THE SUPREME COURT ACT

R.S. c. 139 (1906)

AND

RULES

Civil 1906.

WITH REFERENCES TO ALL THE DECISIONS OF THE COURT DEALING WITH ITS PRACTICE AND JURISPRUDENCE

BY

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TO

THE HONOURABLE CHARLES FITZPATRICK,

CHIEF JUSTICE OF CANADA

TO WHOSE CORDIAL SYMPATHY AS

MINISTER OF JUSTICE

ANY IMPROVEMENT IN THE FORM AND LANGUAGE OF THE PRESENT

SUPREME COURT ACT

IS DUE,

THIS WORK

WITH HIS PERMISSION

IS

MOST RESPECTFULLY DEDICATED.

PREFACE.

Some eight years have now elapsed since the publication of the second edition of Mr. Cassels's book on the practice of the Supreme Court of Canada. An apology, therefore, is perhaps unnecessary for the appearance of this volume dealing with the jurisprudence and practice of the Court.

In view of the fact that the sections of the old law relating to the appellate jurisdiction of the Court have been entirely redrafted in the Revised Statutes of 1906, and may give rise to the false impression that the revision has made some alterations in the law, it may not be out of place here to state the reasons which led the Commissioners to exercise in this case to the fullest extent the power vested in them by the Statute 3 E. VII. ch. 61, which authorized them, in consolidating the statutes,

"to make such alterations in their language as are requisite in order to preserve a uniform mode of expression, and make such minor amendments as are necessary to bring out more clearly what they deem to be the intention of Parliament, or to reconcile seemingly inconsistent enactments."

In March, 1903, the writer sent to the Attorneys-General and Bar Associations of Canada a pamphlet, accompanied by the following circular-letter:—

"*Sir*,—The Commissioners for the revision of the Statutes of Canada have allotted to the undersigned the work of revising in the first instance 'The Supreme and Exchequer Courts Act.' After considering the proceedings in Parliament when the different amendments to the original Act were made, and after reviewing the many decisions of the Supreme Court which deal with its jurisdiction, the writer has been impressed with the desirability of recasting those sections of the Act, by which the appellate jurisdiction of the Court is conferred.

"The matter having been brought to the attention of the Honourable the Minister of Justice, he has instructed the writer to draft a Bill containing the proposed amendments and submit it to the Attorneys-General and the Bar Associations of the different Provinces of Canada, for their consideration.

"I have the honour, therefore, to enclose you a copy of those sections of the Bill in which the amendments appear, accompanied by an explanatory note pointing out the alterations made and giving reasons therefor.

"The aim of the writer has been to use such clear and precise language in defining the Court's jurisdiction, that an end may be put, so far as possible, to the numerous motions to quash, which heretofore have been made at nearly every session of the Court; and at the same time to avoid any suggestion of an attempt to extend the jurisdiction of the Court beyond the boundaries which Parliament itself has intended to place by its legislation, except where the amendments are obviously desirable and have been suggested by members of the Bar or by the Court.

"I shall be pleased to have your view upon the proposed amendments at your earliest convenience."

In the explanatory note which accompanied the letter it was said:—

"The extent of the jurisdiction of the Supreme Court has proved a fruitful subject of litigation, and notwithstanding the many decisions of the Court upon the sections of the statutes dealing with this question, the number of motions to quash for want of jurisdiction appears to grow rather than decrease as the years go by.

"Indeed, during the last ten years there have been as many motions to quash appeals in the Supreme Court for want of jurisdiction as are found in the twenty years preceding. Leaving out of consideration those cases in which the motions to quash have failed, no less than fifty cases of appeals quashed for want of jurisdiction are to be found in the official reports of the Court since 1893.

"The reason for this is obvious, when we examine critically the sections of the Act dealing with jurisdiction.

We find there a great lack of precision in the expression of the mind of Parliament, and the sections are so ill-arranged that even after a very careful and minute examination it is often difficult to determine whether the case is appealable or not.

"In the decisions we frequently find the judges themselves divided in opinion with respect to the jurisdiction of the Court in the case before them for consideration; and if there is room for members of the Court to disagree, it is not to be wondered at, that we frequently find the Bar hopelessly at sea in this matter."

It is not necessary to refer further to this, beyond saying that although a draft bill was prepared for submission to Parliament containing amendments which it was thought might advantageously be made to the Act, it was ultimately decided to do no more than attempt, by redrafting, to minimize, so far as possible, the difficulty so frequently found in determining the jurisdiction of the Court.

It only remains to say that in addition to what has been accomplished by the revision, it has been found possible in the present work to still more simplify the question of jurisdiction by the preparation of a table which will be found on pages 81 and 82, and an explanation on page 80, called a Key for determining the jurisdiction of the Court, and which by a simple process of elimination, makes it possible in most cases to speedily determine the jurisdiction of the Court in appeals from all the Provinces of Canada.

