1916
*Oct. 10.
*Oct. 18.

CHARLES W. TAIT (PLAINTIFF)....APPELLANT;

AND

THE BRITISH COLUMBIA ELECTRIC RAILWAY CO. (DEFENDANTS)........................... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Appeal—Jurisdiction—Action in county court—Concurrent jurisdiction with superior court—Construction of statute—R.S.C., 1906, c. 139, ss. 37b, 70, "Supreme Court Act"—R.S.B.C., 1911, c. 51, "Court of Appeal Act"—R.S.B.C., 1911, c. 53, "County Courts Act"—Motion for new trial—Re-hearing on appeal.

An action in a county court in British Columbia to recover $578, damages for injuries sustained, alleged to have been caused through negligence, was dismissed by the county court judge after the evidence for the plaintiff had been put in; the defendants offered no evidence, but asked for dismissal on the evidence as it stood. The plaintiff appealed to have judgment entered in his favour or, alternatively, to have the case remitted to the county court to have damages assessed, or for such further order as might be deemed proper by the Court of Appeal. The appeal was dismissed and the judgment appealed from affirmed. The British Columbia "Court of Appeal Act" (R.S.B.C., 1911, ch. 51, sec. 15, sub-sec. 3), provides that every appeal shall include a motion for a new trial unless otherwise stated in the notice of appeal. On motion to quash an appeal to the Supreme Court of Canada on the grounds that the notice prescribed by section 70 of the "Supreme Court Act," R.S.C., 1906, ch. 139, had not been given within 20 days from the date of the judgment appealed from and that the action was not of the class in which a county court had concurrent jurisdiction with a superior court, under section 37b of the "Supreme Court Act" limiting appeals to the Supreme Court of Canada.

Held, Duff J. dissenting, that no appeal could lie to the Supreme Court of Canada.

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

Per Fitzpatrick C.J. and Idington J., (Duff and Anglin JJ. *contra*).—As the case was not one in which a county court is given concurrent jurisdiction with a superior court, under section 40 of the "County Courts Act," R.S.B.C., 1911, ch. 53, the Supreme Court of Canada had no jurisdicton to entertain the appeal. *Champion* v. *The World Building Co.* (50 Can. S.C.R. 382), referred to.

Per Anglin J.—In the circumstances of the case the judgment of the Court of Appeal for British Columbia should be regarded as a judgment upon a motion for a new trial, within the meaning of section 70 of the "Supreme Court Act," R.S.C., 1906, ch. 139, and, notice not having been given as thereby provided, there could be no appeal to the Supreme Court of Canada. *Sedgewick* v. *Montreal Light, Heat and Power Co.* (41 Can. S.C.R. 639), and *Jones* v. *Toronto and York Radial Railway Co.* (Cam. S.C. Prac. 432), referred to.

Per Duff J., dissenting.—The judgment from which the appeal is asserted was not a judgment upon a motion for a new trial but a decision on the merits of the case upon an appeal by way of re-hearing by the Court of Appeal for British Columbia which had before it all the evidence necessary for that purpose. There being no ground on which either party could have demanded a new trial, section 70 of the "Supreme Court Act" had no application to the appeal to the Supreme Court of Canada. *Sedgwick* v. *Montreal Light, Heat, and Power Co.* (41 Can. S.C.R. 639) followed. Further, the County Court derived its jurisdiction in the case in question from the provisions of section 30, sub-sec. 1, of the "County Courts Act" (R.S.B.C., 1911, ch. 53), and section 22 of that Act shews that this jurisdiction is concurrent; consequently, the County Court possessed "concurrent jurisdiction" with the Supreme Court of British Columbia within the meaning of section 37*b* of the "Supreme Court Act," R.S.C., ch. 139, notwithstanding that the word "concurrent" is not employed in either of those sections of the "County Courts Act."

MOTION to quash an appeal from the judgment of the Court of Appeal for British Columbia (10 West. W.R. 523), affirming the judgment of McInnes Co.J., in the County Court of Vancouver, dismissing the plaintiff's action with costs.

The circumstances in which the motion to quash the appeal to the Supreme Court of Canada was made are stated in the head-note.

