

LEONARDO LUCIDO AND ROMAN LUCIDO, PLAINTIFFS AND APPELLEES, VS. ROMUALDO VITA, DEFENDANT AND APPELLANT.

G.R. Nos. 7257 and 7258. October 08, 1913

Ponente: JOHNSON, J.

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JOHNSON, J.:

Each of these actions was originally commenced in the court of the justice of the peace of the pueblo of Nagcarlan, Province of Laguna. The first (No. 7257) was an action of forcible entry and detainers. The second (No. 7258) was an action to recover a sum of money due from the defendant to the plaintiffs for the use and occupation of the same lands involved in the first action (No. 7257). Each of said actions was commenced and prosecuted separately in the court of the said justice of the peace, as well as in the Court of First Instance of the Province of Laguna. In each case the judgment of the justice of the peace upon a demurrer was in favor of the defendant. In each case the judgment of the Court of First Instance was in favor of the plaintiffs. The defendant is the appellant in each of said causes in this court. In the Supreme Court said causes, by reason of their intimate relation, have been heard and discussed together. We can see no reason why, in view of the questions presented, the facts and the law relating to each cause may not be discussed in the same decision.

It may be noted that the complaints which constituted the basis of the actions in the court of the justice of the peace also constituted the basis of the plaintiffs' actions in the Court of First Instance.

The plaintiffs alleged in their complaint in the first cause (No. 7257) the following facts:

"I. Plaintiffs and defendant are both residents of the municipality of Nagcarlan, Province of Laguna, Philippine Islands.

"II. The plaintiffs are the owners of each and all of the following parcels situated in said municipality of Nagcarlan, Laguna, P. I.:"

[Here follows a technical description of the lands in question.]

"III. The plaintiff has been in possession of each and all of said parcels of land as lessee from January 5, 1892, to date, under the condition expressly stipulated that he would pay therefor as semiannual rent the sum of 48 pesos three and a half reales Mexican currency, equal and equivalent to the sum of P48.44 Philippine currency, payable at the end of each half year.

"IV. The defendant lessee has not paid the rent due on said parcels of land from February 5, 1892, to January 5, 1904, despite the demands made upon him, wherefore the plaintiff Leonardo Lucido instituted in this court an action for dispossession against the defendant in February of said year, said action having been terminated by and in virtue of a compromise between said parties, set forth in the records of the justice of the peace court as follows:

" 'In the justice of the peace court of Nagcarlan, March 2, 1904; the parties to this suit being present, the justice of the peace called for the plaintiff, who stated that he affirmed the complaint in all its parts and begged the court to proceed to trial and to render judgment in his favor for the remedies requested in his complaint. Being

informed thereof, the defendant answered that he had not refused to pay the corresponding rent, as to Manuel Lucido in his lifetime, part of the sum leased as also to Roman España other sums for the same reason and finally I paid once to Mariano Manas a sum of twenty-five pesos on account, said Manas being the authorized agent of the present plaintiff Leonardo Lucido and for this reason I beg the court, as well as the plaintiff, not to take away from me the lands I hold on lease, for whatever be the sum resulting from the settlement I am ready to have made, I promise to pay four hundred pesos until the 10th of the present month of March, 1904, and hereafter a hundred pesos at the end of each month in case I should owe a larger sum. The plaintiff agreed to all the defendant said and proposed to the court that for determination and examination of the instruments of payment mentioned by the defendant for calculation of the sum that he owed on account of the lease a commission be appointed of two persons, one for each party, naming Camilo Lirio, a resident of this town. Being informed thereof, the defendant on his part named Agripino Viriña. In such condition this case was declared closed, with the costs against both parties and they signed to which I certify.

(Sgd.) " 'PEDRO SUEZA,

" 'Auxiliary Justice of the Peace.

" 'For the plaintiff:

(Sgd.) " 'FLORENCIO MANALO.

(Sgd.) " 'ROMUALDO VITA.'

"V. The defendant has not complied with his obligation to pay the sum of four hundred pesos (P400) on March 10, 1904, as he promised in the foregoing compromise, nor has he at any time and up to date paid it, in spite of the due demands that have been repeatedly made upon him.

"VI. Settlement of the plaintiff's debt for rent due from January 5, 1892, up to January 5, 1904, is still pending and will in any event be the subject of another action.

