 21 of the Supreme Court Act and before the hearing of an appeal instituted by the appellant from a

decision of the Warden's Court exercising jurisdiction under section 145 of the Mining Act. Both parties sought the reference.

The reference seeks clarification of the terms of section 159 of the Mining Act which is headed "Appeals", and reads as follows:-

> "An appeal shall lie to the Supreme Court from a decision of a warden's court or a warden in the same manner as an appeal against a decision of the Local Court or a Magistrate so lies."

No further guidance is given in the Act as to the procedure to be followed in an appeal or the principles to be applied.

Some assistance can be obtained by looking at the history of the legislation.

The present Act was passed in 1980. It replaced the Ordinance of 1939. That ordinance was substantially based on the mining legislation of Western Australia namely the W.A. Mining Act of 1904. The provisions of the latter Act relating to appeals were contained in sections 257 - 266. Those provisions were imported in their entirety into the N.T. Ordinance of 1939 being sections 205 - 214 of that

ordinance. In summary (and omitting the sections relating to formal procedures) the system of appeal was this:-

1. Subject to certain limited exceptions a party aggrieved could bring an appeal to the Supreme Court from any final judgment or order of a warden's court. There is no mention of an appeal from a warden. (s.205)

2. The appeal could be on fact alone, or law alone or both fact and law. But there was no appeal on matter of fact from any summary conviction imposing a penalty. (s.206)

3. If on law alone the appeal was in the form of a special case to be agreed upon between the parties or, if the parties could not agree, to be settled by the warden. (s.209)

4. If on fact alone or both fact and law then, if the Supreme Court so ordered or the parties agreed, the appeal would be by way of rehearing: otherwise the appeal would be heard and determined upon the evidence and proceedings before the warden. (s.210)

(These provisions distinguishing between appeals on matter of law, on matter of fact and law and on matter of fact were regarded by Dixon J. (as he then was) as "unusual". See Grundt v Great Boulder Pty Gold Mines Ltd (1937) 59 C.L.R. 641 at 661-2).

5. The Supreme Court, after hearing the appeal, could make such order reversing or varying the decision appealed against or dismissing the appeal as it thought fit. (s.213)

6. No differentiation is spelled out between appeals from the warden's court exercising criminal jurisdiction or appeals from that court exercising civil jurisdiction, save that, as mentioned, s.206 prohibited an appeal on a matter of fact from any summary conviction imposing a penalty.

None of these sections 205 - 214 of the 1939 Ordinance now appear. They are replaced by section 159 of the present Act which came into force in 1980.

It may be of interest to note that the present W.A. Mining Act 1978-1981 contains some minor changes in the

sections relating to appeals but basically retains the sections now repealed in the N.T. Act and provides only for appeals from warden's courts not wardens (see sections 147 - 151).

What then was the intention of the legislature in abolishing this rather elaborate system of appeal and enacting section 159 of the present Act? One can only conclude that it was considered undesirable to have a separate system of appeal under the Mining Act contrasted with the system of appeal laid down by the Local Courts Act. Hence the specific reference to the Local Court in section 159. It seems also to have been realised that there was a need to provide for appeals from decisions of a warden given in circumstances when he was not sitting as a warden's court. There was a similar recognition in the Local Courts Act that there could be an appeal, at least in interlocutory matters, from a decision of a judge or magistrate when not sitting as a Local Court. To explain this some reference should be made to the Local Courts Act.

That Act establishes Local Courts of Full Jurisdiction constituted by a Judge of the Supreme Court, or a Stipendiary Magistrate; and Local Courts of Limited Jurisdiction constituted by a judge or a Magistrate or two justices. Appeal from a judge is expressed to lie to the

High Court; this being a relic of the times when neither the Federal Court nor the Northern Territory Court of Appeal was in existence; and should obviously now be repealed. Leaving aside those provisions, section 54 gives a right of appeal to the Supreme Court. Section 54(1) is confined to appeals from the Local Court. But section 54(2) allows an appeal by leave from "any interlocutory order made by the Court or a Judge or Stipendiary Magistrate", thereby recognising that some orders can be made otherwise than by the Court. Examples are not difficult to find. Section 63 allows for joinder of plaintiffs but section 63(2) allows "a Judge or Stipendiary Magistrate" to order separate trials. Section 64 provides that "the Court or a Judge or a Stipendiary Magistrate" may order a person or persons to be substituted or added as plaintiff. By section 69 a representative action may be authorized "by a Judge or Stipendiary Magistrate before, or by the Court at, the trial".

See also sections 66, 68, 70(2), 71, 72 et passim.

The expression "Local Court or a Magistrate" in section 159 therefore seems clearly to equate the system of appeals from warden's courts or wardens to the system of appeals in the Local Courts Act relating to Local Courts or Magistrates.

I think this is the preferred interpretation of section 159 rather than to suggest that the expression "Local Court or a Magistrate" imports a distinction between the civil and criminal jurisdiction of the warden's court or warden under the Mining Act so as to give the expression "Magistrate" the meaning "Magistrate exercising jurisdiction under the Justices Act". On that view the section would provide for civil appeals under the Mining Act to be governed by the Local Courts Act whereas criminal appeals would be governed by the Justices Act. I think this gives too forced a meaning to to the word "Magistrate"; for a Magistrate has many and varied duties both in the civil and criminal sphere and there is really no reason so to restrict the expression here. Furthermore it would have been a simple matter for the legislature, if the intention was as suggested, to make that perfectly clear by the use of the term "Court of Summary Jurisdiction" in the same way as it has specifically used the term "Local Court"; so that the final words of the section would read "a decision of the Local Court or a Court of Summary Jurisdiction so lies". The omission to do this is in my view fatal to the above argument.

That is not to say that there may not be a distinction in appeals from a warden's court or warden when exercising criminal jurisdiction. Mr. Mildren Q.C., for the

respondent, has drawn our attention to various offences created by the Mining Act for which penalties by way of fines or imprisonment can be imposed. For example sections 56, 80, 98, 109, 133, 179(4), 181(3), 182(4), 186(1), 189 and 190. As well as these specific offences there is section 156 which provides that a person who defaults in complying with a judgment or order of a warden's court is guilty of an offence for which a penalty of fine or imprisonment can be imposed.

Nowhere in the Mining Act, however, are such offences specifically made cognisable by a warden or warden's court. The only provision where it is specifically stated that a warden may impose a penalty is section 146(2)(d), relating to non-attendance of witnesses to be sworn or make answers; but this, like section 150 - the contempt power - is no more than giving a civil court certain necessary powers to control its own proceedings. It does, however, explain the presence of the word "conviction" in section 154 which provides that "every judgment conviction or order" of a warden's court shall be duly entered in a register kept for that purpose. With that exception it seems that prosecutions under the sections mentioned should properly be taken in a court of Summary Jurisdiction. c.f. section 49(1) of the Justices Act and the definition of "simple offence" in section 4 of that Act.

