1922
*Feb. 7.

ST. LAWRENCE UNDERWRITERS' AGENCY OF THE WESTERN ASSURANCE COMPANY (APPELLANT);

AND

E. P. FEWSTER, (DEFENDANT)....RESPONDENT;

AND

J. MARCHIORI (PLAINTIFF).

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Appeal—Jurisdiction—Action by nominal plaintiff dismissed—Motion asking payment of cost by real plaintiff—"Judicial proceeding"—"Final judgment"—Equal division of the court on motion to quash—"Supreme Court Act", R.S.C. (1906) c. 139, s. 37—"Supreme Court Act" as amended by 10 & 11 Geo. V., c. 32.

In May, 1920, the plaintiff obtained judgment before the County Court against the defendant for damages caused by an automobile collision but on appeal the action was dismissed. The costs of the trial and appeal having been taxed at $1,165.05, execution against the plaintiff was returned *nulla bona*. On February 24th, 1921, a motion was made by the respondent for an order that the appellant, on whose behalf, as insurer of the plaintiff, the action had really been prosecuted, should pay the respondent's costs. The judgment granting the motion was affirmed by the Court of Appeal, and on motion to quash an appeal to this court:

Held, Idington and Brodeur JJ. dissenting, that, as the action had been begun before the 1st of July, 1920, the right of appeal to this court must be determined upon the provisions of the "Supreme Court Act" as they stood before the amendments of 10 & 11 Geo. V., c. 32, which became effective on that date.

---

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

Per Davies C. J. and Duff and Anglin JJ.—The judgment granting the motion is not susceptible of appeal as a "final judgment" under sect. 37 of the "Supreme Court Act", R.S.C. (1906), c. 139. Brodeur J. *contra.*

As three of the six judges were of opinion that the court had no jurisdiction, it was considered that a hearing on the merits would be futile and the appeal was dismissed without costs.

MOTION to quash an appeal from the judgment of the Court of Appeal for British Columbia which, on equal division of the court, had affirmed the judgment of Grant J. and maintained a motion for an order as stated in the head-note.

The plaintiff sued in the County Court for damages to his automobile sustained in a collision with that of the defendant. He recovered judgment in May, 1920, for $597 and costs. On appeal to the Court of Appeal of British Columbia this judgment was reversed, and the action was dismissed with costs. The defendant's costs of the action and appeal were taxed at $1,165.05. Execution against the plaintiff was returned *nulla bona.* The defendant having ascertained that the action had in fact been brought by the St. Lawrence Underwriters in the name of the plaintiff, whom they had insured, applied in February, 1921, to the County Court judge, upon notice, for an order that his taxed costs should be paid by the St. Lawrence Underwriters. This application was granted and, on appeal, the order of the County Court judge was affirmed, the court being equally divided. The St. Lawrence Underwriters, having obtained leave from the Court of Appeal, appealed to the Supreme Court. The defendant moved to quash the appeal.

Tilley K.C. for the motion.—The motion to the County Court judge was made in the action which was instituted before July, 1920. The amendments to

1922

ST. LAWRENCE UNDERWRITERS' AGENCY OF THE WESTERN ASSURANCE COMPANY v. FEWSTER

the "Supreme Court Act" of that year do not apply.—The Court of Appeal had no jurisdiction to grant leave. The appeal, if any, lies under s. 37 of the former statute. The judgment from which it is sought to appeal is not a "final judgment" within the definition in the "Supreme Court Act" prior to 1920.

Heighington contra.—The motion to compel the appellants to pay the defendant's costs was a substantive proceeding. The amendments of 1920 apply and, leave having been obtained, the appeal lies. If not, there is a right of appeal under s. 37 of the former Act. The order of the County Court judge disposes of a substantive right of one of the parties and is therefore a "final judgment".

THE CHIEF JUSTICE.—In the opinion of a majority of the members of the court, this action having been begun before the first of July, 1920, the right of appeal must be determined upon the provisions of the "Supreme Court Act" as they stood before the amendments which became effective on that date. Three of the judges (the Chief Justice, Mr. Justice Duff, and Mr. Justice Anglin) hold the view that, having regard to its incidental nature as a step taken to secure the realization of the judgment for costs rendered against the plaintiff, the application made to the County Court judge for an order that those costs should be paid by the appellants as the real plaintiffs was not a "judicial proceeding" within the meaning of that term as used in the definition of "final judgment" enacted by 3 & 4 Geo. V., c. 51, s. 1, (*Svensson v. Bateman,* (1), and that the judgment from which it is

(1) [1909[42 Can. S.C.R. 146.

sought to appeal is therefore not a "final judgment" appealable to this court under s. 37 of the "Supreme Court Act" (R.S.C., 1906, c. 139.)

