

## ROBERTSON ET AL. v. MURPHY

ON PROPOSED APPEAL FROM THE COURT OF APPEAL FOR  
MANITOBA

1939

\* Feb. 7.  
\* March 21.

*Appeal—Jurisdiction—“Judgment directing a new trial,” Supreme Court Act (R.S.C., 1927, c. 35), s. 36.*

An order made in the action directed that a demurrer pleaded in defence and certain other questions of law arising should be argued and decided before evidence was given or any issue of fact tried. After argument on said questions of law, judgment was given dismissing the action (except as against certain defendants whose position was not then under consideration), it being held in effect that no cause of action was disclosed by the statement of claim. The Court of Appeal for Manitoba, being of opinion that said questions of law should not have been disposed of before the trial, set aside the judgment, and directed that defendants should be entitled to raise on the trial of the action “any demurrer or points of law taken by them in their statement of defence” and that plaintiff should “have leave to amend his statement of claim as he may be advised.”

*Held:* The judgment of the Court of Appeal was not a final judgment nor a “judgment directing a new trial” within the contemplation of s. 36 of the *Supreme Court Act* (R.S.C., 1927, c. 35); and there could be no appeal therefrom to the Supreme Court of Canada.

MOTION by certain of the defendants for an order granting special leave to appeal to this Court from the judgment of the Court of Appeal for Manitoba.

In the action the plaintiff alleged that he was a fireman and a member of the Brotherhood of Locomotive Firemen

PRESENT:—Duff C.J. and Rinfret, Cannon, Crocket, Davis and Kerwin JJ.

1939  
ROBERTSON  
ET AL.  
v.  
MURPHY

and Enginemen and that a certain agreement covering re-organization of Seniority Districts of Engineers, Firemen, etc., had been wrongly interpreted and acted upon, and he claimed damages against certain defendants, certain declarations and other relief. Adamson J., of the Court of King's Bench for Manitoba, ordered that the demurrer contained in the statement of defence of certain defendants and certain questions of law arising in the action should be argued and decided before any evidence was given in the action or any question or issue of fact was tried. Argument was heard by Adamson J. on said demurrer and other questions of law and judgment was delivered thereon dismissing the action (except as against certain defendants whose position was not under consideration in the application). The plaintiff appealed to the Court of Appeal for Manitoba. That Court allowed the appeal and set aside the judgment of Adamson J. Its judgment provided that "notwithstanding this order and judgment" defendants should be "entitled to raise on the trial of this action any demurrer or points of law taken by them in their statement of defence"; and that plaintiff "have leave to amend his statement of claim as he may be advised." The view of the Court of Appeal was that the questions dealt with by Adamson J. ought not to have been disposed of before the trial. Special leave to appeal to the Supreme Court of Canada was refused on an application to the Court of Appeal for Manitoba, and the present application was made to this Court.

*O. M. Biggar K.C.* for the motion.

*E. F. Newcombe K.C.* contra.

The judgment of the Chief Justice and Rinfret, Crocket, Davis and Kerwin JJ. was delivered by

THE CHIEF JUSTICE.—This is an application for leave to appeal from the judgment of the Court of Appeal for Manitoba.

The question to be decided is whether the judgment is an appealable judgment under section 36 of the *Supreme Court Act*. Admittedly, it is not a final judgment, but it is argued that it is "a judgment \* \* \* directing a new trial" within the meaning of that section.

By an order of the 16th of July, 1937, Mr. Justice Adamson directed that the

demurrer contained in the statement of defence of the defendants other than Canadian National Railway Company, Ferguson and Hay and the following questions of law \* \* \* shall be argued and decided before any evidence is given in the action or any question or issue of fact is tried and that the said questions of law be set down \* \* \* for argument

1939  
ROBERTSON  
ET AL.  
v.  
MURPHY  
Duff C.J.

on a date mentioned.

This order was obviously made under marginal rule 466 of the Manitoba Rules of Court.

The learned judge heard argument on all the questions and held in effect that no cause of action was disclosed by the statement of claim. By his formal judgment of the 17th of January, 1938, he dismissed the action against all the defendants other than the Canadian National Railway Company, Ferguson and Hay.

On appeal by the plaintiff to the Court of Appeal, that Court set aside the judgment of Mr. Justice Adamson and directed that the defendants should be at liberty to raise on the trial of the action "any demurrer or points of law taken by them in their statement of defence," and that the plaintiff should "have leave to amend his statement of claim as he may be advised."

The view of the Court of Appeal was that the questions dealt with by Mr. Justice Adamson ought not to have been disposed of before the trial.

We are satisfied that this judgment is not a "judgment \* \* \* directing a new trial" within the contemplation of section 36. The application will, therefore, be dismissed with costs.

CANNON, J.—I would dismiss the motion with costs.

*Motion dismissed with costs.*

Solicitors for the applicants: *Hudson, Ormond, Spice, Swift and Macleod.*

Solicitors for the respondent: *Andrews, Andrews, Burbidge & Bell.*