"VII. Nor has the defendant paid, either wholly or partially, the rent due for lease of said nine parcels of land from January 5 of the present year, 1910, being twelve semiannual payments due amounting to five hundred and eighty-one pesos and twenty-eight centavos (P581.28) Philippine currency, in spite of the friendly and repeated demands made upon him and in spite of the fact that over three days have elapsed since the last demand duly made upon him.

"VIII. In view of the foregoing facts, on the eleventh of the present month, the plaintiffs demanded of the defendant that he immediately vacate the nine parcels of land above described and deliver them without loss of time to the plaintiffs, considering the lease terminated from that time, if he had not already done so, with the notice that if he did not do this he would be sued for a thousand pesos (P1,000) a year from January 5, 1910, in the corresponding action for continued occupation and for losses and damages, but still said defendant refused to do so.

"IX. The plaintiffs will annually suffer losses and damages by the defendant's retention of said nine parcels of land, until the same are finally delivered to them.

"Therefore, the plaintiffs beg the court, after due proceedings, to render judgment in their favor and against the defendant: (1) Decreeing dispossession and removal from each and all of the nine parcels of land above described by the defendant and restitution of each and all of them to the plaintiffs, for failure in payment of rent due and also for illegal detainer thereof; (2) sentencing the defendant to pay to the plaintiffs the sum of four hundred pesos (P400) Philippine currency, to which he obligated himself in the compromise of March 4, 1904, with legal interest from the 11th of said month of March, 1904, when he became delinquent; (3) sentencing the defendant to pay the rent due for the twelve six-month periods that have passed since January 5, 1904, up to January 5, 1910, that is,

the sum of five hundred and eighty-one pesos and twenty-eight centavos (P581.28) Philippine currency, with interest from the date of the filing of this complaint; (4) sentencing the defendant to pay the plaintiffs the sum of a thousand pesos (P1,000) a year from January 5, 1910, until restitution be made to the plaintiffs, or the proportional part for the time elapsed, for losses and damages; and (5) sentencing the defendant to pay the costs of the present suit.

"The plaintiff further asks the court for any other remedy in his favor that may be proper in equity and justice.

"Manila, for Laguna, P. I., March 15, 1910."

In the second cause (No. 7258) the plaintiffs alleged as the basis of their right the following facts:

"I. The plaintiffs and the defendant are both residents of Nagcarlan, Province of Laguna, P. I.

"II. The plaintiffs are the owners of nine (9) parcels of land, five situated in the barrio of Ibabang, Balinakon, and four on the barrio of Oples, of this Municipality of Nagcarlan, Laguna, P. I., the respective descriptions whereof need not be entered in this complaint for the purposes of this suit, which the defendant has occupied and possessed as lessee from January 5, 1892, up to January 5, 1904, under the expressly stipulated condition that he would pay as semiannual rent for the said nine parcels of land the sum of 48 pesos and three and a half reales Mexican currency, equal and equivalent to the sum of P48.44 Philippine currency.

"III. The defendant has not paid the rent due during said lapse of time, amounting to the sum of P1,162.56 Philippine currency, with the exception of the sums of P25, P50, and P300, more or less, receipts having been issued to him, which he paid on account of his debt because of said rent, for which reason the plaintiff, Leonardo Lucido, for himself and on behalf of his brother, the other plaintiff, Roman Lucido, had to file suit for dispossession against the defendant in this court on February 13, 1904, the matter having been terminated by virtue of a compromise between the parties, drawn up in the following terms:"

[Same as the compromise appearing in Clause IV of the complaint in case No. 7257, ante.]

"IV. The defendant, although duly invited and requested by the plaintiffs and by the commission appointed in the compromise above quoted, refused to concur in the settlement of his debt, alleging that he had nothing to settle and that he had paid everything, when in fact he is still in debt to the plaintiffs for the rent of said nine parcels of land and said settlement is still pending, and because of this refusal of the defendant the commission resigned.

"V. If a settlement should be made by the parties in the sense above set forth, the following result would appear:

Credit

Debit

Rent due for the six-month periods included between the dates January 5, 1892, and January 6, 1904, at M8.44 each.

P1,102.56

Payments on account, with receipts issued to the defendant

P25.00

50.00

300.00

Amount promised for March 10, 1904, which is not yet paid but which is now the subject matter of a separate suit between the parties

400.00

775.00

Balance in favor of the plaintiffs and against the defendant

387.56

"VI. The defendant has not paid said balance, or any part thereof, either in the form of monthly installments of P100, which he promised in the compromise above quoted, or in any other way, in spite of the friendly and repeated demands duly made.

