

TURNBULL v. NEW SOUTH WALES MEDICAL BOARD

Court of Appeal: Street C.J., Moffitt P. and Glass J.A.

June 10; Nov. 17, 1976.

Medical Practitioners-Practitioner registered in Tasmania and in New South Wales-Infamous conduct in a professional respect established in Tasmania-Practitioners name removed from both Tasmanian and New South Wales registers-Appeal in New South Wales-Principles applicable-Medical Practitioners Act, 1938, s. 26 (1), (3).

The New South Wales Medical Board constituted under s. 5 (1) of the *Medical Practitioners Act* 1938, acting pursuant to s. 26 (1) of the Act, removed Turnbull's name from the Register of Medical Practitioners for New South Wales. in consequence of a finding by the Medical Council of Tasmania, made pursuant to s. 25 of the Tasmanian *Medical Act* 1959, that professional misconduct charged against him was infamous conduct in a professional respect and the consequent removal of his name from the Tasmanian register of qualified medical practitioners. It was conceded that, if the acts alleged against Turnbull in Tasmania had been done in New South Wales. The disciplinary tribunal constituted under s. 28 of the New South Wales Act would have been authorized to direct the removal of his name from the register in this State.

Turnbull appealed to the Supreme Court pursuant to s. 26 (3) of the New South Wales Act, and, on a motion for certain interlocutory orders and directions, contended that proceedings under s. 26 were such as to require the board to prove anew the charge against him by adducing such evidence as would justify the Supreme Court in making an original finding of guilt or innocence of a charge capable of leading to his name being removed from the New South Wales register: and, that, in the event of a finding of guilt, the Court was required to exercise an original disciplinary discretion in determining what action should be taken with respect to his registration. Helsham J. rejected these submissions, and refused to give directions to enable such a trial to take place before him. On appeal, by leave,

Held: (By Street C.J. and Glass J.A.) (1) The function of the New South Wales Medical Board constituted by s5 (1) of the Medical Practitioners Act, when acting pursuant to s26 (1) of the Act, is administrative in character. Therefore, the appeal provided for by s 26 (3) involves a hearing de novo; that is to say, an original exercise of jurisdiction by the appellate court.

Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd [1975] 2 NSWLR 174 at pp 178-180, followed.

(2) the questions which the appellate court is empowered to determine pursuant to s26 (3) are the same as those which the Board is empowered to determine pursuant to s26(1). This latter power, however, does not extend to enabling the Board itself to conduct a hearing de novo of the charge. Still less has the Board authority to find him guilty or innocent of the charge.

(3) Therefore, in the present case, the Court was not bound to grant the plaintiff a hearing de novo of the charges brought against him in Tasmania. The plaintiff was, however, entitled to propound the question whether the Court considered the case to be one in which the local disciplinary processes provided for in ss. 27-29 of the Act should be invoked, so as to afford the plaintiff a local re-trial of those charges.

(By Moffitt P)(4) The New South Wales Medical Board was not empowered by s26 (1) to inquire into and to determine, the guilt or innocence of the plaintiff of the misconduct charged and found against him in Tasmania; and, on appeal, the Supreme Court was not empowered by s. 26 (3) to make that inquiry and determination as incidental to its decision whether to reverse or confirm the conclusion of the Board.

(5) Semble, it would be contrary to the scheme of the Act to argue that the board. or the Court, should decline to exercise its power to act upon the foreign removal, simply upon the basis that there is an available procedure under ss. 27-29 for a local investigation of the foreign misconduct. One reason for this is the undesirability of bringing witnesses (in effect for the prosecution) from the foreign country to New South Wales, in all probability long after the event; and another is the procedural difficulties likely to be encountered in compelling the attendance of such witnesses, if they should decline to attend voluntarily.

CASES CITED.

The following cases are cited in the judgments:

Anderson and the Medical Practitioners Act. 1938-1964, Re (1967) 85 W.N. (Ptd.) (N.S.W.) 558.

Australian Sporting Club Ltd., Ex parte: Re Dash (1947) 47 S.R. (N.S.W.) 283; 64 W.K. Builders Licensing Board v. Sperway Constructions (Syd) Ptd Ltd [1975J 2 5. W.L.R.

Cook v. Head (1976J I N.S.W.L.R. 176.

Currie, Ex parte: Re Dempsey (1968) 70 S.R. (N.S.W.) I; 88 W.N. (Pt. 2) 193.

Edwards v Soble (1971) 125 C.L.R. 296.

McCaughey v. Commissioner of Stamp Duties (1945) 46 S.R. (N.S.W.) 192; 62 W.N. 230.

McDonald v. Thomas (1954) 33 L.V.R. I.

Phillips v. Commonwealth of Australia (1964) 110 C.L.R. 347.

Sweeney v Fitzhardinge (1906) 4 C.L.R. 716.

Vandersluis. Ex parte; Re Walsh (1960) S.R. (N.S.W.) 246; 77 W.N. 90.

Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes v Dignan (1931) 46 C.L.R. 73.

The following additional cases were cited in argument:

Kench v Fleming (1926) 26 S.R. (N.S.W.) 546; 43 W.N. 156.

McCoan v. General Medical Council [1964J 1 W.L.R. 1107; [1964J 3 All E.R. 143.

Parker v. Commissioner for Motor Transport (1970) 91 W.N. (N.S.W.) 273. Quality

House Pty. Ltd . Re (1966) 84 W.N. (Pt. 1) (N.S.W.) 328.

Skinner v. Beaumont [1974J 2 N.S.W.L.R. 106.

Stollery v. Greyhound Racing Control Board (1972) 128 C.L.R. 509.

Appeal

The plaintiff appealed, by leave, from an interlocutory decision on a summons before Helsham J. in which the plaintiff sought an order restoring his name to the register of medical practitioners in New South Wales. The facts are set out in the judgment of Street C.J.

T.E.F. Hughes Q.C., D.H.J. Bennett and G. M. Kinnane, for the appellant (plaintiff)

B.T.Sully for the respondent (defendant).

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STREET C.J.

The plaintiff was registered in 1933 in Victoria pursuant to the legislation of that state as a legally qualified medical practitioner. In 1934 he was similarly registered in Queensland; in 1936 he was similarly registered in Tasmania; in 1948 he was similarly registered in New South Wales; and in 1962 he was similarly registered in the Australian Capital Territory.

On 12 the September 1975 the council established under the Medical Practice Act 1959 of the State of Tasmania found that professional misconduct charged against the plaintiff was infamous conduct in a professional respect and removed his name from the Tasmanian register of qualified medical practitioners. This finding was made pursuant to s25 of the Tasmanian Act. It followed a properly constituted inquiry pursuant to s24 of the Act which extended over two days of hearing and in which witnesses had been called before the

counsel to give evidence. The plaintiff was represented at the inquiry by counsel and there is no challenge made to the regularity of the proceedings before the council.

The Tasmanian legislation provides for an appeal against an order such as was made against the present plaintiff. It is common ground between both sides in the present litigation that the appeal is of a restricted nature, not being a hearing de novo, and, in the absence of the council having given any reasons for its finding against the plaintiff, he has little prospect of succeeding in such an appeal.

