[HIGH COURT OF AUSTRALIA.

RIDGWAY . . . . . APPELLANT;
DEFENDANT (JUDGMENT DEBTOR),

AND

LOCKWOOD . . . . . RESPONDENT.
PLAINTIFF (JUDGMENT CREDITOR),

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1938.

MELBOURNE, *Oct.* 17.

Latham C.J., Rich, Dixon, and McTiernan JJ.

High Court—Appeal—Supreme Court of State—Judgment in action for more than £300—Subsequent order against defendant as fraudulent debtor for payment of judgment debt by instalments—Appeal from order—Judiciary Act 1903-1937 (*No.* 6 *of* 1903—*No.* 6 *of* 1937), *sec.* 35 (1) (*a*) (1)—*Imprisonment of Fraudulent Debtors Act* 1928 (*Vict.*) (*No.* 3700), *secs.* 4, 5, 11.

An order made by a judge of the Supreme Court under the *Imprisonment of Fraudulent Debtors Act* 1928 (Vict.) that a judgment debtor pay a judgment debt amounting to more than £300 by instalments of £25 a month, in default of payment of any one instalment the whole to become due, and in the alternative ordering imprisonment is not a judgment of the Supreme Court of a State which "is given or pronounced for or in respect of any sum or matter at issue amounting to or of the value of three hundred pounds" within the meaning of sec. 35 (1) (*a*) (1) of the *Judiciary Act* 1903-1937 so as to give an appeal as of right to the High Court.

Observations on the effect of secs. 4, 5 and 11 of the *Imprisonment of Fraudulent Debtors Act* 1928 (Vict.).

Appeal from the decision of the Supreme Court of Victoria (Full Court): *Lockwood* v. *Ridgway*, (1938) V.L.R. 122, dismissed for want of prosecution.

MOTION.

Raymond Lockwood brought an action in the Supreme Court of Victoria against Samuel James Leopold Ridgway for the recovery of money lent by the plaintiff to the defendant. The action was

tried before *Martin* J., who entered judgment for the plaintiff for £1,102 17s. 6d. with costs. The judgment being wholly unsatisfied, the plaintiff proceeded against the defendant under the *Imprisonment of Fraudulent Debtors Act* 1928 (Vict.). *Martin* J. found (in the terms of sec. 5 (3) (*b*) of the Act) that the defendant had " wilfully contracted the liability which was the subject of the judgment without having at the same time a reasonable expectation of being able to discharge the same " and ordered that unless the defendant paid the amount of the judgment by instalments of £25 a month (in default of payment of any one instalment the whole of the balance to become due and payable) he should be committed to prison for a term of six months or until he had satisfied the judgment or should be otherwise discharged by due course of law. The Full Court of the Supreme Court dismissed an appeal by the defendant from that order: *Lockwood* v. *Ridgway* (1).

The defendant gave notice of his intention to appeal from that decision to the High Court; he lodged security for the costs of the appeal at a date earlier than was required by Part II., sec. III., rule 12, of the *High Court Rules*, but he failed to set down the appeal for hearing, and to give notice of setting down to the respondent as required by rule 15. The plaintiff applied to the High Court to dismiss the appeal.

Winneke, for the respondent. There is no appeal as of right. The appeal in *Newmarch* v. *Atkinson* (2) was by special leave, and in that case the amount of the judgment exceeded £300. Sec. 35 (1) (*a*) (1) of the *Judiciary Act* 1903-1937 does not apply, as in proceedings under the *Imprisonment of Fraudulent Debtors Act* 1928 no " sum " is in issue within the meaning of that section. In the original action the plaintiff's case was that the transaction was a loan but the defendant's case was that he had informed the plaintiff that he (the defendant) was forming a company in connection with a dental-apparatus business and the plaintiff had given him the money to purchase shares in the company. That contention was not accepted by the learned judge at the trial, who found a straight-out loan by plaintiff to defendant, and he thought that it was not

(1) (1938) V.L.R. 122. (2) (1918) 25 C.L.R. 381.

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open to the defendant in the subsequent fraud-summons proceedings. The learned judge stopped the examination of the judgment creditor because he was satisfied that there was sufficient evidence and because he had already been examined thereon at the trial.