See also section 280(1) of the Local Courts Act. I understand that in practice such prosecutions are indeed brought before a Court of Summary Jurisdiction. Obviously therefore any appeals from convictions or penalties so imposed would then be governed by the provisions laid down in the Justices Act. If that is so, then there is no reason for any reference to a Court of Summary Jurisdiction in section 159 of the Mining Act, and one may legitimately assume that the expression "Local Court or Magistrate" is used to emphasise that an appeal under that section is governed by the provisions of the Local Courts Act.

I do not consider that there is any room for an argument that offences under the Mining Act could be prosecuted in the Warden's Court by reason of the operation of section 145(k), which gives that court jurisdiction concerning "the recovery of penalties for any breach of the provisions of this Act or the Regulations ...". The opening words of section 145 restrict that jurisdiction to "proceedings cognizable by a court of civil jurisdiction", and the term used is "recovery" not "imposition" of penalties. Like Mr. Mildren I find this a somewhat puzzling subsection and it may be, as he suggests, that it can only be restricted to some sort of private right to recover a penalty although nothing of that nature appears in the Act. It is noteworthy that the parent W.A. Act contains basically

all the other various jurisdictions granted to a warden's court by the other subsections of section 145 but does not contain this subsection. (See section 232 of the W.A. Mining Act 1904).

Mr. Mildren Q.C. has illustrated for us various distinctions between the decision of a warden's court and that of a warden thereby explaining the words in section 159 "decision of a warden's court or of a warden". For acts done by a warden as distinct from a warden's court he refers to sections 9 and 10 (application for miner's right); section 75(2) (determination of compensation for damage to adjoining land); section 184(4) (determination of compensation for damage to private land); section 16(3) and (4) of the Coal Act (wherein the Minister may direct a warden or magistrate under the Mining Act to call upon a licensee to show cause why his licence should not be cancelled and the warden shall forward the evidence and his report to the Minister); section 82 of the Petroleum Act (a warden under the Mining Act may determine compensation for right of access). These may be said to be functions of the warden connected with civil or at least non-criminal matters; again, rather justifying a system of appeals in the civil rather than the criminal jurisdiction. But not all these functions involve a "decision" in the sense of a choice made after considering alternatives. For instance,

sections 9 and 10 appear to make it mandatory, once an application for a Miner's Right is made, for the warden to grant it. See section 10 - "The person to whom an application under section 9 is made shall grant that application ...". The remedy for refusal to grant the Right would therefore no doubt be by way of mandamus rather than appeal. Similarly, sub-sections 16(3) and (4) of the Coal Act do not involve a "decision" but rather an administrative act. But the other instances are questions of method of assessment and quantum and obviously open to the sort of disputed result wherein an aggrieved party might seek to appeal, and there is no reason to doubt that section 159 provides for such appeals.

Mr. Mildren also draws our attention to certain other important functions of the wardens which could not be the subject of appeal. The most obvious of these is the application by a miner to be granted a mineral lease. See section 54. The procedure for this is for the applicant to make an application complying with the provisions of section 55. That application is then heard by the warden "in open court", section 58(1) but also "in the warden's court", section 58(2). But I do not take that expression to mean that the warden thereby sits as a "warden's court". Section 58 and the following section 59 specifically designate certain powers and duties to the warden for the purposes of

carrying out his functions under those sections and those are not connected with Part XII of the Act which deal with "Wardens and Warden's Courts". I consider that the expression "in a warden's court" in section 58(2) is geographical, i.e. a matter of venue, because the full expression is "in the warden's court for the mineral field in which the proposed mineral lease is situated or such other warden's court as the mining registrar, with the consent of the applicant, determines". Furthermore section 58(3) provides that "subject to this Act" the warden "shall determine his own procedures in connection with the hearing". I do not read the expression "subject to this Act" as imparting in this context the framework or provisions of Part XII because there is no reason at all to do so.

In Hazlett and Soblich v Rasmussen (1973) W.A.R. 141, the Full Court of the Supreme Court of Western Australia considered regulations under the Western Australian Mining Act in which it was provided that in applications for registration of a mineral claim a warden should hear the applications and objections in open court and submit a recommendation to the Minister. Wickham J. said at p.146:-

> "The part played by the warden in this process is that of an official functionary and is separate

from his powers when sitting as a Warden's Court under section 230 of the Act".

The duty of the warden under section 58 is to consider the application for the grant of a mineral lease and to hear objections. If no objections are lodged he may dispense with a hearing in open court, section 58(8), but he must in any event consider the application and make a recommendation to the Minister (section 59). Since he makes a "recommendation" and not a "decision" there can be no right of appeal under section 159. No doubt a remedy in the nature of a prerogative writ would lie if he neglected or refused to perform his functions under sections 58 and 59; or failed to act bona fide; but this would not be an appeal.

Sections 58 and 59 apply mutatis mutandis also to applications for mineral claims. See section 85. Again there would be no appeal from the warden's recommendation in relation to a mineral claim.

That there is a difference between a warden and a warden's court is again distinctly recognised in section 155 where in certain circumstances "the warden's court and the warden shall <u>respectively</u> ... be deemed to have and may exercise all the powers of the Supreme Court or a judge". The word "respectively" must have significance.

When one turns to the powers and duties of a warden sitting as a warden's court it becomes obvious that an extensive and important jurisdiction is involved. See Part XII of the Act and in particular sections 145, 148, 152 and 155.

There are no financial limits to this jurisdiction and it is notorious that a decision of the warden's court will not infrequently affect the disposition of capital assets and investments of greater value than would be dealt with in the usual run of cases in the Supreme Court. It becomes therefore of vital importance to the proper and effective functioning of this legislation in the Territory that litigants should know clearly the proper appeal processes.

The intention of the statute therefore would seem to be that where, either by a warden or a warden's court, a "decision" is arrived at, as distinct from an administrative act, there should be a right of appeal from that decision. Section 159 gives to litigants affected by that "decision" that "right of entering a superior court and invoking its aid and interposition to redress the error of the court below" which has classically been regarded as the foundation of the appeal system. Attorney-General v Sillem 10 HLC 704 per Lord Westbury L.C.

No doubt questions of law are more likely to appear on appeals from the Warden's Court because of the far greater breadth of jurisdiction given by section 145. But otherwise there is no reason why the same sort of appeal may not lie as equally from the warden or the warden's court. And logically such appeals being of civil matters should follow the form of appeals provided for another court of civil jurisdiction namely the Local Court.

The circumstances in which this reference arose and the nature of the dispute between the parties, which is set out in the judgment of Kearney J., make it clear that this is an appeal from the warden's court exercising its civil jurisdiction. It may therefore be a sufficient answer to the reference to say that the appeal is to be treated as if it were an appeal from a Local Court and that the provisions of Part VI of the Local Court Act should apply mutatis mutandis to this appeal.