"Therefore, the plaintiffs respectfully beg the court, after due proceedings, to render judgment in their favor and against the defendant, declaring an account and settlement between them and sentencing said defendant to pay the plaintiffs the balance of P387.561 Philippine currency, or the amount that appears against him, with legal interest from the date of the filing of this complaint, at one time or in monthly installments of P100, and the costs of the case. The plaintiffs further ask the court for any other remedy in equity and justice.

"Nagcarlan, Laguna, P. I., April 5, 1910.

(Sgd.) "RAMON DIOKNO,
"Attorney for the Plaintiffs."

To the first complaint (No. 7257) the defendant demurred, alleging that the justice of the peace was without jurisdiction to hear and determine the questions involved in said complaint.

To the complaint in the second cause (No. 7258) the defendant demurred, alleging that there was another action pending between the same parties, for the same cause.

Each of the said demurrers was sustained by the justice of the peace. The first was sustained upon the ground that more than one year had elapsed since the alleged illegal detention of the property in question had begun, and that, therefore, the question presented was one over which the Court of First Instance had original jurisdiction. The second was sustained upon the ground that another action was pending between the same parties for the same cause. The justice of the peace dismissed each of said causes, without giving the plaintiffs an opportunity to amend their complaints.

From said decisions the plaintiffs appealed to the Court of First Instance. In the Court of First Instance, the plaintiffs again used as the basis of their right to recover against the defendant the complaints which had been presented in the court of the justice of the peace.

In the Court of First Instance the defendant again renewed his demurrers to said complaints, basing them upon substantially the same ground as in the court of the justice of the peace. Upon a consideration of said demurrers, the Honorable Vicente Jolson, judge, overruled each of them and ordered the defendant to answer, within a period

of five days. Within the time fixed, the defendant presented his answer, and the respective causes were set down for hearing upon their merits. After hearing the proof, the Honorable Isidro Paredes, judge, rendered a decision substantially granting the prayer of the plaintiffs in each complaint. From each of said decisions the defendant appealed to the Supreme Court and made the following assignments of error:

"I. The Court of First Instance lacks jurisdiction to try this case on appeal.

"II. The contention raised in this case has previously been decided and consequently the plaintiffs and appellants cannot again raise it herein.

"III. The contracts set forth in Exhibits A and B of the plaintiffs, while they do partake of the form of a sale with right to repurchase, with a lease annexed, in reality express nothing more than a loan with guaranty.

"IV. The court erred in not declaring that the appellant had wholly paid the P500, with interest, the amount of the loan made to him by Manuel Lucido, father of the appellees.

"V. The court erred in declaring in its judgment that the appellant cannot allege and prove that the lease set forth in Exhibit A is simulated, because the estoppels in Nos. 1 and 2 of section 333 of the Code of Civil Procedure operate against it."

The appellant, in his first assignment of error, contends that the Court of First Instance was without jurisdiction to try said actions on appeal. The appellant, in a very interesting argument, contends that the action should have been originally commenced in the Court of First Instance; that the Court of First Instance had original jurisdiction over the questions presented in the complaints; that the illegal detention had continued for more than one year; that the justice of the peace was without jurisdiction; that the Court of First Instance could acquire no jurisdiction on appeal of an action originally commenced in the court of the justice of the peace, when the latter had no jurisdiction to try the questions presented and when the question of jurisdiction had been properly and timely raised in the lower court and continued on appeal. In other words, the appellant contends that inasmuch as the justice of the peace had no jurisdiction over the questions presented and an objection had been timely made to his jurisdiction, the Court of First Instance could acquire no jurisdiction, on appeal, to try said causes upon their merits, if the question of jurisdiction was properly raised in the latter court.

The following propositions have been settled by this court:

- That courts of justices of the peace have no jurisdiction to hear and determine actions in forcible entry and detainer when more than one year has expired from the commencement of the illegal detention. See section 80 of Act No. 190, as amended by section 1 of Act No. 1778; *Alonso vs. Municipality of Placer* (5 Phil. Rep., 71); *Ledesma vs. Marcos* (9 Phil. Rep., 618); *Roman Catholic Church vs. Familiar* (11 Phil. Rep., 310); *Gutierrez vs. Rosario* (15 Phil. Rep., 116).

