

[HIGH COURT OF AUSTRALIA.]

MILNE . . . . . APPELLANT;  
PLAINTIFF,

AND

JAMES . . . . . RESPONDENT.  
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF  
WESTERN AUSTRALIA.

*Practice—Setting aside notice of appeal to High Court—Judiciary Act 1903 (No. 6 of 1903), sec. 35 (1) (a) (2)—High Court Rules, Part II., sec. IV., r. 9—Judgment involving claim, demand or question to or in respecting property amounting to £300.*

H. C. OF A.  
1910.  
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PERTH,  
October 20,  
21, 25.  
—  
Griffith C.J.,  
Barton and  
O'Connor JJ.

The plaintiff brought an action for a declaration of right to a strip of land having upon it a wall over which the defendant claimed an easement of support for the beams supporting the upper floor of his adjoining building; he also claimed a mandatory injunction and damages. It was shown that the land and wall were worth £290, and that the plaintiff had suffered actual damage to the extent of £15.

*Held*, that the judgment was one involving a claim respecting property amounting to or of the value of £300 within the meaning of sec. 35 (a) (1) of the *Judiciary Act 1903*, and that therefore an appeal to the High Court lay without leave.

APPEAL from the Supreme Court of Western Australia upholding an order of *Burnside J.*

An action was brought by the plaintiff seeking a declaration of right to a narrow strip of land over which the defendant claimed an easement of support for beams connected with his adjoining building. The plaintiff also claimed a mandatory injunction and damages. The action was heard by *Burnside J.* who ordered



H. C. OF A. judgment to the defendant. The plaintiff gave notice of appeal to the High Court from this decision. The defendant thereupon applied to *Burnside J.* for an order setting aside the notice of appeal on the ground that the judgment did not involve directly or indirectly a claim, &c., to or respecting property of the value of £300. *Burnside J.* granted the order as asked and on appeal to the Full Court his decision was affirmed. The appellant now appealed from the order of the Full Court.

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*Draper* (*F. M. Stone* with him), for the appellant. The Full Court in upholding *Burnside J.* decided that the claim must involve in itself directly or indirectly the sum of £300.

Sec. 35 of No. 6 of 1903, however, sets out that an appeal lies when the property is of the value of £300.

[Counsel referred to *Macfarlane v. Leclair* (1); *Amos v. Fraser* (2).

On the question of values *Griffith C.J.* referred to *Falkners Gold Mining Co. Ltd. v. McKinnery* (3)].

*Pakington K.C.* (*Northmore & Hearder* with him) for the respondent. The test is the amount of damage which the plaintiff would suffer if the right asserted by the defendant were allowed, and this would necessarily be much less than the total value of the property in respect of which it is asserted.

*Draper*, in reply.

*Cur. adv. vult.*

October 25.

The judgment of the Court was read by:—

GRIFFITH C.J. The appellant having given notice of appeal to this Court from a judgment of the Supreme Court of Western Australia dismissing his action, the respondent applied to *Burnside J.* under Rule 9 of Section IV. of Part II. of the Appeal Rules to set aside the notice as being given in a case in which an appeal could not be brought as of right. The action was for a declaration of right to a strip of land about three feet in width having a wall upon it, over which the defendant

(1) 15 Moo. P.C.C., 181.

(2) 4 C.L.R., 78.

(3) (1901) A.C., 581.



claimed an easement of support for the beams supporting the upper floor of his adjoining building. The plaintiff also claimed a mandatory injunction and damages, which would include a reasonable sum by way of compensation in the nature of rent for the use by the defendant of his wall. The application to *Burnside J.* was based on the contention that the value of the matter in issue was less than £300. Upon the affidavits it may be taken that the value of the strip of land was about £130, and the value of the wall about £160, and that the plaintiff had sustained actual direct loss by reason of the presence of the defendant's beams to the extent of £15, irrespective of any right to compensation in the nature of rent.

*Burnside J.*, and the Full Court on appeal, thought that under these circumstances the value of the matter in issue was less than £300.

The question must be determined upon the assumption that the plaintiff was entitled to all that he claimed. The relevant provision of the *Judiciary Act* 1903 is sec. 35 (1) (a) (2), which provides that an appeal shall lie from any judgment 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." The learned Judges appear to have accepted the view put forward by the respondent that the test is the amount by which the plaintiff would be damnified if the right asserted by the defendant were allowed, and that this would necessarily be much less than the total value of the property in respect of which it is asserted. It is, of course, manifest that the extent to which the owner of a tenement would be damnified by the existence of an easement over it is by no means commensurate with the value of the easement to the person entitled to the easement. But in our opinion neither of these values is the test prescribed by the Act. The property in respect of which the plaintiff's claim is asserted (including damages) is of a value exceeding £300. He claims to be entitled to deal with that property as his own, while the defendant sets up a claim which, in effect, would prevent the plaintiff from dealing with it at all except for certain limited purposes, which may not be those for which it is suitable or to

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