REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

1918.

[HIGH COURT OF AUSTRALIA.]

BEARD . . . . . APPELLANT;
PLAINTIFF,

AND

THE PERPETUAL TRUSTEE COMPANY LIMITED . . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 3, 4, 18.

MELBOURNE, *June* 13.

Gavan Duffy, Powers and Rich JJ.

Practice—High Court—Appeal from Supreme Court of State—Appealable amount—Judgment involving claim to property of the value of £300*—Measure of value—Claim to property subject to payment of compensation—Judiciary Act* 1903-1915 (*No.* 6 *of* 1903—*No.* 4 *of* 1915), *sec.* 35 (1).

In order that a judgment may fall within sub-clause 2 of clause (*a*) of sec. 35 (1) of the *Judiciary Act* 1903-1915, it must involve directly or indirectly a determination which so prejudicially affects the litigant wishing to appeal from it as to make him worse off by at least £300 than he would be if he appealed and were wholly successful in his appeal.

The plaintiff, while an infant, had insured his life for £3,000, and shortly after attaining the age of twenty-one years assigned the policy to his grandmother,

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who stood *in loco parentis* to him and who from the time when the insurance was effected up to the date of her death paid the premiums. By her will the grandmother directed that the premiums should be paid by her trustees, and that the policy moneys when paid should fall into the residue of her estate, and she gave a life estate in the residue to the plaintiff with remainders over. Ten years after his grandmother's death the plaintiff instituted a suit in the Supreme Court of New South Wales against the trustees of her estate, he alleging that she took the policy as trustee for him and claiming a right to elect whether he would allow the policy to be dealt with as part of his grandmother's estate or would take it against her will subject to payment of compensation to the trustees. A decree was made declaring that the plaintiff was entitled to so elect, but an appeal by the trustees was allowed by the Full Court, and the suit was dismissed.

Held, by *Gavan Duffy*, *Powers* and *Rich* JJ., that as the amount of the compensation payable was the value of the interest in the policy which would have been taken by the beneficiaries under the will and as that value could not be less than the value of the interest which the plaintiff would have in such policy if he were under no obligation to make compensation, the judgment of the Full Court was not within clause (*a*) of sec. 35 (1) of the *Judiciary Act* 1903-1915, and therefore that the plaintiff was not entitled as of right to appeal to the High Court.

Appeal from the decision of the Supreme Court of New South Wales dismissed as incompetent.

APPEAL from the Supreme Court of New South Wales.

A suit was, in the year 1917, brought in the Supreme Court by Samuel John Bryce Beard against the Perpetual Trustee Co. Ltd. as trustees of the will of Harriett Beard, deceased, in which the statement of claim set out the following allegations (*inter alia*): That the plaintiff, who attained the age of twenty-one years on 23rd September 1898, insured his life with the Australian Mutual Provident Society on 5th January 1897 for the sum of £3,000; that on 28th March 1899 the plaintiff, at the request of his grandmother, Harriett Beard, who stood in *loco parentis* to him, by an indenture under seal assigned to her the policy of insurance and all the benefits secured by it; that the assignment was executed by the plaintiff with the intention and on the understanding of him and Mrs. Beard that she should hold the policy on trust for him; that from the date when the policy was taken out up to the death of Mrs. Beard, she paid all the annual premiums and that she had promised to pay them as advancements to him;

and that by her will dated 2nd September 1905 Mrs. Beard, who died on 20th January 1906, after devising a certain house and land to her trustees so as to give the plaintiff a protected life interest therein with remainders over after his death, gave the residue of her property to the trustees upon trust to pay the premiums in respect of the policy, and directed that the moneys secured by the policy should when paid form part of her residuary estate, and that her trustees should stand possessed of her residuary estate upon the same trusts as those with regard to the house and land. The statement of claim also contained the following paragraph: "The plaintiff is now desirous of exercising his right of electing whether to insist on dealing with the said policy which is still in full force and effect and the moneys thereby represented at the death of the said Harriett Beard as his own or to permit the dispositions of her will with respect thereto to be fully operative." The plaintiff claimed (*inter alia*) a declaration that Mrs. Beard took the assignment of the policy as trustee for the plaintiff; a declaration that all payments of premiums made by Mrs. Beard up to her death were advancements of the plaintiff and enured for his benefit; and a declaration that all rights and powers vested in the defendants as trustees of the will of Mrs. Beard were so vested in them as trustees for the plaintiff. At the hearing of the suit before Simpson C.J. in Eq. it was admitted on behalf of the plaintiff that he was entitled to the policy only upon paying compensation to those whose pecuniary interests under Mrs. Beard's will would be affected by his electing to take the policy. The premiums on the policy, amounting to £56 2s. 6d. a year, were, after the death of Mrs. Beard, paid by the trustees. The surrender value of the policy at the time of Mrs. Beard's death was £402 18s., when reversionary bonuses of £580 10s. had accrued, and at the hearing of the action was £1,153 18s. 7d., when reversionary bonuses of £1,623 14s. had accrued. *Simpson* C.J. in Eq. made a decree by which, after reciting that the plaintiff by his counsel undertook to elect whether he would take in respect of the policy either under or against the will of Mrs. Beard within three months after the final determination of the rights of the plaintiff, and also undertook that in the event of his electing to take against the will he would pay the compensation due by him as ascertained by the Master in Equity

