[HIGH COURT OF AUSTRALIA.]

EBERT . . . . . APPELLANT;
PLAINTIFF,

AND

THE UNION TRUSTEE COMPANY OF AUSTRALIA LIMITED . . . . } RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1957.

SYDNEY, *Dec.* 12.

Dixon C.J., McTiernan, Webb, 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 *"—Claim for administration of deceased's estate under supervision of court—Estate valued at* £1,000*—Interest of beneficiary seeking administration greater than appealable amount—Balance of interest remaining to be paid to beneficiary less than appealable amount—Claim dismissed—Whether appeal lies as of right—Judiciary Act* 1903-1955, *s.* 35 (1) (*a*) (2).

E. was beneficially entitled to a quarter share of the residue of a deceased estate valued at approximately £10,000. Of the amount of her share she had received all but a sum which was less than £1,500. E. brought an action in the Supreme Court of Queensland seeking an order for the general administration of such estate. The action was dismissed, whereupon E. instituted an appeal as of right to the High Court. Upon an objection to the competency of the appeal,

Held, that the appeal was incompetent and that special leave to appeal should in the circumstances not be granted.

For the purpose of s. 35 (1) (*a*) (1) and (2) of the *Judiciary Act* 1903-1955 it still remains generally true that an appellant must show prejudice through the order made which sounds in the required sum of money.

Ballas v. *Theophilos* [*No.* 1] (1957) 97 C.L.R. 186 and *Oertel* v. *Crocker* (1947) 75 C.L.R. 261, referred to; *Tipper* v. *Moore* (1911) 13 C.L.R. 248 and *Robert H. Barber & Co. Ltd.* v. *Simon* (1914) 19 C.L.R. 24, distinguished.

OBJECTION to competency of appeal from the Supreme Court of Queensland.

On 12th May 1953 Gertrude Emily Ebert (hereinafter called the plaintiff) commenced an action in the Supreme Court of Queensland against the Union Trustee Company of Australia Limited the trustee of the estate of William Wood late of Didcot in the State of Queensland deceased, in which she sought orders (1) that the estate of the deceased be administered and the trusts of his will carried into execution under the direction of the court; (2) that an account be taken of all the real and personal estate not specifically devised or bequeathed being estate to come to the hands of the defendant or which but for the defendant's wilful neglect or default might have been so received; (3) that inquiries be made as to what parts of the estate of the deceased were still outstanding; (4) for costs and (5) for further and other relief. The action came on for hearing before *Mansfield* C.J. who, on 22nd July 1957, dismissed the same.

From this decision the plaintiff appealed as of right to the High Court.

By notice dated 23rd August 1957 the defendant company objected to the competency of the appeal upon the substantial grounds:—(1) that the judgment appealed from was not given or pronounced for or in respect of any sum or matter at issue amounting to or of the value of £1,500, and (2) that the judgment appealed from did not involve directly or indirectly any claim, demand or question of or respecting any property or any civil right amounting to or of the value of £1,500.

The facts so far as relevant to the question of the competency of the appeal are sufficiently set forth in the judgment of the court hereunder.

D. L. Mahoney, for the appellant in support of the competency of the appeal. This appeal lies as of right under s. 35 (1) (*a*) (2) of the *Judiciary Act* 1903-1955. Regard should be had in a case of this nature not to the appellant's interest in the estate, which it is conceded falls short of the appealable amount by some £250, but to the value of the whole of the estate and it is that latter value which is involved within the meaning of s. 35 (1) (*a*) (2). The same principle applies here as applies in a suit for the winding up of a company and for the administration of its assets by the court: see *Robert H. Barber & Co. Ltd.* v. *Simon* (1). If it be incorrect to look at the value of the whole estate, then for the purpose of

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

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testing competency, the decree being sought on the footing of wilful default, regard should be had to the amount claimed by the appellant over and above what she has already received, it being assumed that her allegations will be made out. If no appeal here lies as of right, then special leave to appeal is sought, the grounds being the general merits of the case.

