[HIGH COURT OF AUSTRALIA.]

OERTEL . . . . . APPELLANT;
DEFENDANT,

AND

CROCKER . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

H. C. OF A. 1947.

ADELAIDE, *Sept.* 23, 24.

MELBOURNE, *Oct.* 23.

Latham C.J., Starke and Dixon JJ.

Practice—High Court—Appeal from Supreme Court of State—Appealable amount—Judgment for landlord for recovery of possession of property—Property worth over £300*—Tenant's interest worth under* £300*—Whether appeal as of right to High Court—Judiciary Act* 1903-1946 (*No.* 6 *of* 1903—*No.* 10 *of* 1946), *s.* 35 (1) (*a*) (2).

A landlord obtained against his tenant judgment for recovery of possession of the premises occupied by the latter. The value of the property exceeded £300, but it was conceded that the value of the tenant's interest was less than that sum.

Held, that in applying s. 35 (1) (*a*) (2) of the *Judiciary Act*, 1903-1946 the value of the possession under the tenancy was the relevant matter and that the tenant therefore could not appeal as of right to the High Court.

Beard v. *Perpetual Trustee Co. Ltd.*, (1918) 25 C.L.R. 1, followed; *Tipper* v. *Moore*, (1911) 13 C.L.R. 248, explained; *Milne* v. *James*, (1910) 13 C.L.R. 165, not followed.

Appeal from the Supreme Court of South Australia (Full Court): *Oertel* v. *Crocker*, (1947) S.A.S.R. 306, struck out as incompetent.

APPEAL from the Supreme Court of South Australia.

William John Crocker, the landlord of premises let to Alfred Charles Oertel, brought an action in the Local Court of Adelaide in which he successfully sought an order for recovery of possession

H. C. OF A. 1947. OERTEL v. CROCKER.

of the premises. An appeal by the tenant to the Full Court of South Australia was dismissed by a majority (*Napier* C.J. and *Ligertwood* J., *Reed* J. dissenting), though there was a conflict of judicial opinion as to the precise nature of the tenancy. The rent payable was thirty-five shillings per week, and it was common ground that the value of the dwelling house, the subject of the action, exceeded £300. It was, however, conceded that the value of the tenant's interest in the property was less than that amount. The tenant sought to appeal to the High Court as of right and alternatively asked for special leave to appeal. This report is concerned only with the contention that the appeal lay as of right.

Pickering (with him *C. A. L. Abbott*), for the appellant. An appeal lies as of right. The right is conferred by s. 73 of the Constitution subject to restrictions imposed by Parliament. Section 35 of the *Judiciary Act* 1903-1946 detracts from the rights so conferred and should be strictly construed, so that there shall be the minimum interference with the existing rights (*In re Cuno* (1)). The strongest case against me is *Beard* v. *Perpetual Trustee Co. Ltd.* (2). But sub-s. (2) of s. 35 must give rights additional to those conferred by sub-s. (1), and, if the construction adopted in *Beard's Case* (2) is followed, sub-s. (2) becomes nugatory. The words of a statute should be given their literal meaning, unless this results in an absurdity. (He also referred to *Amos* v. *Fraser* (3) ; *Milne* v. *James* (4) ; *Tipper* v. *Moore* (5) ; *Robert H. Barber & Co. Ltd.* v. *Simon* (6) ; *Webb* v. *Hanlon* (7)).

[DIXON J. referred to *Western Australian Insurance Co. Ltd.* v. *Dayton* (8).]

Hogan (with him *H. W. Martin*), for the respondent. If appellant's contention is correct, an appeal will lie as of right in all matters which are only remotely concerned with land over the value of £300. On the true construction of s. 35 of the *Judiciary Act* it is the claim, demand or question which must be of the value of £300. In essence we are claiming not the freehold but relief from the tenant's possession. There is nothing in the decided cases contrary to the principles laid down in *Beard* v. *Perpetual Trustee Co. Ltd.* (2).

