Case and Comment

HUSBAND'S ACTION FOR INJURIES TO WIFE — EFFECT OF WIFE'S CONTRIBUTORY NEGLIGENCE.— An interesting point has recently arisen in the law of contributory negligence where an English court has felt itself unable to follow a decision, covering similar ground, of the Supreme Court of Alberta. The facts which give rise to the issue are of the simplest. A wife is injured in a road accident, due partly to the negligence of the defendant and partly to her own want of care. Under the English Contributory Negligence Act[1] and its Canadian counterparts the court may apportion the responsibility between the defendant and the wife and reduce the amount of the wife's claim accordingly. But suppose the lady's husband is also a plaintiff in the action and claims damages against the defendant for his loss of services and *consortium*. Is his claim also liable to abate to the same extent as the wife's on account of *her* contributory negligence? Yes, the Supreme Court of Alberta has decided;[2] no, according to a decision of the King's Bench Division of the English High Court.[3] This conflict of views may seem to justify some further examination.

It must be conceded at the outset that at the present day the claim of a master against a third party who has brought about the loss of the services of his servant (the genus of which a similar claim by a husband for loss of his wife's services or *consortium* is a species) is of a somewhat anomalous character. Linked as it is with the claim of a parent for the seduction of his child, or that of a husband for the enticement of his wife, this class of case is really a relic of the days "when the servant or apprentice, as well as the wife and child, was a member of the family, and the relation between him and the head of the family had not yet come to be looked upon as resting upon contract".[4] Speaking of the argument that it was an anomaly that such a claim would lie where the servant was only injured but not where his death

[1] C. N. Act, 1945.
[2] *Young* v. *Otto*, [1948] 1 D.L.R. 285.
[3] *Mallett* v. *Dunn*, [1949] 1 All E.R. 973 (Hilbery J.).
[4] *Admiralty Commissioners* v. *S. S. Amerika*, [1917] A.C. 38, at p. 45 (Lord Parker).

occurred, Lord Sumner remarked that "what is anomalous about the action per quod servitium amisit is not that it does not extend to the loss of service in the event of the servant being killed, but that it should exist at all. It appears to be a survival from the time when service was a status."[5] It is therefore hardly to be expected that such a cause of action will readily fit into any modern and systematic classification or that principles of the developed law of tort such as contributory negligence or the maxim *volenti non fit injuria* will be found applicable without qualification. Certain basic propositions may however be regarded as established:

(1) the essence of the cause of action is not the outraged family feeling of the parent, husband or master, but the loss of services or *consortium* which has resulted in his suffering damage;[6]

(2) the cause of action of the parent or master is entirely separate and distinct from that which the child or servant may have in his own right, *e.g.* for personal injuries;[7]

(3) nevertheless, the act or default of the defendant must be "wrongful" as against the child or servant for the parent or master to be entitled to sue the third party;[8]

(4) despite the necessity to show that the act was "wrongful" the consent of the child in a seduction action, even if a full and genuine consent by a child old enough to know its own mind, has never been treated as a defence to a claim by the parent for the loss of services resulting from the seduction.[9]

There is evidently some ambiguity in the proposition that the act of the defendant must be wrongful as against the servant, which the authorities have done little to elucidate. Does it mean that there must be something in the nature of an actionable tort at the suit of the servant, or does it require something less than that? The cases appear to confine themselves to the use of the word "wrongful", but some of the text-book writers have gone further[10] and asserted that an actual tort against the servant must be shown. From this point of view the rule regarding con-

[5] *Ibid.*, at p. 60.
[6] *Ibid.*, at pp. 54-5.
[7] *Hyde* v. *Scyssor* (1619), Cro. Jac. 538.
[8] *Martinez* v. *Gerber* (1841), 3 M. & G. 88.
[9] See *Brownlee* v. *Macmillan*, [1940] A.C. 802. So, too, in the case of enticement of a wife, where no duress is employed and she is merely persuaded to leave her husband voluntarily. Here, of course, the wife herself has no cause of action, but the husband's right of action is not affected by the wife's own wrongful conduct: *Place* v. *Searle*, [1932] 2 K.B. 497.
[10] *E.g.*, Salmond, Torts (10th ed.), p. 361; American Restatement of the Law of Tort, § 703.

