[HIGH COURT OF AUSTRALIA.]

BALLAS . . . . . APPELLANT ;
PLAINTIFF,

AND

THEOPHILOS . . . . . RESPONDENT.
DEFENDANT,

[No. 1]

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1957.

MELBOURNE, *May* 28, 29;

SYDNEY, *July* 11.

Dixon C.J., Webb, Fullagar, Kitto and Taylor JJ.

Practice—High Court—Appeal from Supreme Court of State—Appealable amount—"Claim to or respecting any property . . . of the value of £1,500 *"—Whether amount payable by appellant if successful to respondent by way of e.g. purchase money for the property in question to be deducted in arriving at value—Judiciary Act* 1903-1955 (*No.* 6 *of* 1903—*No.* 35 *of* 1955), *s.* 35 (1) (*a*) (2).

Section 35 (1) (*a*) (2) of the *Judiciary Act* 1903-1955 provides that an appeal lies to the High Court from "every judgment . . . which involves . . . any claim to or respecting any property . . . of the value of £1,500."

Held: that the condition set out in s. 35 (1) (a) (2) is fulfilled if loss of the appeal will deprive the appellant of property of the value of £1,500. It is not necessary for the appellant to establish that when all the economic consequences of the judgment in the court below are pursued they leave him at an ultimate disadvantage estimated or computed at more than the equivalent of £1,500.

Per Kitto J.: The matter or property in dispute on the appeal or the property to or respecting which a claim demand or question is involved in the judgment may not be the same for both parties, in which event the matter or property to be valued is that which is seen to fill the description when the judgment is looked at through the eyes of the appellant.

OBJECTION to competence of appeal from Supreme Court of Victoria.

Harry Ballas commenced an action in the Supreme Court of Victoria against one Efstratia Theophilos, the executrix of the will of his former partner Michael Theophilos deceased, claiming a declaration that he had exercised an option given by the articles

of partnership to purchase the share of his deceased partner and further relief consequential upon such declaration. The defendant executrix counterclaimed for the winding up of the partnership upon the footing that the option had not been exercised and that the partnership had been dissolved by the death of Michael Theophilos and for an order appointing a receiver and manager of the partnership business. The action came on for hearing before *Smith* J. who dismissed it but ordered on the counterclaim that the partnership be wound up and that a receiver and manager be appointed. From this decision Ballas appealed to the High Court.

By notice dated 22nd February 1957 the respondent executrix objected to the competency of the appeal on the following grounds : 1. The said judgment is not a judgment given or pronounced for or in respect of any sum or matter in issue amounting to or of the value of fifteen hundred pounds. 2. The said judgment 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 fifteen hundred pounds. 3. The interest of the appellant in obtaining the reversal or variation of the said judgment is not an interest amounting to or of the value of fifteen hundred pounds in respect of any property or any civil right. 4. The property or civil right of the appellant to or respecting which a claim or demand or question is involved in the said judgment is not property or a civil right amounting to or of the value of fifteen hundred pounds. 5. The interest of the appellant in the said judgment or in the reversal or variation thereof is not property or a civil right amount to or of the value of fifteen hundred pounds. 6. The prejudice which the appellant sustains under the said judgment so long as it is not reversed or varied as sought in this appeal is not property or a civil right amounting to or of the value of fifteen hundred pounds.

The relevant portions of the articles of partnership and the material facts as to the value of the partnership assets appear sufficiently in the joint judgment hereunder.

Gregory Gowans Q.C. (with him *H. Ball*), for the appellant. The appeal is from a judgment involving a claim to property of the value of £1,500. The question determined by the Supreme Court was whether the present interest of the deceased partner's estate in the partnership assets was nothing or was about £4,000 on the footing that the option had not been properly exercised. [He referred to *Robert H. Barber & Co. Ltd.* v. *Simon* (1).] That decision is in

(1) (1914) 19 C.L.R. 24, at pp. 27, 28.

