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*Nov. 11.
*Dec. 10.

PHILIP HESSELTINE AND OTHERS (DEFENDANTS) ..... } APPELLANTS;

AND

A. J. NELLES AND WILLIAM NEWMAN (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Appeal—Final judgment—Further directions—Master's report.

On the trial before the Chancellor of Ontario of an action claiming damages for breach of contract judgment was given for the plaintiffs with reference to the Master to ascertain the amount of damages, further directions being reserved. This judgment was affirmed by the Court of Appeal. The Master then made his report which, on appeal to the Chief Justice of the Common Pleas, was varied by reduction of the amount awarded. The Chancellor then pronounced a formal judgment on further directions in favour of the plaintiff for the damages as reduced. The defendants appealed from the judgments of the Chief Justice and the Chancellor and the two appeals were, by order, heard together, but not formally consolidated. Both judgments were affirmed by the Court of Appeal and the defendants sought to appeal from the judgment affirming them and also from the original judgment sustaining the decision at the trial, having applied without success to the court below for an extension of time to appeal from the latter judgment. See *Nelles* v. *Hesseltine* (27 Ont. L.R. 97).

Held, Brodeur J. dissenting, that the only judgment from which an appeal would lie was that affirming the judgment of the Chancellor on further directions; that the Chancellor could not review the original judgment of the Court of Appeal nor that varying the Master's report and the Court of Appeal was equally unable to review them on the appeal from the Chancellor's decision, and the Supreme Court being required by statute to give the judgment that the Court of Appeal should have given was likewise debarred from reviewing these earlier decisions.

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*PRESENT:—Davies, Idington, Duff, Anglin and Brodeur JJ.

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APPEAL from a decision of the Court of Appeal for Ontario affirming the judgment of the trial judge in favour of the plaintiffs.

Though the appeal was decided on the merits it was argued on a question of jurisdiction only, the appellants contending that though the appeal was from a judgment on further directions, the court could review earlier judgments in the cause. The facts are fully stated in the above head-note.

Nesbitt K.C. and *Matthew Wilson K.C.* for the appellants. All the judgments can be reviewed on this appeal. See *Roblee* v. *Rankin*(1); *North Eastern Banking Co.* v. *Royal Trust Co.*(2); *In re Boyd*(3).

Holman K.C. for the respondents referred to *Clarke* v. *Goodall*(4); *Shaw* v. *St. Louis*(5); *The Queen* v. *Clark*(6); *Desaulniers* v. *Payette*(7).

DAVIES J. agreed with Anglin J.

IDINGTON J.—I do not think this court was constituted as counsel urges for the purpose of reviewing upon appeal all that had transpired in any cause in the courts below, but only such possible causes of error as might be found to exist in a final judgment of the court of last resort in any of the several jurisdictions from which appeal here is given.

If, by the law of the jurisdiction in question, such a power of review existed in the appellate court of final resort therein, then in order that we should give effect to the meaning of section 51 of the "Supreme Court

(1) 11 Can. S.C.R. 137.
(2) 41 Can. S.C.R. 1.
(3) [1895] 1 Q.B. 611.
(4) 44 Can. S.C.R. 284.
(5) 8 Can. S.C.R. 385.
(6) 21 Can. S.C.R. 656.
(7) 35 Can. S.C.R. 1.

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Act," we could review what was reviewable by that appellate court.

That not being what appellants claim or admit they are here for, the appeal must be dismissed with costs.

DUFF J.—I agree with Anglin J. One question and one only arises and that is: Are we, in passing upon the appeal from the judgment of the Court of Appeal given in the appeal to that court from the judgment of the Chancellor on the hearing of the action * * * on further directions, bound by the judgments, first of the trial judge, and secondly of the Court of Appeal itself on the appeal from the judgment pronounced by the Chief Justice of the Common Pleas on the motion to vary the Master's report? That the Court of Appeal in determining the appeal from the Chancellor was bound by the Master's report as varied by Meredith C.J., or by itself, on appeal from Meredith C.J., as well as by the judgment of the trial judge, nobody having a competent knowledge of the practice governing such proceedings can entertain a doubt; and, (the duty of this court being to give the judgment which ought to have been pronounced in the court below,) we are governed, of course, on this appeal by the same principles of law, both substantive and adjective, as the Court of Appeal was. The fact that the appeals from the Chancellor and Meredith C.J. were heard by the Court of Appeal together does not affect the matter in the slightest.