Section 26 of the Medical Practitioners Act, 1938 of New South Wales is in the following terms: "26. (1) If the Board is satisfied that any person registered under this Part has since been removed for misconduct from any register of medical practitioners in any country outside New South Wales, the board may remove his name from the register:

"Provided that the board shall not remove the name of such person from the register pursuant to this subsection if the reason for the previous erasing or removal from a register was an act or omission affecting his conduct in a professional respect unless such act or omission was of a nature for which, if done or omitted to be done in New South Wales, the disciplinary tribunal would have been authorised under this Part of this Act to direct that the name of such person be removed from the Register of Medical Practitioners for New South Wales if registered therein.

(2) Notice of intention to remove the name of any person from the register pursuant to this section shall be given by the board to the person affected either personally or, if his whereabouts are unknown to the board, by advertisement in such manner as the board thinks sufficient, and his name shall not be removed from the register before the expiration of two months from the date of service of such notice or from the date of such advertisement as the case may be.

(3) Any person whose name has been removed from the register pursuant to this section may appeal to the Supreme Court in accordance with rules of F court; and the court may make such order in the matter as it thinks fit, having regard to the merits of the case and to the public welfare."

The New South Wales Medical Board, being "the board" referred to in s.26 removed the plaintiff's name from the Register of Medical Practitioners for New South Wales in December 1975. Before so doing, it duly followed the procedure prescribed by s. 26 (2). It is not in

dispute that the reason for the removal of the plaintiffs name from the Tasmanian register was an alleged act affecting the plaintiffs conduct in a professional respect of a nature for which, if done in this State, the disciplinary tribunal would have been authorized to direct the removal of the plaintiff's name from the register in this State. The plaintiff has consistently denied the truth of the allegation made and found against him in Tasmania.

Following upon the removal of the plaintiffs name from the register in this State, he appealed to the Supreme Court pursuant to s. 26 (3). The matter came before a single judge in the Administrative Law Division on a motion for certain interlocutory orders and directions. Upon the hearing of that motion, a question arose regarding the width and nature of the inquiry upon which the Court is to engage in an "appeal" under s. 26 (3). The plaintiff contended that the proceedings were such as to require the board to prove anew the charge against him by adducing such evidence as would justify the Supreme Court making an original finding of guilt or innocence of a charge capable of leading to his name being removed from the ,new South Wales register; he contended also that, in the event of a finding of guilt, the Court was required to exercise an original disciplinary discretion in determining what action should be taken in respect of the plaintiffs registration. The learned judge declined to accede to these submissions and, in particular, refused to give directions which would have enabled a trial] such as the plaintiff was seeking to take place before him. From that refusal an appeal is now brought to this Court.

The principal matter that has been argued before us concerns the nature of the "appeal" for which provision is made in s. 26 (3). In order to determine this, reference must be made to the general framework of the disciplinary provisions in the Medical Practitioners Act.

Sections 40 et seq. forbid, with criminal sanctions, an unregistered person from practising in this State; this is probably an overstated generality but there is no present occasion to attempt any greater precision. The board is authorized in appropriate circumstances, to enter the names of persons in the Register of Medical Practitioners for New South Wales kept pursuant to the Act. The board is the custodian of the register, and, as such, it has administrative powers in regard thereto as are necessary and to be expected in order to enable it to discharge its duties, including power to correct errors therein.

Coming more specifically to the provisions relevant to the present appeal, 26 has already been quoted in full. It authorizes local deregistration consequent upon deregistration elsewhere. Section 27 bears the marginal note "Disciplinary provisions". It permits a complaint or charge of unprofessional conduct (again I use a generality) to be made to "the

investigating committee" - a committee of three constituted under s. 27A. The investigating committee is required to investigate in camera the substance of any such charge. It may either dismiss the charge, or, if satisfied of its truth but, nevertheless, if it considers the charge of not sufficient seriousness, it may dismiss it. In the third alternative, the investigating committee, if satisfied that a prima facie case has been made out and that the charge is sufficiently serious, it shall refer the charge to the disciplinary tribunal.

The disciplinary tribunal is constituted by s. 28. It is chaired by a judge of the District Court and it comprises four other members. The procedures enacted under s. 28 involve a full hearing of the charge before the disciplinary tribunal, the machinery being such as to ensure a due and regular trial. The disciplinary tribunal, if it adjudges the registered person guilty, has power to reprimand him, suspend him from practice or remove his name from the register.

Section 29 (4) of the Act makes provision for an appeal to the Supreme Court from the disciplinary tribunal. So far as is presently relevant s. 29 (4) is in the following terms: "There shall be a right of appeal to the Supreme Court from an adjudgment of guilt or from an order made pursuant to this section or against any refusal of the restoration of any name to the register and on any such appeal the court may make such order as it thinks proper, having regard to the merits of the case and the public welfare.

"Any such appeal shall be in the nature of a rehearing, and shall be made in accordance with rules of court.

"Without affecting the generality of the foregoing provisions of this subsection, the court may make any order which the disciplinary tribunal might have made in the first instance under subsection (1) "

The similarity between s. 29 (4) and s. 26 (3) is at once apparent. Equally apparent, however, is the inclusion in s, 29 (4) of the prescription: "Any such appeal shall be in the nature of a rehearing" - words that find no place in s. 26 (3). The nature of the proceedings before the disciplinary tribunal, the constitution of that tribunal itself, and the statutory categorization of the appeal as "in the nature of a rehearing" have been recognized as placing such an appeal within the recognized boundaries of an appeal by way of rehearing from a judicial tribunal to a court. There is no corresponding basis to support the same conclusion in respect of an appeal under s. 26 (3).

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 nature of the function discharged by the board, and hence the nature of 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.

On the first of these matters, namely, the function of the board and the nature of its decision, this was clearly administrative in character. Section 26 (1) confers upon the board a summary power to effect a consequential removal from the register in this State when there has been a removal from some register outside the State. The limited character of the prerequisite machinery in s. 26 (2) contrasts significantly with the detailed machinery laid down to be followed by the disciplinary tribunal. There is every indication that the board's function under s. 26 (1) is wholly ministerial or administrative and virtually no indication to the contrary. For the reasons discussed in *Builders Licensing Board v Sperway Constructions (Syd.) Pty. Ltd.* (1) there arises a strong inference that the appeal from such a function will involve a hearing de novo, that is to say, an original exercise of jurisdiction by the appellate court.

The second of the three matters mentioned earlier confirms the conclusion that the appeal to the Supreme Court under s. 26 (3) involves a hearing de novo. The omission of the restricting or limiting addendum in s. 29 (4): "Any such appeal shall be in the nature of a rehearing" - is significant in the context of this statute, although, standing alone. These words are an inadequate indication of the nature of the appeal: *Builders Licensing Board v. Sperway Constructions (Syd.) Ptd. Ltd.* (2). The width of the appellate powers conferred by s. 26 (3) confirms the absence of any restriction or limitation affecting the Court in disposing of the appeal. Once again, there is little that can be urged in denial of the proposition that the Supreme Court on an appeal under s. 26 (3) is charged with an exercise of original jurisdiction involving a complete hearing de novo of the matter before it.