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accord with *Beard* v. *Perpetual Trustee Co. Ltd.* (1) and *Oertel* v. *Crocker* (2). Alternatively, looking only at the claim that was one respecting property of the value of £1,500 if the performance of the option which was denied to the appellant was of the value of £1,500 to him. [He referred to *Oertel* v. *Crocker* (3).] The value of the option is the value of the relevant property not that value less any amount which the appellant might have to pay to the respondent on its exercise.

M. J. Ashkanasy Q.C. (with him *M. V. McInerney* Q.C.), for the respondent. The question whether a party has an appeal as of right is to be tested by the detriment he has suffered. In the case, for example, of a claim for specific performance of a contract for the sale of land for £1,500 the plaintiff if he failed, could not assert that he was worse off by £1,500. *Robert H. Barber & Co. Ltd.* v. *Simon* (4) is not against this approach because the petitioning creditor was, in effect, representative of all the creditors. If it is against this approach, see *Oertel* v. *Crocker* (5). [He referred to *Beard* v. *Perpetual Trustee Co. Ltd.* (6).] All that the plaintiff in this case could have secured, if successful, was a declaration that he had validly exercised the option or if the matter was carried a step further that subject to paying the purchase price and otherwise complying with the terms of the partnership deed he was entitled to become the owner of the partnership business. [He referred also to *Jenkins* v. *Lanfranchi* (7) and *Western Australian Insurance Co. Ltd.* v. *Dayton* (8); *Webb* v. *Hanlon* (9); *Finnegan* v. *Elton* (10).]

Gregory Gowans Q.C., in reply.

Cur. adv. vult.

July 11. The following written judgments were delivered :—

DIXON C.J., WEBB AND FULLAGAR JJ. The respondent in this appeal lodged an objection to its competence. The appeal was instituted as of right on the footing that the judgment from which the appeal was brought was given or pronounced in respect of a matter at issue amounting to or of the value of £1,500 or involved directly or indirectly a claim demand or question to or respecting property or a civil right amounting to or of the value of £1,500.

(1) (1918) 25 C.L.R. 1.
(2) (1947) 75 C.L.R. 261, at pp. 268, 273.
(3) (1947) 75 C.L.R., at p. 267.
(4) (1914) 19 C.L.R. 24.
(5) (1947) 75 C.L.R., at p. 273.
(6) (1918) 25 C.L.R., at p. 6.
(7) (1910) 10 C.L.R. 595.
(8) (1924) 35 C.L.R. 355.
(9) (1939) 61 C.L.R. 313, at pp. 320, 326.
(10) (1948) 1 A.L.R. 120.

On that footing, of course, an appeal as of right would lie under s. 35 (1) (*a*) (1) or (2) of the *Judiciary Act* 1903-1955. The objection denied that the amount at stake, whether par. (1) or (2) of s. 35 (1) (*a*) be applied, is as much as £1,500.

The appeal is from a judgment of *Smith* J. given in an action by one member of a partnership of two against the executrix of his deceased partner.

The relief sought in the action by the plaintiff was a declaration that he had exercised an option given by the articles of partnership to purchase the share of his deceased partner and further relief consequential upon the delcaration. The defendant executrix however counterclaimed for the winding up of the partnership, on the footing that the option had not been exercised and that the partnership had been dissolved by death, and for an order appointing a receiver and manager of the partnership business. The judgment, which was pronounced on 14th December 1956, dismissed the action but ordered on the counterclaim that the partnership be wound up and that a receiver and manager be appointed.

The business carried on by the partnership consisted in a milk bar, confectionery and cafe bearing the name " The Milky Way ". The place of business is in Collins Street, Melbourne. In his reasons for judgment *Smith* J. refers to the circumstance that the plaintiff, the appellant here, and his deceased partner were at all material times working together in the carrying on of a business of starting price bookmaking, a business of which the deceased would seem to be the owner. His Honour described the transactions of this business as having been interlocked to a substantial extent with those of " The Milky Way ", a matter increasing the difficulty of ascertaining the facts.