sent in the case of seduction is classified as an exception to the general rule.[11]

Now it is quite clear that the cause of action of the master is entirely distinct from that of the servant. So it has been held that where a servant is injured by an assault and battery, however slight may be the injury to the servant, he may have an action, but no action will lie at the suit of the master unless he can show an actual loss of services.[12] Why, then, it may be urged, should it be necessary for the master to show a complete cause of action inhering in the servant before the master can himself sue? For his complaint is not that his servant has been the subject of an actionable wrong, but that he, the master, has been wrongfully deprived of the benefit of services to which he was entitled. On this view of the matter what becomes of the requirement that the defendant's act or default must be "wrongful"? Here the law seems to be doing no more than indicating that the right of the master to his servant's services is not an absolute one of which a third party will deprive him at his peril. Thus, though it is not necessary in this class of case to show that the defendant knew that the injured person was the plaintiff's servant[13] — for in the majority of instances this would be to stultify this type of action at birth — it is essential to prove that the defendant was guilty of an act or default which was *prima facie* wrongful. For it is only against such conduct that the master's qualified right receives protection: if the servant is injured by an inevitable accident no action will lie at the suit of the master, not because there has been no tort committed against his servant, but because there is nothing in the defendant's conduct of which the master is entitled to complain.

What then of the case where the defendant has been guilty of an act which is *prima facie* wrongful towards the servant but where, as against the servant, some defence may avail which will negative his cause of action, *e.g.* consent of the servant within the scope of the maxim *volenti non fit injuria*, or his contributory negligence?[14] In this connection it must be borne in

[11] Salmond, *ut supra*.

[12] See *Robert Marys's* case, 9 Co. Rep. 111b, 113.

[13] See *e.g.*, *Berringer* v. *G. E. Ry. Co.* (1879), 4 C.P.D. 163. Contrast the analogous action for procuring a breach of contract, where knowledge of the existence of the contract is a pre-requisite: *British Industrial Plastics Ltd.* v. *Ferguson* (1940), 162 L.T. 313.

[14] Where the defendant relies upon a statutory authorization as a defence, it would seem that if he has done no more than what the statute has authorised, his act cannot be wrongful for any purpose. But the position would be otherwise if he has carried out his statutory power in a negligent or improper manner: cf. *Penny* v. *Wimbledon Urban District Council*, [1899] 2 Q.B. 72.

mind that the law frequently treats certain acts or defaults as being wrongful even though they may not give rise to a cause of action in the circumstances. If I drive my motor car down a crowded high street at 50 miles per hour, and a pedestrian steps straight off the pavement and across the front of the vehicle without looking where he is going, my negligent driving is surely wrongful even assuming it were held that the accident was due to the contributory negligence of the pedestrian. It is true that there cannot be negligence in the air, that it must relate to some particular plaintiff,[15] but where there is a duty owed to a person and a breach of that duty there is clearly a wrongful act even where in the particular circumstances of the case the victim of the wrong is unable to maintain an action.[16] This would seem to apply with equal force to the case where a servant is injured in a railway accident while travelling by virtue of a ticket which excludes the liability of the company. If the servant is injured owing to the negligence of the engine-driver or signalman there is clearly a wrongful act despite the inability of the servant to rely upon it in an action, owing to the express terms of his contract of carriage. The master should therefore be entitled to complain of his loss of services caused by a wrongful act whatever may be the legal position of the servant.[17] So, too, it is nothing to the point that the servant has contributed to the injury by his own want of care, for this is a matter between the defendant and the servant. The master's complaint is that the defendant's wrongful act has deprived him of services to which he was entitled and it is difficult to see, save in one case which will be mentioned later, why it should be open to the defendant to say that the servant was not himself free from blame. Of course the position might be otherwise where the defendant could show that, notwithstanding his own negligence, the entire cause of the loss was the servant's own default, for this is equivalent to saying that there was no causal connection between the defendant's act or default and the actual injury. It is conceived that such a defence must avail whatever the cause of action, where it is based on damage flowing from a wrongful act.[18]

There remains however one particular situation which requires closer consideration. It is well-established that where a

[15] *Bourhill* v. *Young*, [1943] A.C. 92.