I pass, then, to the third of the three matters, this being the critical matter for determination of the present appeal. The question is, recognizing that the Supreme Court is charged with the duty of conducting a hearing de novo, what is it that is to be heard de novo? To answer this question, it is necessary to refer back to the terms of s. 26 (1), and to evaluate their significance in the context of the succeeding disciplinary provisions of the Act.

It is clear enough that the board has a discretion whether or not to remove a person's name from the New South Wales register following upon its removal from a register in a country

outside New South Wales. The section confers a summary power in that behalf. In exercising that discretion the board must have regard to the nature of the act or omission found against the registered person in the foreign country: the proviso to s. 26 (1). It may also have regard to many other factors, including the foreign legislation and procedures invoked against the registered person, the actual course of proceedings and the content and weight of evidence adduced therein, as well as to subjective considerations relating to the registered person and to wider considerations of public welfare within New South Wales. I do not purport to state exhaustively the elements that may legitimately be taken into account by the board in the exercise of its discretion in the matter of D summary deregistration under s.26 (1). But wide though the range of discretionary elements may be, it does not extend to enabling the board itself to conduct a hearing de novo of the charge brought against the registered person in the foreign country. The board does not retry him for that charge, still less has it the authority to find him guilty or innocent of that charge.

It is at this point that the context of the other disciplinary provisions in the Act becomes of relevance. The board may, under s. 26 (1), exercise its summary power of deregistration, in which event an appeal will lie under s. 26 (3). It may, alternatively, decline to exercise its summary power, thereby terminating the matter so far as the board is concerned. A third, and presently significant, course is open to the board: it is competent for the board, when confronted with a foreign removal, to 'refrain from exercising its summary power, and in lieu to invoke, or cause to be invoked, the disciplinary provisions of ss. 27 et seq. by making, by its proper officer, a complaint or charge to the investigating committee. This would initiate the procedures which would lead on to a full hearing and adjudication of the original charge, that is to say, a re-trial, by the disciplinary tribunal under s. 28. This third alternative is a course open to the board to be taken, where it considers that circumstances warrant this being done. So far from this indicating that the board itself should undertake a local re-trial, it recognizes that the machinery for a local re-trial, under sections specifically suited to that end, is available to be invoked.

The right of appeal conferred by s. 26 (3) involves, as I have previously stated, the Supreme Court performing anew, as an original exercise on its part, the statutory function of the board under s. 26 (1). The onus before the Court will rest upon the party or entity who seeks to have the registered person's name removed. Before the Court the registered person is in the position of a defendant. The Court, on hearing such appeal, as an exercise of original jurisdiction on its part, is at liberty to weigh equally as wide a range of discretionary considerations as was the board under s. 26 (1). It must, pursuant to s. 26 (3), re-exercise that statutory discretion, making in the matter such order "as it thinks fit, having regard to the

merits of the case and to the public welfare", As could the board, the Supreme Court on the appeal can decide to remove the registered person's name: it can decide not to remove his name: or, as the third alternative, it can decide that the case is one not appropriate for exercise of the summary power of removal, but is nevertheless one justifying a direction which would invoke the disciplinary provisions of ss.27 and 28 leading to a full local re-trial by the disciplinary tribunal

I do not consider that the power of the Court under s. 26 (3) to "make such order in the matter as It thinks fit, having regard to the merits of the case and to the public welfare" operates to translate the appellate proceedings into a full local re-trial of the foreign charge. This task is no more placed upon the Court under s. 26 (3) than it is placed upon the board under s. 26 (1). The powers which can be invoked to bring about a full local re-trial are available to be invoked by the Court equally as they are available to be invoked by the board. But to contend that the Court itself must preside over a local re-trial involves, in my view, far more than a hearing de novo or an original determination of the matter before the board under s. 26 (1) that is to say, the question of whether or not the circumstances are such as to justify the exercise of a summary power of removal. It is summary removal with which the board is concerned under s.26 (1). And it is with summary removal that the Court is concerned under s. 26 (3). To impose upon either the board or the Court under these two subsections of s. 26 an obligation to preside over a full local re-trial of the foreign charge would be antithetical to a legislation scheme concerning power to effect a summary removal.

Upon the foregoing analysis of the functions of the board and of the Court. I am in agreement with the view of the learned judge at first instance that the Court is not bound to grant to the present plaintiff a hearing de novo before it. The plaintiff is, however, entitled to propound the question whether the Court considers that the case is one in which the local disciplinary processes should be invoked, so as to afford to the plaintiff a local re-trial of the charge against him. This particular question has not thus far been examined at first instance. Reference was made, during the course of argument, to points of contrast in the nature and course of the proceedings followed in Tasmania as against those applying in New South Wales. Varying degrees of Significance might well attach to these points. In addition, the full transcript of the evidence in the Tasmanian proceedings was made available on the appeal, and this discloses material touching closely on the determination of whether there should not be a full local re-trial of the charge against the plaintiff. I shall not comment upon the particular matters arising in connection With the decision to be made at first instance. It should, however, be recorded, on the aspect of the plaintiffs bona fides, that,

he has offered an undertaking to pay the costs associated with bringing from Tasmania the witnesses who might be required to give evidence against him.

Agreeing as I do with Helsham J, that he was neither obliged nor entitled to preside over a full local re-trial, it follows that the appeal from his refusal to give interlocutory directions in preparation for such a re-trial must fail.

The matter will, however, have to proceed in the Administrative Law Division for determination of the question whether there should not be a full local disciplinary investigation of the matters charged against the plaintiff in Tasmania. I would propose that the appeal to this Court be dismissed with costs. The costs of the past proceedings in the Administrative Law Division were reserved; as I envisage that there will be further proceedings in that Division on the determination of the aforesaid question. I would propose that those costs remain reserved for further consideration in that Division.

MOFFITT P. When an appeal is provided from a decision of a court or an administrative body, it is important not to confuse the procedural nature of the appellate inquiry with the substantive jurisdictions of the body appealed from and of the appellate tribunal. Questions as to whether the appeal is in the nature of a re-hearing or whether it is a strict appeal, directed merely to whether there is error in the decision given upon the evidence or material before the body appealed from, are directed to the former, namely the procedural nature of the appeal. So are questions concerning the admission of fresh evidence. Questions as to the substantive jurisdiction of the appellate tribunal are quite different. Whether the appeal procedurally be, or permit, a re-hearing or re-determination in any sense, or whether it be an inquiry into error, the jurisdiction of the appellate tribunal does not exceed, that of the court or body appealed from, except so far as the terms of the statute which provide the appeal so dictate. The statute or statutes defining the general appellate jurisdiction of the appellate court may, and usually will, confer general powers to make orders incidental to determination of the appeal. A statute providing a particular appeal may confer like supplementary powers. Examples are the conferring of the ancillary power to award costs of the appeal: *Cook v. Head* (3), or to make special orders in relation to penalty.