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under the decree before taking an assignment of or dealing with the policy, it was declared that Mrs. Beard took the assignment of the policy as trustee for the plaintiff, that all payments made by Mrs. Beard in respect of the policy were advancements of the plaintiff and enured for his benefit, and that the plaintiff was entitled to elect whether he would claim the policy to be dealt with as part of the estate of Mrs. Beard or would take it against her will subject to the payment of compensation. It was also ordered that it be referred to the Master in Equity to ascertain the amount of compensation. Upon appeal by the defendants the Full Court discharged the order made by *Simpson* C.J. in Eq., and dismissed the suit with costs.

From the decision of the Full Court the plaintiff now appealed to the High Court.

After the appeal had been argued the Court raised the question whether under sec. 35 (1) (*a*) of the *Judiciary Act* the amount or value was sufficient to entitle the plaintiff to appeal as of right.

Maughan (with him *Weston*), for the respondents. The appellant's interest is not of the appealable amount or value. His claim is to an asset for which he must pay compensation. His claim must be of the value of £300. Under sec. 35 (1) (*a*) (2) the measure of value is the value of the appellant's right in the property (*Amos* v. *Fraser* (1); *Shield* v. *Municipality of Huon* (2)). A person who elects to take against a will takes nothing until he has paid compensation to the value of that which he elects to take in order to make up to the beneficiaries what they will lose. Whichever way the appellant elects, he will remain pecuniarily in the same position, and his claim cannot be of the value of £300.

Jordan (*Loxton* K.C. with him), for the appellant. An appeal lies under sec. 35 (1) (*a*) (2) of the *Judiciary Act*, which allows an appeal where the amount or value of the property in respect of which a claim, demand or question is involved is £300 (*Milne v. James* (3); *Robert H. Barber & Co. Ltd.* v. *Simon* (4)), and it is not necessary that the claim, demand or question should amount to or be of

(1) 4 C.L.R., 78, at p. 87.
(2) 21 C.L.R., 109.
(3) 13 C.L.R., 165, at p. 167.
(4) 19 C.L.R., 24, at p. 27.

that value. Here the plaintiff claims the policy, which is worth over £300, and the fact that he has to pay something before he can get the policy does not affect its value for the purposes of the section. Thus, in an action for specific performance of a contract of sale of property of a value of over £300, for the purposes of appeal it would not matter that the plaintiff had to pay the purchase money. There is nothing in the decree of *Simpson* C.J. in Eq. which imposes any charge on the property so as to make the decree one for the policy less something carved out of it. For the purposes of ascertaining the amount of compensation the value of the policy must be taken as at the death of Mrs. Beard (*In re Hancock*; *Hancock* v. *Pawson* (1)), and that value was the surrender value of the policy, £402 18s. The value of the policy to the appellant is greater by £300 than the compensation that he would have to pay.

Maughan, in reply. In *Milne* v. *James* (2) the judgment was said to be in accordance with *Amos* v. *Fraser* (3), and both the property and the claim were of the value of over £300. In *Robert H. Barber & Co. Ltd.* v. *Simon* (4) the question was not decided by any of the Judges. In *McMullan* v. *Stewarts & Lloyds (Australia) Ltd.* (5) the Court apparently considered that it was the claim the value of which must be £300. The least the respondents are entitled to as compensation is the present value of the money due under the policy on the appellant's death, and, taking that sum, the value of the policy to the appellant cannot be greater than the compensation he has to pay.

Cur. adv. vult.

June 13.

The following judgments were read:—

GAVAN DUFFY AND POWERS JJ. In our opinion clauses 1 and 2 of sec. 35 (1) (*a*) of the *Judiciary Act* 1903 are framed for the purpose of allowing an appeal to a litigant who is able to show that he or those whom he represents would be pecuniarily benefited to the extent of £300 if his appeal were wholly successful. Clause 1 deals

(1) (1905) 1 Ch., 16.
(2) 13 C.L.R.,165.
(3) 4 C.L.R., 78.
(4) 19 C.L.R., 24.
(5) 20 C.L.R., 641, at p. 646.