The date of the death of the deceased partner is 18th March 1954, two years and nine months before the date of the judgment under appeal. His name was Theophilos ; that of the plaintiff appellant is Ballas. The partnership deed is dated 2nd April 1948 and provides that as from 1st April 1948 Ballas and Theophilos should be deemed to be partners in the business of " The Milky Way " on the terms and conditions contained in the deed. By cl. 17 of that instrument it is provided that if either partner die during the continuance of the partnership or if it be dissolved by notice or by retirement of a partner, the surviving or continuing partner should have the option of purchasing the share of the deceased partner in the capital and assets of the business on terms which the clause proceeds to set out. The first matter dealt with is the amount of the purchase price. It is ascertained by taking the amount at

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which the share of the deceased partner stands in the balance sheet prepared prior to the death of the deceased, together with his share of the undrawn profits from the date of such balance sheet, together also with the goodwill if any, which in case of dispute is to be valued by the manager of the bank of the firm at that time or, in default of his acting, by a person nominated by him to effect such valuation. This calls for a valuation of the goodwill as at the date of death; the words " at that time " refer to the manager of the bank at that time of the firm.

Next there are terms dealing with payment of the amount. Immediately on the completion of a balance sheet to the date of dissolution, the amount representing the deceased's share of profits since the last balance sheet is to be paid. The balance of the purchase money may be paid then or in twelve quarterly instalments bearing interest at bank rate.

Clause 18 then provides for the event of the surviving partner not exercising the option to purchase the share or interest of the deceased partner. In that event the credits and effects of the partnership must, so the clause provides, be collected and converted into money and thereout the debts and liabilities of the partnership are to be paid and discharged and the residue (if any) divided between the surviving partner and the representatives of the deceased partner in the proportion in which they are entitled thereto.

Ballas, the surviving partner, claimed that he exercised the option to purchase the share or interest of Theophilos his deceased partner. But this contention the executrix contested and, for reasons which are not presently material and into which it is unnecessary now to enter, *Smith* J. held that Ballas had not effectively exercised the option. Accordingly the judgment decreed that his claim as plaintiff in the suit be dismissed. The defendant executrix had made a claim that, on certain facts she set up, she had become solely entitled to the business. The judgment dismissed her counterclaim for a declaration to this effect.

A declaration was made on the counterclaim that the partnership subsisted between Ballas and Theophilos until the latter's death on 18th March 1954, by which event it was dissolved. The judgment then ordered that the partnership be wound up under and by the direction of the court and provided for the appointment of a receiver and manager and for the sale of the assets including goodwill. Certain consequential orders were included but, although they are elaborate, they do not seem to have any important bearing on the present objection to the competence of the appeal.

The relief which the appeal seeks is, as may be supposed, the complete reversal of the judgment so that it would be the counterclaim of the executrix that is wholly dismissed and the claim of Ballas for a declaration that he is the purchaser of the share of the deceased that is substituted. Suppose that such a decree had been made in the first instance and contrast, in terms of money or value, the position which the plaintiff Ballas would enjoy under it with that which he occupies under the judgment as it stands. As it stands he must surrender the assets to the receiver and manager; they must be sold, including the goodwill; and he must be debited in favour of the executrix with half the profits since the death of Theophilos or with seven per cent per annum on the value of his share as she may elect. *Smith* J. says in his judgment that the executrix has elected in favour of taking the share of profits. The residue of the proceeds of the sale of the assets after the liabilities of the partnership are discharged will be divided equally between the appellant Ballas and the executrix in accordance with cl. 18 of the deed.

If the judgment had dismissed the counterclaim wholly and had declared that Ballas, by validly exercising the option given to him by cl. 17 of the deed, had become the purchaser of the share of Theophilos, his deceased partner, he would be entitled, as from 18th March 1954 when the latter died, to the business and the assets thereof as an entirety and would not be accountable for any profits after that date but would be liable to pay to the executrix only the amount ascertained pursuant to cl. 17.