What I have said follows from the nature of the various classes of appeal. If the appeal is in the re-hearing, then, as the term implies, the appellate court re-exercises the jurisdiction of the court appealed from, except so far as the statute otherwise provides. That different evidence is led and acted upon, or that the matter is reconsidered as at the date of re-hearing, does not alter the circumstance that it is the jurisdiction of the body appealed from

which is re-exercised. If the body appealed from is administrative and a court, on appeal, considers the matter afresh, whether upon the whole or part of the material before the administrative body, or whether upon material presented completely afresh, the re-determination of the appellate court is of the question posed to the administrative body and, except so far as the statute otherwise provides, such question is determined in accordance with the requirements of, and the principles enunciated by, the statute which confers the power or jurisdiction upon the body appealed from. By way of example, if the jurisdiction of a tribunal, or power of a body appealed from, is to grant or refuse an application upon its determination of the impact of nominated environmental considerations, then, unless the statute which provides the appeal confers on the court, on appeal, powers to determine the case upon wider considerations, then, whether the appeal be a strict appeal or a re-hearing, the appeal must be determined having regard to the impact of the environmental considerations. It could not determine the appeal upon a basis not open to the tribunal appealed from. By way of further example, if a board had power to cancel or suspend a license, if a licensee had certain prescribed convictions. I do not see how, without special statutory provision, the jurisdiction of the appellate tribunal could exceed that of the body appealed from, so that, an appellant could require the respondent to the appeal to prove again guilt of the offence the subject of the conviction, or otherwise have the appellate tribunal adjudicate upon the question of guilt.

Authorities such as *Phillips v. Commonwealth of Australia* (4) and *Builders Licensing Board v. Sperway Constructions (Syd.) Pty. Ltd.* (5) do not advance the appellant's arguments on the matter under discussion. While they deal with the manner of exercise of the appellate jurisdiction, particularly as to evidence and onus, neither case provides authority upon the subject of enlarging the jurisdiction of the appellate court beyond that of the tribunal appealed from. There was no question in either case but that the appellate tribunal had to deal with the same question, and by resort to the same considerations under the relevant statute, as the tribunal or body appealed from.

Thus it is the exercise of jurisdiction or power at first instance which is examined for error or is re-exercised, unless the statute conferring the appeal otherwise provides. It may be that the appeal Court has less power than the court or body appealed from, as may be the case where there is a true appeal and the appellate court upon finding error has not power to re-exercise the jurisdiction e.g. an appeal to this Court from the Workers' Compensation Commission. The point to be made, however, is that the jurisdiction on appeal is no wider than at first instance, except so far as the statute provides.

It is, of course, a matter of statutory construction whether the statute provides otherwise, namely confers a different or wider jurisdiction upon the appellate court than that of the body or court appealed from. If and so far as it is found that a different or wider jurisdiction is conferred, then, to that extent, the proceeding is not in any sense an appeal, even an appeal by way of re-hearing. It would be an original proceeding involving different issues and principles. So to find, if the proceeding is termed an appeal, would be to find a contradiction within the statute. To avoid such a contradiction, powers conferred in general terms would be construed as incidental to the appeal expressly given. Where an appeal of any description is expressly given it would take clear words to justify particular powers given being construed as derogating from the appellate nature of the proceeding, rather than being construed as in aid of or ancillary to the appeal.

The substance of the appellant's contention is that he should be allowed, as a matter of right or at the Court's discretion, to put in issue the fact of his misconduct in a professional respect in Tasmania, of which he was found guilty by the Medical Council of Tasmania, and in consequence of which his name was removed from the Register of Medical Practitioners for the State of Tasmania. The New South Wales Medical Board, in consequence of such removal and in exercise of the power contained in s. 26 (1) of the Medical Practitioners Act, 1938, removed the appellant's name from the New South Wales register. In his appeal to a judge of the Supreme Court under s. 26 (3), the appellant sought to put in issue the question of his guilt or innocence in the impact of the environmental considerations. It could not determine the appeal upon a basis not open to the tribunal appealed from. By way of further example, if a board had power to cancel or suspend a license, if a licensee had certain prescribed convictions. I do not see how, without special statutory provision, the jurisdiction of the appellate tribunal could exceed that of the body appealed from, so that, an appellant could require the respondent to the appeal to prove again guilt of the offence the subject of the conviction, or otherwise have the appellate tribunal adjudicate upon the question of guilt.

Authorities such as *Phillips v. Commonwealth of Australia* (4) and *Builders Licensing Board v. Sperway Constructions (Syd.) Pty. Ltd.* (5) do not advance the appellant's arguments on the matter under discussion. While they deal with the manner of exercise of the appellate jurisdiction, particularly as to evidence and onus, neither case provides authority upon the subject of enlarging the jurisdiction of the appellate court beyond that of the tribunal appealed from. There was no question in either case but that the appellate tribunal had to deal with the same question, and by resort to the same considerations under the relevant statute, as the tribunal or body appealed from.

Thus it is the exercise of jurisdiction or power at first instance which is examined for error or is re-exercised, unless the statute conferring the appeal otherwise provides. It may be that the appeal Court has less power than the court or body appealed from. as may be the case where there is a true appeal and the appellate court upon finding error has not power to re-exercise the jurisdiction. e.g. an appeal to this Court from the Workers' Compensation Commission. The point to be made, however, is that the jurisdiction on appeal is no wider than at first instance, except so far as the statute provides.

It is, of course, a matter of statutory construction whether the statute provides otherwise, namely confers a different or wider jurisdiction upon the appellate court than that of the body or court appealed from. If and so far as it is found that a different or wider jurisdiction is conferred, then, to that extent, the proceeding is not in any sense an appeal, even an appeal by way of re-hearing. It would be an original proceeding involving different issues and principles. So to find, if the proceeding is termed an appeal, would be to find a contradiction within the statute. To avoid such a contradiction, powers conferred in general terms would be construed as incidental to the appeal expressly given. Where an appeal of any description is expressly given it would take clear words to justify particular powers given being construed as derogating from the appellate nature of the proceeding, rather than being construed as in aid of or ancillary to the appeal.

The substance of the appellant's contention is that he should be allowed, as a matter of right or at the Court's discretion, to put in issue the fact of his misconduct in a professional respect in Tasmania, of which he was found guilty by the Medical Council of Tasmania, and in consequence of which his name was removed from the Register of Medical Practitioners for the State of Tasmania. The New South Wales Medical Board, in consequence of such removal and in exercise of the power contained in s. 26 (1) of the Medical Practitioners Act, 1938, removed the appellant's name from the New South Wales register. In his appeal to a judge of the Supreme Court under s. 26 (3), the appellant sought to put in issue the question of his guilt or innocence in respect of the misconduct found by the Tasmanian council. If this issue is open, the question of onus of proof will arise, namely whether the appellant would succeed and have his name restored to the New South Wales register, unless the respondent proved the appellant's misconduct by admissible evidence, or whether the appellant could succeed only if he affirmatively established his innocence. Even in the latter event, in practical terms, the respondent would be obliged to call the Tasmanian witnesses who established misconduct in Tasmania for, in default, the appellant's case would be unanswered. In a preliminary application, Helsham J. ruled that it was not open to the

appellant to put in issue the question of his guilt or innocence of the charge of misconduct of which he was found guilty in Tasmania.