E. R. CAMERON.

OTTAWA, November 16th, 1906.

ADDENDA ET CORRIGENDA.

Page. 57.—Six lines from the bottom, strike out the words "the present."

Page 80.—Key for determining jurisdiction.—Second line from the bottom for "section" read "sections."

In the same line, after "39" add "49."

In the last line, for words "that section" read "those sections."

Page 81.—Key for determining jurisdiction.—After the words "Province of Quebec" in the 10th line from the bottom, insert, so as to make the same applicable to the immediately preceding paragraphs a, b and c, the words "and in the Province of Quebec if the case is one of those covered by sections 46 and 47, and in the Province of Ontario if the case is one of those mentioned in section 48."

Page 86.—Superior Courts.—The Legislature of the Province of Manitoba, by 5-6 E. VII., c. 18, created a court of appeal for that province to be intituled the Court of Appeal. The Court is vested with all the rights, powers and duties theretofore exercised by the Court of King's Bench sitting *en banc* as a court of appeal, and is therefore a superior court; but the Act of the Parliament of Canada, 6 E. VII., c. 4, neglected to provide for an amendment to the Interpretation Act, R.S., 1886, c. 1, s. 7, ss. 31, so as to include in the expression "superior court," not only the Court of King's Bench for Manitoba, but also the Court of Appeal.

Page 102.—16th line from the bottom, for "47" read "48."

Page 130.—6th line from the bottom, for "O.L.R." read "Q.L.R."

Page. 219.—2nd line from the bottom, for "Wright" read "Knight."

Page 220.—Leave to appeal.—Add to the cases cited here the following:—

Brussels v. *McCrae, unreported* (1904).

This was a motion made to the High Court of Justice, Toronto, to quash a by-law of the village of Brussels which provided for the issue of debentures for the purpose of constructing a sewer in the village. The application was refused by the Chancellor, but his judgment was reversed by the Court of Appeal and the by-law quashed. Upon an appeal taken to the Supreme Court of Canada, the Court of its own motion raised the question of jurisdiction, and after argument held that no appeal lay to the Supreme Court except by leave of the Court of Appeal for Ontario, or the Supreme Court of Canada, and no leave having been obtained, the appeal should be quashed. The appellants to the Supreme Court thereupon applied to the Court of Appeal for leave to appeal, which was granted, and the case subsequently was heard by the Supreme Court on the merits.

Page 396.—11th line from the bottom, after the words "*supra* p." read "338."

In the 9th line from the bottom, for the words "Handley, *supra* p. 338," read "Dig. 2nd ed., 680."

Page. 401.—Rule 10.

Robb v. *Stafford*, Oct. 11th, 1906.

The Court announces that the practice of printing by consent of solicitors only such part of the settled case as they think necessary

and by the same consent providing that the original record be sent to the Supreme Court and used on the appeal is *entirely irregular*, and that in the absence of an order of this Court dispensing with printing, the Court will hereafter look only at the printed case.

Page 417.—Lines 5 and 6 from the top of page do not form part of the Rule, the language of which ends at the word "reply."

Page 485.—13th line, for "does" read "do."

Page 523.—2nd line from the top, for the words "appeal in" read "appeal if."

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REVISED STATUTES OF CANADA

(1906.)

CHAPTER 139.

AN ACT RESPECTING THE SUPREME COURT OF CANADA.

SHORT TITLE.

1. This Act may be cited as the Supreme Court Act. R.S., c. 135, s. 1.

INTERPRETATION.

2. In this Act, unless the context otherwise requires,—

(*a*) 'the Supreme Court' or 'the Court' means the Supreme Court of Canada;

(*b*) 'judge' means a judge of the Supreme Court of Canada and includes the Chief Justice;

(*c*) 'Registrar' means the Registrar of the Supreme Court;

(*d*) 'judgment,' when used with reference to the Court appealed from. includes any judgment, rule, order, decision, decree, decretal order or sentence thereof; and when used with reference to the Supreme Court, includes any judgment or order of that court;

Meaning of expression "judgment."

"The pronouncement in court, oral or written, of the decision of the Court in any case constitutes the judgment of the Court."

C.P.R. v. *Blain*, 36 Can. S.C.R. 159.

Power of Court to vary its own judgment.

"Every court has an inherent jurisdiction to put its records in correct form on application or *ex mero motû* in

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default of application, and the parties are not at liberty either by consent express or implied, or by waiver or acquiescence to bind a court to accept as its judgment anything else but that which the court intended to be its judgment." Per Taschereau, C.J., *C.P.R.* v. *Blain*, 36 Can. S.C.R. 159.

Penrose v. *Knight*, 25th June, 1879.