(1) (1889) 43 Ch.D. 12, at p. 17.
(2) (1918) 25 C.L.R. 1.
(3) (1906) 4 C.L.R. 78.
(4) (1910) 13 C.L.R. 165, at pp. 167, 168.
(5) (1911) 13 C.L.R. 248, at p. 249.
(6) (1914) 19 C.L.R. 24.
(7) (1939) 61 C.L.R. 313, at pp. 320, 326, 331.
(8) (1924) 35 C.L.R. 355.

LATHAM C.J. This is an appeal brought as of right. Objection has been raised as to the competency of the appeal upon the ground that the order in question is not one which "involves directly or indirectly any claim, demand, or question to or respecting any property or any civil right amounting to or of the value of Three hundred pounds" within s. 35 (1) (*a*) (2) of the *Judiciary Act* of the Commonwealth. We are of opinion that there is no appeal as of right in this case and will give our reasons for that opinion at a later date.

Oct. 30.

The following written judgments were delivered :—

LATHAM C.J. The appeal in this matter was instituted as of right. It was objected on behalf of the respondent that the appeal was incompetent because the judgment of the Supreme Court from which the appeal was brought did not satisfy the conditions of the *Judiciary Act* 1903-1946. The Court upheld the objection, postponing the statement of reasons.

The relevant provisions of s. 35 are as follows :—"35—(1) The appellate jurisdiction of the High Court with respect to judgments of the Supreme Court of a State, or of any other Court of a State from which at the establishment of the Commonwealth an appeal lay to the Queen in Council, shall extend to the following judgments whether given or pronounced in the exercise of federal jurisdiction or otherwise and to no others, namely :

(*a*) Every judgment, whether final or interlocutory, which—

(1) 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 ; or

(2) involves directly or indirectly any claim, demand, or question, to or respecting any property or any civil right amounting to or of the value of Three hundred pounds."

The respondent to the appeal is the owner of a house in Adelaide. He sought to recover possession of the house from the appellant by proceedings in the Local Court at Adelaide. The appellant occupied the house under a written agreement for a term of three years, which expired on 28th January 1942. The special magistrate found that before the expiry of the three-year term a conversation took place between the plaintiff and the defendant to the effect that the plaintiff refused to renew the lease, and that it was agreed that the defendant should remain in possession until the plaintiff wished to return to Adelaide from the West Coast where he was

H. C. OF A. 1947.

OERTEL v. CROCKER.

Latham C.J.

employed, or the defendant was transferred from Adelaide by his employer. The magistrate held that there was an oral agreement for a term of uncertain duration following upon a term of years and that, apart from the *National Security* (*Landlord and Tenant*) *Regulations*, the payment of rent under the agreement had the effect of turning what would otherwise have been regarded as a tenancy at will into a tenancy from year to year. In view, however, of the existence of the *National Security* (*Landlord and Tenant*) *Regulations*, the special magistrate held that no tenancy from year to year could be implied, but that the tenant had the right to remain in occupation until an order for recovery of possession was made in favour of the landlord under the regulations. After considering questions of relative hardship, as required by the regulations, the magistrate made an order for possession.

Upon appeal to the Full Court the decision of the magistrate was upheld by a majority (*Napier* C.J. and *Ligertwood* J., *Reed* J. dissenting) (1). The learned judges varied in their opinion. The Chief Justice was of opinion that the tenancy was a tenancy from year to year, but determinable by notice at any time during the year if the plaintiff returned to Adelaide. *Reed* J. was of opinion that the tenancy was a weekly tenancy, or at most a monthly tenancy, while *Ligertwood* J. was of opinion that the tenancy was a tenancy at will. Upon no view was the term of the tenancy longer than that of a tenancy from year to year.

The rent payable by the defendant was thirty-five shillings per week. The dwelling house, possession of which the plaintiff sought to recover, was " of the value of £300 and upwards." It is contended for the appellant (defendant) that the judgment of the Supreme Court involves directly a claim to or respecting property amounting to more than the value of £300, the property being the house and land occupied by the defendant. It is argued that the judgment for the plaintiff, if upheld, entitles him to possession of a property worth more than £300 and, if the judgment is set aside, the result is that the defendant retains possession of the property.