- That Courts of First Instance have jurisdiction in actions to recover the possession of real property illegally detained, together with rents due and damages, even though one year has not expired from the beginning of such illegal detention, provided the question of ownership of such property is also involved. In other words, if the party illegally dispossessed desires to raise the question of illegal dispossession, as well as that of the ownership over the property, he may commence such action in the Court of First Instance immediately or at any time after such illegal dispossession. If he desires to raise the question of illegal possession only, Courts of First Instance do not have original jurisdiction in such a case until after the expiration of one year from the date of the illegal dispossession. The courts of justices of the peace have exclusive original jurisdiction in such cases until after one year has expired after the illegal detention. See section 80 of Act No. 190, as amended by section 1 of Act No. 1778; *Alonso vs. Municipality of Placer* (5 Phil. Rep., 71); *Ledesma vs. Marcos* (9 Phil. Rep., 618).

- If an action is commenced in the court of the justice of the peace and that court has no jurisdiction over such action, and the question of jurisdiction is properly and timely raised, the Court of First Instance has no jurisdiction over such an action on appeal, except to determine whether or not the court of the justice of the peace had jurisdiction, provided the question of jurisdiction is properly raised. (U. S. vs. Ang Suyco, 17 Phil. Rep., 92; Carroll vs. Paredes, 17 Phil. Rep., 94; Davis vs. Director of Prisons, 17 Phil. Rep., 168; U. S. vs. Bernardo, 19 Phil. Rep., 265.) On appeal from the justice of the peace, the appellate court has only such jurisdiction as the justice of the peace had. If the latter had no jurisdiction, the appellate court acquires none by the appeal, provided the jurisdiction of the lower court is put in question in both the lower court and on appeal. (U. S. vs. Bernardo, supra.)

In view of the foregoing propositions it becomes necessary, with reference to the first assignment of error, to determine, whether or not the justice of the peace had jurisdiction to try and determine the questions presented by the complaints. The question of the jurisdiction of the justice of the peace was properly and timely raised by demurrer. The justice of the peace reached the conclusion that he did not have jurisdiction to try said causes. He held that the first action (7257) had not been commenced within one year after the alleged illegal possession and that there was another action pending between the same parties for the same cause. He held with reference to the second (7258) that the illegal possession of a tenant begins from the date of his failure to pay the stipulated rents, and that, inasmuch as a number of years had expired without the payment of the stipulated rents, he had no jurisdiction over said cause. With that conclusion of the justice of the peace we cannot agree. It is true that the landlord might, upon the failure of the tenant to pay the stipulated rents, consider the contract broken and demand immediate possession of the rented property, thus converting a legal possession into an illegal possession. Upon the other hand, however, the landlord might conclude to give the tenant credit for the payment of the rents and allow him to continue indefinitely in the possession of the property. In other words, the landlord might choose to give the tenant credit from month to month or from year to year for the payment of the rent, relying upon his honesty or his financial ability to pay the same. During such period the tenant would not be in illegal possession of the property and the landlord could not maintain an action of desahucio until after he had taken steps to convert the legal possession into an illegal possession. A mere failure to pay the rent in accordance with the contract would justify the landlord, after the legal notice, in bringing an action of desahucio. The landlord might, however, elect to recognize the contract as still in force and sue for the sums due under it. It would seem to be clear that the landlord might sue for the rents due and unpaid, without electing to terminate the contract of tenancy. Whether he can declare the contract of tenancy broken and sue in an action of desahucio for the possession of the property and in a separate action for the rents due and damages, etc., Quaere. (Secs. 80 and 84, Act No. 190, amended by Act No. 1778.)

In the present cases it appears that the defendant had been in possession of the property under a contract since the year 1892. In the month of March, 1904, the plaintiffs commenced an action to eject the defendant from the possession of said property. By said action the plaintiffs evidently intended to treat the possession of the defendant as an illegal possession. It did not have that effect, however, for the reason that said parties entered into a compromise agreement, by virtue of which the defendant continued in the legal possession of said property. So far as the allegations in the complaints are concerned, there is nothing which shows that the defendant was in the illegal possession of the property, until on or about the 11th day of March 1910, when the plaintiffs, by virtue of the provisions of section 1 of Act No. 1778, gave the defendant the notice required by law, to turn over to them the immediate possession of the property. So far as the complaints show the defendant had been in the legal possession of the property up to and including the time of the notice of March 11, 1910. The action of desahucio was commenced by the plaintiffs on the 15th of March, 1910. The illegal possession of the defendant commenced at the time of the notice of March 11, 1910. It is clear, therefore, that the year provided by law within which the

action must be brought, if brought before the justice of the peace, had not expired and the justice of the peace had jurisdiction to try the questions presented. The justice of the peace committed an error in sustaining the demurrer and in holding that he was without jurisdiction to hear and determine the questions presented by the complaints.