ANGLIN J.—A judgment determining the liability of the defendant company was pronounced by the trial judge on the 16th of March, 1907, and was affirmed by

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the Court of Appeal for Ontario on the 21st of April, 1908. Under these judgments a reference took place before the Master at Windsor to ascertain the amount to which the plaintiffs were entitled by way of damages for breach of the defendants' agreement to transfer certain bonds and shares of stock. The Master made his report on the 7th of April, 1909. The defendants appealed from the report and the Chief Justice of the Common Pleas, on the 23rd of January, 1911, varied it by reducing the sums awarded as damages. On the 1st of March, 1911, the Chancellor of Ontario pronounced a formal judgment on further directions awarding the plaintiffs' judgment for the damages allowed them by the Master's report as varied on appeal. The defendant company appealed to the Court of Appeal from the judgment of the Chief Justice of the Common Pleas and also from the judgment of the Chancellor. An order was made for the "consolidation" of the two appeals and the printing of one appeal book in both. Though spoken of as a consolidation, this order in effect merely provided for the hearing of both appeals together. These appeals were dismissed by the Court of Appeal on the 28th of September, 1911, and from the judgments dismissing them the present appeal is brought. The appellants seek on this appeal to have this court review not merely the judgment of the Chancellor on further directions, but also the judgment of the Chief Justice of the Common Pleas varying the report as to damages and the original judgment of the trial judge determining liability, affirmed on appeal as against the company by the Court of Appeal.

At an early stage of the present appeal in this court an application was made to the registrar to affirm its

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jurisdiction. On that application the appeals which had been taken to the Court of Appeal from the judgment of the Chief Justice of the Common Pleas and from the judgment of the Chancellor were treated as two distinct appeals. They had been entertained and disposed of as such by the Court of Appeal and not as consolidated in the technical sense, but merely as joined for convenience at the hearing and to save expense in printing. I have no doubt that they were rightly so dealt with and that the suggestion now made that there was a complete consolidation in the technical sense is ill founded. The mere hearing of the two appeals together would not, of course, enlarge the scope of the appeal from the judgment on further directions. The learned registrar determined that in so far as the appeal was from the judgment on further directions, this court had jurisdiction; that in so far as it was from the judgment affirming the order of the Chief Justice of the Common Pleas varying the Master's report this court had not jurisdiction; and that in so far as it was from the judgment of the Court of Appeal affirming the original judgment determining the liability of the company no appeal would lie. On appeal the registrar's conclusions were affirmed by this court. On the argument counsel for the appellants then insisted, as he now insists, that the action, though in form equitable, was in substance and reality a common law action to recover damages for breach of contract, and the case was dealt with by the court on that footing. See *Clarke* v. *Goodall*(1).

Application for leave to appeal, or to extend the time for appealing to this court from the judgment

(1) 44 Can. S.C.R. 284.

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of the Court of Appeal affirming the original judgment of the trial judge as against the company, was subsequently made to the late Chief Justice of Ontario, who refused it; and on appeal to the Court of Appeal his refusal was affirmed.

The appellants now seek, notwithstanding all that has taken place, to have this court review upon the present appeal, limited as it is to the judgment of the Court of Appeal affirming the judgment of the Chancellor on further directions, the question of the company's liability under the judgments of 1907 and of 1908 and also the question as to the amount of damages to which the plaintiffs are entitled under the judgment of the Chief Justice of the Common Pleas affirmed by the judgment of the Court of Appeal, from which it has already been held that no substantive appeal lies to this court.