On the other hand, the plaintiff contends that the value of the freehold is an irrelevant matter in applying s. 35. The only matter in contest between the parties is whether or not the defendant can continue to occupy the property as a tenant, weekly or monthly or from year to year. The value of the tenancy is the difference between the rent of thirty-five shillings per week and the value of the occupation, and it is not suggested that this difference is as much as £300.

(1) (1947) S.A.S.R. 306.

The provisions of s. 35 of the *Judiciary Act* 1903-1946 are evidently intended to secure that there shall be an appeal as of right only in a case of some substance, and the standard of such substance (so far as relevant in this case) is fixed at £300. The section must be applied in many varying cases. Actions for debt or damages are plainly covered by sub-s. (1). In the case of a claim for a debt of, say, £500, or for £500 damages for breach of contract or tort it is plain that there is a sum or matter at issue. Judgment for the plaintiff for £300 or any greater amount is appealable as of right by the defendant. Judgment for the plaintiff for a smaller amount would not be so appealable. Judgment for the defendant would be appealable as of right by the plaintiff. Judgment for the plaintiff for only £100 upon a claim for £500 would also be appealable by the plaintiff. Where a judgment is given for the recovery of land or for delivery up of a chattel where the land or the chattel is worth more than £300, judgment is not given or pronounced in respect of any particular sum, but it is given or pronounced in respect of a matter at issue amounting to the required value.

In many cases, however, there is no sum or matter in issue and yet something of the value of £300 may be involved directly or indirectly in the judgment. Sub-paragraph (2) of par. (*a*) of s. 35 (1) represents an endeavour to deal with these other cases. The judgment may be a judgment for an injunction, for specific performance of a contract, for administration of a trust, for a declaration of right, or for the issue of a prerogative writ. In these cases the judgment is not given for a sum or matter at issue between the parties. But nevertheless the issue between the parties—described as a claim, statement or question—may be capable of an estimate of value.

It is the judgment which must involve a claim, demand or question of a particular character. A judgment can *involve* a claim &c. only in the sense that it is a judgment with respect to such a claim &c. The appeal must relate to the judgment viewed as involving such a claim &c.

The words used in s. 35 (1) (*a*) (2) are substantially the same as those to be found in certain Orders in Council relating to the right of appeal to the Privy Council. An example can be found in the Order in Council of 9th June 1860 relating to Victoria, which is printed in *Victorian Statutes*, vol. IV. (1890), p. 3232. Under that order there was a right of appeal in two cases—(1) where the judgment was given or pronounced for or in respect of "any sum or matter at issue" above the value of £500, and (2) when the

H. C. OF A. 1947. OERTEL v. CROCKER. Latham C.J.

judgment " shall involve, directly or indirectly, any claim demand or question to or respecting property or any civil right amounting to or of the value of £500." These provisions (except as to the amount specified) are the same as those contained in pars. (1) and (2) of s. 35 (1) (*a*) of the *Judiciary Act*. In other Orders in Council the words have been varied. (See *Bentwich, Practice of the Privy Council in Judicial Matters in Appeals*, 3rd ed. (1937), p. 10—Colonial Appeal Rules—the " matter in dispute " must amount to a certain value : similarly in the Order in Council relating to appeals from the Canadian Provinces—*Bentwich*, pp. 30 et seq.). In the case of Victoria and of other States or colonies an appeal now lies as of right " where the matter in dispute on the appeal amounts to or is of the value of £500 sterling or upwards, or where the appeal involves, directly or indirectly, some claim or question to or respecting property or some civil right amounting to or of the value of £500 sterling or upwards " : see *Victorian Statutes*, vol. V. (1929), p. 888. The words are: " the appeal involves." In the *Judiciary Act*, s. 35, the words are: " the judgment involves."

The section makes it necessary to ascertain the claim or demand made or the question raised (that is, by some person who makes a claim—apart from a claim there is no " question ") which is involved in the judgment for the purpose of the appeal. A defendant as such makes no claim ; he resists the plaintiff's claim. But judgment for the defendant in a case is a judgment which is a judgment with respect to the plaintiff's claim, and therefore, in the words of s. 35 (1) (*a*) (2), is a judgment which involves the plaintiff's claim.