Having in mind my opening observations, two questions arise. The first, is whether it is within the scope of the power of the New South Wales Medical Board under s. 26 (1) for it to inquire into, and for it to determine, the guilt of the appellant of the misconduct charged and found against him in Tasmania. Of course, if it is, then that subject is a proper subject for consideration upon appeal, whether or not the board in fact so inquired. If it is not, the second question is whether s. 26 (3) in conferring an "appeal" has also given to the Supreme Court jurisdiction to make the inquiry and determination in question, as incidental to its decision whether to reverse or confirm the conclusion of the board.

The relevant section of the Medical Practitioners' Act is as follows: "26. (1) If the board is satisfied that any person registered under this Part: has since been removed for misconduct from any register of medical practitioners in any country outside New South Wales, the board may remove his name from the register:

"Provided that the board shall not remove the name of such person from the register pursuant to this subsection if the reason for the previous erasing or removal from a register was an act or omission affecting his conduct in a professional respect unless such act or omission was of a nature for which if done or omitted to be done in New South Wales, the disciplinary tribunal would have been authorised under this Part of this Act to direct that the name of such person be removed from the Register of Medical Practitioners for New South Wales if registered therein.

(2) Notice of intention to remove the name of any person from the register pursuant to this section shall be given by the board to the person affected either personally or, if his whereabouts are unknown to the board, by advertisement in such manner as the board thinks sufficient, and his name shall not be removed from the register before the expiration of two months from the date of service of such notice or from the date of such advertisement as the case may be.

(3) Any person whose name has been removed from the register pursuant to this section may appeal to the Supreme Court in accordance with rules of court; and the court may make such order in the matter as it thinks fit, having regard to the merits of the case and to the public welfare ."

The condition for the exercise of the discretionary power to remove the name from the register is satisfaction of the board of a removal for misconduct from a register in another country, in this case Tasmania. This power is to be contrasted with the power to remove from the register provided in s. 29 (1) (c), following the exercise of the jurisdiction and powers provided in ss. 27-29. These sections provide for detailed procedures for the investigation and trial of complaints and charges against registered persons. These include, as provided by s. 27 (1) (c) that the registered person "has been guilty of misconduct in a professional respect", and by s. 27 (1) (a) that the person "has been convicted in New South Wales or elsewhere by any court of any felony, misdemeanour, crime or offence".

The scheme for determination of the truth of allegations, including allegations of misconduct in a professional respect, is, first, for investigation by an investigation committee the ultimate powers of which are provided by s. 27 A (3). It may dismiss the complaint or charge; it may deal finally with a complaint or charge by reprimand where appropriate, but only after the registered person has had an opportunity to appear before it, and make written representations to it; or, if satisfied there is a prima facie case and that the complaint or charge is sufficiently serious, it may refer the complaint or charge to the disciplinary tribunal. Safeguards in proceedings before this committee are provided for the person, against whom the complaint or charge is laid, including that the proceedings be in camera.

Section 28 sets out detailed procedures in respect of a complaint or charge brought before the disciplinary tribunal. The disciplinary tribunal sits in open court. The registered person concerned is to be afforded an opportunity of defence, either in person or by his solicitor or counsel. In addition to removal of name from the register, the available penalties, in respect of a finding of guilt, include reprimand, or caution, or suspension for a period not exceeding twelve months. Section 29 (2) provides: "Where any registered person has been so adjudged guilty. the tribunal shall not make an order suspending such person from practice or directing that his name be removed from the register where the offence is such that, either from its trivial nature or from the circumstances in which it was committed, or the conduct is such that it does not, in the public interest, disqualify the person from practising his profession."

Thus it is recognized that a finding of professional misconduct will not automatically lead to removal from the register, and that the nature of the offence, and the circumstance in which it is committed, and the relevant public interest, must be considered before removal.

The bodies so set up to investigate and try complaints and charges, i.e. to determine their truth, are so constituted that the decision making is left to representative members of the medical profession, but with the assistance of persons with legal qualifications, i.e. a stipendiary magistrate as chairman of the investigating committee: s. 27 A (1) and a District Court judge as chairman of the disciplinary tribunal: s. 28 (2). The committee has as its other member's two medical practitioners and the tribunal four other members who are members of the medical board whose members are almost entirely medical practitioners: ss. 5 (3). 28 (1).

In my view, the terms of s. 26 (1) make it clear that the exercise of the power there provided does not involve direct inquiry by the board itself into the question of guilt. A New South Wales removal, although a matter of discretion, depends upon a foreign removal "for" (and, therefore. a finding there of) "misconduct". It is an administrative power to accept a foreign finding in substitution for a local investigation and finding of misconduct. To construe s. 26 (1) so that a local removal depends upon the board's own direct inquiry and satisfaction of guilt of misconduct would contradict and deny the terms of the subsection and substitute a different power.

An examination of the context of the Act in which s. 26 (1) is set leads to the same conclusion. Thus the provision made in s. 26 stands in contrast with direct inquiry into misconduct expressly provided in ss. 27-29 for use by a more limited and expert body. Once the condition has been met that the board finds there has been an appropriate foreign removal from the register, the discretion conferred by s. 26 (1) leaves it open to the board to consider whether the foreign finding was such that it is prepared to act upon it. While not seeking to confine a discretion not limited by any express words, no doubt the board could consider the nature of the procedures leading to the foreign finding and, in particular, whether there was a fair and reliable inquiry. This might involve a consideration of the constitution and procedures of the investigating body and, perhaps, the manner in fact of the exercise by that body of its powers. It might consider the available rights of appeal, or of judicial interference otherwise, to correct error in the foreign finding. Section 26 (2) provides a delay in a New South Wales removal which would provide, for a person whose deregistration in New South Wales was proposed, an opportunity to attack the finding in the place where it was made.

The board might come to accept more readily decisions given in other States as against decisions given in truly foreign countries. The board, no doubt, would also consider the nature of the misconduct found, the context in which it occurred, the relevance of it to New

South Wales conditions and continued practice here, and the proper resolution of any conflict between hardship in New South Wales to the registered person, if removed from the register, and local public interest, if allowed to remain on the register. In the end, however, the power of the board is to act, or not act, upon the foreign removal by a removal here. Of course, if the foreign removal is not considered to provide a satisfactory basis for removal here, direct inquiry into the misconduct or alleged misconduct could take place under ss. 27-29, assuming investigation and trial were practicable from an evidentiary point of view. This, however, would not be an exercise of power under s. 26, but by different bodies under different sections.

