[HIGH COURT OF AUSTRALIA.]

AMOS . . . . . APPELLANT;
PLAINTIFF,

AND

FRASER AND ANOTHER . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1906.

MELBOURNE, *Sept.* 17, 18, 25.

Griffith C.J., Barton and O'Connor JJ.

Practice—Appeal to High Court—Judgment involving claim, demand or question to or respecting property amounting to £300—*Judiciary Act* 1903 (*No.* 6 *of* 1903), *sec.* 35 (1) (*a*), (2)—*Judgment ordering trustee to pay costs—Right of trustee to appeal.*

An action was brought by a remainderman asking for a declaration that the trustees were liable to keep and maintain the property and the buildings and fences thereon in repair during the life of the tenant for life. The property was valued at about £2,000, and the buildings and fences thereon at over £300.

Held, that a judgment of the Supreme Court of a State refusing any relief was a judgment which involved a claim, demand, or question to or respecting property amounting to or of the value of £300 within the meaning of the *Judiciary Act* 1903, sec. 35 (1) (*a*), (2), and therefore that an appeal to the High Court lay without leave.

Per O'Connor J.—The measure of the appealable amount is the value of the appellant's interest in the property or civil right.

An order refusing a trustee his costs is subject to appeal, as is also the question as to whether the trustee has been guilty of such misconduct as to disentitle him to costs.

Judgment of Supreme Court varied.

APPEAL from the Supreme Court of Victoria.

An action was brought in the Supreme Court of Victoria by Annie Amos against Alexander Fraser and Margaret Riley in

which the claim indorsed on the writ, dated February 18th 1905, was as follows:—"The plaintiff's claim is as devisee of a freehold farm and its appurtenances at Millbrook in the State of Victoria under the will dated 3rd October 1898 of her father Joseph Riley who died in or about October 1898 subject to the life estate therein of the widow of the said testator of which will the defendants are the executors and trustees and have obtained probate thereof from the Supreme Court of Victoria and have assumed the administration of the testator's estate including the said farm and its appurtenances. And the plaintiff claims that the defendants as such executors and trustees have allowed the said farm and its buildings and fences to get out of good order and condition and into disrepair in breach of the trusts of the said will.

"And the plaintiff claims that the said defendants may be removed as trustees and new trustees appointed for the due administration of the estate of the said testator and the protection and preservation of the said farm."

Pursuant to an order on summons for directions the following particulars of defence were given on 25th March 1905:—

"1. That until receipt of plaintiff's letter of 21st Sept. 1904 addressed to the defendant Alexander Fraser the defendants were not aware that the farm mentioned in the indorsement of claim on the writ herein and its buildings and fences required repair.

"2. That since the said date they have not had in hand any moneys which they could apply to the purpose of effecting such repairs.

"3. That the plaintiff is the wife of one Thomas Amos who was tenant of the said farm at the time of the death of the testator and has been tenant thereof ever since and is now tenant thereof. That she has resided throughout with her husband on the said farm and has been aware throughout of the necessity for such repairs and did not until her said letter make any complaint to the defendants on the subject.

"Upon this ground the defendants will contend that she is not entitled to maintain this action."

Pursuant to leave granted on 26th May 1905 the indorsement of claim on the writ was amended by adding the following:—

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"or in the alternative that the said estate of the said testator may be administered by the Court or under its supervision or in the alternative that the defendants as such trustees may be declared bound to keep and maintain the said farm and its buildings and fences in good order condition and repair and protected from waste during the life of the said widow."

The will of the testator contained the following provisions as to the farm at Millbrook:—

"I give to my trustees my farms at Millbrook and Wallace upon trust to pay the net rents and profits thereof to my wife during her life and after her death then as to my said farm at Millbrook for my said daughter Annie her heirs and assigns . . . I authorize and empower my trustees during the life of my wife to lease my said farms at Millbrook . . . at the best rent obtainable for the same for such terms not exceeding in any one case twelve years to take effect in possession and on such conditions as to them shall seem proper and to apply such part of the rents as they may think fit in keeping the buildings and fences thereon in good order and condition and in improving the same as to them shall seem advisable and generally to manage the said farms as fully and effectually to all intents and purposes as I could myself if living."

