

1944
 *Feb. 1.
 *March 10.

HYMIE SAPERSTEIN (PLAINTIFF)... APPELLANT;
 AND
 KENNETH CHARLES DRURY }
 (DEFENDANT) } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH
 COLUMBIA

Appeal—Jurisdiction—Amount in controversy in the appeal (Supreme Court Act, R.S.C. 1927, c. 35, s. 39).

MOTION to quash for want of jurisdiction an appeal by the plaintiff from the judgment of the Court of Appeal for British Columbia (1) in that the amount or value in controversy in the appeal to this Court did not exceed the sum of \$2,000 and no special leave to appeal had been obtained.

The plaintiff had claimed damages (claimed in the statement of claim at \$10,000 general damages and \$735 special damages) against the present respondent and three other persons for breach of an alleged agreement to lease to the plaintiff certain premises owned by the defendants. Two of the defendants, who resided outside the jurisdiction, were not served with the writ of summons, and the action proceeded against the present respondent and the other defendant. The trial Judge, Robertson J., in a judgment written subsequent to the trial, held that the present respondent had no authority from his co-owners to enter into the agreement (as the trial Judge found he had done) and dismissed the action as against the said other defendant, but he held that the present respondent would be liable for damages for breach of warranty of authority and that the plaintiff should be allowed to amend his statement of claim by pleading a claim therefor. The formal

*PRESENT:—Rinfret C.J. and Davis, Kerwin, Hudson, Taschereau and Rand JJ.

(1) 59 B.C. Rep. 281; [1943] 3 W.W.R. 193; [1943] 4 D.L.R. 191.

judgment at trial gave the plaintiff liberty to amend his statement of claim by inserting therein a claim for damages against the present respondent for breach of warranty of authority, adjudged that the plaintiff was entitled to damages against the present respondent for such breach of warranty, to be assessed, and directed an enquiry as to damages. No assessment of damages was made. (No evidence as to damages under the original claim for damages was given at the trial, it being agreed that if there should be a finding for the plaintiff, there should be a reference as to the damages). An appeal by the present respondent was allowed by the Court of Appeal for British Columbia (1), which dismissed the action as against him. The plaintiff appealed to this Court and the respondent moved to quash the appeal as aforesaid.

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SAPERSTEIN
v.
DRURY.
—

G. Henderson for the motion.

G. J. McIlraith contra.

THE COURT.—This is a motion to quash for want of jurisdiction an appeal by the plaintiff from the judgment of the Court of Appeal for British Columbia reversing the judgment at the trial and dismissing the action. As pointed out by the Chief Justice of British Columbia, the judgment at the trial afforded the plaintiff a relief that had not been sought, upon a ground that was not pleaded or suggested in argument. In accordance with leave granted by the trial judgment, the plaintiff amended his statement of claim but did not claim any specific amount of damages in connection with the alleged new cause of action.

The sums which had already been claimed have reference only to the cause of action originally put forward by the plaintiff, upon which he did not succeed even before the trial judge. The most that the plaintiff could secure by his appeal to this Court would be the restoration of the trial judgment. The material filed on this application does not establish that more than two thousand dollars is involved in the appeal; neither does it appear from the record; and the application must therefore be granted with costs.

Motion granted with costs.

Solicitor for the appellant: *P. J. Sinnott*.

Solicitors for the respondent: *Crease, Davey, Fowkes, Gordon & Baker*.