Next, the claim &c. must be to or respecting property or a civil right amounting to or of the value of £300. In *Re Robert H. Barber & Co. Ltd.* (1) *Harvey* J. held that the words " amounting to or of the value of £300 " should be read as attached, not to the words " property or any civil right," but as qualifying the words " claim, demand or question." The decision of *Harvey* J. was, however, reversed on appeal (2). It would be difficult to attach a clear meaning to the words " any question amounting to or of the value of £300." Accordingly, the phrase " amounting to or of the value of £300 " should be regarded as qualifying the words " any property or any civil right." The question to be asked will be : " What is the value of the property to which the claim, demand or question involved in a judgment relates ? " i.e., the value of the property so far as it is claimed or demanded or a question is raised respecting it.

There is an appeal as of right when the judgment involves " directly or indirectly " a claim &c. of the specified character.

(1) (1913) 30 W.N. (N.S.W.) 91. (2) (1914) 19 C.L.R. 24.

A judgment involves a claim &c. indirectly when the judgment itself does not directly deal with a claim of the character mentioned, but does do so indirectly. For example, in *Kidney* v. *Melbourne Tramway and Omnibus Co. Ltd.* (1) the defendant company had been fined £1 for carrying passengers in a tram-car without obtaining a licence under the by-laws of the City of Melbourne. Upon an order to review the Full Court upheld the conviction. The amount directly involved was only £1, but if the company was bound, as had been held, to take out licences for all its tram-cars the cost to the company would have been £2,000 a year. It was held (*Kidney* v. *Melbourne Tramways and Omnibus Co. Ltd.* (2)) that the decision indirectly involved a claim with respect to property exceeding £500 in value and that leave to appeal to the Privy Council should accordingly be given.

If the appellant can show that if his appeal succeeds the alteration consequentially made in a judgment with respect to some property or civil right will make him better off by at least £300, then the judgment appealed against is a judgment involving a claim &c. respecting property or a civil right amounting to the value of £300. This view was clearly adopted in *Beard* v. *Perpetual Trustee Co. Ltd.* (3). If, however, he cannot show that this is the case, the party has no right of appeal under s. 35 (1) (*a*) (2).

The decision in *Beard's Case* (3) is in accord with the decisions given with respect to the provisions of the Orders in Council to which reference has been made. The test adopted has been the value of the interest of the appellant which will be affected by the appeal. *Allan* v. *Pratt* (4) (referred to in this Court in *Jenkins* v. *Lanfranchi* (5)) was an appeal from Quebec, and the right of appeal depended on whether the "matter in dispute" exceeded the value of £500 sterling: see *Safford and Wheeler, Privy Council Practice*, p. 407. It was held that under such a provision the judgment was to be looked at as it affected the interests of the party who was prejudiced by it and who sought to relieve himself from it by appeal. In my opinion this interpretation should be applied to s. 35 (1) (*a*) (2) of the *Judiciary Act*. A judgment, for the purposes of appeal, should be regarded as "involving" a claim when it has so dealt with a claim that the interest of the appellant in obtaining its reversal or variation is an interest in respect of property or any civil right, which interest is of the value of £300. Thus a plaintiff who has been denied by a judgment the establishment of a right

(1) (1902) 27 V.L.R. 679.
(2) (1902) 8 A.L.R. (C.N.) 29.
(3) (1918) 25 C.L.R. 1.
(4) (1888) 13 App. Cas. 780.
(5) (1910) 10 C.L.R. 595.

H. C. OF A. 1947. OERTEL v. CROCKER. Latham C.J.

which is a right to property or to a civil right and which is of the value of £300 has an appeal as of right. A defendant against whom a judgment has been given which prejudices him to the extent of £300 in respect of a claim made against him to any property or civil right also has an appeal as of right.