From the judgment of the justice of the peace the plaintiffs appealed to the Court of First Instance, where the same complaints were presented which had been presented in the court of the justice of the peace and the question of jurisdiction was again raised. Upon the issue thus presented, the Court of First Instance had jurisdiction only to determine whether or not the justice of the peace had jurisdiction in said cause. Instead of determining that question alone, the Court of First Instance decided that it had jurisdiction and ordered the defendant to answer, and proceeded to hear the causes upon their merits. From the final judgments rendered by the Court of First Instance the defendant appealed.

Section 16 of Act No. 1627 provides that a judgment, rendered by the Court of First Instance, on an appeal from a judgment of the justice of the peace, shall be final and conclusive, except in cases involving the validity or constitutionality of a statute or a municipal ordinance. Notwithstanding the separate provisions made for an appeal in *desahucio* cases in section 2 of Act No. 1778, we have decided in the cases of *Priolo vs. Priolo* (9 Phil. Rep., 566) and *Aragon vs. Araullo* (11 Phil. Rep., 7) that appeals in the third instance can no longer be resorted to, except in the cases expressly provided for in section 16 of Act No. 1627. Said appeals to this court constitute the third instance. No question of the validity or constitutionality of a statute or a municipal ordinance is presented.

Our conclusions are, therefore:

- That the justice of the peace committed an error in holding that he had no jurisdiction to try the questions presented in the complaint, in cause No. 7257. One year had not elapsed after the illegal detention began.
- That the Court of First Instance committed an error, after determining that the justice of the peace had jurisdiction, in not returning the cause for trial upon its merits. The plaintiffs, under the law, had a right to have the question tried by the justice of the peace.
- That this Court is without authority to decide the cases upon their merits.

In view of the conclusions which we have reached under the first assignment of error, we deem it unnecessary to discuss the others or to analyze the very interesting argument presented by the appellee in his brief.

Considering, therefore, that the justice of the peace has exclusive original jurisdiction to determine the questions presented in the present case, and considering that the parties have a right, under the law, to have the present case tried upon its merits by the justice of the peace, it is hereby ordered that the present appeal be dismissed, without any finding as to costs in any of the instances, with direction that the cause be remanded to the Court of First Instance and that said court is hereby directed to issue an order directing the return of the present cause to the justice of the peace, and that said justice of the peace be directed to proceed to try the cause upon its merits.

Arellano, C. J., Torres and Mapa, JJ., concur.

CONCURRING

MORELAND, J.,

Logically this court ought not, perhaps, to enter into a discussion of or decide the question whether the demurrer in the justice's court was properly sustained and the case there dismissed in consequence. That was a question which was presented to the Court of First Instance and was passed by that court without decision—at least not

effective decision. The court should have decided that question. If it decided it in the affirmative, the cause should have been returned to the justice's court for trial on the merits. If in the negative, the action in the appellate court should have been dismissed, unless the parties expressly consented to a trial in that court under its original and not its appellate jurisdiction. Moreover, the questions decided by the Supreme Court on this appeal, namely, the sufficiency of the complaint and the jurisdiction of the justice's court, that is to say, the questions of law raised by the appeal from the justice's court, are questions which could not have reached us if the Court of First Instance had done its duty and decided that question itself. This is so for the reason that such decision would have been final and conclusive so far as the Supreme Court is concerned. Neither of the parties under the law have the right to a third instance. This being the case, it is somewhat illogical for the Supreme Court, simply because the Court of First Instance did not act properly, to take up and decide a question which could not possibly have come before it if the Court of First Instance had acted in accordance with law. Our action then, it seems to me, should be limited to the declaration that the Court of First Instance exceeded its authority in trying the case on the merits when the appeal raised only questions of law. Limiting ourselves to this declaration, the logical course to pursue would be to return the cause to the Court of First Instance for the resolution of the questions of law raised by the appeal. A mistake of the Court of First Instance should not give a party a third instance to which he would not have been entitled but for the mistake. It seems to me, therefore, that in resolving this appeal we should limit ourselves to the decision of questions which are properly before us and which the law intended us to decide, and not those questions which are exclusively within the jurisdiction of the Court of First Instance.