As the appeal is to be heard immediately and by the court as now constituted it is obvious that the opinion of three members of the court adverse to its jurisdiction will necessarily be fatal to the appellant's success. It would therefore seem to be futile to hear argument on the merits, which may not be considered by one-half of the court, with whom dismissal of the appeal is a foregone conclusion.

It would seem to be the better course that the motion to quash should be refused and the appeal itself now dismissed—both without costs.

IDINGTON J. (dissenting).—The respondent Fewster was sued in one of the county courts of British Columbia by one Marchiori for damages done to his automobile, and recovered judgment for $597.52 and costs.

Upon appeal the Court of Appeal reversed the judgment with costs and that judgment was duly deposited with the registrar of the County Court as provided for by one of the rules of court and thereupon the judgment derived its effect from that rule, which reads as follows:—

> 21. When the Court of Appeal has pronounced judgment, either party may deposit the same, or an office copy thereof, with the registrar of the County Court, and upon being so deposited such judgment shall be filed and may be enforced as if it had been given by the County Court.

Thereupon an execution was issued by said county court against said Marchiori and duly returned *nulla bona* by the sheriff. That return was followed by an application by the respondent Fewster to the said court to have the appellant ordered to pay the costs so awarded.

1922

ST. LAWRENCE UNDERWRITERS' AGENCY OF THE WESTERN ASSURANCE COMPANY v. FEWSTER

Idington J.

The grounds alleged were that the appellant had in fact instigated Marchiori to bring the action. And the learned senior judge of the county court granted said order without giving any reasons.

The appellant had never been made a party to the said action, or in any way been served with notice thereof, or relating thereto, until said notice after the judgment and execution and return thereof as aforesaid.

The appellant herein appealed from said order to the Court of Appeal and contended there was no jurisdiction in the county court to make such an order.

That court, on equal division, dismissed said appeal, the learned Chief Justice and Mr. Justice Galliher being in favour of allowing said appeal and the other learned justices Martin and McPhillips, being in favour of dismissing it.

Section 161 of the "County Courts Act," R.S.B.C. (1911) c. 53, is as follows:)

> 161. All the costs of any action or proceeding in the court not herein otherwise provided for shall be paid by or apportioned between the parties in such manner as the judge shall think fit, and in default of any special direction shall abide by the event of the action, and execution may issue for the recovery of any such costs in like manner as for any debt adjudged in the said court.

It is difficult to see how the county court judge could have power to make such an order under said provision, especially as to the costs directed by the Court of Appeal which were specifically awarded by the said court and liability therefor also specifically determined and finally disposed of by virtue of said order and the Rule 21 first above quoted.

I only refer to this to shew the importance of the questions raised and the reason for that court, though so divided, agreeing to allow and granting an order giving leave to bring an appeal to this court.

The power to grant such leave to appeal here was given by section 37 of c. 32 of 10-11 Geo. V., assented to the 16th June, 1920, and radically amending the "Supreme Court Act," and which in the enacting part of the new section 37 and subsec. (a) thereof, reads as follows:

37. Subject to sections thirty-eight and thirty-nine, an appeal shall lie directly to the Supreme Court from any final judgment of a provincial court, whether of appellate or original jurisdiction, other than the highest court of final resort in the province, pronounced in a judicial proceeding which is not one of those specifically excepted in section thirty-six—

(a) in any case by leave of the highest court of final resort having jurisdiction in the province in which the proceeding was originally instituted; provided that except in cases in which such highest court of final resort has concurrent jurisdiction with the court from which it is sought to appeal, special leave shall not be granted in any case which is not appealable to such highest court of last resort and which has not been heretofore appealable to the Supreme Court; and, . . .

That was brought into force by the following:—

4. This Act shall come into effect on the first day of July, 1920; but in regard to appeals in proceedings which shall have been begun in the court or before the body having original jurisdiction therein before that day, the Supreme Court shall nevertheless continue to possess and exercise the jurisdiction conferred by the sections hereinbefore repealed.

The said proceeding against the appellant was first taken on the 24th February, 1921, was quite independent of the original cause of action and had no relation thereto, but to the allegation that the affidavit and exhibits thereafter referred to set forth as the foundation for the motion.

In short it was a substitution for any new action which might have been founded on the facts alleged as to the instigation of what in the final result might have been declared unfounded in law.

1922

ST. LAWRENCE UNDERWRITERS' AGENCY OF THE WESTERN ASSURANCE COMPANY v. FEWSTER

Idington J.