The decision in *Tipper* v. *Moore* (1) is not inconsistent with the foregoing statements. In that case the Supreme Court had decided that a will dealing with property worth more than £1,000 was valid and had granted probate. The unsuccessful caveator appealed to the High Court. His interest in the estate of the deceased person if the will were held to be invalid would have been of a value less than £300, but the decision of the Supreme Court involved the single and indivisible question as to the granting of probate of a will dealing with an estate worth more than £300. It was held that there was a matter at issue between the parties of the value of over £300 and that therefore there was an appeal as of right. The judgment directly determined claims to property of a value exceeding £300.

The only case which is in my opinion clearly irreconcilable with the general current of authority is *Milne* v. *James* (2) where it was held that the fact that the value of land in respect of which a plaintiff claimed an easement was the crucial matter in determining whether a judgment for the defendant involved a claim &c. to or respecting property of the value of £300. The prejudice to the appealing plaintiff was said not to be the relevant measure of value. This case is, I think, inconsistent with prior cases (e.g., *Jenkins* v. *Lanfranchi* (3)) and with subsequent cases (e.g., *Beard's Case* (4)) and should not, in my opinion, be followed.

Thus the effect of s. 35 depends upon the claim, demand or question in relation to which the judgment is given, and which is the matter for determination upon the appeal.

In the present case the title of the plaintiff to the freehold of the land is not in dispute. It is not a subject matter of claim, demand or question. The value of the freehold is therefore irrelevant for the purpose of determining whether there is an appeal as of right.

What is in dispute is whether the defendant has any and, if so, what interest as a tenant. The judgment of the Supreme Court is a judgment with respect to the claim of the plaintiff for possession and to the claim of the defendant to retain possession against the plaintiff. The value of the possession under the tenancy is the relevant matter in applying s. 35.

(1) (1911) 13 C.L.R. 248.
(2) (1910) 13 C.L.R. 165.
(3) (1910) 10 C.L.R. 595.
(4) (1918) 25 C.L.R. 1.

There is no evidence that the tenancy is of a value of £300 or more and therefore there is no right of appeal.

STARKE J. The Court struck out this appeal on the ground that it was incompetent.

It was an appeal from a judgment of the Supreme Court of South Australia which dismissed, by a majority, an appeal from an order of the Local Court of Adelaide directing that possession of certain property be given to the respondent by a certain date.

It was claimed that the judgment of the Supreme Court was appealable to this Court pursuant to the provisions of the *Judiciary Act* 1903-1946, s. 35 (1) (*a*) (2).

So far as material that section provides that the appellate jurisdiction of this Court with respect to judgments of the Supreme Court of a State shall extend to every judgment, whether final or interlocutory, which involves 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, but so that an appeal may not be brought from any interlocutory judgment except by leave of the Supreme Court or the High Court.

The words of s. 35 (1) (*a*) (2) were adopted, I should think, from some Order in Council making provision for appeals as of right to the Privy Council from final orders of the Supreme Courts of the Australian Colonies or States (see the Orders in Council relating to Victoria, 9th June 1860, printed in a note to the *Supreme Court Act* 1890, s. 231, in the 1890 edition of the Statutes, and 23rd January 1911, printed at the end of the *Supreme Court Act* 1928 in the 1928 edition of the Statutes).

The appellant here does not suggest that he is the owner of the property the value of which exceeds £300, as is admitted. At best, he claims that he is a tenant from year to year of the property at a weekly rental of thirty-five shillings payable by monthly instalments determinable by six months' notice expiring at the end of some year of the tenancy, subject however to the provisions of the *National Security* (*Landlord and Tenant*) *Regulations*, Part III.

It was conceded during the argument that the value of such a tenancy could not, and did not, amount to the value of £300.

But it was contended that as the property exceeded in value the sum of £300 the appeal was as of right whatever might be the value of the appellant's tenancy (see *Amos* v. *Fraser* (1); *Tipper* v. *Moore* (2) and compare with this case *Skinner* v. *Trustees Executors and Agency Co. Ltd.* (3)). But in *Amos* v. *Fraser* (4) *O'Connor* J. did

(1) (1906) 4 C.L.R. 78, at p. 84.
(2) (1911) 13 C.L.R. 248.
(3) (1901) 27 V.L.R. 377.
(4) (1906) 4 C.L.R. 78.