It would seem, however, to be contrary to the scheme of the Act to argue that the board, or the Court in its place, should decline to exercise its power to act upon the foreign removal, simply upon the basis that there is an available procedure for a local investigation of the foreign misconduct, i.e. under ss. 27-29. Assuming such an approach were open, I think that, in a case such as the present, there would be some difficulties and dangers in too readily concluding that such alternate procedure is really available in any effective sense. First the very existence of s. 26 appears to accept the impracticability of resort to local disciplinary proceedings in respect of foreign misconduct leading to foreign removal. Then, apart from any procedural difficulties, there are undesirable features in bringing patients (in this case a young female patient, complaining of sexual misconduct), and retrying the same issue in a State foreign to the complainant, and, as in the present case where there is registration in a number of States, possibly in a succession of States, and successively subjecting the patient or patients, long after the event, to cross-examination asserting falsity in respect of a story found to be true in the local State of the patient. The more would this be so where there is an appeal to the Supreme Court of the State where the misconduct has been found to have been proved. Further, the question arises whether there is any procedure available to compel a witness from another State to come here or to give evidence before the disciplinary tribunal. The circumstance that powers under the Royal Commissions Act, 1923-1934 are conferred upon the tribunal by the Medical Practitioners Act, s. 28 (8), would not enable powers under s. 16 (1) of the Service and Execution of Process Act 1901-1973 (Cth.) to be resorted to. The availability of the last mentioned provision to compel attendance of interstate witnesses would require the tribunal be a "court" as used in the context of s. 16 (1). If the witness could not be brought here, it would be impossible to try an issue of misconduct which turned upon the credit of witnesses without the trier of the facts hearing the original complainant witnesses.

However, the point to be made is that it is quite outside the ambit of the power provided in s. 26 (1) to undertake the difficult task of directly investigating the fact of misconduct in the other country. The different power of removal in s. 26 from that in ss. 27-29 no doubt derives from recognition of that difficulty.

Direct investigation of guilt of misconduct being outside the ambit of the board's power, then, as indicated at the outset, it is outside the appellate power, unless the statute, by its terms, adds such to the appellate jurisdiction. The second question earlier referred to then arises. The appellant's submission is that the words of s. 26 (3) enlarge the appellate jurisdiction beyond that of the board. The question for decision is whether the words in s. 26 (3) "and the court may make such order in the matter as it thinks fit, having regard to the merits of the case and to the public welfare" do so. I assume for present purposes that the board's decision is administrative and that, in accordance with the decision in *Sperway's case* (6) the appellate procedure is of the widest type, so that the Court considers the question of removal afresh, upon any relevant material placed before it. It must first be noted that the jurisdiction conferred on the Supreme Court is, by the express terms of s. 26 (3). an "appeal". Unless the quoted words at the end of s. 26 (3) enlarge the jurisdiction, the Court's discretion to remove or confirm the removal depends upon its conclusion that there has been a removal for misconduct in Tasmania, and that the terms of s. 26 (2) are met. Having so found, then in exercise of the discretion to remove re-exercised by the Court, it would be open to it to examine for itself the nature and course of the Tasmanian proceedings and the nature of the misconduct found. In the present case, the transcript is before the trial judge, and from this it appears that there was a lawyer assisting the inquiry who summed up judge-advocate style. Counsel before us has indicated that it is not suggested that the appellant was denied natural justice, or that any error occurred in the course of the proceedings, or that the finding of guilt was not open upon the evidence. It is, however, complained that no reasons were given for the finding of guilt. It is not complained that the Tasmanian council was bound to give reasons. An appeal has been lodged to the Tasmanian Supreme Court and is pending, but the appellant submits that, as the finding was open, the appeal can be expected to fail. What the appellant seeks is a trial of the question of guilt in a court, and in particular a New South Wales court, on the assertion by him of his belief that, because of past events, he cannot have a fair trial in Tasmania. It was submitted that the A finding of guilt was upon the female complainant's evidence, which was only slightly corroborated. This, however, is not so. There was strong corroboration, and, further, in the course of the trial the appellant made concessions which left, so far as the record reveals, a strong case against him.

In my view, the words which I have quoted and which define the order which the Court on appeal may make, do not enlarge its jurisdiction, so as to convert the proceedings into a retrial of the appellant upon the charge found B against him in Tasmania, or so as to leave his guilt a relevant issue in the appeal. The words simply make it clear that, as incidental to a determination of the appeal, the Court can make any order which it considers appropriate. It is an order "in the matter", namely in, and therefore incidental to, exercise of appellate jurisdiction conferred by the subsection. The words "thinks fit", "merits of the case" and "public welfare" in s. 26 (3) only serve to emphasize the discretion to be re-exercised and the width of that discretion. They are apt to describe the considerations to be taken into account once there is a finding of relevant misconduct. They serve a similar function to the provision made in s. 29 (2) and the not dissimilar words as to powers on appeal provided in s. 29 (4). The latter subsection provides an appeal in the nature of a re-hearing against a finding of guilt. The provision of such appeal itself must lead the Court to find the charge proved or not proved. The addition in s. 29 (4) of power to "make such order as it thinks proper having regard to the merits of the case and the public welfare serve no purpose of providing jurisdiction to determine guilt or innocence. That jurisdiction is already provided, because there is an appeal by way of re-hearing. The added powers are entirely ancillary. The Court is to weigh and judge the offence, once proven. Section 29 (4), therefore, stamps these words as providing a power ancillary to the appeal. The similar quoted words of s. 26 (3), in my view, are directed to emphasizing that the Court, on appeal, has the unfettered discretion on appeal which the board had. They do not enlarge the basic power provided in s. 26 to make a reciprocal removal. This conclusion follows from my initial observations, and the circumstance that the words of the subsection under consideration are appropriate to describe powers ancillary to a determination of the appeal.

If the appellant's submission be correct, then after a removal from the New South Wales register by the disciplinary tribunal under s. 29 (l) (c) in respect of a conviction in Tasmania referred to in s. 27 (l) (a), there seems to be no reason why, upon appeal, the appellant could not insist upon a retrial by the Supreme Court of the Tasmanian charge. The words of s. 26 (3) do not justify converting the appeal into a proceeding quite different from the exercise of power appealed from.

If the appellant's contention were correct, some quite extraordinary results would follow, which appear quite foreign to the legislative intent demonstrated by ss. 26-29. The scheme of the Act is to provide investigatory powers which, subject to legal guidance, are exercised by members of the medical profession. These powers are specifically conferred and precisely defined. However, it is said that the general words of s. 26 (3) should be construed

to confer a jurisdiction upon a court to conduct for the first time in New South Wales an original trial of a person registered in New South Wales in respect of an offence alleged in another State or country. If what the appellant contends, he is entitled to do, then the provision made in s. 26 (1) could be avoided- at will and reliance upon a foreign removal made unworkable. An appeal would make the board, in effect, a prosecutor in most cases facing the near impossible task of importing foreign witnesses to reprove the case here.

It was argued at first instance and on appeal, in the alternate, that the judge at first instance, even if not bound to receive evidence leading to the reopening and retrial of the issue of misconduct in Tasmania, had a discretion to do so. The learned trial judge assumed, without deciding, that he had such a discretion, but concluded, in the circumstances, that he would not exercise the discretion in favour of receiving the evidence. In my view, there is no such discretion, in that, for the reasons I have given, retrial here of the Tasmanian charge, whether as a matter of obligation or discretion, is outside the power of the board, and the appellate jurisdiction of the Court.