The other material facts are set out in the judgment.

The action was heard by *Madden* C.J., who made a declaration "that the defendants as trustees of the will of the said Joseph Riley deceased are bound to keep and maintain the freehold farm at Millbrook in the State of Victoria, of which the plaintiff is the devisee under the will of the said Joseph Riley deceased, and its buildings and fences in good order condition and repair and protected from waste during the life of the widow of the said testator." The learned Chief Justice also ordered that the plaintiff's costs of the action, except so much as referred to the claim to have the defendants removed as trustees, and to have new trustees appointed, and the claim for administration by or under the supervision of the Court, and the defendants' costs in respect of those claims should be taxed and set off against one another, and that the balance should be paid to the plaintiff by the

defendants and that the costs payable by the defendants should not be allowed to them out of the testator's estate.

From this judgment the defendants appealed to the Full Court, which allowed the appeal with costs, and dismissed the action without costs.

The reasons for the judgment of the Full Court were as follow:—

"1. That, before the hearing, the defendants had acknowledged their obligation to repair in exercise of their discretionary trust contained in the will directing them 'to apply such part of the rents as they may think fit' in keeping building and fences in good order &c., and, therefore, no declaratory judgment as to the existence of such obligation was necessary.

"2. That the declaration contained in the judgment was altogether erroneous, embodying the supposed obligation of trustees in relation to repairing trust property in the absence of express provisions, and was not in accord with the express provision of the will as to repairing.

"3. That, at the hearing, the plaintiff abandoned her claim to have the defendants removed from their trust, which the defendants could have successfully resisted, and asked for nothing but an unnecessary declaration, and the action was in fact brought to a hearing merely for the purpose of obtaining costs from the defendants.

"4. That the defendants would have been entitled to their costs of the action against the plaintiff but for the fact that they did not acknowledge their obligation to repair until after the issue of the writ, and, having regard to this, the Full Court gave judgment for the defendants without costs.

"5. That the judgment under appeal was wrong in directing the defendants to pay certain costs to the plaintiff and in directing an impracticable apportionment of the costs of the action in favour of the defendants.

"6. The Full Court gave judgment for the defendants because no declaration was necessary, and the plaintiff was not entitled to the other relief sought by the statement of claim. It allowed the appeal with costs because the plaintiff was not entitled to the judgment obtained against the defendants and the defendants

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had a right to complain not only of the erroneous declaration but of the order made against them as to costs."

From the judgment of the Full Court the plaintiff, having obtained special leave, now appealed to the High Court.

The defendants on the appeal moved to rescind the special leave to appeal and to strike out the appeal, and also moved to vary the judgment of the Full Court by striking out the order that the action should be dismissed without costs and substituting therefor an order that the action should be dismissed with costs.

Isaacs A.G. (with him *Bryant*), for the plaintiff appellant. The trustees were not entitled as of right to their costs. Trustees are entitled to be indemnified for all costs lawfully incurred by them. But if they commit breaches of trust they are liable to pay costs just like any other persons. Here the defendants committed a breach of trust in allowing dilapidations to go on for a long time: *In re Hotchkys*; *Freke* v. *Calmady* (1); *Lewin on Trusts*, 11th ed., p. 695; *Trustees, Executors and Agency Co. Ltd.* v. *Jope* (2). The plaintiff was on her amended claim entitled to a declaration, and that amended claim is to be taken as the original commencement of the action: *Sneade* v. *Wotherton Barytes and Lead Mining Co.* (3). As to the right to a declaration, see *Barraclough* v. *Brown* (4). Special leave to appeal was properly granted. The judgment, in refusing a declaration, involves a question respecting property amounting to the value of £300 within the meaning of the *Judiciary Act* 1903, sec. 35, (1) (*a*) (2). The buildings &c. on the land are valued at over £300, and, if they are not kept in repair, the property will be worth at any rate £300 less to the appellant when she becomes entitled to it.

Mitchell K.C. and *Goldsmith*, for the respondents. Trustees cannot be deprived of their costs except on the ground of misconduct: *Fane* v. *Fane* (5), and the trustees may appeal where they have been deprived of costs: *Turner* v. *Hancock* (6).