However lest there be any doubt as to the application of those provisions it is sufficient to say that the appropriate principles have conveniently been mapped out by several South Australian decisions on legislation almost precisely the same as the Territory legislation and which undoubtedly was the fons et origo of the Territory legislation. The leading case is Greater Adelaide Land

Development Company Limited v Hamilton (1930) S.A.S.R. 114. That was a decision of the Full Court of South Australia which examined the appeal provisions of the S.A. Local Courts Act 1926 and in particular section 63 of that Act. Section 63 is, with two variations, (namely a power to amend in section 63(1)(f) which does not appear in the Northern Territory Act, and a reference in the latter Act to the High Court) couched in precisely the same language as section 59 of the Local Courts Act of the Territory. In Greater Adelaide Land Development Company Ltd v Hamilton (supra) Napier J., delivering the judgment of the Full Court said:-

> "In the Local Courts Act 1926 there is a general power to order a new trial, with an express power to make this order on the ground of surprise and to receive fresh evidence; and to this extent it may be said that the 'appeal' is extended beyond the primary meaning of the word. But the object of the extension is undoubtedly still correctional, i.e. these powers enable the superior Court to redress or to provide for the redress of errors of fact arising from undue haste, or from inadequate presentation in the inferior Court. Subject to this extension of the primary meaning, the context supports and confirms the natural sense of the word 'appeal'. There is no appeal as of right. The litigation is determined by the final judgment of the Local Court unless and until the Judge grants an order to shew cause. The party 'dissatisfied' with the judgment is required to assign some specific ground of appeal, i.e. some definite suggestion of error, which the Judge considers sufficient to justify his order calling upon the other party to shew cause why the judgment should not be set aside or varied (Sharrock v. The London N.W. Co., (1875) 1 C.P.D. 70). The powers of the Court are carefully enumerated, but they do not include the power conferred by the Rules of the

Supreme Court - 'to give any judgment or make any order which ought to have been made, and to make such further or other order as the case may require' (Order LVIII., r.8); and there is no provision that 'the appeal shall be by way of rehearing' (ibid., r.1). Quilter v. Mapleson (supra) was decided upon these provisions in the Rules of Court, and the omission to use any equivalent terms in the Local Courts Act 1926 is highly significant, in view of the reference, in sec. 63 (3), to the taking of fresh evidence which is regulated by the very rule (Order LVIII., r.8) which confers the power already quoted. We have not overlooked sec. 63 (1) (d), which uses the words of the Rules of the Supreme Court, Order XXIX., r.1, but we do not think that it discloses any intention that the Court should do more than grant redress where an erroneous decision has been given. This statutory provision for 'appeals from Local Courts' comes down from a time when 'rehearings' and 'appeals' were different things, and the Supreme Court rule by which an appeal from the decision of a Judge is made by way of rehearing has been adapted from the Chancery practice. The omission of a similar provision in the Local Courts Act and the need for an order to shew cause on specified grounds maintain the old nature of the appeal as correctional only, and as referable to the date of the judgment appealed from. The extension of this appeal to issue of fact does not affect this position. In Small v. Attwood (supra) the House of Lords decided the case on facts.

For these reasons, we think the Local Courts Act 1926 gives no right to a rehearing on appeal save in so far as the taking of fresh evidence may amount to a rehearing. It gives a right to complain of an erroneous decision, but, subject thereto, the judgment of the Local Court is a final adjudication of the rights of the parties;"

The S.A. Local Courts Act 1926 has been superseded by the Local and District Criminal Courts Act 1926-75 but section 63 of the earlier Act remains, and in the same terms and the South Australian Courts have consistently applied the Greater Adelaide Land Development case.

Thus in Bagshaw v Taylor (1977) 18 S.A.S.R. 564 at 566-7 Sangster J. referred to "some clear principles of long standing relating to appeals to this Court from Local Courts". He expressed those principles as follows:-

> "First, the Local and District Criminal Courts Act, 1926-1974, gives no right to a re-hearing on appeal save in so far as the taking of fresh evidence may amount to a re-hearing. It gives a right to complain of an erroneous decision, but subject thereto the judgment of the Local Court is a final adjudication of the rights of the parties (Greater Adelaide Land Development Co. Ltd. v. Hamilton (1930) S.A.S.R. 114, per Curiam at p.118)). That was a decision upon the Local Courts Act, 1926, which Act has been amended from time to time, and re-named; I can find, however, no amendments which render the proposition I have taken from that case now inapplicable. I note that the learned editor of the second edition of Hannan's Local and District Criminal Court Practice (1973) treats that case as applicable; see pp. 63-64.
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> The applicability of the above-mentioned proposition to the present Act is also inherent in the views expressed in Churchill v. Badenochs Transport Ltd. and Devine (1971) 1 S.A.S.R. 63; see particularly per Bray C.J. at pp.64-66.
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> Secondly, on an appeal from a court comprising a judge (or magistrate) sitting without a jury, although the finality of the verdict of a properly instructed jury has been abandoned, and the decision of the facts is that of the judge (or magistrate) alone, nonetheless the finality of a finding of fact untainted by error of law ought not lightly be foregone: Edwards v. Noble (1971) 125 C.L.R. 296, per Barwick C.J. at p.302; Da Costa v. Cockburn Salvage and Trading Pty. Ltd. (1970) 124 C.L.R. 192, per Windeyer J. at p.214.
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> Thirdly, where a question turns on credibility of witnesses it must be borne in mind that this Court does not have certain advantages, such as observation of the demeanour of the witnesses and the whole atmosphere of the hearing, which are available to the Court below (Dearman v. Dearman

(1908) 7 C.L.R. 549, per Griffith C.J. at pp. 552-553; Semple v. Nominal Defendant (1971) 45 A.L.J.R. 713).

True it is that appeal courts show greater reluctance to disturb a finding that an onus of proof has not been discharged than vice versa (Dearman v. Dearman), per Griffith C.J. at p.553), and that appeal courts regard themselves as in as good a position as the trial judge (or magistrate) to draw inferences from the primary facts (Whiteley Muir and Zwanenberg Ltd v. Kerr (1966) 39 A.L.J.R. 505, per Barwick C.J. at p.506); but, in my opinion, both those propositions are subject to the general proposition, which I have stated earlier, that an appeal court ought not lightly to interfere with a finding - or inference - of fact by the trial judge (or magistrate) Whiteley Muir and Zwanenberg Ltd v. Kerr, per Barwick C.J. at p.506)."

His Honour's decision was reversed by the Full Court on a question of law (18 S.A.S.R. 527 et seq) but no fault was found with His Honour's enunciation of the above principles relating to appeals from the Local Court.

In my view these cases should be applied to appeals under the Northern Territory Local Courts Act and therefore to appeals from decisions of a warden's court or warden when exercising civil jurisdiction under the Mining Act or any other Act where a warden's court or warden is given civil jurisdiction. I would therefore agree with Kearney J. and answer the question raised by the reference as he has answered it.

NADER J: This is a reference to a Full Bench of three appeals from a warden's court under section 159 of the Mining Act. That section provides:

> "An appeal shall lie to the Supreme Court from a decision of a warden's court or a warden in the same manner as an appeal against a decision of the Local Court or a Magistrate so lies."

Counsel for both parties joined in an application to refer the appeals to a Full Court under section 21 of the Supreme Court Act. I referred them accordingly and was one of the bench constituted to hear the reference. The reference was heard on 22 October 1987. I understand the appeals are the first to be brought under section 159 of the Mining Act, and it was thought prudent to have laid-down with authority the nature of such appeals for future guidance.