G. L. Hart Q.C. (with him *A. S. Given*), for the respondent was not called upon.

DIXON C.J. delivered the oral judgment of the COURT :—

This is an objection to competency of an appeal. The appeal is instituted from a judgment and order of the Chief Justice of Queensland. The suit, which his Honour heard at considerable length, was of a somewhat old-fashioned sort, that is to say, for an order for the general administration of the estate of a deceased testator. The relief claimed is that the estate of the testator be administered; that the trusts be carried into execution under the direction of the Court; that an account be taken of all the real and personal estate not specifically devised or bequeathed being estate to come to the hands of the defendant or which but for the defendant's wilful neglect or default might have been so received; for inquiries as to what parts of the testator's estate are still outstanding; for costs; and for further or other relief. The suit was dismissed by the Chief Justice.

The estate is said to bear a value of about £10,000. The plaintiff is beneficially entitled to a quarter of the residue. Of her share she received enough to make it quite clear that her share in what remains as yet undistributed would be below the appealable minimum.

The question is whether the relief claimed can be said to come within s. 35 (1) (*a*) (2) of the *Judiciary Act* 1903-1955. The question is not exactly of a type which has come before us often, frequent as these questions have been. But we have recently given elaborate consideration to the criteria for determining whether a claim involves the appealable minimum. We have done so in *Oertel* v. *Crocker* (1) and more recently in *Ballas* v. *Theophilos* [*No.* 1] (2). What was said there rather qualifies the application of what was said in *Oertel* v. *Crocker* (1) to cases such as specific performance when the full value of the property involved, regarded independently of the consideration, involves the appealable amount.

(1) (1947) 75 C.L.R. 261. (2) (1957) 97 C.L.R. 186.

In the present case the relief relates entirely to the administration of assets. The claim is that because the order sought is with respect to all the property, that is to say, the full estate and it exceeds £1,500 in value it comes within s. 35 (1) (*a*) (2) of the *Judiciary Act*. We do not think that that is correct. It still remains generally true that the plaintiff must show prejudice through the order made which sounds in the required sum of money. What we said in *Ballas* v. *Theophilos* [*No.* 1] (1) was that that is qualified in some cases, and in particular in cases where recovery of an amount equal to the appealable amount of £1,500 is sought, but there is some answerable detriment, a corresponding detriment to the plaintiff that we thought ought not to be set off for the purpose of ascertaining the amount involved.

We therefore think that on that footing it is not a competent appeal.

It was further contended that because the decree was sought on the footing of wilful default there might be a difference, viz., because it was sought as a first step to make the trustee company itself liable personally for neglect which might exceed the amount. The decree sought does not do it in itself. It is merely a step that conceivably might result in further steps which might end in some sort of decree ; even then it would be necessary to prove that the amount of £1,500 was involved beyond liabilities.

In the cases to which we have referred we discussed to some degree *Robert H. Barber & Co. Ltd.* v. *Simon* (2), and also *Tipper* v. *Moore* (3), a very special case which has created some difficulty over a period of years in this department of the law. These cases were concerned with what I may describe as suits in relation to the administration of assets ; but the explanations given of these cases show that they do not apply. It is clear that *Robert H. Barber & Co. Ltd.* v. *Simon* (2), which is a company case relating to liquidation of the entire mass of assets of the company, and in which the company was the appellant, has no application to the present case.

We were asked for special leave to appeal. Members of the Bench have studied elaborately the judgment of his Honour and we have all heard the points specifically made in relation to that judgment. We are clearly of opinion that they do not fall within our general rule of granting special leave.

Of course the discretion to grant special leave is a wide one, and there has been a good deal of fluctuation from time to time in the administration of that discretion. But we cannot see any point

(1) (1957) 97 C.L.R. 186.
(2) (1914) 19 C.L.R. 24.
(3) (1911) 13 C.L.R. 248.

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in a case such as this which makes it right in the exercise of our discretion to bring it up to this Court, and we think the time has arrived when we ought to be more rigid in the exercise of the power to give special leave.

For those reasons special leave is refused.

The appeal will be dismissed as incompetent, with costs including costs involved in the application for special leave.

Appeal dismissed as incompetent with costs including costs involved in the application for special leave.

Solicitors for the appellant, *Carter Capner & Co.*

Solicitors for the respondent, *Sydney Robertson & Nicholson.*

R. A. H.