[16] Cf. cases where a party is debarred from taking advantage of his own wrongful act, even though no action will lie against him in respect of that act: see *e.g.*, *Alexander* v. *Rayson*, [1936] 1 K.B. 169.

[17] *I.e.* on the assumption that the servant has not bought the ticket as agent for the master; cf. *infra*.

[18] See *Foulkes* v. *Metropolitan Ry.* (1880), 5 C.P.D. 157.

person is injured by the concurrent negligence of two tortfeasors the injured person will not be identified with the negligent or other wrongful conduct of one of the tortfeasors merely because he was in that person's care, as for instance in the case of a passenger being driven by a negligent motorist,[19] or a child who is negligently led across the street by his parent or guardian.[20] In the same way a wife will not be identified with her husband's negligence.[21] Suppose however that in the particular circumstances when the accident arose one of the tortfeasors was the servant or agent of the injured plaintiff, *e.g.* where he was being driven by his own chauffeur, whose negligence contributed to the accident. Plainly in such a case the other tortfeasor would be able to set up the chauffeur's negligence even in an action by the employer.[22] Here of course the master is suing for injuries to himself, but a similar situation may well arise where he is suing in respect of injury to his servant. For the servant when involved in the accident may have been actually engaged in some duty arising out of his employment. The railway journey, for example, undertaken by the servant and in respect of which he has taken a ticket excluding the liability of the company, may have been for the purpose of the master's business, or the servant may have been crossing the road on some errand of his master's. In such a case there seems no reason why the ordinary principle of agency should not apply, and the negligence of the servant thus become available to the defendant as a defence to a suit at the instance of the master. In the case of husband and wife or parent and child, however, the relationship of agency is far less likely to exist between the parties so as to afford an opportunity to the defendant to plead the wife or child's consent or contributory negligence as matter of defence against the husband or parent.

One line of authority which is apt to confuse the issue[23] is that dealing with the case where a wife has been killed in an accident and her husband sues, under the Fatal Accidents Act,[24] for damages in respect of her death. Such a claim, which was not permissible at common law,[25] is based on the dependency of the surviving spouse,[26] and at any rate in the case of the English

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[19] *The Bernina* (1888), 13 App. Cas. 1.
[20] *Oliver* v. *Birmingham Omnibus Co.*, [1933] 1 K.B. 35.
[21] *Mallett* v. *Dunn*, *supra*, pp. 975-6.
[22] See *The Egyptian* (1910), 102 L.T. 465 (H.L.).
[23] See *e.g.*, *Young* v. *Otto*, [1948] 1 D.L.R., at pp. 288, 290.
[24] 1846, s. 1 (the English Act).
[25] *Osborn* v. *Gillett* (1873), L.R. 8 Ex. 88.
[26] 1846 Act, s. 2.

statute, is made expressly subject to the deceased's death having occurred in circumstances which would have entitled the deceased to maintain an action if death had not ensued.[27] No conclusion can therefore be drawn from the cases decided on the footing of this or any similar provision. It may be added that as the effect of the contributory negligence of the deceased person was formerly to bar the dependant's claim under the Fatal Accidents Act in its entirety,[28] the Contributory Negligence Act, 1945, has expressly applied its provisions relating to apportionment to this type of claim.[29]

The result would appear to be that, generally speaking, the husband, parent or master who sues for loss of services or *consortium* should not be affected by any conduct of the injured person which has deprived the latter of his personal remedy, provided always that the defendant has been guilty of some wrongful act or default which was causally related to the injury. On the other hand, if the injured person was in the actual position of a servant or agent of the plaintiff claiming for loss of services, and was acting in the course of his employment, or within the scope of his agency, when the accident occurred,[30] his conduct will be identified with his employer or principal, whose right of action may thereby be lost. In the case of the negligence of the injured person having contributed to the accident, such conduct in these circumstances would have been a complete answer to the worker's suit at common law, but there seems little doubt that the apportionment provisions of the 1945 Act would now be held to apply.[31]