It appears that according to the balance sheet as at 30th June 1953, the share of the deceased partner stood at £4,413 after his share of profits for the year had been credited and his drawings during the year debited. That seems to be the basal figure from which the price of the option is to be constructed by following cl. 17. But on the assets side of that balance sheet £2,000 is put down for goodwill and it may be that cl. 17 contemplates the absence from the balance sheet of any figure for goodwill and for that reason requires it to be added. Probably it is of no real consequence, because the parties are by no means disposed to deny to the goodwill a value of at least £2,000 and so the task under cl. 17 for the bank manager would be to say at how much more it should be valued as at the date of the death of Theophilos. But eight days before that date the executrix drew £3,000 for which she has been held accountable to the partnership. Theophilos's share of profits from 30th June 1953, at which date the last balance was made up, to the date of his death is said to be £1,658. But during that period

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Theophilos drew £1,704 which has been attributed to the capitalised profits of the prior year or years. It will perhaps be noticed that cl. 17 makes no express provision for the case of the drawing of previous profits or capital by the deceased partner between the date as at which the prior balance sheet is made up and his death, but it may be assumed for the purpose in hand that such drawings must be brought into account in ascertaining the ultimate liability of the surviving partner on exercising the option of purchase.

On this footing it is probably right to adopt the assumption for the purpose of the objection to competence that to discharge the purchase price for the share of Theophilos deceased, the amount for which Ballas would be liable to the executrix would be £4,367. It may be that this sum should be reduced by some amount forming part of the £3,000 for which the executrix is accountable to the partnership. But in any case there must be added half any amount for which as at 18th March 1954 the goodwill might be valued in excess of £2,000. As already stated, the date as at which the value of the goodwill is to be fixed is the date of the death of Theophilos.

According to an accountant whose opinion is given in the materials before us, a practice in valuing the goodwill of such a business as " The Milky Way " is to take the profits of the last yearly accounting period, deduct a notional salary for the working proprietor, and treat the value of the goodwill as twice the balance remaining. Fixing a salary of £1,560 and taking the profit shown by the balance sheet for the year ended 30th June 1953, the result would be a value of the goodwill of £3,262 or an excess over the £2,000 attributed to goodwill in the balance sheet of £1,262, half of which is £631. The reason for saying that perhaps something should be deducted on account of part of the £3,000 which the executrix withdrew just before the death of Theophilos is that it seems likely that it was not all contained in the assets of the partnership as at 30th June 1953, but that some unascertained portion accrued afterwards. But it is better to ignore this. If it is ignored the sum of the other amounts would make the purchase price of the deceased's share £4,998.

For this Ballas would obtain a title to the whole business and the assets as from 18th March 1954 ; and he would be entitled to retain all the profits earned since that date up to the date of the judgment.

The hypothesis is that Ballas is declared to have become the purchaser of Theophilos's share by a valid exercise of the option. If on that hypothesis Ballas would, as at the date of the judgment, be placed in a situation with reference to the business exceeding in point of financial advantage the foregoing amount of £4,998 by the

appealable amount of £1,500, then clearly enough he would be entitled to appeal as of right. But whether that would be his situation is a question of figures and values which on the meagre materials before us can be answered only inferentially or presumptively. But we know that from the date of the death of Theophilos the appellant Ballas was in possession of the business and received the profits, and there is good reason to believe that the profits did not fall off. If the judgment stands he must therefore account for profits for two years and nine months, only half of which profits would be reflected in the distribution to him under the winding up order. He swears that in the year ended 30th June 1955 alone he was entitled to receive £5,514 profit from the business. From 18th March 1954, the date of the death of Theophilos, until the end of that yearly accounting period on 30th June 1954, he says that £913 was earned by way of profit. Under the winding up order which the appellant seeks to have set aside the assets of the business would be sold and there is no ground for thinking that they would realise an amount which would fully represent to him the value they would have to him while in his hands as part of a going concern.

On the whole it might well be a proper inference that as compared with the situation in which the claim in his action would have left him had it not failed, the judgment does place him in a position of prejudice amounting to £1,500, when all the consequences of the judgment are pursued.

It is true that under r. 8 (8) of O. 70 of the rules of this Court, the burden of establishing the competence of an appeal is upon an appellant. But in such a case as this the probability raised by the circumstances might be regarded as sufficiently high to discharge the onus.

But in a case of this description it is hardly necessary for the appellant to establish that what may be called the economic consequences of the judgment upon him leave him at an ultimate disadvantage estimated or computed at more than the equivalent of £1,500. For the claim that the appellant had exercised the option and therefore is entitled to the ownership of the assets of which he is possessed, that is to say the assets forming as a totality "the business", is a claim to property of the value of £1,500 or more. To lose that property by the judgment means the immediate deprival of the possession and ownership of property exceeding the requisite value.