It would seem, therefore, that the more logical disposition of the case would be to remand it to the Court of First Instance with instructions to resolve the only questions presented to it on the appeal, namely, whether the allegations of the complaint filed in the justice's court show a cause of action over which that court had jurisdiction, and to act in accordance with the conclusion reached.

However, the majority of the Court being in favor of deciding here the questions of law which properly belong to the Court of First Instance and of returning the cause direct to the justice's court for trial, and the result being substantially the same in the end, I yield my judgment to that of my brethren.

The only reason for this concurring opinion is to set out another phase of the case which I think should not be overlooked.

It is strenuously argued that no appeal lies in this case to the Supreme Court, for the reason that, the case having been begun in the justice's court, that section of the Code of Civil Procedure is applicable which provides that "a judgment rendered by the Court of First Instance on appeal shall be final and conclusive except in cases involving the validity or constitutionality of a statute or municipal ordinance;" and that there not being involved a question of that nature, the appeal to this court was without authority of law and confers no jurisdiction except to dismiss.

My contention is (1) that under the statute relating to appeals from justices' courts an appeal may be taken either upon a question of law alone, or for a new trial; (2) that, if an appeal is on a question of law alone, the Court of First Instance has no jurisdiction to do aught than decide that question of law, and affirm, or reverse and remand, as the case may be; (3) that on such an appeal the Court of First Instance has no jurisdiction to try the case upon the merits; (4) that if it does do so, it does so by virtue of an attempt to exercise its original and not its appellate jurisdiction; (5) that a judgment after such a trial is not a judgment rendered on an appeal from a justice's court, and therefore the prohibition against an appeal to the Supreme Court in a cause originating in the justice's court does not apply; (6) that in an appeal from a judgment after such a trial this court will first examine the questions of law involved, and, if it find that the Court of First Instance tried the case on the merits when the appeal was on questions of law alone, it will reverse and remand to the justice's court for trial, thereby securing to the plaintiff the right which the statute has conferred upon him, that of trying his cause upon the merits in the justice's court.

The right to "appeal," as that word is used in the statute granting appeals from justices' courts, is the right to go to the appellate court upon a question of law alone or for a new trial. While no particular procedure is laid down by the Code in cases of appeals on questions of law alone, and while the procedure provided for refers only to appeals for a trial de novo, nevertheless, I am of the opinion that these circumstances furnish no ground for the denial of a right to appeal upon questions of law alone and, consequently as happens in these very cases, the denial of the right to appeal altogether. If a litigant cannot appeal from a justice's court upon a question of law alone, but must always be obliged to accept a new trial in the appellate court, he is denied not only the right to appeal in the particular case, but, by reason of the appellate court's trying the case on the merits, he is deprived of the fundamental right expressly granted to him by statute, namely, the right to try the question of mere possession in the justice's court.

The present cases are a clear illustration of the results of the contention that the only appeal permitted from a justice's court is one for a new trial in the Court of First Instance; and that, therefore, every appeal taken from that court, no matter of what kind or nature, makes, for the appellant, a second instance in the appellate court, no matter what the appellate court does, what questions it decides or what powers it invokes. The plaintiff in these cases went into a justice's court and sought to obtain possession of land upon the ground that it was withheld in violation of the statute of unlawful detainer; but was refused the opportunity to try his cause before that court, it being held that the action was one which did not come within its jurisdiction. A demurrer to the complaint was sustained upon that ground and the plaintiff was thereupon summarily dismissed from the court. Upon appeal it was held by the Court of First Instance, and it has been held by this court, that the justice's court had jurisdiction of the subject matter of the actions and should have proceeded with their trial, and that the dismissal of the actions was erroneous.

It is, therefore, unquestioned that the plaintiff had the right to have his cause heard by the justice's court by virtue of the provisions of the Code of Civil Procedure. The refusal of that court to take cognizance of the action deprived him of that right. It is contended, by those who assert that the only appeal from a justice's court is one for a new trial in the appellate court, that there is no possible way by which the plaintiff in this case can obtain the benefits of his statutory right to have his cause heard in the justice's court, inasmuch as the appeal was of necessity one for a new trial in the appellate court, and his cause would be there heard upon the merits. In other words, although he appealed for the sole purpose of getting a trial in the justice's court, a right which the Code expressly gives him, he is nevertheless denied that right although the appellate court finds that he is entitled to it and that the justice's court erred in denying it. This interpretation of the law is, in my opinion, unsustainable from any point of view.