(1) 32 Ch. D., 408, at p. 416.
(2) 27 V.L.R., 706; 24 A.L.T., 30.
(3) (1904) 1 K.B., 295, at p. 297.
(4) (1897) A.C., 615, at p. 623
(5) 13 Ch. D., 228.
(6) 20 Ch. D., 303.

[GRIFFITH C.J. referred to *In re Beddoe*; *Downes* v. *Cottam* (1).]

The declaration made by *Madden* C.J. was too large, and, on the appeal, when the Full Court said that the plaintiff was not entitled to a declaration in that form, no request was made for a declaration in a modified form, and none could be made without the tenant for life being a party. Substantially the only claim in the amended writ was for the removal of the trustees.

There was no jurisdiction in the Court to make a general declaratory order, but only to say in a particular case whether certain repairs should be made. As to the duty of trustees to repair, see *In re Montagu*; *Derbishire* v. *Montagu* (2); *In re Freman*; *Dimond* v. *Newburn* (3); *In re Willis*; *Willis* v. *Willis* (4); *In re Farnham's Settlement*; *Law Union and Crown Insurance Co.* v. *Hartopp* (5); *In re Folk* (6).

Upon the proper construction of the *Judiciary Act* 1903, sec. 35, the appellant has failed to show that this is a case where special leave to appeal should have been granted, and the special leave granted should therefore be rescinded. The onus is upon the appellant to show that the case falls within the section. The meaning of sec. 35 (1) (*a*) (2) is that the effect of the decision will indirectly affect the parties to the litigation to the extent of £300: See *Brown* v. *Higgins* (7); *Commercial Bank of Australia Ltd.* v. *McCaskill* (8); *In re Armstrong and Culley* (9); *Skinner* v. *Trustees Executors and Agency Co. Ltd.* (10); *Ko Khine* v. *Snadden* (11); *Quick and Groom's Judicial Power of the Commonwealth*, p. 149.

Isaacs K.C., in reply, referred to *Lewin on Trusts*, 11th ed., pp. 605, 1244; *Easton* v. *Landor* (12); *Dutton* v. *Thompson* (13); *In re Knox's Trusts* (14).

Cur. adv. vult.

September 25.

GRIFFITH C.J. By the will of Joseph Riley, of Ballarat, who died in October 1898, a farm called "Millbrook," amongst other

(1) (1893) 1 Ch., 547.
(2) (1897) 1 Ch., 685, at p. 693.
(3) (1898) 1 Ch., 28.
(4) (1902) 1 Ch., 15.
(5) (1904) 2 Ch., 561.
(6) 6 W.W. & aB. (E.), 171.
(7) 25 V.L.R., 691; 21 A.L.T., 269.
(8) 23 V.L.R., 343; 19 A.L.T., 102.
(9) 4 V.L.R. (L.), 178.
(10) 27 V.L.R., 377; 23 A.L.T., 65
(11) 5 Moo. P.C.C. (N.S.),67.
(12) 67 L.T., 833.
(13) 23 Ch. D., 278.
(14) (1895) 2 Ch., 483.

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property, was given to his trustees upon trust to pay the net rents and profits to his wife during her life, and, after her death, to his daughter Annie, who is the appellant. By the will the testator authorized his trustees during the life of his wife to lease the farm of "Millbrook" "at the best rent obtainable for the same for such terms not exceeding . . twelve years to take effect in possession and on such conditions as to them shall seem proper and to apply such part of the rents as they may think fit in keeping the buildings and fences thereon in good order and condition and in improving the same as to them shall seem advisable." When property is given to several persons in succession "it is the duty of trustees, for the purpose of properly performing their trust, to see that the trust property does not fall into decay from want of repair, and if the occasion for repairs arises they should apply to the Court to direct the proper repairs and the mode in which the expenses of such repairs are to be borne." (*Lewin on Trusts*, 11th ed., p. 695, citing *In re Hotchkys, Freke* v. *Calmady* (1)).

In the present case that duty of the trustees was modified by the express direction of the will that they might apply so much of the rent as they might think fit in keeping the buildings and fences in repair. A difficulty having arisen between the appellant, the person entitled in remainder, and the trustees as to the repair of the fences on the farm, she commenced a suit against them, to the particular nature of which I will refer later, in substance to assert her right to have the fences and buildings kept in repair during the widow's lifetime. The suit is, in effect, for administration of the trusts of the will so far as the fences and buildings on the farm are concerned.