Such a thing falls literally within certain of the exact words comprised within par. (2) of s. 35 (1) (*a*), "every judgment . . . which involves . . . any claim to any property . . . of the value

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of £1,500." In *Beard* v. *Perpetual Trustee Co. Ltd.* (1) the Court (*Gavan Duffy*, *Powers* and *Rich* JJ.) dealt with a case in which the appellant had sought to establish his right to elect to take a policy of insurance on his own life to which he claimed to be entitled in equity. He claimed a right to elect as against the estate of a testatrix. His case was that she had held the policy as a constructive trustee for him. But in her will she had purported to dispose of the policy in favour of others, while in the same will she made dispositions of other property in the appellant's favour. It was conceded that his election must be with compensation to the beneficiaries in whose favour the testatrix had purported to dispose of the policy and that, paying such compensation, the net value to the appellant of a decree in his favour would be less than the requisite sum (then £300), although the value of the policy itself was much greater. The Court decided that the appellant had no appeal as of right from a judgment denying his claim. *Gavan Duffy* and *Powers* JJ. at the outset of a joint judgment formulated a general proposition thus: "In our opinion clauses 1 and 2 of s. 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 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" (2).

This general proposition is stated in a form that has been found too absolute and, while accepting the notion underlying it as the principle which forms the basis of s. 35 (1) (*a*), an endeavour was made in *Oertel* v. *Crocker* (3) to point out some of the qualifications and the extensions subject to which it must be understood and applied. Perhaps this attempt to expound the manner in which the principle so ascribed to the provision might apply was in some respects inadequate.

In *Beard's Case* (1) counsel for the appellant had said in his argument—"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

(1) (1918) 25 C.L.R. 1.
(2) (1918) 25 C.L.R., at pp. 5, 6.
(3) (1947) 75 C.L.R. 261, at pp. 270-275.

money " (1). A scrutiny of the joint judgment in *Beard's Case* (2) will show that their Honours conceded that if the suit had been to enforce the constructive trust and not the right to elect, the appeal as of right would have existed and that the reason why the actual judgment did not fulfil the conditions of s. 35 (1) (*a*) (1) or (2) was that the appellant in that case " 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 (the) will would be affected by his taking such assignment " (3).

We think that the qualification suggested by the observation made by counsel in the course of his argument in *Beard's Case* (2) must be understood as applying to the principle attributed to s. 35 (1) (*a*). It amounts in truth to no more than this, that once you get the denial by a judgment of a claim to a title to an estate or interest in land or an interest in personalty and the estate or interest of which the judgment deprives the claimant is itself of the requisite value you do not inquire further. For it means that he has been prejudiced in proprietary rights which he claims of the prescribed value. You do not inquire further to ascertain whether the appellant himself is consequentially relieved of a personal liability or liabilities which would sufficiently counterpoise the prejudice economically to enable one to say that on balance his economic situation has not suffered to the extent of £1,500. This falls within what *O'Connor* J. said in *Amos* v. *Fraser* (4) in the passage quoted in *Oertel* v. *Crocker* (5) for the formulation of principle. *O'Connor* J. said—" the measure of value is to be the value of the appellant's right in the property " (6); that is the right claimed by him but denied by the judgment.

In *Oertel* v. *Crocker* (7) itself the appellant's claim was to occupy a dwelling house 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 " (8). The value of the fee simple was immaterial. There was no claim to that estate.

In the present case the assets claimed are in the possession of the appellant as the asserted owner and full ownership and possession are the subject of his claim and of them the judgment deprives him.

For these reasons we think the objection to the competency of the appeal fails and should be overruled.

(1) (1918) 25 C.L.R., at p. 5.
(2) (1918) 25 C.L.R. 1.
(3) (1918) 25 C.L.R., at p. 6.
(4) (1906) 4 C.L.R. 78, at pp. 87, 88.
(5) (1947) 75 C.L.R. 261, at p. 272.
(6) (1906) 4 C.L.R., at p. 88.
(7) (1947) 75 C.L.R. 261.
(8) (1947) 75 C.L.R., at p. 271.