It should be noted that the statute provides that "either party to an action before a justice of the peace may appeal from the judgment of the justice of the peace to the next regular stated term of the Court of First Instance to be held within the province in which the judgment was rendered in the manner herein provided" (section 74 of the Code of Civil Procedure); and that "a perfected appeal shall operate to vacate the judgment of the justice of the peace, and the action when duly entered in the Court of First Instance shall stand for trial de novo upon its merits in accordance with the regular procedure in that court, as though the same never had been tried and had been originally there commenced." (Section 75, same.)

In considering these actions the language must be carefully noted. It is observed, in the first place, that there is no limitation on the appeal granted in section 74. The right to appeal is full and complete and is unrestricted as to the scope thereof or as to the nature of the question to be presented in the appellate court.

It must be observed, in the second place, that the language of section 75 restricts its application to new trials in the appellate court. It has no reference to an appeal which presents to the appellate court questions of law. The words

"de novo" and "upon its merits" and "as though the same had never been tried," all demonstrate conclusively that the appeal referred to in that section is one for a new trial. This necessarily presupposes that there has already been a trial in the justice's court because, as a matter of language, there could not be a new trial in the appellate court if there had not been an old trial in the court below. In other words, the appellate court cannot try a cause de novo, that is, again, unless the cause has been tried before.

The necessary conclusion is, therefore, that section 75 does not apply to appeals from judgments of justices' courts upon questions of law alone. This is not only clear from the language used, but it is also clear from reason. If a plaintiff, as in the present case, goes into a justice's court with a case perfectly cognizable by that court under the law and that court, in the face of the statute which expressly gives the plaintiff the right to be heard in that court in the first instance, arbitrarily and erroneously refuses to hear the cause and summarily dismisses the plaintiff from the court without a hearing, should not such plaintiff have a remedy by which he could compel the justice of the peace to accord him the right thus expressly granted him by statute? It is undoubted that he should; and the appeal given by section 74 is fully adequate to that purpose. But, if the theory of an appeal from a justice's court contended for in these actions is sustained, then such plaintiff, by the very act of appealing, is deprived of his right to have corrected the very error appealed from, for the instant that he arrives at the Court of First Instance on the appeal he is there told that the Court of First Instance has no power to hear any appeal except for a trial of the case upon the merits, that is to say, a trial "de novo," and that he cannot, therefore, afford any relief concerning the error alleged and which is the sole basis of the appeal. It is to be observed that the trial in the appellate court on the merits, in the first instance, is the very thing which the statute sought to avoid when it gave exclusive original jurisdiction in this class of cases to justices' courts. In giving the justice's court exclusive original jurisdiction of an action for the possession of real estate, the object of the legislature was to avoid the loss of time and the great expense which necessarily follow the trial of cases in the Court of First Instance, and the hardship and even injustice that would naturally result to one who had been illegally deprived of the possession of his lands. The very purpose of the statute was, therefore, to prevent the Court of First Instance from trying the case originally upon the merits. Thus it will be seen that the theory that the only appeal possible from a justice's court is one in which the case must be tried upon the merits in the appellate court accomplishes the very purpose which the statute was designed to avoid.

Moreover, this theory prevents the plaintiff whose complaint has been dismissed on demurrer from having decided in the appellate court the only question presented to the justice's court, the only question raised by the appeal and the only question that can possibly be presented to the appellate court. That question is one of law, namely, whether the plaintiff's complaint, upon demurrer, shows that the justice's court had jurisdiction of the action. That is the only question raised in the court below, it is the only question upon which the appeal was taken, and it is the only question that can, in any manner, be touched by the appellate court. An appeal does not give the Court of First Instance the right to make something out of nothing; to draw from nowhere questions that were never presented in the court below, were never passed on by that court, and were never presented to the appellate court. The first principle governing the powers of appellate courts is that they are governed and controlled absolutely by the questions raised in the court below that were passed upon by it, and which are presented by the appeal.