A formal reference was not prepared and the proceedings went ahead without one. For my own part I should say that a formal reference was desirable as the proceedings would have been easier to follow, at least by me. The lack of rules regulating the matter has not prevented reference books from being prepared in the past.

Again, on a general note, this case is an illustration of the waste of scarce court time and the resources of litigants brought about by obscure drafting of Acts of Parliament. This particular provision could so very easily have been made clear but, because of its obscurity, a whole day's litigation before the Full Court was required.

Enterprise Gold Mines NL (the appellant) submitted that an appeal from a warden's court should be by way of rehearing on the transcript of proceedings before that court and otherwise in accordance with the relevant provisions of the Justices Act.

Mineral Horizons NL (the respondent) submitted that the appeal should be in accordance with the relevant provisions of the Local Courts Act.

Section 159 is somewhat obscure but, in accordance with accepted rules of construction, the court should endeavour to ascertain the meaning of the section and apply it accordingly.

A warden's court has criminal as well as civil jurisdiction. Section 152 of the Mining Act confers upon a warden's court power, inter alia, to impose penalties. There are sections of the Act (e.g. ss 182, 186, 189 and 190) which specify penalties for specified conduct.

It seems reasonable that the provisions for appeals from a warden's court exercising civil jurisdiction should differ from those for appeals from a warden's court exercising criminal jurisdiction. One only has to consider that the provisions for appeal from a court exercising jurisdiction under the Local Courts Act differ from those for appeal from a Court of Summary Jurisdiction. Indeed, section 159 seems to me to make best sense if it is seen as recognising that very distinction.

It follows that the comprehension of the word 'Magistrate' as used in section 159 must be limited by construction. The word itself is apt to describe a person with jurisdiction civil and criminal under a number of statutes. To establish as a criterion the manner in which an appeal lies from a Magistrate, unless restricted by construction, is meaningless. I would limit the comprehension of 'Magistrate' by qualifying it with the phrase 'exercising jurisdiction as a Court of Summary Jurisdiction.' Such a construction preserves the distinction between appeals of a civil nature and those of a criminal nature.

A suggestion that the words '...lie...in the same manner...' might signify **how** an appeal is to be instituted, rather than specifying its nature, is untenable.

I cannot conceive of the Parliament going to the trouble to specify the procedure by which an appeal is to be lodged and at the same time ignoring the question how the court should dispose of the appeal.

Therefore I would hold that an appeal under section 159 is to be governed, mutatis mutandis, by the appeal provisions of the Local Courts Act unless the proceedings appealed from are of a criminal or penal nature when the appeal would be subject to the provisions of the Justices Act.

If, as I would hold, the present appeals, being purely civil, lie in the manner of an appeal against a decision of a Local Court, the question remains what is the manner in which such an appeal lies? To answer the question resort must be had to the Local Courts Act and the relevant cases.

Part VI of the Local Courts Act provides for appeals form Local Courts. It is made up of a number of sections concerned with appeals, but the relevant section for present purposes is section 59:

> 59. POWERS OF COURT ON HEARING OF APPEAL
>
> (1) Upon the hearing of any appeal the High Court or Supreme Court may -

(a) draw all inferences of fact which might have been drawn by the Local Court appealed from;

(b) order a new trial on such terms as it thinks fit, and may make such an order on the ground of surprise;

(c) order judgment to be entered for any party;

(d) make any other order, on such terms as it thinks fit or proper, to ensure the determination on the merits of the real questions in controversy between the parties; and

(e) make such order with respect to the costs of the appeal as it thinks proper.

(2) If the High Court or Supreme Court is of opinion that, although any ruling, direction, judgment, determination or order objected to may not have been strictly according to law, substantial justice has been done between the parties, it shall dismiss the appeal, with or without costs, and if the High Court or Supreme Court is of opinion that, although there has been a substantial wrong or miscarriage of justice, the wrong or miscarriage affects part only of the matter in controversy, it may allow the appeal with regard to that part and dismiss it as to the other part, with or without costs.

(3) The High Court or Supreme Court, upon the hearing of any such appeal, shall have all the powers and duties as to amendment or otherwise of the Local Court appealed from, together with full discretionary power to receive further evidence upon questions of fact. The Rules of the High Court or of the Supreme Court for the time being in force regulating the receiving of further evidence upon an appeal shall apply to the mode of giving such further evidence and the conditions under which it is receivable.

That section, in all respects material for present purposes, is the same as section 63 of the Local and District Criminal Courts Act, 1926, as amended, (South Australia). Either the NT Act was taken from the SA Act, or they had a common source. A leading case concerning the operation of the appeal provisions of the SA Act is Greater Adelaide Land Development Company Limited v Hamilton [1930] State Report (SA) 114. That case depended on section 63 of the SA Act as it was in 1929. It should be mentioned in order to understand an otherwise inexplicable part of sub-section (2) of section 63 that sections 60, 61 and 62, repealed by Act No.102 of 1969, required obtaining an order by the appellant from a judge calling upon the other party to show cause. As far as I can see, those repealed provisions were not replaced by other provisions. Section 63, at the time of the Greater Adelaide Case was as follows:

> 63.(1) Upon the hearing of any appeal the Supreme Court or Judge hearing the appeal may -
>
> (a) draw all inferences of fact which might have been drawn by the Local Court appealed from:
>
> (b) order a new trial on such terms as it or he thinks fit, and may make such order on the ground of surprise:
>
> (c) order judgment to be entered for any party:
>
> (d) make any other order, on such terms as it thinks fit or proper to ensure the determination on the merits of the real questions in controversy between the parties:

(e) make such order with respect to the costs of the appeal as it thinks proper:

(f) amend the appeal to show cause or notice of intention to cross-appeal:

and every such order shall be final.

(2) If the Supreme Court or such Judge is of opinion that, although any ruling, direction, judgment, determination, or order objected to may not have been strictly according to law, yet that substantial justice has been done between the parties, it or he shall discharge the order, with or without costs, and if the Supreme Court or such Judge is of opinion that, although there has been a substantial wrong or miscarriage of justice, such wrong or miscarriage affects part only of the matter in controversy, it or he may make the order absolute with regard to such part, and discharge it as to the other part, with or without costs.

(3) The Supreme Court or such Judge upon the hearing of any such appeal shall have all the powers and duties as to amendment or otherwise of the Local Court appealed from, together with full discretionary power to receive further evidence upon questions of fact. The Rules of Court under the Supreme Court Act, 1878, for the time being in force regulating the receiving of further evidence upon an appeal from a single Judge of the Supreme Court shall apply as to the mode of giving such further evidence and the conditions under which it is receivable.