It should be added that leave to appeal was granted upon the argument that the decision appealed from would substantially determine whether the appellant could succeed in the appeal to Helsham J. During the hearing before us, we suggested that, if the appellant were to fail before us, it would be undesirable to leave outstanding 'any other question which the appellant might raise with the prospect of a further appeal to this Court. After it was indicated that there was only one alternate question that would remain, counsel agreed that this Court should decide this remaining question. In taking this course, counsel for the appellant indicated that if these questions were decided against the appellant, there was no further issue to be litigated before Helsham J. The complaints earlier referred to concerning some features of the Tasmanian procedures, e.g. the failure to give reasons and the alleged slight corroboration were relied upon before us, as they were before Helsham J only as providing a ground for the Court to exercise a discretion, if one existed, to allow evidence before the Court on the issue of guilt or innocence of the misconduct found proved in Tasmania. It was not sought to be argued that these matters of complaint provided ground in themselves to allow the appeal from the board.

The alternate question raised was as follows: Prior to exercise of power under s. 26 (1), the board received notification from the Medical Council of Tasmania that, following a formal inquiry by the council the appellant "was found guilty of infamous conduct in a professional respect and his name was removed from the Register of Medical Practitioners of Tasmania". A copy of the charge was enclosed. It stated the charge as above under the heading

"charge", and then added under "Particulars of Misconduct" that on 13th March, 1975, the appellant did certain things to, and in relation, to, a female patient set out in twelve paragraphs. Most were of acts or words of sexual excitement in a connected sequence. Several, however, were more neutral, such as that the appellant put his arm or arms around the patient, and that he said to her: "You are beautiful." It was argued that there were really twelve charges and that what the board had before it did not disclose which charge had been found proven, and that, if it had been one of the lesser matters such as quoted, there would be no basis for a New South Wales removal, having regard to the proviso in s. 26 (1). There is no substance in this submission. There was one charge of professional misconduct and a removal based upon a finding of the same. There was material before the board to enable the condition of s. 26 (1) to be fulfilled, namely satisfaction of the board of removal of the appellant from the Tasmanian register for A misconduct. The proviso in s. 26 (1) against a New South Wales removal did not apply, because the material before the board established a removal for misconduct in a professional respect, which, if it had occurred in New South Wales would have authorized the disciplinary tribunal to direct removal from the register.

The consequence of the conclusions I have come to is that, not only should the appeal to this Court be dismissed but, there being no outstanding matter, the appeal to Helsham J. should also be dismissed. However, I think it more appropriate that this Court merely dismiss the appeal to it with costs, leaving the single judge to make such final order as is appropriate.

GLASS J .A. This is an appeal by leave from an interlocutory decision made in relation to a summons brought by Reginald John David Turnbull, the plaintiff, against the New South Wales Medical Board. By that summons he sought an order restoring his name to the register of medical practitioners in C this State. The constituent facts may be shortly stated.

Since the year 1948 the plaintiff has been registered under the provisions of the Medical Practitioners Act, 1938 and entitled as such to practise in this State as a doctor. Since 1936, he had been registered in Tasmania under similar legislation and entitled on that account to practise there. On 12th September, 1975, at a meeting of the Medical Council of Tasmania, it was resolved that a charge against him of infamous misconduct in a professional respect had been proved to its satisfaction, and that his name should be removed from the register of medical practitioners for the State of Tasmania. On 12th September, 1975, the New South Wales Medical Board was notified of that finding and decision. By letter dated 23rd October, 1975, the board informed the plaintiff that it had been formally notified of the removal of his

name from the Tasmanian register. It further informed him of the board's intention to remove his name from the New South Wales register, such decision to take effect at the expiration of two months in accordance with s. 26 of the Medical Practitioners Act, 1938. It also called attention to his right to appeal to the Supreme Court.

Section 26 of the Act is in the following terms:

“(1) If the board is satisfied that any person registered under this Part has since been removed for misconduct from any register of medical practitioners in any country outside New South Wales, the board may remove his name from the register:

"Provided that the board shall not remove the name of such person from the register pursuant to this subsection if the reason for the previous erasing or removal from a register was an act or omission affecting his conduct in a professional respect unless such act or omission was of a nature for which, if done or omitted to be done in New South Wales, the disciplinary tribunal would have been authorised under this Part of this Act to direct that the name of such person be removed from the Register of Medical Practitioners for New South Wales if registered therein.

(2) Notice of intention to remove the name of any person from the register pursuant to this section shall be given by the board to the person affected either personally or, if his whereabouts are unknown to the board, by advertisement in such manner as the board thinks sufficient, and his name shall not be removed from the register before the expiration of two months from the date of service of such notice or from the date of such advertisement as the case may be.

(3) Any person whose name has been removed from the register pursuant to this section may appeal to the Supreme Court in accordance with rules of court; and the court may make such order in the matter as it thinks fit, having regard to the merits of the case and to the public welfare."

The plaintiff having duly exercised his rights under s. 26 (3). the appeal came on for hearing before Helsham J. sitting in the Administrative Law Division of the Court. Counsel for the plaintiff submitted that the appeal was of the widest possible kind. For the board it was argued that the appeal was of a very limited character. The submissions for the board were adopted by the trial judge. Before us it has been contended, on the plaintiffs behalf, that the learned judge fell into error of law when he determined the nature of such an appeal to the Supreme Court. Before examining the competing submissions affecting this matter it may be

useful to delineate the realm of discourse to which they belong. 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 re-determined 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* (7). (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* (8). 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* (9) *Edwards v. Noble* (10).

(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 retried. The party succeeding below enjoys no advantage, and must, if he can, win the case a second time: *Streeney v. Fitzhardinge* (11).

On behalf of the board, it was submitted that the appeal under s. 26 (3) was an appeal in the strict sense, and that the only question it posed was whether the board acted properly on the material before it, viz. the Tasmanian finding that the appellant was guilty of unprofessional conduct. For the plaintiff, it was submitted that the section gives him the right to a hearing *de novo* in which the issue of guilt or innocence is re-litigated, and that his Honour fell into error in declining so to rule. The plaintiffs position was supported by a number of arguments which I shall compendiously state: (a) because the Court is directed to have regard "to the merits

of the case and to the public welfare" it is obliged to investigate for itself the merits of the original charge: (b) because s. 26 (J) makes no provision for a hearing before the board. the appeal against its decision should be of the fullest kind; (c) because the appeal given by s. 29 (4) against the decision of a New South Wales disciplinary tribunal is described as an appeal "in the nature of a rehearing", the omission of those words from s. 26 (3) indicates that it was to be an appeal of a more extensive nature; (d) s. 26 (1) contemplates removal of an automatic kind following deregistration in any foreign country. By comparison with local conditions some foreign standards of conduct may be restrictive and some foreign standards of adjudication may be inferior. Accordingly, an appeal of the fullest kind, involving the question of guilt or innocence of the alleged misconduct, must have been intended; (e) because the decision under appeal was executive in its nature.

If our task of construction depended simply upon the indications of legislative intention to be found in the language internal to the section, or in the way in which it contrasts with the language in other sections, I would find it difficult to determine what kind of appeal was being vouchsafed to a medical practitioner whose deregistration overseas had been acted upon by the local authorities. But I have been persuaded that the answer to this question is governed by an established canon of construction which depends, not upon the nuances of statutory language, but upon the nature of the decision under appeal. In *Ex Parte Australian Sporting Club Ltd. v. Dash* it was laid down by the Full Court of the New South Wales Supreme Court that, when an appeal is brought from an executive authority to a court, the latter exercises, not appellate, but original jurisdiction. In *Phillips v. Commonwealth of Australia* the High Court was considering the nature of an appeal to a Victorian County Court from the decision of the delegate of the Commissioner for Commonwealth Employees' Compensation that an employee had ceased to be entitled to compensation. The judgment contained the following passages "What the section does is to provide for the judicial review of administrative decisions of a particular character and upon any such review it is, we think, for the Court to pronounce anew upon the rights of the parties as disclosed by the evidence before it."