H. C. OF A. 1947.

OERTEL v. CROCKER.

Starke J.

not agree with this interpretation of the *Judiciary Act*. He said that the measure of the value was the appellant's right in the property (see the report (1) and *Beard* v. *Perpetual Trustee Co. Ltd.* (2)).

And, in short, I agree with this view and with the suggestion of *Cussen* J. in *Malone* v. *Registrar of Titles* (*No.* 2) (3) speaking of the Order in Council of 23rd January 1911 making provision for appeals from the Supreme Court of Victoria to the Privy Council, that the words in that Order, " ' some question respecting property ' are equivalent to the expression ' some proprietary right '." That meaning, he added, was consistent with the cases he had referred to and showed that the test was whether the person applying for leave to appeal was prejudiced by the judgment to the extent of £500 (see *Macfarlane* v. *Leclaire* (4) ; *Allan* v. *Pratt* (5)).

DIXON J. This appeal was struck out as incompetent on the ground that the order of the Supreme Court of South Australia from which it was sought to appeal did not involve any claim, demand or question to or respecting any property or civil right amounting to or of the value of £300 and that in no other way did it comply with the conditions upon which an appeal as of right depends. The reasons for this decision were not given at the time because the facts of the case brought to a point a difference of view concerning s. 35 (1) (*a*) (2) of the *Judiciary Act* which earlier cases appear to illustrate and, the matter having been well and fully argued by counsel for the appellant, it was thought better to take the opportunity of stating our reasons in writing.

In *Conway* v. *Conway* (6) *Williams* J. " pointed out that there were two apparently conflicting views as to determining the appealable interest, one being that you ascertained the value of the property to which the judgment related, and the other that the judgment was to be looked at as it affected the interest of the party who was prejudiced by it, and who sought to relieve himself from it by appeal." It is this difference of view that the facts of the present case seemed to bring to an issue.

The appeal was from an order of the Supreme Court dismissing an appeal from a judgment, order or determination of the Local Court of Adelaide to the effect that the respondent should recover possession from the appellant of a dwelling house and should recover mesne profits.

(1) (1906) 4 C.L.R., at pp. 87-88.
(2) (1918) 25 C.L.R. 1.
(3) (1919) V.L.R. 484, at p. 485.
(4) (1862) 15 Moo. P.C. 181 [15 E.R. 462].
(5) (1888) 13 App. Cas. 780.
(6) (1941) 15 A.L.J. 221, at p. 222.

The appellant occupied the dwelling at a weekly rent. There was nothing to show or even suggest that the value to him of his occupation of the house so far exceeded the rent that his claim to continue in occupation at that rent possessed a value of £300 or more. But the value of the fee simple of the dwelling, of which the respondent was owner, exceeded £300. It was therefore said on the appellant's behalf that the order of the Local Court and the order of the Supreme Court affirming it fell within s. 35 (1) (*a*) (2) and involved directly or indirectly a claim, demand or question to or respecting property amounting to or of the value of £300. In accordance with this view the affidavit filed with the notice of appeal for the purpose of showing that the order was one from which an appeal lay as of right said simply, and correctly, that it was a final order in respect of an action for the recovery of the possession of a certain tenement which was of the value of £300 and upwards.

In my opinion the attempt to give to s. 35 (1) (*a*) (2) an operation wide enough to include such a case does violence to its real intention.

The contention must in the end depend on the word "respecting" and it appears to me to give to that word a much more indefinite meaning than it bears in the context. What the parties each claim is possession, the one to retain it and the other to obtain it. The physical subject of the possession is the house and land. The "property" in the house and land, the estate in fee-simple, is what is worth £300 and upwards. But that is not the subject of the claim, demand or question.

The word "respecting" is used to require a connection between the claim, demand or question and the valuable property or civil right, and, as it is used in addition to the word "to," it must be a connection which that word does not cover. But it seems to me to be obvious that the connection must be close, immediate or proximate and that the connection between a mere claim to possession of a thing and the full property therein, which alone possesses the required value, is too tenuous and distant.