Napier J. read the judgment of the Court in Banco constituted by Angas Parsons, Napier and Piper JJ. At p116 their Honours said:

"It follows that the first question is whether the ordinary appeal from the Local Court is a true appeal or a rehearing, since 'on an appeal strictly so called, such a judgment can only be given as ought to have been given at the original hearing; but on a rehearing such a judgment may be given as

> ought to be given if the case came at that time before the Court of first instance' (Quilter v Mapleson, (1882) 9 QBD 672, per Jessel MR at p676). ... On the hearing the Supreme Court has power to amend the order to shew cause, to draw all inferences of fact which might have been drawn by the Local Court, to order a new trial - including a new trial on the ground of surprise - or to order judgment for any party, or to make any other order to ensure the determination upon the merits of the real questions in controversy between the parties, and 'every such order shall be final' (sec. 63(1)). If the ruling or judgment of the Local Court is not strictly in accordance with law, but substantial justice has been done, the Supreme Court is required to discharge the order (sec. 63(2)). In addition the Supreme court has all the powers and duties, as to amendment or otherwise, of the Local Court appealed from, together with full discretionary power to receive further evidence upon questions of fact. ..."

The reference to the power to amend the order to shew cause is no longer applicable in South Australia by reason of the repeal referred to above, but it appears that a consequential amendment to sub-section 63(2) ought to have been made by removing the reference to discharging the order. From the material available to my researches, that consequential amendment has not been made. However, I cannot see that any real problem flows from the failure. The provision would have to be read as a requirement to "dismiss the appeal". Indeed, that is the phrase used in subsection 59(2) of the NT Act. But, paragraph 63(1)(f) of the SA Act, now providing power to "amend the grounds of appeal or of any cross-appeal.", has no equivalent in the NT Act. The reference in the passage quoted to a requirement

to discharge the order must, in the NT, be read as a requirement to dismiss the appeal.

The other powers and duties referred to in the quoted passage are all contained in the NT Act.

Their Honours went on to say at p117:

> "Upon a consideration of these provisions we think that it is impossible to say that the Statute gives the appellant any right to a rehearing."

That statement may have been very slightly modified by a later passage in the judgment at p118:

> "For these reasons, we think that the Local Courts Act 1926 gives no right to a rehearing on appeal save in so far as the taking of fresh evidence may amount to a rehearing."

I am unaware of anything arising from the differences between the SA Act as it was in 1929 and the NT Act as it is today that would affect the gravamen of the decision in the Greater Adelaide Case. None of those differences have any bearing on the nature of the appeal.

The Greater Adelaide Case has been affirmed a number of times: see e.g. Cheesman v Launer [1972] 3 SASR 573 at 576-7; Cross v Reilly [1979] 21 SASR 553 at 554-5;

I would hold that that case correctly states the nature of appeals to the Supreme Court under section 54 of the Local Courts Act. Such appeals are not by way of rehearing but are appeals stricto sensu. In view of my earlier remarks, I would therefore hold that the present appeals under section 159 of the Mining Act are of a like nature. I think it would be quite inappropriate to enter into a theoretical analysis of more particular questions concerning the appeals, such as in what circumstances it might be proper to receive further evidence under subsection 59(3). Matters of that kind ought, in my opinion, await the hearing of the appeals.

KEARNEY J.: The background to this Reference is as follows. Mineral Horizons N.L. (herein called "Horizons") claims to be the owner of Mineral Claim No. 516, having purchased it from Australian Blue Metals Limited. It instituted proceedings in the warden's court under section 145 of the Mining Act, claiming that Enterprise Gold Mines N.L. (herein called "Enterprise") had wrongfully entered on part of M.C. 516 and taken samples therefrom when Australian Blue Metals Limited was the owner. Horizons sought an order that Enterprise deliver up the samples and the information it had gained from them. Horizons also asked the warden's court to determine its dispute with Enterprise as to the boundary between their adjoining mining claims.

Horizons succeeded in the warden's court. Enterprise appealed to the Supreme Court, under section 159 of the Act. Before the appeals were heard and by consent of the parties a question was referred to this Court under section 21(1) of the Supreme Court Act. Nader J. has outlined how that occurred; I agree with his Honour's comments on the procedural deficiencies, which may be remedied in future by Order 65 of the new Rules of Court.

The Reference is directed, in substance, to ascertaining the meaning and effect of section 159 of the Mining Act, and the nature and extent of the appeal to the

Supreme Court for which section 159 provides. I turn to the first of these two questions.

Enterprise submitted (initially) that the effect of section 159 is that the appeal is by way of a rehearing upon the evidence taken before the warden's court, and otherwise may accord with section 177 of the Justices Act, which deals with the powers of the Supreme Court when hearing appeals from courts of summary jurisdiction. At the root of this submission is the contention that the term "warden" as used in the Mining Act is synonymous with the term "warden's court".

It is clear, however, from an inspection of the Act that there is a dichotomy between a warden's court and a warden. Under section 142 of the Act the warden's court is constituted by the warden but the two are quite separate and distinct institutions intended to carry out quite separate functions under the Act. The general scheme of the Act in this regard seems clear enough. The warden's court exercises at least an extensive civil jurisdiction, carrying out functions which are judicial in nature. The warden carries out a variety of administrative functions, in some of which he is clearly required to act judicially, for example, when determining compensation under section 75(2) and section 184(4).

Part VI of the Act, dealing with mineral leases, provides an illustration of the distinction. Section 58(1) provides that the Warden is to hear any objections to a grant of a mineral lease "in open court"; I agree with the Chief Justice that the reference to "warden's court" in section 58(2) does not mean that the warden then sits as a warden's court. His determination is not a decision which decides rights or imposes liabilities, it results in a recommendation by the warden to the Minister that the mineral lease be either granted or refused or granted on conditions (section 59). The recommendation by the warden has no binding force and affects no rights. What the warden does in making a determination of "the relative merits", is a step in an inquiry leading ultimately to executive action.

When section 159 is read in the light of the dichotomy in the Act between "warden" and "warden's court" it appears to provide for appeals from decisions of those two institutions as follows:-

1. Appeal lies to the Supreme Court from a decision of the warden's court "in the same manner" as an appeal from a decision of the Local Court lies to the Supreme Court; and

2. Appeal lies to the Supreme Court from a decision of a warden "in the same manner" as an appeal lies from a decision of a Magistrate to the Supreme Court.

This construction of section 159, in so far as it assimilates an appeal from a warden's court to an appeal from a Local Court, appears to result in a workable appellate system. Part VI of the Local Courts Act deals comprehensively with appeals from the Local Court to the Supreme Court, and Local Court Appeal Rules regulate those appeals. In effect, therefore, section 159 appears to provide comprehensively though tersely for an appeal from a decision of a warden's court.

Upon this construction, section 159 also assimilates appeals from a warden to appeals from a Magistrate; this may involve difficulties. Magistrates are given many different functions to perform under scores of enactments; there is no single enactment which provides for an appeal against a decision of a Magistrate to the Supreme Court. However, it may well be that the legislature had in mind when referring in section 159 to "an appeal against a decision of ... a Magistrate", the provision in section 54(2) of the Local Courts Act, relating to appeals from interlocutory orders by Magistrates. I agree with the Chief

Justice that this is the preferable interpretation of section 159.

Neither Enterprise nor Horizons contended that section 159 should be construed in the way outlined above. For differing reasons, they both submitted that the word "Magistrate" in section 159 should be read as "court of summary jurisdiction".