W. N. Tilley K.C. supported the motion.

R. M. Macdonald contra.

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THE CHIEF JUSTICE.—This is an action for damages brought in the County Court, in British Columbia, in which the plaintiff claimed some $560. His action was dismissed at the trial and this judgment was affirmed by the Court of Appeal. The plaintiff now appeals to the Supreme Court of Canada and the case is set down for hearing on the "Western List." No question of jurisdiction is raised in the respondents' factum, but they launched a motion on 16th June, last, returnable on the first day of this session of this court in which they asked to have the appeal quashed for want of jurisdiction. The Supreme Court Rules provide, by rule 4, that, within fifteen days after security is approved, the respondent shall move to quash for want of jurisdiction, and rule 5 provides that, upon service of the motion, all further proceedings shall be stayed unless a judge of the Supreme Court should otherwise order. The bond appears to have been made in June, although the exact date is not given, but the order allowing it is dated 2nd June, so that notice of motion was given promptly by the respondent. Notwithstanding the rules, the appellant has proceeded to print his case on appeal and file his factum and the respondents have also filed their factum, nobody appearing to pay any attention to rule 5 which stayed proceedings and which was expressly passed to avoid costs being incurred of the printing where the court might have no jurisdiction.

The jurisdiction of the court turns, in part, on the view to be taken of section 37(*b*) of the "Supreme Court Act" which gives an appeal where the amount in dispute is $250 or upwards and the court of first instance has concurrent jurisdiction with a superior court. The cases in which the County Court, in British Columbia, shall have concurrent jurisdiction

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with the Supreme Court of that province are set out in the Revised Statutes of British Columbia, ch. 53, sec. 40, and none of these covers an ordinary case of damages as to which the County Court is given express jurisdiction up to $1,000 by section 30 of the Act. If there is jurisdiction in this case, it means that every action in a county court in British Columbia, between $250 and $1,000 is appealable to the Supreme Court of Canada. There is no doubt that the Supreme Court of the province has jurisdiction in every kind of action, including the actions in which special jurisdiction is conferred upon the County Court and other inferior courts, but this cannot mean that because the Supreme Court always has concurrent jurisdiction with inferior courts an appeal therefore will lie. Our Act surely means that an appeal lies here only in a case where the inferior court is given concurrent jurisdiction with the superior court in matters which, without some express provision, would alone be cognizable by the superior court. *Vide Champion* v. *The World Building Co.*(1).

Mr. Justice Idington desires that I should add that he remains of the opinion expressed in the *Champion Case*(1).

The motion to quash should be allowed with costs.

DAVIES J. agreed that the appeal should be quashed with costs.

IDINGTON J. also agreed that the appeal should be quashed with costs, adding that he remained of the opinion he expressed in the case of *Champion* v. *World Building Co.*(1)

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DUFF J. (dissenting).—The ground of the application is that this is an appeal from a "judgment upon a motion for a new trial" within the meaning of section 70 of the "Supreme Court Act."

The circumstances are that, at the conclusion of the plaintiff's, appellant's, case, in a trial in the County Court of Vancouver, the defendants, respondents, moved for judgment and the trial judge granted judgment dismissing the action. The plaintiff, appellant, then appealed to the Court of Appeal praying, by his notice of appeal, a judgment of that court

> reversing the judgment appealed from and directing that judgment be entered for the plaintiff for the sum of $578.59 or such other sum as to the Court of Appeal may seem meet or, in the alternative, remitting the said action to the County Court to have the damages assessed or such further order or judgment as to the said Court of Appeal may seem meet.

The plaintiff's complaint upon which the action was brought was that he had been wrongfully run down by one of the defendants' cars and the defence was contributory negligence. This defence the learned county court judge held to have been established. The Court of Appeal, in hearing the appeal, was exercising the powers conferred upon it by section 116 of the "County Courts Act," section 6 of the "Court of Appeal Act" (R.S.B.C., 1911, ch. 51), and order 53, rr. 1-3*a*; these last mentioned rules providing that all appeals "shall be by way of re-hearing" and that the Court of Appeal

> shall have all the powers and duties * * * of the court or judge appealed from * * * to draw inferences of fact and to give any judgment or order which ought to have been made and to make any such further or other order as the case may require.

The plaintiff had, as above mentioned, completed his evidence in the County Court and the Court of Appeal had before it all the materials necessary to enable it to give judgment for the plaintiff, if he was in law entitled to it, on the facts established by that

evidence. The defendants having deliberately taken the position that they were entitled to judgment on the evidence as it stood were not (if the Court of Appeal should be against them on the main issue) entitled as of right to demand that the case be remitted to the County Court even for the assessment of damages. No ground was or could be suggested for granting a new trial to the appellant if he should be held not entitled to judgment on the evidence before the Court of Appeal.