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CRIMINAL LAW — SECTION 9 OF THE JUVENILE DELINQUENTS ACT, 1929 — NON-COMPLIANCE WITH — OTHER DEFECTS. — The decision in *Rex* v. *Newton*[1] is a puzzling one. The accused,

[27] *Ibid.*, s. 1.
[28] *Vincent* v. *Southern Ry.*, [1927] A.C. 430.
[29] S. 1(4).
[30] Thus if the servant was injured in a railway accident and was travelling by virtue of a ticket which excluded liability for negligence, it would be necessary for the defendant company to show both that the journey itself was within the scope of the servant's employment, and also that he had authority, either general or particular, to travel on those particular terms.
[31] The wording of C. N. Act, 1945, s. 1(1), is: "Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person . . . ". "Own fault" here presumably includes the fault of a servant or agent acting within the scope of his employment or agency.
[1] [1949] 1 W.W.R. 790 (Alberta Supreme Court).

a juvenile, was charged with murder and, after proceedings had been taken in the juvenile court and the case transferred to the criminal court under section 9 of The Juvenile Delinquents Act, 1929,[2] he was committed for trial and indicted for murder. A motion was made to quash the indictment — not for any defect in the indictment itself, but for something that occurred before the case reached the criminal court. The motion was granted and the indictment quashed on two grounds, first, that the case was not properly transferred from the juvenile court to the criminal court under section 9 and, secondly, that the information and complaint in the juvenile court had served its purpose and could not be used further in the criminal court, and the J.P., who took the information in the juvenile court, should have requested the magistrate to act for him, which he did not do.

In the first place, it is difficult to see how errors (if they were errors) in the juvenile court can give grounds for quashing an indictment. If this is the law, it would follow that any procedural defect in the proceedings prior to a preliminary hearing would constitute good grounds for quashing an indictment, which is a rather startling proposition in law, to say the least.

The grounds upon which the indictment was quashed in this case raise important questions of law relating to the proper form of charge to be laid against juveniles in criminal cases and the proper method of transferring a case to the criminal court under section 9. On the first ground upon which the indictment was quashed, namely that the case was not properly transferred from the juvenile court to the criminal court, the judge quoted from a signed minute of the juvenile court judge, reading in part as follows:

> I ordered this child to be proceeded against by indictment in the ordinary court, in accordance with the provisions of the Criminal Code in that behalf.

It was held that this was insufficient and that the juvenile court judge should have stated his belief that the transfer was for the good of the child and in the best interests of the community. It was not decided that a formal order was necessary.

The holding on this point would seem to have been sufficient for the decision of the case but the learned judge went further and held that:

(1) when the information and complaint in the juvenile

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[2] 19-20 Geo. V, c. 46.

court had served its purpose it could not be used further as an information and complaint in the criminal court; and

(2) the J.P. who swore the information and complaint in the juvenile court should have requested the police magistrate, who subsequently took the preliminary hearing, to act in his stead in relation to the proceedings.

With respect, these opinions were not only unnecessary for the decision of the case, since it had already been decided that there was no proper transfer to the criminal court under section 9, but would appear to be in conflict with one another. If the original information and complaint in the juvenile court had served its purpose and could not be used further, the J.P., before whom they were taken, was *functus officio* and could not ask the police magistrate to act for him. It would be a futile and presumptuous thing for a juvenile court judge to ask a magistrate to act for him in his (the magistrate's) own court! The learned judge refers to *Rex* v. *Greenwood* [3] as authority for such a request, but that case did not deal with proceedings in the juvenile court but with a request from one magistrate to another, and has no application.