Enterprise contended that "warden's court" and "warden" in the Act are synonymous; that as a court of summary jurisdiction can only be constituted by a Magistrate the reference to "Magistrate" in section 159 was intended to be a reference to that court; and that on its proper construction section 159 provides that an appellant from the warden's court may choose to appeal either in accordance with the provisions for appeal from the Local Court or in accordance with the provisions for appeal from a court of summary jurisdiction. I should say immediately that I do not think section 159 can bear such a construction.

Horizons contended that there is a dichotomy in the Act between "warden" and "warden's court"; that a warden's court has both a civil and criminal jurisdiction; and that upon its true construction section 159 provides that appeals from decisions of the warden's court in its civil

jurisdiction are to be instituted in accordance with the procedure for appeal from a Local Court (also a court of civil jurisdiction) while appeals from decisions of the warden's court in its criminal jurisdiction are to be instituted in accordance with the provisions for appeal from courts of summary jurisdiction (which are courts of criminal jurisdiction). This construction also entails reading "Magistrate" in section 159 as "court of summary jurisdiction", and appears to treat the reference to "warden" in section 159 as superfluous.

While the language of the Act is far from clear on the question whether the warden's court has a criminal jurisdiction, I am persuaded by the reasoning of the Chief Justice that the better view is that the warden's court has no criminal jurisdiction. It follows that Horizon's construction of section 159 is not open.

The submissions by the parties were an attempt to transilluminate section 159, an opaque provision which requires, I think, the urgent attention of the Legislative Assembly. It appears desirable that the Mining Act be carefully examined with a view to differentiating more clearly between functions appropriate to the warden as such, which would be administrative in nature, and judicial functions appropriate to the warden's court. As to the

warden, there should perhaps be a clear differentiation between those administrative functions in which he is required to act judicially and those in which he is not.

It is clear that the litigation between Horizons and Enterprise was within the civil jurisdiction of the warden's court. Whatever the proper interpretation of section 159 may be, I think it clearly provides that the current appeals are to be dealt with in the Supreme Court "in the same manner as an appeal against a decision of the Local Court".

Mr Mildren Q.C. submitted that the phrase "in the same manner" meant that section 159 was directed only to the method of instituting an appeal. I do not think that so restricted a construction is tenable; rather, all of the provisions which regulate the institution and hearing of an appeal from a Local Court are intended to apply to an appeal from a warden's court.

The second question raised by this Reference concerns the nature and extent of the appeal under section 159; to this I now turn. What is involved is a consideration of Part VI of the Local Courts Act, comprising sections 53 to 62. Section 54 of the Local Courts Act provides:-

> "(1) Any party who is dissatisfied with any final judgment, determination or order of a Local Court ... may appeal ... to the Supreme Court"

As Windeyer J. pointed out in Da Costa v Cockburn Salvage & Trading Pty Ltd (1970) 124 CLR 192 at 202, the word "appeal" has more than one sense for modern law. The scope and effect of an appeal must in the end be governed by the terms of the enactment creating it: Commissioner for Railways (NSW) v Cavanagh (1935) 53 CLR 220 at 225.

Both parties, relying on authorities in South Australia dealing with the nature of an appeal under the Local and District Criminal Courts Act 1926 (S.A.), identical in all relevant respects with the Local Courts Act, submitted that the appeal under section 54 was by way of an appeal stricto sensu, and not an appeal by way of rehearing; this terminology and the underlying assumption that this traditional dichotomy is a meaningful and exhaustive characterization of appeals, requires some examination.

In Quilter v Mapleson (1882) 9 QBD 672 Jessel M.R. distinguished appeals stricto sensu from rehearings, as follows (at p.676):-

> "On an appeal strictly so called, such a judgment can only be given as ought to have been given at the original hearing; but on a rehearing such a judgment may be given as ought to be given if the case came at that time before the Court of first instance."

In that case, the law applicable had changed before the appeal was heard; the Court of Appeal granted relief according to the new law since the appeal was by way of rehearing, and the Court was empowered to make such further order as the case might require.

In its ordinary meaning "rehearing" contemplates simply the re-arguing of a cause or matter already the subject of decision. Bearing in mind the comment by Viscount Sankey L.C. in Powell v Streatham Manor Nursing Home (1935) A.C. 243 at 249 that "there are different meanings to be attached to the word 'rehearing'", in the sense used in the authorities the word carries connotations from its origins in the old Court of Chancery in England. In that Court appeal lay from a Vice-Chancellor or the Master of the Rolls to the Lord Chancellor; but because these judges sat as delegates of the Chancellor they were not regarded as independent judges and the appeal was considered to be a rehearing by the Chancellor and was so termed. As Jessel M.R. said in Quilter v Mapleson (supra) at 676, "there was no strict appeal". The nomenclature

persisted after the creation of the Court of Appeal in Chancery in 1851 and the later fusion of courts and creation of the Court of Appeal in 1873 and 1875. In England the original Order 58 Rule 1 of the Rules of the Supreme Court of 1875 provided that "All appeals to the Court of Appeal shall be by way of re-hearing..."; Rule 4 gave the Court "full discretionary power to receive further evidence upon questions of fact", and "power to draw inferences of fact and to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require". The appeal to the Court of Appeal remains a rehearing under the current Order 59 Rule 3. The fact that the appeal is a rehearing means that the Court of Appeal may make such order as the court of first instance could have made if the case had been heard before that court on the date on which the appeal was heard. It does not mean that the witnesses are heard afresh, (as in a hearing de novo) though further evidence may be called. It means that the appeal is not limited to considering whether a misdirection, misreception of evidence or other alleged defect in the trial has taken place, so that a new trial should be ordered, but that the Court will consider (as far as may be relevant) the whole of the evidence given in the court below (and any further evidence allowed to be called) and the whole course of the trial. See generally the Supreme Court Practice, 1985, Volume 1, pp.813-4.

The distinction between the two types of appeal and the matters relevant to deciding which type of appeal is intended when the legislature provides for an appeal, have been considered in many cases in Australia.

In McCullin v Crawford (1921) 29 CLR 186 an Act provided that a party to a determination of hotel rent by a Licences Reduction Board could "appeal from the determination" to a Court of Petty Sessions. The Board had reduced the rent. A party appealed against the reduction. The Court of Petty Sessions conducted a fresh hearing and reduced the rent even further. Before the High Court it was contended on the one hand that the Act conferred power on the Court of Petty Sessions to rehear the whole case and to deal with it de novo as a court of first instance, as it had done; the opposing contention was that the Act conferred power only to decide whether the complaint of the appellant was well-founded. The High Court, upholding the former contention, said at pp.192-3:-

> "... the word 'appeal' is a word of flexible meaning and is not invariably used in the strict or limited sense ... The word is fairly capable of more than one meaning. The meaning of the word in sec.13 is to be determined upon a consideration of the words of that section and of the other provisions of the Acts dealing with the adjustment of the rents of licensed premises."

See also Edwards v Noble (1971) 125 CLR 296 at 304, per Barwick C.J. on the distinction between the two forms of appeal, and the consequence of the description of an appeal as a rehearing.