[DIXON J. The belief of the defendant at the time of the transaction was material, and evidence exculpating him ought not to have been excluded.]

The learned judge heard the defendant's own version. The notes made by the judge in his note-book constitute a sufficient compliance with sec. 11 of the *Imprisonment of Fraudulent Debtors Act*. That section does not require more than the substance of the evidence given by the judgment debtor on his examination. It is admitted that the note taken was a full one.

Claude Robertson, for the appellant. Negotiations have proceeded for a settlement of these proceedings since the appeal was instituted.

[RICH J. referred to *Brickwood* v. *Young* (1).]

The failure to set the appeal down for hearing at this sittings of the court arose from the appellant's inability to provide funds for the further prosecution of the appeal. He had not delayed the due institution of the appeal, which is brought on substantial grounds. Special leave to appeal is unnecessary as the order for imprisonment in default of payment of the whole amount of the judgment is one given or pronounced for or in respect of a sum amounting to £300 or a matter at issue of the value of £300 within the meaning of sec. 35 (1) (*a*) (1) of the *Judiciary Act* 1903-1937. That provision limits the appellate jurisdiction to judgments where the *quantum* of the sum or matter at issue is over £300. *Holroyd* J., in *Altson* v. *Dunne* (2), said : " So far as regards the imprisonment of the defaulting debtor, the new order is a complete substitute for the original." For the purposes of the right to an appeal as of course, the order for payment by instalments and in default imprisonment becomes the appealable judgment. Secondly, the order of *Martin* J. involves directly or indirectly a claim, demand, or question, to or respecting property or a civil right amounting to or of the value of £300 within

(1) (1904) 2 C.L.R. 74.
(2) (1900) 26 V.L.R. 372, at p. 376 ; 22 A.L.T. 100, at p. 101.

sec. 35 (1) (*a*) (2). The order is final, not interlocutory. The original judgment is a species of " property " or, in any case, a " civil right " which was directly or indirectly involved in the proceedings under the *Imprisonment of Fraudulent Debtors Act* 1928. If special leave to appeal to this court is necessary, at least three questions involved are of sufficient importance to justify such special leave being granted. *Martin* J. did not find fraud, although a claim was made in the alternative to recover as money had and received as on a total failure of consideration. The learned judge found that it was a simple transaction of loan. The judgment, however, was for the sum of £1,102 17s. 6d. simply, without reference to the basis of the judgment. The appellant was examined under the *Imprisonment of Fraudulent Debtors Act* 1928 and was cross-examined on matters not germane to such proceedings and as to his general bad character and prior convictions. The examination of a debtor under sec. 4 is limited to the matters therein specifically stated. No other inquiries are authorized to be made under that section. The debtor may be examined as to " the mode in which the liability the subject of such judgment was incurred." The learned judge allowed the debtor to be cross-examined beyond the limits authorized by that section. His Honour did not allow the judgment creditor to be cross-examined as to the circumstances in which the liability was contracted or otherwise incurred for the purpose of showing that the debtor's intention at that time was honest. *Martin* J. considered that an endeavour was being made to impugn the truth of the finding on which the original judgment was based. The question whether he had " wilfully contracted such liability without having at the same time a reasonable expectation of being able to discharge the same " had not been determined in the original proceedings, and evidence ought not to have been excluded on that ground. The examination of the debtor had not been taken down in writing, as required by sec. 11 ; the judge had merely taken a note in his own book of the evidence. It does not appear that his notes constituted the whole of the examination. This is fatal to the validity of the order (*R.* v. *Shelley* ; *Ex parte Jones* (1) ; *White Rock Lime Co. Pty. Ltd.* v. *Pullman* (2)).

(1) (1883) 9 V.L.R. (L.) 297 ; 5 A.L.T. 90.

(2) (1931) V.L.R. 14.