The judgment of the Supreme Court, as settled and entered, having directed that the costs should be paid by the appellant to the respondent, on application of respondent, the order was amended by directing that the costs should be paid by the appellant's "next friend" to the respondent, the appellant having sued and prosecuted the appeal by his next friend.

Ritchie, C.J., in Chambers.

Reeves v. *Gerriken*, Cout. Dig. 1122, 10th Apl. 1880.

Counsel for respondent moved for leave to address Court on question of appointment of valuators and question of costs, disposed of by final judgment of Court. Referred to Taschereau, J., in chambers, who stated to the Court that the respondent sought to practically reverse the judgment of the Court. The motion was dismissed with costs.

Soulanges Election Case, 28th March, 1885.

Counsel for appellant moved to amend final order of Supreme Court as to costs, such order declaring that the respondent should pay the costs in the court below, but the trial judge having refused to tax to appellant the costs of certain witnesses examined in cases not appealed to the Supreme Court. *Held*, that the judge was right. Motion refused with $25 costs.

Smith v. *Goldie*, Cout. Dig. 1123, 9th Dec., 1885.

On a petition presented in Court (five judges being present of the six who had heard the appeal), it was shewn that an error had occurred in drawing up the minutes. The Court ordered the judgment as entered to be amended and so varied as to make it conform to the intention of the

Court, and the principles upon which it was based, and that the judgment so amended should be read *nunc pro tunc*. S. 2, s.-s. (*d*). Judgment.

Rattray v. *Young*, Cout. Dig. 1123, 18th March, 1886.

Motion to amend final judgment in appeal. The Court when delivering judgment during the previous session, stated that a sum of $2399 should be awarded to plaintiff. The order in appeal providing for the payment of that sum was settled and sent to the court below. Counsel for appellant contended that it clearly appeared there had been an error in the calculation, and that in arriving at the sum awarded certain sums had been twice deducted, depriving the plaintiff of a sum of $3,218.98. Counsel for respondent contended that it did not appear upon the face of the reasons for judgment that an error had been made, and therefore the application was in the nature of a re-hearing. Under the practice of the Privy Council this could not be allowed. *Held*, that it being clear that by oversight or mistake an error had occurred, the Court had power of its own motion to amend its judgment to make it conform to the intention of the Court and the principles upon which its judgment was based. Order to be made directing the Registrar to call upon the proper officer of the court below to have the judgment of the Court returned to be amended.

Providence Insurance Co. v. *Gerow*, 14 Can. S.C.R. 731.

The Court having directed a new trial, an application was made on a subsequent day to vary or reverse the judgment of the Supreme Court on the ground that the question in dispute had been submitted to the jury and considered, although by oversight the answer was not in the printed case. The application was refused, the Court saying: "The Court must determine an appeal on the case transmitted to it. As no application was made to amend the case before the appeal was argued, it is too late now. To grant this motion would necessitate a re-argument of the appeal."

Millard v. *Darrow*, Cout. Dig. 1123, 14th May, 1901.

The judgment on appeal (31 Can. S.C.R. 196) ordered a variation of the decree appealed from so that appellant

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should be entitled to immediate specific performance, but that respondent should have his costs in the original action. On motion before the full Court to vary the minutes of judgment as settled by the Registrar it was ordered that a clause should be inserted as follows: "That the appellant should not be obliged to pay the costs of the original action unless and until the respondent delivers to him a good and sufficient conveyance in fee simple of the property mentioned." No costs were allowed on the motion.

Quebec & Ontario Ry. Co. v. *Philbrick*, Cout. Dig. 1119.

The Supreme Court had refused a writ of prohibition to prevent the taxation of respondent's costs by the county judge, such taxation having been made before the judgment of the Supreme Court was given; but the Court stated that the respondent was not entitled to costs. Counsel for appellants moved to re-open argument of that part of the appeal as to the right to the prohibition, and for a re-consideration thereof, on the ground that the amount taxed to respondent had been paid into the county court, and that the county judge might make an order directing the money so paid into his court to be paid out to respondent unless prohibited. *Held*, that the application which was really for a re-hearing of the appeal, which had been duly considered and adjudicated upon by the Court, could not be entertained.

Crease v. *Fleischman*, 34 Can. S.C.R. 279.

The judgment of the trial court in favour of plaintiff was thought to be indefinite and defective, and a third party who had purchased the plaintiff's interest attempted to take advantage of it. An application to the court below to amend the judgment was refused in the absence from the record of the third party. An appeal to the Supreme Court was dismissed, the Court being of the opinion that the judgment below properly construed required no amendment to obtain the effect desired by the appellant, but no costs were given of the appeal as the plaintiffs improperly opposed the motion to rectify and occasioned unnecessary costs.

Chambly Manufacturing Co. v. *Willet*, 34 Can. S.C.R. 502. S. 2, s.-s. (*d*). Judgment.