The first question for determination is whether the subject matter of the suit amounts to £300. In my opinion the subject, matter of the suit can be regarded either as the farm "Millbrook," which is said to be of the value of about £2,000, or else, at least the buildings and fences upon that farm, the object of the suit being the preservation of those buildings and fences, and it is admitted that they are worth more than £300. In my opinion, therefore, the subject matter of the judgment in question, which

(1) 32 Ch. D., 408.

denied the appellant any relief involves a claim, demand or question to or respecting property amounting to or of the value of £300. I think, therefore, that the appeal lies as of right.

That being so, it is necessary to consider what are the rights of the parties. Before the action was brought the trustees had denied the plaintiff's right to have the trust property kept from falling into decay. She thereupon issued a writ in February 1905 in which she sought certain relief. The writ is somewhat informally framed, but the whole claim is as follows:—"The plaintiff's claim is as devisee of a freehold farm and its appurtenances at Millbrook in the State of Victoria under the will dated the 3rd day of October 1898 of her father Joseph Riley who died in or about October 1898 subject to the life estate therein of the widow of the said testator of which will the defendants are the executors and trustees and have obtained probate thereof from the Supreme Court of Victoria and have assumed the administration of the testator's estate including the said farm and its appurtenances. And the plaintiff claims that the defendants as such executors and trustees have allowed the said farm and its buildings and fences to get out of good order and condition and into disrepair in breach of the trusts of the said will. And the plaintiff claims that the said defendants may be removed as trustees and new trustees appointed for the due administration of the estate of the said testator and for the protection and preservation of the said farm." No pleadings were delivered, as, on a summons for directions, it was ordered that there should be none. Upon that claim it is clear that the foundation of the plaintiff's claim was the assertion of her right to have the buildings and fences kept in good repair, and she alleged that the refusal of the defendants to perform their duty was sufficient to justify her claim that they should be removed from their offices of trustees. I cannot entertain any doubt that, as the claim was drawn, and without any amendment, the Court could have made a declaration of her right.

Various proceedings were taken, the parties were at arms' length, and, finally, the case came on for trial before *Madden* C.J., and he made a declaration of the plaintiff's right. Before the trial the writ had been amended. The declaration made by the learned Chief Justice was in terms which it is admitted were

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rather too wide, his attention not having been called to the particular point now referred to. He also ordered the defendants to pay the costs of the action, with an immaterial exception. From the whole of that judgment the defendants appealed to the Full Court, and the Full Court discharged the judgment for the plaintiff and dismissed the action, but refused to allow any costs to the defendants. There is no doubt that an appeal lay to the Full Court from the judgment of *Madden* C.J., so far as regards the declaration, and I think there is no doubt that an appeal also lay from it so far as regards the costs, because it is a settled rule that a trustee cannot be ordered to pay costs in an action for administration unless the occasion of the suit has arisen from something in the nature of the trustee's own misconduct. It is also settled that the question whether a trustee has been guilty of such conduct as to justify the Court in ordering him to pay costs is appealable. Therefore, although the plaintiff was entitled to a declaration of her right, the defendants were entitled to appeal against the judgment so far as regards costs. It is not necessary to refer to the facts in detail. It is sufficient to say that, in my opinion, no such misconduct on the part of the defendants was established as would justify an order for costs against them. How, then, ought the Full Court to have dealt with the matter? They should have amended the order of the learned Chief Justice by omitting the order as to costs, and should have left the declaration standing. Whether they should have made the plaintiff pay the defendants' costs of the action is another matter.