In *Rex* v. *H. & H.*[4] Mr. Justice Manson of the Supreme Court of British Columbia laid down the proposition, which seemed somewhat startling at the time, that "there is only one offence known to *The Juvenile Delinquents Act, 1929,* and that is a delinquency" [5] — apparently basing his statement on sections 2, 3 and 4 of the Act. If this is a correct deduction from the Act, which, as the judge admits, "is not a lawyer's Act, not a model of perfection in the matter of draughtsmanship, not one to which it is easy to apply the ordinary rules of construction",[6] it follows that in laying a charge against a juvenile for a criminal offence the charge should be that the juvenile "did commit a delinquency in that he did [so and so]" [7] and, if the case is transferred to the criminal courts under section 9, a fresh charge would appear to be necessary since, apart from the Juvenile Delinquents Act, there is no offence known to the criminal law as a "delinquency".

In the instant case it appears that *Rex* v. *H. & H.* was not brought to the court's attention and that in Alberta the

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[3] [1948] 1 W.W.R. 322; 90 C.C.C. 244 (Alta. Supreme Court, Appellate Division).
[4] [1947] 1 W.W.R. 49; 88 C.C.C. 8.
[5] [1947] 1 W.W.R. 49, at p. 59.
[6] *Ibid.*, p. 51.
[7] *Ibid.*, p. 60.

practice of charging a "delinquency" is not generally followed, since the accused in that case was charged, not with a "delinquency", but with murder. It is unfortunate that the case did not go to appeal but apparently the prosecution thought that an appeal was unnecessary, since the footnote to the case says that the accused was subsequently brought before another juvenile court judge who ordered that he be proceeded against by indictment in the ordinary courts.[3]

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* * *

CRIMINAL LAW — RECEIVING — EXPLANATION OF RULE IN REX V. SCHAMA; REX V. ABRAMOVITCH. — Crown prosecutors and other law enforcement officers will welcome the decision in *Rex* v. *Garth*[1] which modifies and clarifies the rule in *Rex* v. *Schama; Rex* v. *Abramovitch*[2] — that "perplexing case"[3] — which has given trouble ever since it was decided by the Court of Criminal Appeal in England in 1914. The trouble arose from the words of Lord Reading in giving judgment in that case, where he said: "If the jury consider that the explanation may reasonably be true, although they are not convinced of its truth, they should acquit the accused, because the Crown has not discharged the burden which rests upon it of satisfying the jury, beyond reasonable doubt, that the accused is guilty".[4] This passage has now been explained by Lord Chief Justice Goddard, speaking for the court in *Rex* v. *Garth*, as follows:

> Possession of property recently stolen where no explanation is given is evidence which can go to the jury that the prisoner received the property knowing it to have been stolen, but, bearing in mind that the *onus* is always on the prosecution, if the prisoner gives an explanation which raises a doubt in the minds of the jury whether or not he knew the property was stolen, the ordinary rule applies, the case has not been proved to the satisfaction of the jury, and he is entitled to be acquitted. A proper direction to the jury would be: 'If the prisoner's account raises a doubt in your minds, then, of course, you ought not to say that the case has been proved to your satisfaction'.

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[3] From newspaper reports published since this was written it appears that the sixteen-year old accused in *R.* v. *Newton* has been found guilty of murder by the ordinary courts and sentenced to death. According to the reports an appeal for remission of sentence has been made to the Minister to Justice.

[1] [1949] W.N. 170; [1949] 1 All E. R. 773.

[2] (1914), 84 L.J.K.B. 396; 11 Cr. App. R. 45; 24 Cox C.C. 591.

[3] So called by Viscount Sankey L. C. in *Woolmington's* case, [1935] A.C. 462, at p. 481.

[4] 24 Cox C. C. 591, at p. 594.

The learned Chief Justice concludes by saying: "If that simple fact were borne in mind, a good deal of the confusion which often arises by an attempt to lay down the law in accordance with *Abramovitch's* case will be avoided".

This, coming from the Court of Criminal Appeal in England, the same court that decided *Abramovitch's* case, has equal authority with that case, and presents a more rational view of the rule laid down by Lord Reading, which as Lord Goddard suggested has created so much confusion.