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with judgments given or pronounced in respect of any sum or matter at issue amounting to or of the value of £300. Such a judgment, whether it affirms or denies the right of the claimant to succeed, must bring the unsuccessful party within that category. He must be worse off by at least £300 than he would be if he appealed and were wholly successful in his appeal. Clause 2 deals with judgments which are not in terms given or pronounced as provided in clause 1 but which involve directly or indirectly the determination of any claim, demand or question amounting to or of the value of £300, that is to say, any determination which so prejudicially affects the litigant wishing to appeal as to make him worse off by at least £300, than he would be if he appealed and were wholly successful in his appeal. It is claimed for the appellant in this case that the judgment in the action declares him to be entitled to the beneficial interest in a policy of life insurance of a value greater than £300, and that the decree made by the Supreme Court of New South Wales on appeal from that judgment deprived him of the benefit of that declaration. If this were all, the case would in our opinion come within the provisions of clause 1 : the matter at issue would be of the value of £300. The appellant might have sought a declaration that the insurance policy in question was his property without making any reference to his grandmother's will. Had he been ultimately unsuccessful in such a proceeding, the question of election would never have arisen. Had he been successful, he might properly have made his election after he had established his title, but the fact that he could not take a benefit under his grandmother's will unless he chose to acquiesce in the dispositions contained in that will with respect to the policy or, in the alternative, compensated those who would have benefited by such dispositions, would have been irrelevant in considering the value of the matter at issue between the parties. But the appellant did not pursue that course. For his own purposes he desired to have two independent questions determined in one litigation, and he sought and obtained a judgment under which he was entitled to have an assignment of the policy only after he had made compensation to those whose pecuniary interests under his grandmother's will would be affected by his taking such assignment. The value of the matter at issue is to be determined

for the purposes of the proposed appeal by ascertaining how much better off he would be pecuniarily if the original judgment stood than he would be under the decree made by the Supreme Court of New South Wales. He has not sought any alteration in the original judgment, and had he done so it is clear that we could not make any order more favourable to him than that judgment in view of the pleadings and the claim he made before the trial Judge. In this view of the case he has not discharged the onus of showing that he comes within the provisions of sec. 35, because he has not, and we think could not, show that an assignment of the policy to him on condition of his paying the prescribed compensation would leave him a balance of £300, or indeed any balance. The amount of that compensation is the value of the interest in the policy which would have been taken by the beneficiaries under the will, and that cannot be less than the value of the interest which the plaintiff would have in such policy if he were under no obligation to make compensation to such beneficiaries.

RICH J. I agree that the appeal is incompetent. Sub-sec. 1 (*a*) of sec. 35 of the *Judiciary Act* is founded on the importance to the would-be appellant of the issue decided against him.

In pars. 1 and 2 of the sub-section that importance is counted in terms of money, £300; in par. 3 it is represented by the nature of the case itself, as affecting his personal status. But as the importance of the matter to the appellant is the governing consideration, it is clear that an unconditional claim to property is very different for appeal purposes from his claim to the same property fettered with a condition which reduces the value of that property to him.

In the present case the claim to the policy (assuming its present value to be a fixed sum) is not a claim *simpliciter*, but is a claim to the policy of that value *less* what has in the circumstances to be given by way of compensation to those affected by the appellant's election. The balance, if any, is the true claim, and that is the only measure of the importance of the claim to the appellant.

It is unnecessary to consider whether the appellant's case falls under par. 1 or par. 2 of the sub-section: the same measure of value

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for determining the question of the right of appeal applies to both paragraphs. The rule is that "the judgment is to be looked at as it affects the interests of the party who is prejudiced by it, and who seeks to relieve himself from it by appeal." The words of the sub-section are adapted from the Order in Council, 13th November 1850, making provision for appeals from the decisions of the Supreme Court of New South Wales. Cases in the Privy Council on similar words are also based on the principle that the appealable value is the value of the contested matter to the appellant: *Allan* v. *Pratt* (1); *Mohideen Hadjiar* v. *Pitchey* (2); *Manley* v. *Palache* (3); *Radha Kunwan* v. *Reoti Singh* (4).

Appeal dismissed.

Solicitor for the appellant, *H. O. Marshall.*
Solicitor for the respondent, *F. W. Walker.*

B. L.

(1) 13 App. Cas., 780, at p. 781.
(2) (1893) A.C., 193.
(3) 73 L.T., 98; 11 R., 566, at p. 568.
(4) (1916) 38 Ind. Rep. (All.), 488.