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KITTO J. The argument presented against the competency of the appeal sought to carry expressions which have been used in other cases to such a length as to desert the language of the statute. The relevant provision, s. 35 (1) (*a*) (2) of the *Judiciary Act* 1903-1955 (Cth.), gives a right of appeal to this Court against every judgment of the Supreme Court of a State which involves directly or indirectly any claim, demand, or question, to or respecting any property or civil right amounting to or of the value of £1,500. The judgment of the Supreme Court of Victoria against which the present appeal is brought denies a claim by the appellant that he has validly exercised an option to purchase a share in a partnership formerly existing between himself and a person now deceased, and grants a claim by the respondent, the deceased partner's executrix, that orders should be made for the winding up of the partnership and for ancillary purposes. The deceased partner's share in the partnership is worth more than £1,500, but the difference between the value of that share and the price to be paid for it by the appellant if he has validly exercised his option of purchase may be less than £1,500. On the footing that the difference is not shown to be as much as £1,500 the respondent contends that the appellant has not discharged the onus which lies upon him of establishing that the case falls within s. 35(1) (*a*) (2).

It is often true, as has been said in other cases, that the question whether a judgment is appealable as of right may be tested by asking by how much the appellant is worse off in consequence of the judgment or by how much he will be better off if he succeeds in the appeal. But where this is true it is so only because the inquiry provides a convenient way of finding the answer to the actual question which the language of the statute poses. It is a mistake, I think, to treat the inquiry as if it had been substituted for that question by judicial decision. Sub-paragraph (1) of s. 35 (1) (*a*) gives an appeal from every judgment given or pronounced for or in respect of any sum or matter at issue amounting to or of the value of £1,500; and probably the only cases in which the inquiry I have described may not be sufficient to determine whether an appeal lies under that provision are the cases of judgments which are not "for" a sum or matter at issue but "in respect of" such a sum or matter. Under sub-par. (2), however, there is more room for cases to occur in which the inquiry will not suffice; for what has to be valued is property (I leave aside civil right) identified by the fact that a claim, demand or question "to or respecting" it is involved directly or indirectly in the judgment.

In relation to a provision as to appeals to the Privy Council, resembling sub-par. (1) in that it refers to the value of " the matter in dispute ", the Privy Council held in *Macfarlane* v. *Leclaire* (1) and *Allan* v. *Pratt* (2) that " in determining the question of the value of the matter in dispute . . . the correct course to adopt is to look at the judgment as it affects the interests of the parties who are prejudiced by it, and who seek to relieve themselves from it by an appeal " (3). The cases of *Lipshitz* v. *Valero* (4) and *Meghji Lakhamshi & Bros.* v. *Furniture Workshop* (5) show that a similar method of approach is to be adopted under a provision which applies where an appeal to the Privy Council involves directly or indirectly " ' some claim or question to or respecting property ' " amounting to or of a prescribed value. The question is to be considered " from the point of view of the appellant ", as was said in a passage in the last-mentioned case (6). The sentence in which this expression occurs relates it to the " value ", but it is clear, I think, from the actual decisions in all the cases above cited that what is meant is that the value which is material is the value of the property which from the appellant's point of view answers the description in the relevant legislation. The principle laid down is not simply that if the matter or property to be valued has a special value for the appellant, that is the value to be considered. Its primary meaning, in relation to Privy Council appeals, is that in order to decide what matter or property is to be valued you consider from the appellant's point of view what is in dispute on the appeal; and similarly it means in relation to High Court appeals under s. 35 (1) (*a*) (2) of the *Judiciary Act* that in order to decide what property is to be valued you consider from the appellant's point of view what is the property to or respecting which a claim demand or question is involved in the judgment of the Supreme Court.

