[HIGH COURT OF AUSTRALIA.]

JENKINS . . . . . APPELLANT;
PLAINTIFF,

AND

LANFRANCHI . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1910.

MELBOURNE, *May* 31.

*Griffith C.J., O'Connor, Isaacs and Higgins JJ.

Practice—Appeal from Supreme Court of State—Appealable amount—Judiciary Act 1903 (*No.* 6 *of* 1903), *sec.* 35—*Special leave—Appeal as to costs alone—Competency of appeal—Objection taken at hearing—Costs.*

In ascertaining the appealable amount under sec. 35 of the *Judiciary Act* 1903 in the case of a plaintiff who has failed and seeks to appeal to the High Court the test is the amount of the sum which he has claimed and has failed to recover.

So, where a plaintiff had obtained a judgment in the Supreme Court for £600 which on appeal to the Full Court was reduced to £500,

Held, that for the purpose of an appeal by the plaintiff to the High Court the adverse judgment was in respect of £100 only, and that an appeal would not lie without leave.

Special leave to appeal from a decision of the Supreme Court as to costs alone, where those costs are in the discretion of the Supreme Court, will only be granted in very special circumstances.

Where an objection to the competency of an appeal is not taken until the hearing, the successful objector will not in general be allowed costs.

Appeal from the Supreme Court of Victoria dismissed as being incompetent, and special leave to appeal refused.

APPEAL from the Supreme Court of Victoria.

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An action was brought in the Supreme Court of Victoria by Flora Jenkins against Margaret Thorpe and Joseph Lanfranchi, in which the plaintiff sought a declaration that the plaintiff was not bound by two several contracts made between her and the defendant Thorpe, and a consequential order for the return of £600 which had been paid to an agent of Thorpe. The defendant Lanfranchi was the assignee of all the rights of Thorpe under the contracts. The action was tried before *Madden* C.J. During the course of the trial the plaintiff amended her statement of claim, and thereupon the defendant Lanfranchi paid into Court the sum of £500. *Madden* C.J. gave judgment for the plaintiff against both defendants, declaring the contracts to be void, and directing them to pay to the plaintiff £600, and also the plaintiff's costs of the action, with certain deductions. From that judgment the defendant Lanfranchi appealed to the Full Court, which allowed the appeal with costs, varied the judgment by directing the defendant Lanfranchi to pay £500 instead of £600, and ordered that the parties to the appeal should abide their own costs of the action.

The plaintiff now appealed to the High Court.

Dethridge, for the appellant.

Bryant (with him *Hotchin*), for the respondent. There is no appeal as of right in this case, for the only amount involved is £100.

Dethridge. Literally the judgment of the Full Court is a judgment for a sum amounting to £300 within sec. 35 of the *Judiciary Act* 1903, and an appeal to this Court will lie without leave. If not, the plaintiff should have special leave to appeal. The important question of law is whether, the £100 having been received by the agent of Thorpe, who afterwards assigned the benefit of the contracts to Lanfranchi, that agent did not hold it for Lanfranchi so as to effect a constructive receipt of the money by Lanfranchi. See *Rennick* v. *Robertson* (1). The plaintiff should have special leave to appeal as to costs, for the Full Court awarded them on a wrong principle.

(1) 20 V.L.R., 165; 15 A.L.T., 176.

GRIFFITH C.J. It is objected that this appeal, which is from a judgment of the Supreme Court of Victoria, is incompetent because the amount at issue, in the words of sec. 35 of the *Judiciary Act* 1903, does not amount to the value of £300. The plaintiff, who is the appellant, recovered in the Supreme Court judgment for £600. On the defendant's appeal to the Full Court that amount was reduced to £500.

The rule for determining what is the appealable amount is laid down in *Allan* v. *Pratt* (1), in which the previous case of *Macfarlane* v. *Leclaire* (2) was referred to. Lord *Selborne* said:— "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."

In the case of a judgment against a defendant he is prejudiced to the extent of the amount given against him. In the case of a plaintiff who fails he is prejudiced to the extent of the amount he fails to recover. In this case that amount is £100. It is quite clear therefore that the amount is less than £300, and that an appeal to this Court does not lie without special leave.

Mr. *Dethridge* asks for special leave to appeal, but in order to have special leave he would have to invoke a novel doctrine which has never been suggested by any text writer, and which seems to me to be as wanting in reason as in authority. There is no ground for granting special leave.

Then Mr. *Dethridge* asks us to grant special leave to appeal in view of the decision of the Full Court on the question of costs. The Supreme Court having reduced the amount of the judgment also directed that each party should abide his own costs. The amount of the costs was in the discretion of the Court, and it is not an uncommon thing in some circumstances to order each party to pay his own costs. In fact what we are asked to do is to review the discretion of the Supreme Court. Some circumstances are pointed out which go to suggest that the measure dealt out to the plaintiff was a rather hard one. But I do not know of any instance in which an appellate Court has reviewed a decision of the Court appealed from on a mere question of costs within the discretion of the Court. Therefore, although the Court has form-

(1) 13 App. Cas., 780, at p. 781. (2) 15 Moo. P.C.C., 181.

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ally jurisdiction to entertain an appeal when only the costs are in question, it would require a case of very extreme circumstances to justify us in interfering when there is no other foundation for the appeal.

The appeal, therefore, is incompetent, and the proper order is to dismiss it.

It has been pointed out that where an objection as to the competency of an appeal is only taken when the case comes on, it is only allowed without costs, on the ground that if the objection had been taken sooner the other party would not have been put to the expense of preparing for the hearing. No notice of this objection was given—on the contrary, notice of cross-appeal was given. Under all the circumstances we think we should dismiss the appeal without costs.

O'CONNOR J. concurred.

ISAACS J. concurred.

HIGGINS J. concurred.

Appeal dismissed.

Solicitors, for the appellant, *Lawson & Jardine*, for *E. H. Tuthill*, Bendigo.

Solicitors, for the respondent, *Cohen & Herman*, for *Cohen, Kirby & Woodward*, Bendigo.

B. L.