In Turnbull v New South Wales Medical Board (1976) 2 NSWLR 281 legislation provided that a person whose name had been removed from a register of medical practitioners could "appeal" to the Supreme Court. The plaintiff contended that this was an appeal of the widest possible kind; the Board contended that it was of a very limited character. Street C.J. said at p.285:-

> "In determining the character and scope of an appeal under s.26(3) it is necessary to take into account, in particular, three matters. The first is the decision from which the appeal lies; the second is the form of expression used by the legislature in its description of the appeal and of the powers of the court on the appeal; and the third is the particular field of considerations and powers open to the board in the discharge by it of its function." (emphasis mine).

Having examined these matters the Chief Justice concluded that the appeal in question involved a hearing de novo before the Supreme Court. In a penetrating analysis of the nature of an appeal, Glass J.A. said at pp.297-8:-

"Appeal is a term loosely employed to denote a number of different litigious processes which have few unifying characteristics. They vary greatly in the extent to which the appellate court may interfere with the result below. Graded in ascending order, in accordance with the width of the corrective power exercised by the appeal court, they are as follows:

(a) Appeals to supervisory jurisdiction. Only errors going to jurisdiction or denials of natural justice can be ventilated.

(b) Appeals on questions of law only, e.g. from the Workers' Compensation Commission. Undetermined or wrongly determined issues of fact must be remitted.

(c) Appeals after a trial before judge and jury. The result below will be disturbed if the judge fell into error of law, or if the jury's errors of fact transcend the bounds of reason. But, except for the assessment of damages, issues of fact must be redetermined in a new trial.

(d) Appeals from a judge in the strict sense, e.g. appeals to the High Court. If the judge has fallen into error of law, or has made a finding of fact which is clearly wrong, the appellate court will substitute its own judgment. Only such judgment can be given as ought to have been given at the original hearing. Later changes in the law are disregarded and additions to the evidence are not allowed: Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan (1931) 46 CLR 73, at p.107. [emphasis mine]

(e) Appeals from a judge by way of rehearing, e.g. appeals under s.75A of the Supreme Court Act, 1970. Judicial opinion differs on whether a power to receive fresh evidence is implied: Ex parte Currie; Re Dempsey (1968) 70

SR(NSW) 1; 88 WN(NSW) (Pt2) 193. Almost invariably, however, it is expressly conferred. If errors of law or wrong findings of fact have occurred below, the appellate court will try the case again on the evidence used in the court below, together with such additional evidence as it thinks fit to receive. Since it will decide the appeal in the light of the circumstances which then exist, changes in the law will be regarded: Ex parte Currie; Re Dempsey [supra]; Edwards v Noble (1971) 125 CLR 296 at p.304. (emphasis mine)

(f) Appeals involving a hearing de novo, e.g. appeals from a court of Petty Sessions to a Court of Quarter Sessions. All the issues must be re-tried. The party succeeding below enjoys no advantage, and must, if he can, win the case a second time: Sweeney v Fitzhardinge (1906) 4 CLR 715."

In Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan (1931) 46 CLR 73 persons convicted under certain Commonwealth regulations had appealed to the High Court by way of order nisi to review. The regulations had been disallowed before the High Court heard the appeals, so at that time the appellants were no longer liable to conviction. This led to a consideration of the nature of the appeal under section 73 of the Constitution which vested jurisdiction in the High Court "to hear and determine appeals".

At p.85 Gavan Duffy C.J. and Starke J. said:-

> "'Appeal' is used in more senses than one: it is a process which may subject (1) the whole matter for rehearing; (2) a question of law only, for review; (3) the facts as well as the law for review - that is, whether the order of the tribunal from which the tribunal was right, on the materials which it had before it. Orders nisi to review belong to the third type or description of appeals.
>
> Consequently the only question for this Court is whether the convictions or adjudications were, on the materials before the tribunal from which this appeal is brought, in accordance with the law as then existing."

Dixon J. (as he then was) noted at p.107 that the authorities established that upon such an appeal it was for the High Court to form its own judgment of the facts as far as it was able to do so, and said that for that reason "an appeal to this Court is often said to be by way of rehearing". His Honour then proceeded to explain why that description was erroneous.

His Honour distinguished an appeal in the sense of a review to redress the error of the court below on the material before that court (that is, the classic appeal stricto sensu), from an appeal by way of rehearing. In discussing the nature of an appeal by way of rehearing in the context of the appeal to the Court of Appeal in England, his Honour said at p.109:-

> "The remedy they gave to the unsuccessful litigant was a rehearing of his cause of the kind illustrated by the cases since decided. But such a remedy is not an appeal in the proper sense. 'An appeal is the right of entering a superior Court, and invoking its aid and interposition to redress the error of the Court below' (per Lord Westbury L.C., Attorney-General v Sillem (1864) 20 HLC 704 at p.724; 11 ER 1200 at p.1209). Upon an appeal to the Privy Council, the question considered is whether the judgment complained of was right when given (Ponnamma v Arumogam (1905) AC 383, at p.388))... 'their Lordships can safely say that it is not the practice of this Board to entertain any other appeal than one strictly so called, in which the question is whether the order of the Court from which the appeal is brought was right on the materials which that Court had before it' (per Lord Davey in Ponnamma v Arumogam (supra, at p.390)". (emphasis mine).

His Honour noted (at p.109) the distinction in the Constitution between the High Court's appellate and original jurisdiction; that the "simple language" of section 73 of the Constitution contained "nothing to suggest that this Court [unlike the Court of Appeal in England] is to go beyond the jurisdiction or capacity of the Court appealed from"; that the "Court has always refused to hear fresh evidence"; and concluded (at p.111) that the Court's appellate power was "confined to the position of the parties at the time the judgment complained of was given".

On the point of reception of fresh evidence I note that in Ronald v Harper (1910) 11 CLR 63 the High Court held that it had no jurisdiction to receive fresh evidence on an appeal under section 73 of the Constitution; see also Davies and Cody v R (1937) 57 CLR 170 at 172, per Latham C.J.

Evatt J. in Dignan's case (supra) at p.112 also considered that the appeal under section 73 was an appeal "strictly so called" and noted that therefore it was not competent for the Court to take into consideration "matters which have occurred since the decision of the Magistrate".

In Dignan's case (supra) the Court dismissed the appeals, holding that the question under its appellate power was whether the convictions were, on the evidence before the Magistrate, in accordance with the law at the time of the convictions.

In Duralla Pty Ltd v Plant (1984) 54 ALR 29 the issue was whether the Full Court of the Federal Court, exercising appellate jurisdiction, was required to apply the law as it then stood, or as it stood at the time of the decision under appeal. The Court held that an appeal to the Federal Court in its appellate jurisdiction is not in the nature of a rehearing but is in the nature of an appeal in the strict sense. Accordingly it would not make a decision

on the application of an amendment to the law which came into force after the decision of the trial judge.