Take, for instance, the facts in *Macfarlane* v. *Leclaire* (1). A plaintiff sued to recover a sum which was less than the appealable amount, but the judgment which he obtained determined as against a third person that certain property of a value greater than the appealable amount, which the third person claimed as his own, belonged to the defendant, and it ordered that that property be applied towards satisfying all the defendant's debts. If the matter had been looked at from the plaintiff's point of view, as it would have been if he had been the appellant, the matter in dispute must

(1) (1862) 15 Moo. P.C. 181 [15 E.R. 462].
(2) (1888) 13 App. Cas. 780.
(3) (1862) 15 Moo. P.C., at p. 187 [15 E.R., at p. 465].
(4) (1948) A.C. 1.
(5) (1954) A.C. 80.
(6) (1954) A.C., at p. 88.

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have been held to be the debt owing to him. But it was the third party who appealed; and when the judgment was looked at as it affected his interests the matter in dispute was seen to be the whole of the property which it made available to satisfy the defendant's debts. Similarly in *Meghji Lakhamshi & Bros.* v. *Furniture Workshop* (1) where landlords sued to recover the possession of land from former tenants and failed because it was held that the defendants had a statutory tenancy, the property which the Privy Council held must be valued for the purpose of determining whether there was a right of appeal was the freehold, "the property, vacant possession of which they were claiming" (2), notwithstanding that from the tenants' point of view it might have been said that the only property as to which any claim or question was involved in the judgment was the right of occupation which the tenants asserted. Indeed, that that would have been said may be inferred from the case of *Lipshitz* v. *Valero* (3) where a person who had been ordered to vacate land, and claimed the protection of a legislative provision in favour of tenants, was held to have a right of appeal, not because the freehold of the land was of greater value than the appealable amount, but because the value of the right of occupation which he claimed included the value of a building which he would have to leave on the land if the order to vacate should take effect. So, too, in *Oertel* v. *Crocker* (4) this Court held that a tenant against whom an order for recovery of possession had been obtained by his landlord had no right of appeal under s. 35 (1) (*a*) (2), because from the tenant's point of view the order involved only a claim or question to or respecting the property consisting of the right to possession—not to or respecting the freehold—and the right of possession was admittedly of less value than the appealable amount.

It seems to me, then, that the doctrine as to looking at the judgment from the appellant's point of view means that the matter or property in dispute on the appeal or the property to or respecting which a claim, demand or question is involved in the judgment, may not be the same for both parties, and that where that is the case the matter or property to be valued is that which is seen to fill the description when the judgment is looked at through the eyes of the appellant. In many cases it makes no difference through whose eyes it is regarded; and when that is so it cannot matter that the appellant's individual financial interest in the outcome of the litigation is less than the appealable amount, provided that the value of the property is of that amount. Examples of this may be

(1) (1954) A.C. 80.
(2) (1954) A.C., at p. 88.
(3) (1948) A.C. 1.
(4) (1947) 75 C.L.R. 261.

found in *Amos* v. *Fraser* (1) and *Tipper* v. *Moore* (2). See also the kinds of cases mentioned by *Dixon* J. in *Oertel* v. *Crocker* (3). There may well be cases in which difficulty will arise from the uncertainty of the word "respecting"; but such cases are not likely to be frequent if it is remembered that, as the present Chief Justice has said (4), the word requires a connexion which is close, immediate or proximate, and if the illustrations provided by the cases above referred to are borne in mind.

Oertel v. *Crocker* (5) is an example of the class of cases in which, once the relevant property has been correctly identified, there is no practical difference between saying that the question is whether that property is worth the appealable amount and saying that the question is whether the appellant will be better off by the appealable amount if the appeal succeeds. This is so in a case where, as in *Oertel* v. *Crocker* (5), the relevant property is a right to the possession of land, because each question requires simply that against the value of the possession there must be set off an allowance in respect of any liabilities that are incident to the title to possession which the appellant asserts. Whenever the relevant property consists of a bundle of rights and obligations, the obligations as well as the rights must necessarily be taken into account in valuing it. But a case of that description is to be contrasted with cases of which a ready example is a purchaser's action for specific performance of a contract for the sale of an estate in fee simple in land, in which the plaintiff fails in the Supreme Court. The relevant property is the fee simple, and if its value is equal to or more than the appealable amount, the case is covered by s. 35 (1) (*a*) (2), whatever may be the amount which the appellant will be liable to pay for purchase money and otherwise in the event of the appeal succeeding; for the liability is not an incident of the property and therefore is not a factor to be considered in valuing it. The purchase price is ordinarily evidence of the value. In such a case it is not correct to say that the competence of the appeal depends upon whether the appellant will be better off by the appealable amount if he wins the appeal than if he loses it. It may be that he will be worse off, for the purchase price may exceed the value of the land. But even so, since the judgment below involves a question respecting the land, it follows that the value of the land determines whether there is a right of appeal. Of course if the subject of the sale were an equity of redemption, it would be the equity and not the freehold which would have to be