Upon the theory which I am criticising the appellate court would not only raise and decide questions not raised in the court below or passed upon by it or presented by the appeal, but it would go further and refuse to hear the only question that was raised in the court below, that was passed upon by it, and that was presented on the appeal, namely, the question of law as to whether or not the justice's court had jurisdiction of an action of unlawful detainer. This is clear, for, if the appellate court tries such case upon the merits, it necessarily disregards the question of whether the justice's court had jurisdiction of the action, that question being utterly immaterial. As a

necessary result the appellant not only gets a trial in the appellate court, the very thing that he does, not want and the very thing that the statute of unlawful detainer guards against, but, after he has made his laborious way to the appellate court, he is subjected to the further injustice of being told that the court will not consider the only question that he has to present to it.

It is clear, therefore, that the plaintiff in the cases at bar had the right to appeal upon question of law alone, that is, as to the legality of the action of the justice of the peace in dismissing the case for lack of jurisdiction; and that, therefore, the only power conferred by that appeal upon the appellate court was to determine that question of law and, when that question was resolved favorably to the appellant, to reverse the judgment sustaining the demurrer and remand the cause for trial upon the merits.

In the case of *Bennett vs. Phelps* (12 Minn., 326 [216]) which was an action instituted originally before the justice of the peace for money had and received, the supreme court said: "The appeal being taken on questions of law only, no question of law can be tried or raised in the district court except those tried or raised in the court below, and to which an exception was taken to the order made thereon by the justice, except objection to the jurisdiction of the court, and that the complaint or answer does not state facts sufficient to constitute a cause of action or defense."

In the case of *State vs. King* (42 La. Ann., 77), the court said that it could not "be asked to determine the merits of the controversy in any contingency, when such were not before him on the appeal," and that "in a case of a reversal in a suit like the present one, it could not pass upon the merits of the litigation, for the reason that the merits had not been determined below and would have to remand. In case of affirmance, there would be no merits to determine."

In the case of *Coughran vs. Wilson* (7 S. D., 155), the action was one before a justice of the peace in which a counterclaim was interposed to a demand for a sum of money. The court gave judgment for plaintiff for the amount found due upon his evidence. The defendant appealed to the county court upon questions of law alone. The county court rendered judgment for defendant for the amount of the counterclaim as pleaded. On appeal to the supreme court it was held that it was not an appeal for a new trial in the appellate court, but only for the review of alleged errors of law occurring at the trial in the justice's court; that on such an appeal it would not try the case itself; * * * that the judgment should have been reversed, and the cause remanded for trial in the justice's court.

In the case of *People vs. Court* (10 Cal., 19), it was held that "the county court can only retry the issues tried in the court below. That is what is meant by a trial anew in the county court, under section six hundred and twenty-six." See *Fabretti vs. Superior Court* (77 Cal., 305).

Spelling in his *Appellate Practice*, section 749, states the rule to be that "where the justice has rendered judgment, without a trial of issues of fact, upon a question of law alone—for instance, by a ruling upon a demurrer, and such ruling was erroneous—the superior court should reverse the judgment and remand the case with directions to the justice's court to overrule the demurrer, with leave to the plaintiff to amend if so advised."

See *Maxon vs. Superior Court* (124 Cal., 468).

In *Myrick vs. Superior Court* (68 Cal., 98), which was a proceeding for a writ of certiorari, it appeared that in the justice's court a motion of defendant to dismiss the action had been granted and judgment in his favor rendered for costs. On appeal the superior court tried the whole case and gave judgment for the plaintiff. The supreme court annulled the judgment upon the ground that there could be no trial of issues of fact in the superior court because there had been none in the justice's court. (*Larue vs. Gaskins*, 5 Cal., 507; *Brown vs. Superior Court*, 72 Cal., 14.)

It is undoubted that, in an appeal from a justice's court, whether upon questions of law alone or for a new trial, the decision of the appellate court upon that appeal is final and conclusive unless the validity or constitutionality of a statute or municipal ordinance is involved. Where, however, the appeal is one on the law only and the appellate court refuses to take cognizance of the appeal, but proceeds to try the action upon the merits, thereby exercising not appellate power but original jurisdiction, the prohibition just referred to does not apply.

I do not desire to be understood as expressing the opinion that where there has actually been a trial in the justice's court, the defeated party may then appeal on questions of law alone and thus prevent the appellate court from trying the action on the merits.

I am of the opinion that the appeal to this court is proper, and I concur in the judgment of this court annulling the judgment of the Court of First Instance and remanding the cause to the justice's court for trial.

Trent, J., dissents.

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