"In the first place, there arose for determination the question whether the liability of the Commonwealth to pay compensation to the appellant as a totally incapacitated employee should be brought to an end. Upon this issue the onus rested fairly upon the Commonwealth "

The first of these decisions, having been made by this Court and applied on a number of occasions, is one which we ought to follow. The second decision is one which we must follow. Their authority proclaims a hearing on appeal to a court, from an administrative or

executive decision, to be a hearing de novo. The semantic identity of "anew" and "de novo" can be no accident. But the proposition rests on more cogent doctrinal factors. To describe the appeal court as exercising original jurisdiction means that a judicial investigation is being made for the first time. There is no judicial finding the correctness of which is to be presumed until its wrongness is exposed: *McCaughey v. Stamp Duties Commissioner*. To require the Commonwealth to win again the issue on which it had succeeded before the delegate is of the essence of a hearing de novo. Quite recently this Court applied the same principle in *Builders Licensing Board v. Sperway Constructions (Syd.) Pty. Ltd.* It found that the decision of the Builders' Licensing Board which suspended a builder's licence for a period of six months was an administrative act. It then held, in accordance with the foregoing decisions, that on appeal to it, the District Court was required to embark on a hearing de novo. It so ruled, notwithstanding that the appeal was described by the statute as one by way of re-hearing. In *Phillips'* case also, the appeal was so described. The canon of construction prevailed over the statutory description. I take it, therefore, to be settled doctrine which this Court ought to apply that, when an appeal is brought to a court against an decision it conducts a hearing de novo.

It remains only to consider whether the decision of the board against which the appellant has appealed was an administrative or executive act within the meaning of this doctrine. In *McDonald v. Thomas Sugerman J.* held that, for the purposes of determining that question, it is necessary to examine the character of the proceedings, rather than the character of the subject matter with which they deal. He held that a Land Board which decided to recommend that a licence be granted for the building of a dam was a judicial tribunal having regard to the fact that its decision was made after a public inquiry, held in open court before a magistrate who had power to summon witnesses. Considerations of this kind would lead to the conclusion that the decision of a disciplinary tribunal sitting under s. 28 of the Act was that of a judicial tribunal. Appeals to the Supreme Court against its decisions are described as appeals in the nature of re-hearing: s. 29 (4), and the canon of construction could not be invoked in aid of a hearing de novo: cf. *Re Anderson and the Medical Practitioners Act. 1938-1964*. But the character of the proceedings before the board under s. 26 (1), no less than the subject matter with which they dealt, combine to impress that decision with the properties of an executive act.

But what is the decision made by the board which is liable to be re-examined afresh by the Supreme Court in the exercise of its original jurisdiction? If it was hearing an appeal de novo from the Tasmanian decision of misconduct followed by removal, the plaintiffs guilt or innocence of the conduct charged against him could be re-litigated. But the appeal was from

the decision of the New South Wales board made under s. 26. The trial judge upheld the submission that no more v.-as decided by the board than the question whether it should, in the exercise of its discretion act upon the foreign removal; this was a decision which necessarily involve the acceptance of the finding of misconduct; the board, therefore, had no power to re-open that finding, and neither could a court hearing an appeal from its decision de novo. I agree with that submission as far as it goes. Neither Helsham J. nor this Court, on appeal from him, can inquire into the appellant's guilt or innocence of the charges preferred against him in Tasmania. The Supreme Court, in the performance of its original jurisdiction, cannot exercise a power which the board did not have, and the board clearly has no such power under s. 26. But the board does have other powers. It may in the exercise of its discretion, decide not to use its summary powers under s. 26. It may then make a complaint or charge under s. 27 that the appellant has been guilty of misconduct in a professional respect. A complaint of that character would be heard by the investigating committee which, under s. 27 A must consist of a stipendiary magistrate as chairman, a member of the Health Commission of New South Wales and a medical practitioner nominated by the New South Wales Branch of the Australian Medical Association. If that committee were satisfied that a prima facie case has been made out, it might refer the complaint or charge to the disciplinary tribunal. Under s. 28 the disciplinary tribunal conducts a full judicial inquiry under the chairmanship of a District Court judge, from which an appeal lies by way of re-hearing to the Supreme Court: s. 29 (4).

The original jurisdiction of the Supreme Court has been invoked by summons returnable before Helsham J. in which the plaintiff seeks an order that his name be restored to the register. We are hearing an appeal, by leave, from that judge's refusal to allow the question of guilt or innocence to be reopened during that hearing. For reasons already given, his refusal cannot be called into question. But, since the trial judge is exercising the original jurisdiction of this Court on the hearing of an appeal de novo, the question for him is whether he should or should not, in his discretion exercise the summary power of the board to remove the appellant from the register. He has to decide for himself whether that administrative act should be performed. The decision is to be made on' the materials properly placed before him: *Ex pane Vandersluis*; *Re Walsh* (20). No common rule can be laid down governing the exercise of that discretion. Clearly, if the removal was based upon a conviction for a serious offence involving a patient regularly obtained before a judge and jury, no reason would appear why the board or the judge should not exercise the summary power. On the other hand, there would be a case for a discretionary refusal to exercise it upon the basis of a foreign removal for hostility to government policies vaguely formulated as an allegation, and dubiously established as a fact. These are terminal positions which

illustrate the extremely broad spectrum of turpitude which might found a removal for misconduct in a foreign country. It is a matter for the trial judge whether, on the materials placed before him, he feels persuaded to exercise the board's power of summary removal. It would be a factor for his consideration in the present instance that the proceedings before the Tasmanian council fell short in a number of respects of the standards of adjudication which have been established in this State. There was, for example, no prior investigation in the nature of a committal proceeding before an independent committee, there was no judicial officer acting as chairman of the Tasmanian council, and no reasons for its findings were published. If the trial judge were of opinion that the appellant's name should not be removed from the register, except following an acceptable local determination of the matters charged against him leading to an adverse

By result, he could refuse to exercise the summary power of the board. He could then, if he saw fit, deal with the appeal by restoring the plaintiff to the register and thus require the board to exercise its powers under s. 27 in an endeavour to obtain such an adjudication, Since the plaintiff has failed to obtain from this Court either of the directions sought in his notice of appeal, the appeal has failed and should be dismissed. The hearing in the Administrative Law Division of the Supreme Court should now proceed, having regard to the views which have been expressed as to the nature of an appeal to it. The costs of the appeal to this Court should be paid by the plaintiff.

Appeal dismissed with costs.

Solicitors for the appellant (plaintiff): Dawson Waldron.

Solicitor for the respondent (defendant): R. J. McKay (Crown Solicitor).