Canadian cases, such as the decision of the Supreme Court of Canada in *Rex* v. *Richler,*[5] the decision of the Alberta Court of Appeal in *Rex* v. *Searle,*[6] the decision of the British Columbia Court of Appeal in *Rex* v. *Lockhart*[7] and others, were all based on the rule in *Schama and Abramovitch,* so that these cases must now be considered in the light of the recent decision in *Rex* v. *Garth.*

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* * *

JURISDICTION OF THE SUPREME COURT OF CANADA — FINAL JUDGMENT — AMOUNT OR VALUE OF THE MATTER IN CONTROVERSY.— In *Montreal Tramways Co.* v. *Creely*[1] the Supreme Court of Canada again considered the meaning of "final judgment" and of "amount or value of the matter in controversy" in the Supreme Court Act. After dismissing a motion for a non-suit at the close of the plaintiff's case, the presiding judge (Tyndale C. J.) had suspended a jury trial in order to allow the defendant to apply for leave to appeal to the Quebec Court of King's Bench (Appeal Side). The defendant's application was granted by St. Jacques J. but the appeal was quashed by the full court on the ground that the judgment sought to be appealed from did not fall within any of the conditions required by article 46 of the Quebec Code of Civil Procedure to make it susceptible of appeal. The defendant then appealed to the Supreme Court of Canada.

The first question considered on the motion to quash which ensued was whether the judgment of the Court of King's Bench was "final". It was held to be so on the ground that it did finally

[5] [1939] S.C.R. 101; 72 C.C.C. 399.
[6] [1929] 1 W.W.R. 491; 51 C.C.C. 128.
[7] [1949] 1 W.W.R. 73.
[1] [1949] S.C.R. 197.

determine defendant's right to appeal this issue and that such right was a "substantive right".

No one appears to have contended that the judgment dismissing the motion for non-suit originally was anything else than interlocutory. Had the defendant allowed the trial to proceed to verdict and judgment, it would undoubtedly have been open to him on appeal from the final order to request reconsideration of the decision on the motion for non-suit as well as of all other interlocutories. Thus the question before the Supreme Court was really whether this situation had been changed by the judgment of the Court of King's Bench. That this judgment is final *on the appeal* cannot be doubted; it is conclusive on the issue and it will not be open to review on a subsequent appeal on the merits. However it is equally clear that it is not final *in the case*. Whether it is "final" within the meaning of the Supreme Court Act depends on whether it does determine in whole or in part any "substantive right" (section 2(b)).

No other indication of the meaning of "final judgment" is to be gathered from the Act except that section 36 limits the right of appeal to

(*a*) a final judgment; or
(*b*) a judgment granting a motion for a nonsuit or directing a new trial.

Why Parliament considered a judgment granting a motion for a non-suit as not being a final judgment is hard to understand. It could hardly be suggested, without violating the golden rule, that the draftsman meant that the right of appeal should exist when the motion was granted but not when it was dismissed. As to the specific provision respecting judgments directing a new trial, it should imply that they are not final judgments unless one can say that its association with the provision on non-suits shows that it also was inserted *ex majore cautela*.

In the decision under consideration the judgment appealed from is held to be "final" and the right to appeal from a judgment dismissing a motion for a non-suit is held to be a substantive right on the basis of a number of precedents. Five of these are cases in which the judgment appealed from had finally disposed of one or more distinct grounds of action or of defence.

In *Ville de St-Jean* v. *Molleur*[2] the Quebec Court of Appeals had dismissed *on the merits* an appeal from a judgment sustaining a demurrer as to three counts out of five.[3] Thus, as a result of this judgment, these grounds of action stood finally dismissed.

[2] (1908), 40 S.C.R. 139.
[3] (1907), 16 K.B. 559.

The Supreme Court held that "When by a judgment a distinct and separate ground of action is . . . 'finally disposed of' . . . it is . . . a final judgment with respect to that ground of action".