It is quite clear that according to the practice of the courts of Ontario on the motion for further directions the learned Chancellor could not review the original judgment determining the company's liability; and it is equally clear that he could not have entertained anything in the nature of an appeal from the report of the Master as varied by the judgment of the Chief Justice of the Common Pleas. The matters dealt with by those judgments were *res judicatæ*. He might, however, have considered the whole of the evidence both at the trial and before the Master and all the proceedings which had taken place for the purpose of adjudicating upon the question of costs. This latter fact explains the recital in the formal judgment of the Chancellor of the reading of the evidence and

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of all the proceedings. See *Goodall* v. *Clarke*(1); *Gould* v. *Burritt*(2); *Downey* v. *Roaf*(3); *McGill* v. *Courtice* (4). There is here no suggestion that the original judgment was improvidently pronounced or did not correctly express the intention of the court as in *Kelly* v. *McKenzie*(5); *Commercial Bank* v. *Graham* (6), and *Mitchell* v. *Strathy*(7); no contention that the report was improper or unsatisfactory in the sense which caused the court to refuse to act upon reports in *Baldwin* v. *Crawford*(8), and *Taylor* v. *Craven*(9), decisions which may also be ascribed to the undoubted jurisdiction over reserved costs. The learned Chancellor could not on the hearing on further directions take into consideration any matter which was in issue on the original hearing; Daniels' Ch. Pr. (7 ed.), p. 948; nor anything which was, or would properly have been, the subject of an appeal from the report, *ibid.*, p. 946. Neither was it open to the Court of Appeal on the appeal from the judgment on further directions to do what the learned Chancellor might not have done. Our jurisdiction is statutory. By section 51 of the "Supreme Court Act" we are required to give the judgment which the court whose decision is appealed against should have given. In discharging that duty it is not within our power on an appeal from the judgment of the Court of Appeal confirming a judgment on further directions to do anything which the judge who disposed of the motion on further directions in the first instance could not have done. We are, therefore,

(1) 19 Ont. W.R. 944.
(2) 11 Gr. 234.
(3) 6 Ont. P.R. 89.
(4) 17 Gr. 271.
(5) 2 Man. L.R. 203.
(6) 4 Gr. 419.
(7) 28 Gr. 80.
(8) 1 Gr. 202.
(9) 10 Gr. 488.

not in a position on the present appeal to review either the earlier judgment of the Court of Appeal affirming the judgment of the trial judge determining the liability of the defendant company, or the later judgment of the Court of Appeal affirming the judgment of the Chief Justice of the Common Pleas varying the Master's report.

It was strongly pressed on behalf of the appellants that unless these two judgments are open to review on the present appeal from the only final judgment which has been rendered in this action, they are denied any effective recourse to this court. No doubt that is the case, due to the fact that a course of procedure has been followed in this instance with which we have latterly become quite familiar in common law actions. Since the "Judicature Act," and more particularly in recent years, the High Court judges when dealing with such cases have sometimes found it convenient to adopt the procedure of a court of equity and to refer the assessment of damages and similar questions to an officer of the court for determination, reserving further directions. When this court was constituted in 1875 (38 Vict. ch. 11, sec. 17), it was given jurisdiction, subject to certain limitations, to hear appeals

> from all final judgments of the highest court of final resort * * * established in any province of Canada in cases in which the court of original jurisdiction is a superior court.

By the statute 42 Vict. ch. 39, sec. 9, "final judgment" was interpreted to mean

> any judgment, rule, order or decision whereby the action, suit, cause, matter or other judicial proceeding is finally determined and concluded.

This definition is now found in sub-section (*e*) of section 2 of the "Supreme Court Act." By section 1 of the statute 42 Vict. ch. 39, it was also provided that

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an appeal shall lie to the Supreme Court of Canada from any decree, decretal order, or order made in any suit, cause, matter or other judicial proceeding originally instituted in any superior court of equity in any province of Canada, other than the Province of Quebec, and from any decree, decretal order, or order in any action, suit, cause, matter or judicial proceeding in the nature of a suit or proceeding in equity which shall have been originally instituted in any superior court in any province of Canada other than the Province of Quebec.