Two things may be conceded. In the first place, I agree that grammatically the words "amounting to or of the value of" are attached to and qualify the words "any property or civil right" which they immediately follow and not the words "claim demand or question." The latter are too far back in the sentence as well as being inappropriate. The second thing that may be conceded is that the word "respecting" is attached to the words "claim" and "demand." It may be that in the expression "claim demand or question to or respecting" the word "to" cannot be attached

H. C. OF A. 1947. OERTEL v. CROCKER. Dixon J.

to " question." You can hardly speak of " any question to any property." But it does not follow that correspondingly the word " respecting " is attached only to " question " and not to " claim, demand." But, conceding so much, I think that the claim or demand must itself relate to a civil right or legal property of the required value before it can fall within the true meaning of the expression " claim demand or question to or respecting any property or any civil right amounting to or of the value of £300 " as used in the sub-paragraph. The principle of a provision limiting the right of appeal by reference to the amount involved must go to the prejudice measured in money suffered by parties adversely affected by the judgment. And that seems to be the policy of sub-pars. (1) and (2) of s. 35 (1) (*a*).

The parallel provisions of the various colonial and provincial statutes and Imperial Orders in Council defining rights of appeal to the Privy Council are variously expressed, but for the most part they have been thus interpreted and applied. In *Allan* v. *Pratt* (1) Lord *Selborne* agreed in principle with the rule, which had already been laid down, " 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." He continued : " If there is to be a limit of value at all, that seems evidently the right principle on which to measure it."

In perhaps the earliest case on the subject in this Court, *Amos* v. *Fraser* (2) *O'Connor* J., after quoting the language of s. 35 (1) (*a*) (2), said :—" There are two ways in which that sub-section may be read, viz., that if the property is of the value, or the civil right is of the value, of £300, no matter what the value of the claim may be, an appeal lies. I do not think that is the proper interpretation. It would lead to very great absurdities. The other interpretation is that the claim, demand, or question must in itself involve directly or indirectly the value of £300. That I think is the right interpretation of the section. That is to say, in any case in which, directly or indirectly, the claim of the appellant involves a right in respect of property which right is in itself of the value of £300, an appeal lies. In other words, the measure of value is to be the value of the appellant's right in the property." The grounds of his Honour's decision do not appear to be those given by *Griffith* C.J., but in my opinion they express the general principle upon which the provision proceeds, though some qualifications or reservations may be necessary, and to these I shall afterwards refer.

(1) (1888) 13 App. Cas. 780, at p. 781. (2) (1906) 4 C.L.R. 78, at pp. 87-88.

In *Milne* v. *James* (1) a decision was given admitting an appeal from a judgment dismissing a suit for a declaration of right to a strip of land and a wall thereon together valued at £290. The defendant claimed an easement of support over the wall; and the deficiency in amount or value was made up of £15 damages to the wall done by the beams of the defendant's structure resting thereon. The reasons given for the decision appear in the end to come down to the view that the defendant's claim or assertion amounted to a denial of the plaintiff's dominion over his property, and that consequently the declaration of right and the damages which the plaintiff had unsuccessfully sought together made up the required amount. But there are passages in the reasons not easy to reconcile with the principle which *O'Connor* J. had adopted (2). Moreover, there is some doubt of the application of the principle to the facts. But it is not clear that there was any intention to depart from the principle. This observation may certainly be made of *Western Australian Insurance Co. Ltd.* v. *Dayton* (3). It seems that the principle was again applied in *Shield* v. *Municipality of Huon* (4). In *Beard* v. *Perpetual Trustee Co. Ltd.* (5) it was formulated with some elaboration as if to establish it as the doctrine of the Court.