The Court of Appeal gave judgment dismissing the appeal on the ground that the defence of contributory negligence was proved and that the judgment of the county court judge dismissing the action was right.

In these circumstances it seems clear that section 70 of the "Supreme Court Act" has no application. The judgment of the Court of Appeal was a judgment upon an appeal "by way of re-hearing" in which the plaintiff prayed judgment for a specified sum for which he alleged judgment ought to have been given in the County Court on the evidence adduced before that court; it was a judgment declaring that, on that evidence, the County Court was right in refusing him judgment and dismissing his action. The plaintiff now appeals to this court asking that this judgment of the Court of Appeal be reversed and that judgment be given in his favour for the sum claimed in his action.

The fact that by the plaintiff's notice of appeal in the Court of Appeal alternative relief was prayed as well as the fact that the Court of Appeal had power to deal with the appeal by remitting the case to the County Court are nothing to the purpose. By section 15, sub-sec. 3, of the "Court of Appeal Act" every appeal includes an application for a new trial unless the notice of appeal expressly states otherwise.

It could not be argued that every appeal brought by

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such a notice is necessarily a "motion for a new trial" within section 70; it could not be so argued for the reason that until you looked into the merits you could not say that on the materials before the Court of Appeal it was not the duty of the Court of Appeal to give judgment in favour of the appellant.

That is precisely applicable to this case in which the Court of Appeal had, in fact, all the necessary materials before it and the defendants (respondents) had elected at the trial to stand on that material and to ask that the issues between them and the plaintiff should be determined according to the effect of that material.

In *Sedgwick* v. *Montreal Light, Heat and Power Co.*(1), at page 642, this court unanimously concurred in the following statement of the law:—

> In my view the words "motion for a new trial," in section 70, should be read as meaning "motion for a new trial only" and not as including cases in which the motion is substantially for other relief and only as an alternative for a new trial;

and, in that case, the court having decided unanimously that a motion for judgment *non obstante veredicto* could not succeed, but that, on the ground of misdirection, a new trial should be granted pursuant to the alternative claim in the appellant's motion in the court below, for the reason mentioned in the above quotation from the judgment of my brother Anglin, held that the appeal was not an appeal from a judgment on a motion for a new trial and that section 70 had, therefore, no application.

The second objection was suggested from the bench —an objection of which I desire to speak with the greatest respect because it has the support of the opinion of my brother Idington expressed in his judg-

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ment in *Champion* v. *The World Building Co.*(1), at page 386. The objection arises in this way: The jurisdiction of this court to entertain an appeal such as this, where the action out of which the appeal arises did not originate in a superior court, rests upon section 37, sub-section *b*, of the "Supreme Court Act" which provides that in such a case, in the provinces of Nova Scotia, New Brunswick, British Columbia and Prince Edward Island, this court shall possess jurisdiction to entertain an appeal from any final judgment of the highest court of final resort where—

the sum or value of the matter in dispute amounts to two hundred and fifty dollars or upwards, and in which the court of first instance possesses concurrent jurisdiction with a superior court.

The point made against the appeal is that the jurisdiction of the County Court of Vancouver to entertain the plaintiff's action was not a jurisdiction that satisfied the condition

the court of first instance possesses concurrent jurisdiction with a superior court.

Were it not for the difference of opinion among the members of this court I should have said that the objection was demonstrably untenable. The jurisdiction of the County Court to entertain the plaintiff's action is given by section 30 of the "County Courts Act," sub-sec. 1, and the powers the County Court possessed in exercising that jurisdiction are set forth in section 22. These provisions are as follows:—

Sec. 22.—Every county court shall, as regards all causes of action within its jurisdiction for the time being, have power to grant and shall grant in any proceeding before such court such relief, redress, or remedy, or combination of remedies, either absolute or conditional, and shall in every such proceeding give such and the like effect to every ground of defence or counterclaim, equitable or legal (subject to the provision next hereinafter contained), in as full and ample a manner as

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might and ought to be done in the like case by the Supreme Court. 1905, ch. 14, sec. 22.

Sec. 30, sub-sec. 1.—In all personal actions where the debt, demand, or damages claimed do not exceed one thousand dollars.