This provision, slightly altered, now appears in the "Supreme Court Act" as clause (*c*), of section 38. It was made because in equitable procedure it frequently happened that judgments, which did not finally determine and conclude the suit or matter, did finally determine and dispose of substantial rights of litigants. But the procedure followed in common law actions did not require such a provision. Except in the case of a judgment allowing a demurrer to, or otherwise finally disposing of one or more of several distinct claims or grounds of action; *Ville de St. Jean* v. *Molleur*(1); *McDonald* v. *Belcher*(2); and in the case of post-judgment interpleader issues which have been treated as distinct judicial proceedings; *Hovey* v. *Whiting*(3), at page 525, ordinarily the only judgment in an action which, under common law procedure, disposed of the rights of litigants in the subject-matter of the litigation was the final judgment that concluded the action itself. A judgment determining rights and directing a reference to assess damages or to take accounts with a reservation of further directions was not a feature of that procedure. In common law cases, subject to the exceptions which I have mentioned, the right of appeal to this court was, therefore, allowed to remain limited to judgments which concluded the action.

(1) 40 Can. S.C.R. 139. (2) [1904] A.C. 429.
(3) 14 Can. S.C.R. 515.

It would appear to have been thought at first that every appeal to the court of last resort in the province might be deemed "a judicial proceeding" within the statutory definition of 1879, and the judgment rendered in it appealable as a judgment finally disposing of such proceeding. That view was expressed in *Chevalier* v. *Cuvillier*(1), followed in *Shields* v. *Peak*(2), at p. 592. It should be noted, however, that in both these cases the appeals were from judgments allowing demurrers. Under such a construction of "final judgment" as used in the "Supreme Court Act," every judgment of a provincial court of appeal involving a sufficient amount would be appealable to this court. The restriction of the right of appeal to final judgments and the special provisions for appeals in equitable and other cases would be meaningless and useless. The view that every such appeal is in itself "a judicial proceeding," within the meaning of that phrase in the section of the "Supreme Court Act" interpreting "final judgment," was soon found to be so inconsistent with the whole scheme of the statute that it was abandoned. *Ontario and Quebec Railway Co.* v. *Marcheterre*(3), at page 147; *Molson* v. *Barnard*(4); *Rural Municipality of Morris* v. *London and Canadian Loan and Agency Co.*(5); and it is now well established in the jurisprudence of this court that, except in equitable proceedings and other cases specially provided for, an appeal will not lie from any order or judgment pronounced in the course of an action brought in the courts of a province where the procedure is modelled on the English system, although it may have the effect

(1) 4 Can. S.C.R. 605.
(2) 8 Can. S.C.R. 579.
(3) 17 Can. S.C.R. 141.
(4) 18 Can. S.C.R. 622.
(5) 19 Can. S.C.R. 434.

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of disposing of substantial rights, unless it finally determines and concludes the action itself or some distinct claim or ground of action. *Wenger* v. *Lamont* (1); *Goodall* v. *Clarke* (2); *Crown Life Ins. Co.* v. *Skinner* (3). This harmonizes with the fact that, like an appeal to the English Court of Appeal (O. 58, R. 1), an appeal to a provincial court of appeal under the system established by the judicature Acts is not a distinct judicial proceeding, but is a motion in the cause "by way of re-hearing" (B.C. Rules, O. 58, R. 1, and R.S.B.C. (1911), ch. 51, sections 6 and 13; Man. K.B. Rule 647, and 5 & 6 Edw. VII., ch. 18, sec. 7 (*a*); Ont. Con. R. 798.) By the last-mentioned rule an appeal to the Ontario Court of Appeal is expressly declared to be "a step in the cause."

In considering cases in which this court has entertained appeals from judgments and orders of the Exchequer Court, which would not be deemed final judgments under the statutory definition of that term in the "Supreme Court Act," it must be borne in mind that by section 82 of the "Exchequer Court Act" (R.S.C. 1906, ch. 140) providing for appeals to this court, it is declared that

> a judgment shall be considered final for the purposes of this section if it determines the rights of the parties, except as to the amount of damages or the amount of liability.