The second case is *Bulger* v. *The Home Insurance Company.*[4] The judgment appealed from ordered the appointment of an arbitrator against the objections of an insured who, in other proceedings, was claiming reinstatement and damages. It was held that these claims were in effect negatived by the judgment complained of and that this made it final.

In *The Cosgrave Export Brewery Company* v. *The King*[5] the judgment appealed from was an order of the Exchequer Court striking out from a defence in an action for taxes a paragraph urging a set-off. Although it did not adjudicate on the claim sought to be set-off, it was held that the right of set-off is substantive.

In *Ballantyne* v. *Edwards*[6] the Quebec Superior Court had dismissed the action on an inscription in law based on prescription. On appeal, prescription was held not to exist and the inscription in law was dismissed. The judgment of the Court of Appeals, although not final in the case, finally disposed of the question of prescription, which was held to be a substantive right making the judgment final within the meaning of the Supreme Court Act.

In *Hartin et al.* v. *May et al.*[7] a judgment holding unfounded a plea of *res judicata,* which had been sustained in the first instance, was held final for the purpose of an appeal to the Supreme Court of Canada.

It must again be pointed out that in each of these cases the judgment held to be final did adjudicate on some distinct ground of action or of defence. No such circumstance appears to exist in the case under consideration, so that the decision appears to be based mainly on other precedents in which the "substantive right" disposed of was a right of appeal.

Montreal Tramways Co. v. *Brillant*[8] is somewhat similar to the instant case in that the issue also was a motion for a non-suit. However the essential difference is that the motion was *granted* in the Superior Court so that the judgment in appeal dismissing it could be held to be in effect an order for a new trial. At least

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[4] [1927] S.C.R. 451.
[5] [1928] S.C.R. 405.
[6] [1938] S.C.R. 392.
[7] [1944] S.C.R. 278.
[8] [1929] S.C.R. 598.

this is what the official report says and, further, it does not reveal any consideration of the question of jurisdiction.

In *The Grand Council of the Canadian Order of Chosen Friends* v. *Local Government Board and the Town of Humboldt*[9] the report also does not disclose any discussion of the Supreme Court's jurisdiction. The Court of Appeals of Saskatchewan had held that it had no jurisdiction to entertain an appeal from an order of the Local Government Board; this judgment was affirmed.

In *The Provincial Secretary of the Province of Prince Edward Island* v. *Egan and The Attorney General of Prince Edward Island*[10] the situation was much the same. A county court judge had allowed an appeal from a decision of the Provincial Secretary refusing to issue a licence. On appeal, the Supreme Court of Prince Edward Island *en banc* held that the order was competent and that it had no jurisdiction. This judgment was reversed by the Supreme Court of Canada, which held that the provincial court had jurisdiction because the county court judge did not.

In the last two cases the judgment appealed from dealt solely with a right of appeal, but this right was the substance of the case, not an incident, and thus the judgment was final in every sense. Such was also the case in *Ripstein* v. *Trower*[11] in which an appeal was allowed from a judgment[12] dismissing an action on a declinatory exception. In all these cases the judgment dismissing the appeal concluded the issue: the right of the appellant to assert his claim was definitely denied. But, in the case under consideration, should it not be said that the question is whether appellant is entitled to have the judgment dismissing the motion for non-suit reviewed otherwise than on an appeal on the merits, not whether he is entitled to have it reviewed at all? Is this not the very distinction between a procedural and a substantive right?

The second question is whether the amount claimed in the original action was the "amount in controversy" in the judgment appealed from. The Supreme Court held that it was.

In all the cases in which a distinct ground of action or of defence was disposed of, there was of course no difficulty in finding that the amount claimed was the amount in controversy. In the cases of appeals from the decisions of boards or of government officials, this question did not arise because special leave to appeal to the Supreme Court of Canada was obtained. In the

[9] [1924] S.C.R. 654.
[10] [1941] S.C.R. 396.
[11] [1942] S.C.R. 107.
[12] (1940), 69 K.B. 424.

absence of such leave, the Supreme Court of Canada held itself to be without jurisdiction in *Gatineau Power Co.* v. *Cross.*[13] In this case, the Court of King's Bench had quashed an appeal from an order of the Quebec Public Service Commission. It was held that the matter in controversy was the right of appeal from the Commission's order refusing to authorize an expropriation and that such right is not appreciable in money.