The Full Court dismissed the action without costs, thereby intimating plainly that they thought the conduct of the defendants had been such as disentitled them to receive costs from the plaintiff. The conduct of the action by the defendants may in one point of view be regarded as being very vexatious. In my opinion it was certainly so open to criticism as to justify the Court in not giving them the costs in the Court below. That was the opinion of the Full Court, and I see no reason to dissent from it. Therefore, what the Full Court should have done was merely to omit the order for payment of costs, and the defendants, having on their appeal partly succeeded and partly failed, should have had no costs of the appeal. On the present appeal to this

Court, the plaintiff is entitled to succeed to the extent of getting the order of the learned Chief Justice as to her right restored, but she is not entitled to succeed in having his order as to costs restored. So here again the appellant partly succeeds and partly fails. The result is, in my opinion, that the order of *Madden* C.J., should be restored so far as it contains a declaration of right, but with this variation, viz., the substitution for the declaration there made of a declaration that the defendants are bound to make proper provision from time to time for keeping the buildings and fences on "Millbrook" farm in good order and condition and repaired and protected from waste during the lifetime of the tenant for life; that his order should be also amended by omitting the order for taxation and payment of the plaintiff's costs by the defendants; and that the declaration in the order that the costs payable by the defendants should not be paid out of the estate should be amended so as to read :—Costs of the defendants not to be allowed out of the estate of the testator. There should be liberty to apply. The result will be that the parties will have the pleasure of paying their costs of this litigation out of their own pocket.

BARTON J. I entirely concur.

O'CONNOR J. I am of the same opinion. I wish to add a word as to the question whether an appeal lies as of right in this case. I think it does. The construction of sec. 35 of the *Judiciary Act* 1903 is involved in that determination. Sub-sec. (1.) (*a*) (1) deals entirely with the amount of the matter which is in issue in the action. That has no application here. Under sub-sec (1.) (*a*) (2) an appeal lies as of right if the judgment "involves directly or indirectly any claim, demand, or question, to or respecting any property or civil right amounting to or of the value of Three hundred pounds." 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

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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. That view is supported by the decisions in the Victorian Courts cited to us, to which I need not refer, and by a passage in the judgment of the Privy Council in the case of *Macfarlane* v. *Leclaire* (1). That was a petition to rescind leave to appeal from the Court of Appeals of Lower Canada, and the question to be determined involved the interpretation of the words "value of the matter in dispute" in the Act 34 Geo. III. c. 6, sec. 30, of the Acts of the Province of Lower Canada which provided that the judgment of the Court of Appeals of the Province should be final in all cases where the matter in dispute did not exceed the sum or value of £500. It is not necessary to consider the facts of that case. Lord *Chelmsford*, in delivering the opinion of the Judicial Committee, said:—"In determining the question of the value of the matter in dispute upon which the right to appeal depends, their Lordships consider 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. If their liability upon the judgment is of an amount sufficient to entitle them to appeal, they cannot be deprived of their right because the matter in dispute happens not to be of equal value to both parties; and, therefore, if the judgment had been in their favour, their adversary might possibly have had no power to question it by an appeal." The question being, therefore, the value to the appellant of her right in respect of the property in question, I am of opinion that the amount involved is clearly over £300. The amount involved both directly and indirectly in her right to a declaration was the whole of the difference between the value of the property when it would come to her after the death of Mrs. Riley in a properly repaired condition, and the value of it

(1) 15 Moo. P.C.C., 181, at p. 187.

in the condition in which it would come to her if the trustees had effected no repairs.

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Appeal allowed. Order appealed from discharged. Judgment of Madden C.J. restored with certain variations and omitting the order for taxation of the plaintiff's costs and payment thereof by the defendants. Liberty to apply. Money if any paid by defendants to plaintiff under judgment to be repaid. No order on motions to strike out appeal and to rescind special leave.

Solicitor, for appellant, *F. H. Tuthill*, Ballarat.

Solicitors, for respondents, *Pearson & Mann*, Ballarat.

B. L.

[HIGH COURT OF AUSTRALIA.]

BAGNALL . . . . . APPELLANT;
PLAINTIFF,

AND

WHITE . . . . . RESPONDENT.
DEFENDANT,

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ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

SYDNEY, *Aug.* 21, 22, 30.

Statute of Frauds (29 *Car. II.*, *c.* 3), *secs.* 3, 4—*Agreement by tenant to surrender leasehold—Executed agreement—Surrender by operation of law—Admissibility of parol evidence—Special leave to appeal—Difficult question of law—Case involving small amount—Rescission of special leave.*

Griffith C.J., Barton and O'Connor JJ.