Again, in considering cases from the Province of Quebec in which interlocutory judgments have been reviewed by this court, whether on substantive appeals from them, or incidentally when dealing with appeals from judgments finally disposing of actions, it should

(1) 41 Can. S.C.R. 603. (2) 44 Can. S.C.R. 284.
(3) 44 Can. S.C.R. 616.

be remembered that in the opinion of eminent judges from that province who have been members of this court, some judgments, which lawyers trained in the English system might deem interlocutory at all events under the statutory definition of final judgment in the "Supreme Court Act," should be regarded as wholly or in part final and definitive under the system of jurisprudence which obtains in that province, and as such appealable to this court; while others, as purely interlocutory, are subject to the maxim "l'interlocutoire ne lie pas le juge," and, therefore, reviewable on appeal from the final judgment concluding the action. *Shaw* v. *St. Louis* (1); *Ontario and Quebec Railway Co.* v. *Marcheterre* (2); *Desaulniers* v. *Payette* (3); *Willson* v. *Shawinigan Carbide Co.* (4). Whatever difficulty the definition of "final judgment" in the "Supreme Court Act" may present to the hearing of a substantive appeal from a judgment which, though final in another sense under the Quebec system of jurisprudence, does not finally determine and conclude the action, suit, cause, matter or other judicial proceeding, section 51 of the statute offers no obstacle to the review of an interlocutory judgment to which the maxim quoted applies on appeal from the judgment which finally determines an action in the Province of Quebec.

If it should be thought desirable to give to litigants in other provinces a right of appeal to this court from any judgment which finally determines or disposes of substantial rights, that might be done by substituting for the definition of "final judgment" now in the

(1) 8 Can. S.C.R. 385.
(2) 17 Can. S.C.R. 141.
(3) 35 Can. S.C.R. 1.
(4) 37 Can. S.C.R. 535.

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"Supreme Court Act," a definition similar to that which governs in Exchequer Court cases. To permit the review of interlocutory judgments on appeals from the final judgments in actions brought in provinces in which legal procedure is based on the English system would tend to unduly prolong litigation and to enormously increase its expense. To allow the opening up, on an appeal from a judgment merely on further directions and costs, of the judgment which determined liability and directed a reference to ascertain its amount would probably result in the entire cost of what might have been a very expensive reference being thrown away whenever the original judgment should be reversed by this court or should be so varied that the basis of reference would be substantially altered. But any such change in our jurisdiction must be made by Parliament. We are powerless to effect it.

Since we have jurisdiction over the appeal from the final judgment on further directions the present appeal may not be quashed; but inasmuch as counsel for the appellants has intimated that if he cannot open up the judgment determining their liability or the later judgment on the quantum of damages it would be useless to argue the appeal from the judgment on further directions, in which nothing but the disposition of costs could be dealt with, this appeal should be now dismissed; and I see no reason why the usual result as to costs should not follow. *Desaulniers* v. *Payette*(1).

BRODEUR J. (dissenting).—We are called upon to decide whether on an appeal from a final judgment in

(1) 35 Can. S.C.R. 1.

Ontario we can review the interlocutory orders which have disposed of the real points in dispute.

It is claimed by the respondents that an interlocutory order is *res judicata,* that it cannot be opened by the judge who renders the final judgment, and that the Court of Appeal and this court are bound by that order.

On the other hand, the appellants state that an interlocutory order can be reviewed and that it should not operate so as to bar or prejudice this court from giving such decision as may be just.

It is now the settled jurisprudence of the Supreme Court as evidenced by the following decisions: *Union Bank of Halifax* v. *Dickie*(1); *Clarke* v. *Goodall*(2), and *Crown Life Ins. Co.* v. *Skinner*(3), that the interlocutory judgments similar to the ones in question in this case cannot be formally appealed from.

But it has never been decided whether those interlocutory judgments could be reviewed when the action is brought before us on an appeal from the final judgment.

What are the facts in the present case? First the question of liability of the defendant company, now appellant, was decided in 1908 by the High Court and the Court of Appeal, and a reference was ordered to determine the quantum of damages. It was certainly the most important question to be decided as to whether the defendant company was or was not liable. However, as that judgment was not a final one no formal appeal therefrom on account of the decisions above quoted, could be taken.