The last case referred to is that of *Tremblay* v. *Duke-Price Power Co.*,[14] which was an appeal dismissed on motion by the Court of King's Bench on the ground that the required security had not been furnished. It was held by the Supreme Court that the amount originally claimed in the proceeding was not involved in this judgment because it turned merely on a matter of practice and procedure. More recently, in *Fiset* v. *Morin*,[15] the Supreme Court of Canada similarly held that there could be no appeal from a judgment of the Court of King's Bench dismissing an appeal on motion by reason of an alleged irregularity in the giving of the security. In those cases the judgment was final, but it was held that the amount of the original claim was not the amount in controversy in the proceeding, although as a result the litigation stood decided adversely to the appellant. This was held to be a consequential result.

In the judgment under consideration, *Tremblay* v. *Duke-Price* is distinguished on the ground that it "really turned merely on a matter of practice and procedure" and that no question of the jurisdiction of the Court of Appeals was involved. An earlier precedent is relied on in support of the jurisdiction, *Lord* v. *The Queen.*[16] In this case the Court of Appeals had dismissed the appeal because the inscription had been filed after the expiration of the time limited by law. The court had raised the point itself in rendering the judgment and had held that it was thereby deprived of its jurisdiction. On appeal to the Supreme Court of Canada the case was remitted to the Court of Appeals for decision on the merits. How fine the distinction is will be appreciated when it is noted that this is the very remedy which in *Morin* v. *Fiset* was said not to involve the amount claimed, and that in *Furois* v. *Cossette*,[17] a decision of the Court of King's Bench on which its judgment in that case is expressly based, the *ratio decidendi* was that "un cautionnement est de l'essence de

[13] [1929] S.C.R. 35.
[14] [1933] S.C.R. 44.
[15] [1945] S.C.R. 520.
[16] (1901), 31 S.C.R. 165.
[17] [1943] K.B. 239.

l'inscription et tient à la juridiction même de la Cour" (security for costs is an essential part of the inscription and a condition of the jurisdiction of the court).

In the final result it will be noted that a judgment of the Court of Appeals quashing, for *alleged want of jurisdiction*, an appeal from an interlocutory order and remitting the case to the Superior Court for decision on the merits was held to be "final" and to involve the amount claimed in the action although judgments quashing an appeal on the merits, for *an alleged irregularity*, were held to be "final" but not to involve the amount of the judgment of the court of first instance.

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Plato's Noctural Council

And when he has carried on his inspection during as many out of the ten years of his office as he pleases, on his return home let him go to the assembly of those who review the laws. This shall be a mixed body of young and old men, who shall be required to meet daily between the hour of dawn and the rising of the sun. They shall consist, in the first place, of the priests who have obtained the rewards of virtue; and, in the second place, of guardians of the law, the ten eldest being chosen; the general superintendent of education shall also be a member, as well the last appointed as those who have been released from the office; and each of them shall take with him as his companion a young man, whomsoever he chooses, between the ages of thirty and forty. These shall be always holding conversation and discourse about the laws of their own city or about any specially good ones which they may hear to be existing elsewhere; also about kinds of knowledge which may appear to be of use and will throw light upon the examination, or of which the want will make the subject of laws dark and uncertain to them. Any knowledge of this sort which the elders approve, the younger men shall learn with all diligence; and if any one of those who have been invited appear to be unworthy, the whole assembly shall blame him who invited him. The rest of the city shall watch over those among the young men who distinguish themselves, having an eye upon them, and especially honouring them if they succeed, but dishonouring them above the rest if they turn out to be inferior. This is the assembly to which he who has visited the institutions of other men, on his return home shall straightway go, and if he have discovered any one who has anything to say about the enactment of laws or education or nurture, or if he have himself made any observations, let him communicate his discoveries to the whole assembly. (Plato: Laws XII. 951. Jowett translation)