But in the earlier case of *Tipper* v. *Moore* (6) and perhaps in *Robert H. Barber & Co. Ltd.* v. *Simon* (7) the value of the subject matter of the litigation was made the test, rather than the interest of the appellant therein or the amount of the prejudice he would suffer under the judgment. In *Webb* v. *Hanlon* (8) in a passage I shall not repeat, I discussed s. 35 (1) (*a*) (2) and the consistency of *Tipper* v. *Moore* (6) with *Beard* v. *Perpetual Trustee Co. Ltd.* (5). I expressed the opinion, to which I adhere, that the course of decision is against construing the provision as authorizing an appeal as of right against an order which, while it stands, does not prejudice to the extent of £300 proprietary or other rights to which any person or persons would be entitled if the order had not been made or if the order sought by the party appealing had been made.

The decisions of the Court in *Watson* v. *Johnson* (9) and in *Ridgway* v. *Lockwood* (10) tend to support this view, although perhaps the earlier of the two cases at all events might have been decided in the same way on any view of the sub-paragraph.

(1) (1910) 13 C.L.R. 165.
(2) (1906) 4 C.L.R., at pp. 87-88.
(3) (1924) 35 C.L.R. 355.
(4) (1916) 21 C.L.R. 109.
(5) (1918) 25 C.L.R. 1.
(6) (1911) 13 C.L.R. 248.
(7) (1914) 19 C.L.R. 24.
(8) (1939) 61 C.L.R. 313, at pp. 326-327.
(9) (1936) 55 C.L.R. 63.
(10) (1938) 60 C.L.R. 732.

H. C. OF A. 1947. OERTEL v. CROCKER. Dixon J.

It is to be noticed that it is the judgment, not the appeal or the subject matter, of the suit or proceeding which must under par. (1) be given or pronounced for or in respect of any sum or matter at issue amounting to or of the value of £300, and under par. (2) must involve a claim, demand or question to or respecting any property or civil right of that amount or value. In this respect it resembles the second paragraph of s. 110 of the Indian *Code of Civil Procedure*: see *Udoychand Pannalal* v. *P. E. Guzdar & Co.* (1). That it is the judgment and not the subject matter of the suit may be of much importance where the subject of controversy in the suit is of more than the required value but the order, being, for example, of an interlocutory character, happens not itself actually to involve a claim demand or question to or respecting the subject of controversy in the suit.

Both because of the form of s. 35 (1) (*a*) (1) and (2) and for reasons of substance, it is necessary to qualify the statement that the appellant must be worse off by £300 than he would be if the judgment had not been given or if he obtained the relief he seeks in the appeal. One qualification or reservation that must be made is where the appellant occupies a representative capacity or is suing in another right or as a representative party or in interests which go beyond his own private right. For example, if a will has been pronounced against and the order affects the interests of beneficiaries to the prescribed value, the executor, though not a beneficiary, may well have a right of appeal. Again, suppose under a rule corresponding to *Rules of the Supreme Court*, Order 16, r. 32 (England) a representative is appointed of an unascertained class. Might he not come within s. 35 (1) (*a*) (2) ?

Then if the order sought by the appellant necessarily and of its own force established rights of more than the required value, the appellant having a sufficient *locus standi*, it may be a question whether that might not be enough even if the appellant's own interest did not reach the standard. For example, a beneficiary seeks an order for the replacement of a trust fund by a trustee. Must his own interest in the amount to be replaced be more than £300 ? That is perhaps a question which we must leave outstanding. For the possible justification of the decision in *Tipper* v. *Moore* (2) lies in the view that, if the appellant were able to invalidate the will, he thereby established the title of all the next of kin and their collective interests amounted to more than £300.

Perhaps, too, it is wise to make a reservation for some of the situations which may conceivably arise in cases of prohibition and

(1) (1925) L.R. 52 I.A. 207. (2) (1911) 13 C.L.R. 248.

certiorari. But, generally speaking, I think that a satisfactory guide will be found if the prejudice sustained by the appellant under the judgment is considered or the advantage which he might obtain by the appeal.

Appeal struck out as incompetent. Application for special leave refused. No order as to costs.

Solicitors for the appellant, *Pickering, Cornish and Lempriere Abbott.*

Solicitors for the respondent, *E. J. C. & L. M. Hogan and Hugh Martin.*

C. C. B.