The parties then proceeded on the reference and

(1) 41 Can. S.C.R. 13. (2) 44 Can. S.C.R. 284.
(3) 44 Can. S.C.R. 616.

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there also a most important issue was fought. The referee having reported a certain amount of money as representing the quantum of damages that the company should pay, an appeal from his decision was brought before the Chief Justice of the Common Pleas, Sir William Meredith, who varied the report as to the amount. The latter judgment was rendered on the 23rd of January, 1911.

On the 8th of March, 1911, a judgment was rendered by the Honourable Chancellor on the plaintiffs' motion for further directions and for costs. In the formal order of the Chancellor it is stated that;

> Upon hearing read the *pleadings, proceedings, judgment at trial,* certificate of the Court of Appeal, the report of the local Master at Sandwich, the judgment of the Honourable the Chief Justice of the Common Pleas varying the report, *the evidence, orders, certificates, papers and all proceedings* had and taken in the cause and upon hearing counsel as aforesaid—
>
> This court doth order and adjudge that the defendants, The Windsor, Essex and Lake Shore Rapid Railway Company do pay to the plaintiff, A. J. Nelles the sum of $10,648.90 * * * that the defendants, The Windsor, Essex and Lake Shore Rapid Railway Company do pay to the plaintiffs their costs. * * * "

The defendants appealed from the judgment of the Chief Justice of the Common Pleas and from the judgment of the Chancellor and those appeals were dismissed by the Court of Appeal on the 28th of September, 1911.

Notice of appeal was then given to this court and later on a motion was made before the registrar to affirm the jurisdiction of this court to hear the appeals, first from the judgment of 1908, secondly, from the order of Sir William Meredith given on the 23rd of January, 1911, and thirdly, from the judgment of the Chancellor of the 8th March, 1911.

The registrar refused to grant the motion as to the two first orders or judgments relying on section 69 of

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the statute and on the cases above quoted of *Clarke* v. *Goodall*(1), and *Crown Life Ins. Co.* v. *Skinner*(2), but he added:—

> In holding that no appeal lies from this judgment (referring to the judgment of the Chief Justice at the Common Pleas) I am not to be taken as being of the opinion that the Supreme Court may not in dealing with an appeal from the final judgment, open up any interlocutory judgment of the Court of Appeal or any other court below on this matter.

That opinion of the registrar was confirmed later on by the court itself.

The appeal then came up on the merits and the first question that was discussed was whether we could review the interlocutory judgments, first the one rendered in 1908 declaring the liability of the company, and the second rendered in January, 1911, determining the amount of damages.

We did not consider it advisable to hear the parties upon the merits of those two interlocutory judgments until we would decide that preliminary point.

I am strongly of the view that Parliament in giving an appellate jurisdiction to this court intended to give us and has given us the power to hear and determine all the issues in a case.

The formal appeal may be taken only from the final formal judgment, but in considering that judgment we have the right to review all the interlocutory orders which at one time or another have been rendered in the case by the High Court (section 51 "Supreme Court Act").

In general principle an interlocutory order remains, until final judgment, subject to the control of the court and open to reconsideration and revision (Cyc., vol. 11, page 503).

(1) 44 Can. S.C.R. 284. (2) 44 Can. S.C.R. 616.

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That rule is simply the confirmation of the old Roman saying, *judex ab interlocutoris discidere potest.* We find also that principle established in the French law under the well-known phrase *"l'interlocutoire ne lie pas le juge final."*

It is claimed that the practice in Ontario is that in a final judgment the interlocutory orders are never disturbed. I may say that we have in the Province of Quebec an almost similar practice, and it is very seldom that we see a judge reversing the opinion of one of his confreres on demurrer or another incident. They do as the Chancellor did in this case, they examine all the papers, interlocutory judgments and other proceedings and render the final judgment. But in law those interlocutory judgments have no binding effect and they can be reviewed and reconsidered. But supposing that a judge of co-ordinate jurisdiction cannot reconsider the interlocutory order, could that rule be applied as to the appellate courts ? As far as England is concerned that question is disposed of by Order 58, Rule 14, which says:—

> No interlocutory order or rule from which there has been no appeal shall operate so as to bar or prejudice the Court of Appeal from giving such decision upon the appeal as may be just.