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The following judgments were delivered :—

LATHAM C.J. This is a motion to dismiss an appeal for want of prosecution under sec. III., rule 15, of the Appeal Rules of the High Court. The material before the court shows that the appellant has not set down the appeal for hearing or given notice to the respondent of setting down as required by the rule, and, therefore, the respondent makes out a prima-facie case for action by the court under the rule as asked in the notice of motion, that is to say, for dismissal of the appeal for want of prosecution. The appellant, however, points out that negotiations have been taking place for settlement, and this explains, it is said, the delay which has taken place. Further, reference has been made to *Brickwood* v. *Young* (1), where in similar circumstances the court paid considerable attention to the fact that the appellant had shown the bona fides of his appeal by lodging security at a date earlier than was necessary under the rules. The affidavit filed on his behalf shows in this case that the appellant has that circumstance also to his credit. Accordingly, prima facie it would appear that, following the practice laid down in *Brickwood* v. *Young* (1), an order should be made that, upon the appellant forthwith setting down the appeal for hearing, the appeal might proceed and this motion be dismissed, the appellant, however, paying the costs of the motion.

In this case, however, there are other circumstances which have to be considered before such a conclusion can properly be reached. It is objected on behalf of the respondent that there is no appeal as of right in this case. The order from which the appeal is brought was made under the *Imprisonment of Fraudulent Debtors Act* 1928 by *Martin* J. That order recites a judgment in an action under which the appellant became liable to pay to the respondent a sum of £1,102 17s. 6d. The order made under the *Imprisonment of Fraudulent Debtors Act* was made on the ground that the appellant, the defendant in the original action, had wilfully contracted the liability the subject of the judgment without having at the time a reasonable expectation of being able to discharge the same. After the judgment, proceedings under the *Imprisonment of Fraudulent Debtors Act* were taken and an order was made, on

(1) (1904) 2 C.L.R. 74.

the ground stated, whereby it was ordered that the amount of the judgment should be paid by instalments of £25 a month and that on default in payment of any instalment, the whole of the balance should become due and payable; in the alternative imprisonment for six months was ordered.

From that order an appeal was taken to the Full Court, which dismissed the appeal, and the appeal to this court is an appeal from the judgment of the Full Court. It is said that this appeal is of right because it falls under sec. 35 (1) (*a*) (1) of the *Judiciary Act*. That provision is to the effect that an appeal lies to this court from every judgment of the Supreme Court of a State which is given or pronounced for, or in respect of, any sum or matter at issue amounting to or of the value of £300. Now the actual judgment from which the appeal is brought is one ordering that unless the appellant pays certain moneys he be imprisoned for six months. The original judgment in the action was for £1,102 17s. 6d. No question now arises as to the liability of the appellant to pay that amount. The question is whether the judgment under the *Imprisonment of Fraudulent Debtors Act* can be said to be a judgment for or in respect of a sum or matter at issue amounting to or of the value of £300. I am unable to say that there was any sum or matter at issue—I stress those words "at issue"—in the proceedings under the *Imprisonment of Fraudulent Debtors Act* within the meaning of sec. 35 (1) (*a*) (1). An appeal is given in respect of a sum or matter at issue to the amount stated. In my opinion, the object of the legislature in this provision is to limit appeals to cases where judgments affect the liability of a party in relation to a matter at issue of that amount, or may either impose a liability of that amount upon a person, or relieve a person from liability to that amount. In my opinion, this was not an order of such a character that there is an appeal as of right.

Application was then made for special leave to appeal, and it was contended that important questions were raised as to the limits of cross-examination, or possibly more strictly examination, under sec. 4 of the *Imprisonment of Fraudulent Debtors Act*. It was also urged that the judgment of the Supreme Court was wrong in holding that notes admitted to have been taken and accurately taken by

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the learned judge himself could constitute a compliance with sec. 11 requiring that the examination shall be taken down in writing.

The learned judges of the Supreme Court have expressed in strong words their views upon the merits of the appellant's case. It would also appear probable that, if leave were granted, apart altogether from any evidence that may have been wrongly admitted, there is sufficient evidence to support the conclusion of the Full Court that the appellant was engaged in a fraud of a gross character.

Having regard to the fact that the appellant is out of time in setting down this appeal and to the merits of the case itself, I am of opinion that this is not a case in which special leave to appeal should be granted.

It becomes necessary to deal with the motion itself. The matters to which I have referred are relevant to the consideration of the motion, and, accordingly, I am of opinion the motion should be allowed and the appeal dismissed with costs for want of prosecution. The respondent should have the costs of the motion.