At p.38 Smithers J. noted that the "simple statement" of the appellate jurisdiction in the Act would lead to a conclusion that it was an appeal stricto sensu; but that there were however other provisions, by which the Court could receive further evidence and exercise powers (e.g. draw inferences of fact, set aside a jury verdict and grant a new trial) some of which would not be available to a court exercising appellate jurisdiction stricto sensu. Section 59 of the Local Courts Act contains similar provisions. His Honour proceeded to consider whether the presence of these attributes converted the jurisdiction to one in which appeals were by way of rehearing; and noted (at p.39) that in Chamberlain v R (1984) 51 ALR 225 the High Court did not suggest "that the relevant inquiry is other than to determine whether there was error in the decision when given". After referring at length to the judgment of Dixon J. in Dignan's case (supra), and noting that the appeal to the Privy Council remained an appeal stricto sensu despite the Board's power to remit for further hearing, his Honour concluded (at p.41):-

> "Thus it appears an appeal may retain its essential nature as an appeal stricto sensu, notwithstanding that remedies available on such an appeal may be extended.

...

> The question before this court may remain whether there was error in the judgment at first instance when it was given, although by virtue of ss.27 and 28 of the Act proceedings upon an appeal to this court may involve reference by it to matters which have occurred after the judgment appealed from was given."

At p.43 his Honour said:-

> "Where, operating as an appeal court in an appeal stricto sensu, the court considers that the judgment of the learned judge at first instance was in error ... it would be required, perhaps by drawing inferences and possibly with the assistance of fresh evidence, to decide what the judgment of the learned judge should have been at the date on which he gave it."

See also the judgment of Northrop J. at pp.49-54 and the authorities there discussed, particularly Freeman v Rabinov (1981) VR 539 at 547-8, per Lush J. His Honour said at p.53:-

> "There is a power conferred upon the court to admit further evidence. There is the wide range of orders that the court may make on an appeal. There is the power to draw inferences of fact. These powers suggest that the nature of the appeal is by way of rehearing."

However, at p.54 his Honour concluded that "in all the circumstances" the appeal was "not in the nature of a rehearing", though the court had "wide powers to ensure that injustice is not suffered and for that purpose may admit further evidence in the hearing of an appeal".

Greater Adelaide Land Development Company v Hamilton (1930) SASR 114 is the leading authority in South Australia for the proposition that the appeal corresponding to the appeal under Part VI of the Local Courts Act is "correctional" in its nature. Curiously, it does not appear to have been cited in any of the earlier judgments of this Court. The word "correctional" is ambivalent; what requires to be ascertained is the width of the corrective power - see the analysis by Glass J.A. in Turnbull's case (supra). However, it appears that the Court meant that the appeal under Part VI is directed to the correction of errors in the court below rather than to a new determination of the rights and liabilities of the parties, as in a rehearing. Yet the appeal under Part VI cannot be an appeal stricto sensu as in Dignan's case (supra), because of the power under section 59(3) to receive further evidence; that is recognized by the Court in Greater Adelaide Land Development Company v Hamilton (supra) in its caveat at p.118 that there is no right to a rehearing "save in so far as the taking of fresh evidence may amount to a rehearing".

To attempt to characterize the appeal under Part VI as if appeals are either appeals stricto sensu or rehearings on the basis that these terms retain all the fixed connotations they once had, does not seem to be particularly helpful; as Mason J. said in Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd (1976) 135 CLR 616 at 622:-

> "... elucidating the legislative intent ... is not greatly illuminated by the Delphic utterance that the appeal is by way of rehearing."

I consider that Duralla Pty Ltd v Plant (supra) and Freeman v Rabinov (supra) provide guidance which should be followed.

Against this background I consider that the appeal under section 159 of the Mining Act and Part VI of the Local Courts Act is designed to provide redress for an erroneous decision of the warden's court which involves substantial injustice. It does not involve a hearing de novo of the issues before the warden's court. The evidence on appeal is the evidence taken before the warden's court unless the Court exercises its power under section 59(3) to receive further evidence. Subject to that, the appeal is by way of argument upon the evidence before the warden's court. It may be treated as an appeal in the strict sense as referred

to in Ponnamma v Arumogam (supra) and as described by Glass J.A. in Turnbull's case (supra) in that it is directed to the correction of errors in the decision of the warden's court and the law to be applied is the law as it stood when the warden's court gave its decision, though it is not an appeal in the strict sense in that the Supreme Court is not necessarily confined to "the materials which that [i.e. the warden's] court had before it".

The judgment to be given on appeal is the judgment which ought to have been given at the original hearing before the warden's court on the evidence before that court and any further evidence received under section 59(3). If further evidence is received under section 59(3) the appropriate order may be for a fresh hearing before the warden's court under section 59(1)(b). The principles applicable to the reception of further evidence under section 59(3) are explored in Orr v Holmes (1948) 76 CLR 632 at 640-642, per Dixon J.and in Orchard v Orchard (1972) 3 SASR 89 at 98-100, per Bray C.J.

The appeal goes to both questions of fact and law; see McGregor v Rowley (1928) SASR 67.

In approaching its task the Supreme Court has statutory power under section 59(1)(a) of the Local Courts

Act to draw "all inferences of fact which might have been drawn" by the warden's court. It is bound to form its independent judgment on the issues, though where their resolution turns on the credibility of witnesses, the Court will usually lack the material which would enable it to do so and will generally be compelled to accept the findings of primary fact of the warden's court; see generally Paterson v Paterson (1953) 89 CLR 212 at 219-224. Where the decision in the warden's court turned on an assessment of the trustworthiness of witnesses, it cannot be reversed unless the Supreme Court is convinced for other reasons that it was wrong; see Dearman v Dearman (1908) 7 CLR 549 at 553, per Griffiths C.J. and Chambers v Jobling (1986) 7 NSWLR 1. The position is different where the decision turns upon inferences from uncontroverted facts, as opposed to findings based directly on testimony; the Supreme Court does not have to be convinced that the warden's court was wrong in the inferences it drew, before drawing conflicting inferences, though in deciding on the proper inferences to draw it will give respect and weight to the conclusion of the warden's court - see Warren v Coombes (1979) 142 CLR 531. In this connexion because the warden's court exercises a specialized jurisdiction the cautionary words of Wells J. in Pacminex (Operations) Pty Ltd v Australia (Nephrite) Jade Mines Pty Ltd (1974) SASR 401 at 415 are applicable:-

> "Unless it is demonstrated on appeal that the Warden whose judgment is called in question has committed some egregious blunder in his findings of fact, or has misdirected himself on the law, I should, I think, be slow to interfere with those parts of his judgment that emanate principally from his knowledge understanding and assessment of the esoteric work of miners and mining tenements."

I would answer the questions raised by the Reference as follows:-

> "An appeal from the warden's court is regulated by the provisions for the institution, hearing and determination of appeals from the Local Court. In its essence it is an appeal in the strict sense and the question for decision by the Supreme Court is: "Subject to s.59(2) of the Local Courts Act, has the decision of the warden's court been shown to have been incorrect when it was given, on the evidence before that Court, or on that evidence together with any further evidence properly admitted on the hearing of the appeal; and if so, what should that decision have been, on the date it was given?"