In Ontario section 81 of the "Judicature Act" states that on questions of law or practice the Court of Appeal and the High Court are bound by their former decisions until they are overruled by a higher court. Here is what it says:—

> 81 (1) The decision of a Divisional Court or of the Court of Appeal on a question of law or practice shall, unless overruled or otherwise impugned by a higher court, be binding on the Court of Appeal and all Divisional Courts thereof, as well as on all other courts and judges, and shall not be departed from in subsequent cases without the concurrence of the judges who gave the decision, unless and until so overruled or impugned.

(2) It shall not be competent for the High Court or any judge thereof in any case arising before such court or judge to disregard or depart from a prior known decision of any court or judge of co-ordinate authority on any question of law or practice without the concurrence of the judges, or judge who gave the decision; but if a court or judge deems the decision previously given to be wrong and of sufficient importance to be considered in a higher court, such court or judge may refer the question to such higher court.

We have in British Columbia a decision in the case of *Edison General Electric Co.* v. *Edmonds*(1), almost similar to this one.

The statement of defence has raised an objection in point of law. Judge Drake had decided the point of law in favour of the defendants. Upon appeal the Divisional Court had confirmed Mr. Justice Drake's decision. Upon motion then made to him the action was dismissed by the same judge as the action was substantially disposed of by the decision of the point of law.

Appeal was then made to the full court, which decided that the interlocutory judgment of Mr. Justice Drake and of the Divisional Court could be reviewed. Chief Justice Davie in rendering the judgment of the full court said, at page 379:—

It never, I think, was intended either by our own "Supreme Court Act" or the rules, or by the "Supreme and Exchequer Court Act," that by virtue of an interlocutory tribunal pronouncing what in effect is a final judgment that there the litigant's rights should be concluded. There can, I think, be but one final determination upon the merits of an action, and when you arrive at that stage, and not until then, the right of appeal as from a final judgment arises; and upon the final appeal in determining the merits of the case, the court is not to be barred by any interlocutory decision not brought by appeal to the full court. To this effect, I take it, is Rule 683, which says that no interlocutory order or rule from which there has been no appeal shall operate so as to bar or prejudice the full court from giving such decision upon the merits as may be just.

(1) 4 B.C. Rep. 354.

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That Rule 683 is the exact reproduction of the English Order 58, Rule 14, and we find in England the following decisions which enunciate the principle that an interlocutory order will not operate so as to bar the Court of Appeal from giving the decision which is considered just. *Sugden* v. *Lord St. Leonards*(1); see *per Mellish* L.J., page 208; *Laird* v. *Briggs*(2).

Now coming to the examination of the jurisprudence of this court on the point at issue I find that the court in the case of *Magann* v. *Auger*(3) has reviewed an interlocutory judgment and has allowed the appeal and maintained the *exception declinatoire* the object of that interlocutory judgment. The formal appeal was from the final judgment. In 1906 in the case of *Willson* v. *Shawinigan Carbide Co.*(4), there had been a direct appeal from the judgment on an *exception declinatoire*. This court quashed the appeal on the ground that the objection as to the jurisdiction of the Superior Court might be raised on a subsequent appeal from the final judgment on the merits.

In 1908 in a case of *North Eastern Banking Co.* v. *The Royal Trust Co.*(5) we find facts very much similar to those in this case. It was an Exchequer Court case. Judgment had been rendered on the merits and a reference had been ordered. The report of the referee was brought down and no appeal was taken to the judge from the report within the 14 days mentioned in sections 19 and 20 of the then rules of the court (Exchequer Reports, vol. 6, page 449). The power of the court to vary seemed to be at an end. It

(1) 1 P.D. 154.
(2) 16 Ch. D. 663.
(3) 31 Can. S.C.R. 186.
(4) 37 Can. S.C.R. 535.
(5) 41 Can. S.C.R. 1.