It was far more such an independent proceeding than is an interpleader issue founded on a judgment and in way of enforcing execution thereof which was declared long ago to be a new proceeding and the resulting judgment therein appealable here. The decision of the Privy Council in the case of *Macfarlane* v. *Leclaire*, (1) is presented in Cameron's Supreme Court Practice as the basis of our jurisprudence in that regard.

I submit that the order in question herein as clearly was as that the beginning of a new collateral proceeding under the Act giving the Court of Appeal power to grant that leave which it has given to come here. Hence I hold the motion to quash such an appeal should not be granted.

I am unable to understand why the imperative words of the first part of the above quoted section bringing the amending Act into force on 1st July, 1920, are to be discarded when invoked in a case where the proceeding in question clearly began after that date, and clearly had, for reasons already assigned, no legal connection therewith.

At all events if that county court proceeding and judgments are to be held as so connected with the order in question as to be reasonably invoked as a barrier to the other parts of the amending Act expressly giving the power to the Supreme Court of Alberta to give such leave as given, then surely the right to appeal still exists within the remaining part of the said section 4.

I alternatively, therefore, submit that the judgment now appealed from herein, if to be so based on the appeal from the Court of Appeal as arising out of the county court suit, is appealable without leave under

(1) [1862] 15 Moore P.C. 181.

the provisions of the "Supreme Court Act" providing for appeal here where the jurisdiction was concurrent with that of the British Columbia Supreme Court jurisdiction.

If such a jurisdiction existed in any case in any court as to make such an order as in question, certainly it was also in the case here in question within the British Columbia Supreme Court's jurisdiction.

It was a power which the judge of the court must be presumed to have exercised not by virtue of anything in way of trying the county court suit, or anything in the way of trying to enforce said judgment therein, as in the case of *Svensson* v. *Bateman*, (1) and in exercising such a power he must have been, instead of leaving the parties to try it out, in a new action attempting to enforce or give a remedy for an alleged wrong which might well have been, and more properly, asserted by suing for the amount involved in the Supreme Court of British Columbia.

I by no means think that this is the correct view of the case presented on the motion to quash, but submit it is logically the alternative to be adopted if the latter part of said section 4 is to override the first, as urged upon us.

If the new motion is so bound up, however, with the case as to come within the latter part of the section, then surely an appeal must lie just as in any other like independent issue arising in the case in which the right of appeal is preserved by the latter part of the section.

In either of the foregoing alternatives by way of testing the power of the learned judge, I think the appeal should not be quashed, but the motion dismissed and the appeal be heard in due course.

(1) 42 Can. S.C.R. 146.

1922

ST. LAWRENCE UNDERWRITERS' AGENCY OF THE WESTERN ASSURANCE COMPANY v. FEWSTER

Brodeur J.

DUFF J.—I concur with the Chief Justice.

ANGLIN J.—I concur with the Chief Justice.

BRODEUR J.—I am of opinion that the judicial proceeding which has given rise to this appeal is not the original action in the county court but the application made by the respondent to have the appellant ordered to pay the costs awarded on the original action. *Turcotte* v. *Dansereau* (1); *King* v. *Dupuis* (2); *Lefeuntun* v. *Véronneau* (3); *Macfarlane* v. *Leclaire* (4).

This application having been made on the 24th of February, 1921, then the right of appeal is to be determined by the amendment to the "Supreme Court Act" of 1920 (ch. 32 of 10-11 Geo. V, s. 4). The appellants, under the provisions of the latter amendment, have obtained leave; then this appeal is properly before us and should be heard. This is a final judgment appealable to this court under section 37 of the "Supreme Court Act."

The motion to quash should be dismissed.

But as we are equally divided on this question of jurisdiction and as it is obvious that the opinion of three members of the court adverse to its jurisdiction will be necessarily fatal to the appellants' success, it would therefore be futile to hear arguments on the merits.

The appeal then should be dismissed but without costs.

(1) [1896] 26 Can. S.C.R. 578.
(2) [1898] 28 Can. S.C.R. 388.
(3) [1893] 22 Can. S.C.R. 203.
(4) 15 Moore P.C. 181.

MIGNAULT J.—I concur in the opinion of the Chief Justice that the right of appeal in this case must be determined upon the provisions of the Supreme Court Act before its amendments in 1920.

Inasmuch as three members of the court are of the opinion that the order complained of is not a final judgment within section 37 of the Supreme Court Act, it is obvious that the appeal could not succeed and, without expressing any opinion as to the nature of the judgment, I concur in the dismissal of the appeal without costs.

Motion dismissed without costs.

Appeal dismissed without costs.