

APPEAL from the Supreme Court of New South Wales.

Robert H. Barber & Co. Ltd., a company registered in New South Wales, went into voluntary liquidation, and William Hirsch was appointed voluntary liquidator. On 24th June 1913, on the petition of George Simon, trading as Simon, Israel & Co., *Street J.* ordered the Company to be compulsorily wound up. On 27th June 1913 the Company and Hirsch gave notice of appeal to the High Court from that decision. On 3rd July 1913, on the motion of Simon, *Harvey J.*, acting under rule 11 of Sec. III. of Part II. of the *Rules of the High Court* 1911, set aside the notice of appeal of 27th June on the ground that the appeal did not involve, directly or indirectly, any claim, demand, or question, to or respecting any property or any civil right amounting to or of the value of £300, within the meaning of sec. 35 (1) (a) (2) of the *Judiciary Act* 1903-1912.

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From that decision Hirsch and the Company obtained special leave to appeal to the High Court. On the hearing of the appeal a motion was made by the respondent to rescind the order granting special leave to appeal. In support of the motion affidavits were filed in which it was alleged that the Company consisted of 1,600 shares, of which 800 stood in the name of G. S. Stoltz, 795 in the name of R. H. Barber, and one each in the names of five of the signatories of the memorandum and articles of association; that some years prior to the liquidation Stoltz was supposed to have committed suicide and his estate was sequestrated, and C. F. W. Lloyd was appointed official assignee; that the compulsory liquidation of the Company had with the knowledge and acquiescence of Barber proceeded notwithstanding the proceedings by way of appeal, and practically all the assets had been realized; that about May 1914 Hirsch died; and that the executors of Hirsch and the official assignee of Stoltz declined to take part in the appeal to the High Court.

Other facts are stated in the judgments hereunder.

Oliver Teece (with him *Nicholas*), for the appellants. The assets of the Company which were to be administered under the order complained of were worth more than £300, and there was therefore an appeal as of right.

Maughan (with him *Weston*), for the respondent. The order

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granting special leave to appeal should be rescinded. There is no one who is entitled to carry on the appeal, the voluntary liquidator having died and no one else having been appointed in his place. The solicitor cannot carry on the appeal in the absence of the authority of some one entitled to represent the Company. The compulsory liquidation has been carried on and practically completed, and that has been done with the acquiescence of the only shareholder who is substantially interested in the Company. As to the appeal itself, no appeal lies as of right from an order for the compulsory winding up of a company which is in voluntary liquidation.

That order does not involve, directly or indirectly, "any claim, demand, or question, to or respecting any property or any civil right amounting to or of the value of £300," within the meaning of sec. 35 (1) (a) (2) of the *Judiciary Act*. The words "amounting to or of the value of £300," in that section qualify the words "any claim, demand, or question," and not the words "any property or any civil right." See *Macfarlane v. Leclaire* (1); *Allan v. Pratt* (2); *Amos v. Fraser* (3); *Milne v. James* [No. 1] (4). The effect of an order for compulsory liquidation where the company is already in voluntary liquidation is not to take the legal or beneficial interest in any property from the Company, but merely to substitute the official for the voluntary liquidator. The claim, demand or question involved in such an order cannot be said to be of the value of £300. Nor can the fact that the petitioning creditor alleges that the company owes him more than £300 bring the case within the section.

Teece, in reply.

GRIFFITH C.J. This is an appeal by special leave from an order of *Harvey J.* setting aside a notice of appeal to this Court given by the present appellants against an order made by *Street J.* for winding up the appellant Company. The order of *Harvey J.* purported to be made under rule 11 of Sec. III. of Part II. of the *Rules of the High Court*, which provides that "when notice of appeal is given without leave or special leave of the High Court

(1) 15 Moo. P.C.C., 181, at p. 187.

(2) 13 App. Cas., 780.

(3) 4 C.L.R., 78, at p. 87.

(4) 13 C.L.R., 165.

in a case in which an appeal cannot be brought as of right, the Court from which the appeal is proposed to be brought, or a Judge thereof, may set aside the notice." When the order for compulsory winding up was made the Company was in voluntary liquidation, and the appellant Hirsch was the voluntary liquidator. The assets of the Company were worth some thousands of pounds. The petitioning creditor was the present respondent, who claimed to be a creditor of the Company for about £17,000, which claim the Company disputed. He was therefore a person claiming to be a creditor and seeking to enforce his claim by the process of a compulsory winding up. The effect of the winding up order, so far as it caused a change of status, was immediate and definite, although for some purposes its operation was not conclusive, since the validity and amount of this petitioning creditor's debt might still have been disputed in the winding up. On the other hand the order had the immediate effect of taking the property of the Company out of its own hands in which it remained during the voluntary liquidation, and placing it under the entire control of the official liquidator, with power to carry on the Company's business and to dispose of its property. Under those circumstances it is impossible to deny either that the winding up order was a judgment pronounced in respect of a sum at issue amounting to £300, or that it was a judgment respecting property of that value. From both points of view it was within the terms of sec. 35 (1) (a) (2) of the *Judiciary Act*. The appeal, therefore, lay as of right, and the learned Judge had no authority to set aside the notice.

We were, however, asked to rescind the special leave to appeal. The first ground urged was that the special leave ought not to have been granted at all. The order from which it was sought to appeal, if valid, deprived the appellants of their constitutional and statutory right of access to this Court. Being clearly wrong, it was quite right that leave should be given to appeal from it and important in the general interest that it should be discharged. Then it was said that since the leave was given the Company has been practically wound up by the official liquidator, so that the main appeal would now be futile. Whose fault is that? The present appellants duly gave notice of appeal in

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pursuance of the leave, and duly lodged security. The operation of the order of *Harvey J.* was thereby suspended, and the original appeal was and still is pending. Now it is said that because during its pendency the respondent or those who came in under the winding up order have given full effect to it, the appellants should be no longer heard to complain of it. It would be a singular inversion of justice to hold that an appellant who has observed the condition giving him the right of appeal can be deprived of that right by the conduct of the respondent. It will be for the Court on the hearing of the principal appeal to do what is right under the altered circumstances.

A further objection was taken that the original appeal against the winding up order was not properly instituted. It was instituted in the names of the voluntary liquidator and the Company. It is doubtful whether the liquidator was formally a necessary or even a proper party, but certainly the Company was a competent appellant, and it is equally certain that the voluntary liquidator was a competent, and, indeed, the proper, person to institute the appeal in its name. The fact that he is since deceased does not affect the validity of the original institution.

The motion to rescind must therefore be refused and the appeal allowed.

ISAACS J. I agree, and would only add this, that whatever interpretation be given to the relevant paragraph of sec. 35 of the *Judiciary Act* the requisite amount exists.

POWERS J. I agree.

Appeal allowed. Order appealed from discharged. Motion to set aside notice of appeal dismissed with costs. Respondent to pay costs of this appeal including costs of motion to rescind special leave to appeal.

Solicitor, for the appellants, *William Arnott.*

Solicitors, for the respondent, *Sly & Russell.*

B. L.