(1) (1906) 4 C.L.R. 78.
(2) (1911) 13 C.L.R. 248.
(3) (1947) 75 C.L.R., at p. 274.
(4) (1947) 75 C.L.R., at p. 271.
(5) (1947) 75 C.L.R. 261.

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valued for the purposes of s. 35 (1) (*a*) (2); but it would still be true that the price to be paid for the property purchased (the equity) would not be deductible. To deny any relevant difference between, on the one hand, a case of a claim to a freehold by virtue of a transaction which entails a liability and, on the other hand, a case of a claim to an interest which carries a liability as one of its incidents, would be, I think, to fall into error in consequence of a too undiscriminating adoption of the notion that the right of appeal depends on the value of the disadvantage arising to the appellant from the judgment of the Supreme Court or the advantage which could accrue to him from his succeeding on the appeal.

In the present case, the judgment of the Supreme Court involves, from the point of view of each party, at least a claim to the interest of the deceased partner in the partnership. In valuing that interest the liabilities of the partnership have of course to be set off against the assets. But that having been done, and the interest having been found to have a value exceeding £1,500, the case falls within s. 35 (1) (*a*) (2); and it cannot matter, even if it be the fact, that the price payable for the interest by the appellant if he succeeds in the appeal will be less than £1,500 below the value of the interest. But it would be right to take a broader view still. The judgment of the Supreme Court involves, again from the point of view of each party, a question whether the whole of the assets of the partnership are to remain with the appellant as his property or are to be realised and the proceeds applied in a due course of winding up, the ultimate surplus being divided between the appellant and the estate of his deceased partner. Since the assets are proved to be worth more than £1,500, again the case is shown to fall within s. 35 (1) (*a*) (2).

The objection to the competency of the appeal should accordingly be overruled.

TAYLOR J. I agree that the objection to the competency of the appeal should be overruled.

Quite clearly, the judgment appealed from is, in the language of s. 35 of the *Judiciary Act* 1903-1955, a judgment directly involving a claim or demand to property, that is, the share in a partnership of a deceased partner. The applicant's claim to this proprietary interest is denied by the judgment and, this being so, it is, in my view, unnecessary for the purposes of this objection to do more than inquire whether the value of that interest equals or exceeds £1,500. Upon the evidence, it is clear that it does but for the respondent it is contended that this fact alone is of little consequence; the true test, it is said, is whether success in the appeal

will enrich the appellant to the extent of at least £1,500. This inquiry, it is contended, must be answered in favour of the respondent for there is nothing to show that the value of the proprietary interest exceeds by any sum the consideration which success in the appeal will require the appellant to provide.

The argument of the respondent is based upon observations made in the course of giving effect to the provisions of s. 35 in particular cases but to treat those observations as providing an exhaustive test in all cases is, as *Kitto* J. has said, " to desert the language of the statute " and to substitute, for the criteria provided by the statute for use in a variety of cases, a general test calculated to produce quite different results in many cases. Where, as here, the *property* is clearly identifiable there can be no justification for holding that the value of the property is not the relevant consideration whether the appellant, if he is successful, will be required to pay to the respondent the full value of the property or some lesser sum or nothing at all. In my view the appeal is clearly competent and the cases which were referred to on behalf of the respondent do not either require or justify a conclusion to the contrary.

Objection to the competency of the appeal overruled with costs.

Solicitor for the appellant, *E. L. Moran.*
Solicitors for the respondent, *W. W. R. Blair & Son.*

R. D. B.