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was held that an appeal will lie to the Supreme Court from an order of the judge confirming the report. It is to be noticed that by section 82 of the "Exchequer Court Act," chapter 140, R.S.C. (1906), some interlocutory judgments of the Exchequer Court may be appealed to this court. Though there was no appeal from the interlocutory I draw the inference that it would, however, be reviewed by this court.

The respondents have referred to three cases decided by this court and which according to them preclude the consideration of interlocutory judgments.

These are the cases of *Shaw* v. *St. Louis,* in 1883 (1); *The Queen* v. *Clarke,* in 1892(2), and *Desaulniers* v. *Payette,* in 1904(3).

Of those three cases the last one seems to have some bearing upon the point at issue.

The two other cases, *Shaw* v. *St. Louis*(1) and *The Queen* v. *Clarke*(2) were decided on an entirely different question since the court declared that the judgments were final though they did not terminate the suit and that some references were ordered.

It was simply decided there might be appeals from interlocutory judgments which terminate a question of law or of fact, but which are not, however, the final judgments of the case.

I may add, however, that in the case of *The Queen* v. *Clarke*(2) the judges, Patterson and Gwynne JJ. who were dissenting gave us their opinion that those interlocutory judgments could be reconsidered on an appeal from the final judgment.

The judgment in *Desaulniers* v. *Payette*(4), upon

(1) 8 Can. S.C.R. 385.
(2) 21 Can. S.C.R. 656.
(3) 35 Can. S.C.R. 1.
(4) 33 Can. S.C.R. 340.

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which was rendered later on the judgment above quoted(1) could hardly be considered as a good precedent as it was practically overruled in the case of *La Ville de St. Jean* v. *Melleur*(2), where it was decided that a judgment depriving the appellant of his right to rely on some of the grounds of his action was a final judgment which could be appealed here.

The contention that this court has no alternative other than to affirm the judgment appealed from because the question of costs alone was then decided seems to me absolutely wrong—and why ? Because it is said the Supreme Court can only reverse the judgment of the Court of Appeal if that court is wrong; but the judgment of the appeal court was right, because how could it have said that the judge below was wrong when he had done no more than conform to its own judgment on the earlier appeal ? And so it happens that the judgment of the trial judge which may have been absolutely wrong can never be reformed by the highest appellate court.

That conclusion so repugnant to my common sense comes about because the rules of practice which have been adopted by the courts below for the purpose of expediting the business of the court are permitted to produce a result which is nothing but a travesty upon the due administration of justice.

The trial judge or the Court of Appeal in the future will have simply, in order to avoid an appeal to this court, to state in their decree that the defendants or the plaintiffs should win on the true issues in the case and reserve the question of costs for further adjudication and those true issues could never be brought up here.

(1) 35 Can. S.C.R. 1. (2) 40 Can. S.C.R. 139.

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When one considers the circumstances under which the Supreme Court was organized, that the bill as introduced in Parliament would have precluded any appeal from this Supreme Court to the Privy Council (R.S.C. (1906), ch. 139, sec. 159) that the Judicial Committee has always refused to be bound by any rule of practice or procedure in the courts below which would prevent it from doing justice, and that the "Supreme Court Act" (section 68) provides that proceedings in appeal shall where not otherwise provided in the Act, be as nearly as possible in conformity with the practice of the Judicial Committee, I, for one, find myself unable to concur in such an important conclusion as it is said the court must arrive at in the present case. In giving to that practice the effect which is asked by the respondents it would be limiting the appeals to the Supreme Court and it is not in the power of the provincial courts any more than of the provincial legislature to circumscribe the appellate jurisdiction granted by the "Supreme Court Act," which was passed pursuant to section 101 of the "British North America Act." (*Crown Grain Co.* v. *Day*(1).

My conclusion is that the interlocutory judgments rendered by the Court of Appeal in 1908 and by the Chief Justice of the Common Pleas in 1911, can be reviewed and reconsidered in this appeal.

Appeal dismissed with costs.

Solicitors for the appellants: *Wilson, Pike & Stewart.*
Solicitors for the respondents: *Rodd & Wigle.*

(1) [1908] A.C. 504.