Within the natural meaning of the words "concurrent jurisdiction" clearly the jurisdiction of the County Court in respect of actions coming within section 30, sub-sec. 1, is "concurrent" with that of the Supreme Court. It is said, however, that in applying section 37, sub-sec. *b*, to British Columbia a restricted meaning must be attached to the phrase "concurrent jurisdiction;" that the classes of actions falling within the description contained in sub-sec. *b* must be limited to actions brought before the County Court under the authority of section 40 of the "County Courts Act" which establishes and defines the equitable jurisdiction of county courts and in which this language appears:—

The said county courts shall also respectively have and exercise, concurrently with the Supreme Court, all power and authority of the Supreme Court in the actions or matters hereinafter mentioned.

A good many reasons could be adduced to shew the fallacy of this line of argument but I shall limit myself to two. First. The provisions of the Act relating to the jurisdiction conferred by section 30 are as apt and sufficient to shew that the jurisdiction thus conferred is "concurrent" with the jurisdiction of the Supreme Court as is the language quoted in section 40 although in the first mentioned provisions the word "concurrent" itself is not employed.

Secondly. The underlying assumption of the argument is that sub-section *b* of section 37 of the "Supreme Court Act," in its application to appeals from British Columbia, must be governed in the interpretation of it by reference to the British Columbia legislation touching the jurisdiction of the county

courts, in other words, that sub-section *b*, as regards such application, was framed with a view to such provisions. If that be the assumption upon which sub-section *b* is to be read, it is sufficiently obvious that, consistently with the supposition that the legislature was not actuated by the merest caprice, the argument cannot be sustained. That is so, for this reason—which would occur immediately to persons familiar with the operation of the county court jurisdiction in British Columbia. By far the most important jurisdiction of the county courts in many respects is what is known as the "mining jurisdiction," "Mineral Act," R.S.B.C., 1911, ch. 151, sec. 140; "Placer Mining Act," R.S.B.C., 1911, ch. 165, sec. 154. The county court by virtue of the provisions of the "Mineral Act" and the "Placer Mining Act" has "all the jurisdiction and powers of a court of law and equity" in a great variety of actions in respect of subjects touching mines, the business of mining, water-rights relating to mining, including among other things personal actions where the debt or damages claimed arise directly out of the business of mining, suits for foreclosure or redemption in relation to mining property, actions of ejectment or trespass in relation to such property, actions between employers and employees, actions for supplies to persons and companies engaged in mining, in all cases without limitation as regards amount or value. It is, of course, inconceivable, or perhaps one should say hardly conceivable, that any legislature dealing with the subject of appeals to this court arising out of actions in county courts in British Columbia should have deliberately enacted, or in its enactments have intentionally used language having the effect that the jurisdiction in appeal of this court should be limited to appeals aris-

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ing out of actions of the classes enumerated in section 40 of the "County Courts Act" (where, speaking generally, the amount or the value of the thing involved is limited to $2,500), thereby denying the right of appeal to suitors in the "mining jurisdiction" of the county court in cases involving tens or hundreds of thousands of dollars. Yet such is, beyond question, the intention that must be attributed to the Dominion Parliament in enacting section 37*b* in so far as it relates to British Columbia in order to sustain the objection I am discussing.

The motion should be dismissed with costs.

ANGLIN J.—Although by his notice of appeal to the Court of Appeal for British Columbia the plaintiff nominally asked for an order directing judgment to be entered in his favour, or in the alternative remitting the action to the County Court to have damages assessed, the action, having been dismissed at the close of the plaintiff's case and without any evidence for the defence having been heard, practically the only relief open was a new trial. Substantially the plaintiff's motion to the Court of Appeal was for a new trial only, and the judgment of the Court of Appeal should, in my opinion, be regarded as a judgment upon a motion for a new trial within the meaning of that phrase in section 70 of the "Supreme Court Act." The notice prescribed by section 70 not having been given, I think the appeal should, on this ground, be dismissed.

This disposition of the motion is quite consistent with the decisions in *Sedgewick* v. *Montreal Light, Heat and Power Co.*(1), and *Jones* v. *Toronto and York Radial Railway Co.*(2), p. 432.

(1) 41 Can. S.C.R. 639. (2) Cam. S.C. Prac. (2 ed.) 432.

I adhere to the view which I expressed in *Champion* v. *The World Building Co.*(1) as to the construction of section 37*b* of the "Supreme Court Act."

Appeal quashed with costs.

Solicitors for appellant: *Bird, Macdonald & Ross.*
Solicitors for respondents: *McPhillips & Smith.*

(1) 50 Can. S.C.R. 382.