RICH J. I agree.

DIXON J. I agree. In my opinion the appeal is incompetent.

The opening words of sec. 4 of the *Imprisonment of Fraudulent Debtors Act* show that a judgment establishing a civil liability must exist before proceedings are taken under sec. 5. Sec. 5 itself and the schedule, which contains the form of order for commitment, Form II., show further that the order relates to the imprisonment of the judgment debtor as a quasi-punitive remedy and is not concerned with establishing civil liability. Sec. 35 (1) (*a*) of the *Judiciary Act* 1903-1937 falls into three paragraphs, the third of which affects status only. This case does not fall within the first paragraph, because that paragraph relates to cases of appeal against a judgment which affects the liability for or in respect of a sum of money or something of a value amounting to £300 at least. The liability arises under the judgment and is not affected by the making of an order for imprisonment. The second paragraph refers to property or a civil right amounting to or of the value of £300, and the judgment must directly or indirectly involve some claim, demand or question

in respect of such property or civil right. In my opinion it is impossible to treat a judgment under sec. 4 as such a piece of property or such a civil right.

In relation to the application for special leave to appeal, I do not desire to express any final opinion upon any of the three points of law advanced in support of it. The decision of the Supreme Court has been treated in this argument as meaning that under sec. 4 of the *Imprisonment of Fraudulent Debtors Act* a judgment debtor compulsorily examined may be questioned upon matters which are irrelevant to his committal upon any of the grounds set out in secs. 4 and 5, but which do go to his general credit as a witness. If that is what is meant, I think the decision must be regarded as open to question, and our refusal of special leave must not be taken to mean that its correctness may not be called in question in this court. In the present case it appears that the evidence which is the subject of objection is not necessarily or certainly inadmissible on any ground except as going to credit. It may have been relevant to one or other of the grounds on which the application for committal was based by the judgment creditor, although not to that upon which the order was actually founded.

The second ground which has been relied upon is that *Martin* J. stopped the cross-examination of one of the witnesses. I am not satisfied that his Honour meant to do more than to say that, as the judge before whom the trial took place, he knew enough about that matter and it ought not to be pursued.

The third matter was procedural only and does not go to the merits of the case. It is an objection that the examination was not taken in writing. It may be open to doubt whether sec. 11 of the *Imprisonment of Fraudulent Debtors Act* was complied with. In the Full Court it was stated that the learned judge had informed the court that he had taken down the substance of what had been deposed to by the debtor. The word " substance " seems to imply that he did not take down the whole of the examination, which, strictly speaking, is required. Sec. 11 does not say who is to take it down, but it does appear that the whole examination should be taken down, although not necessarily by question and answer, but as depositions are taken.

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Dixon J.

These are the three matters of law on which we are asked to grant special leave. But we are confronted with very strong statements by each of the learned judges as to the merits of the case. If they are well founded, the order made should be affirmed whatever decision might be arrived at upon the questions of law relied upon. Before we grant special leave to appeal I think we should be satisfied that the concurring opinions of the four judges who have dealt with the case as to the nature of the facts proved against the judgment debtor are in some material respect open to serious question. Of this I am not satisfied.

Special leave to appeal should be refused and the appeal dismissed for want of prosecution.

McTIERNAN J. I agree. I do not think the appeal is competent. The order against which the appeal is proposed is not, in my opinion, covered by sec. 35 (1) (*a*) (1) and (2) of the *Judiciary Act*. Regarding the application for special leave to appeal, I do not think that the proposed appellant has any merits entitling him to a favourable exercise of the court's discretion, and his application should be refused on that ground. At the same time, I should like to add that I am not convinced that the reasons of the learned judges of the Supreme Court bear the construction which the applicant's counsel seeks to place upon them as to the limits of cross-examination allowed by the *Imprisonment of Fraudulent Debtors Act* 1928.

I agree with the order proposed by the Chief Justice.

Motion allowed with costs. Appeal dismissed with costs for want of prosecution.

Solicitors for the applicant, respondent, *Gair & Brahe*.

Solicitor for the respondent, appellant, *Philip G. Warland*.

H. D. W.