Upon the argument of the appeal the attention of the Court was not called to the fact that if the appellant succeeded in having the order for certain protective works made by the court below set aside, certain items of damage which had been struck off by the Superior Court owing to the contemplated works should be added to the damages awarded to the plaintiff, or a reference made to the courts below for some final adjudication with respect thereto. This point was first raised upon the settlement of the minutes of judgment, and an application was subsequently made to the full Court to vary the form of judgment as pronounced and to increase the amount of damages found by the trial judge. The Court having heard the parties by counsel, amended the judgment by referring three items of damage back to the Superior Court to be investigated. No costs were allowed on the motion as the point was not taken on the hearing of the appeal.

Letourneau v. *Carbonneau*, 35 Can. S.C.R. 701.

The minutes of judgment as settled by the Registrar directed that the appellants' costs should be paid out of certain moneys in court, and in this form the judgment was duly entered and certified to the clerk of the court below. Subsequently it was made to appear that there were no moneys in court available to pay these costs, and upon the application of the appellants the Court amended the judgment, directing that the costs of the appellants should be paid by the respondents forthwith after taxation.

Binding effect of decisions.

The Queen v. *Grenier*, 30 Can. S.C.R. 42.

The generality of the law as expounded in the *Grand Trunk Rly. Co.* v. *Vogel*, 11 Can. S.C.R. 612, was so materially narrowed by the subsequent decisions that Sir Henry Strong, C.J., in this case questions whether it had any further binding authority, and the Court speaking through him held itself free to reconsider the whole matter if the

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question which had to be decided in the *Grand Trunk Rly. Co.* v. *Vogel* should again arise for consideration.

Re Burrard Election, Duval v. *Maxwell*, 31 Can. S.C.R. 459.

Held, per Gwynne, J., the Supreme Court is competent to overrule a judgment of the Court differently constituted, if it clearly appears to be erroneous.

Formal judgment as entered—effect to be given to.

Booth, Perley & Bronson v. *Ratté*, 21 Can. S.C.R. 637.

The action was brought to recover damages against the defendants who were mill owners, for throwing sawdust into the Ottawa River. The defence was prescription, and that they ought not to have been joined together in the same action, but the defence, after a final appeal to the Privy Council, was dismissed and the case referred to the Master's office to determine the damage which the defendants respectively should pay. The appellants appealed against the amount awarded by the Master, and the appeal was dismissed by the Chancellor of Ontario and by the Court of Appeal, the latter court being equally divided, the dissenting judges stating their inability to give judgment until furnished with additional information, and expressing the opinion that in consequence of the views held by them, the case must stand over until this information had been furnished and that the situation was different from what it would have been if the Court had been divided, two judges being in favour of affirming and two of reversing the judgment below.

On appeal to the Supreme Court of Canada, the preliminary objection was taken that by reason of two of the judges of the Court of Appeal having withheld their judgment, no judgment could properly have been pronounced, but this objection was overruled, the Court holding that the appellate court could not go behind the formal judgment which stated that the appeal had been dismissed; further, the position was the same as if the four judges had been equally divided in opinion in which case the appeal would have been properly dismissed.

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C. P. Rly. Co. v. *Blain*, 36 Can. S.C.R. 159.

B., a passenger on a railway train, was thrice assaulted by a fellow passenger during the passage. The verdict at the trial was maintained by the Court of Appeal, but the Supreme Court ordered a new trial unless B. would consent to his damages being reduced (34 Can. S.C.R. 74). In the reasons for judgment it was said that the damages could only be recovered for the third assault, but the formal judgment of the Court ordered a new trial generally unless the plaintiff accepted the reduced amount of damages. The plaintiff having refused to accept such amount, the new trial was had and B. again obtained a verdict, the damages being apportioned between the second and third assaults. On appeal to the Supreme Court of Canada from the judgment of the Court of Appeal maintaining this verdict, *Held*, that the formal judgment of the Supreme Court in the first appeal, as entered, was not at variance with the written memorandum read in open court as the judgment of the Court, and that the reasons of judgment were mere opinions which might be considered as part of the judgment in so far as they disclosed the grounds upon which it was rendered, but they could not vary the text or *dispositif* of the formal judgment, and that the appellants had only themselves to blame if they were deprived of the benefit of the former judgment of the Supreme Court as they raised no objection to the judgment as settled, although they were duly notified and appeared before the Registrar, and did not move to have the minutes varied before they were transmitted to the court below.

Constitution of Court giving judgment.

Angers v. *Mutual Reserve*, 35 Can. S.C.R. 330.

At the hearing in the Supreme Court objection was taken *in limine* by the appellant's counsel that the judgment in the Court of King's Bench, Quebec, was a nullity as it was delivered by four judges although argued before five. The majority of the Court overruled the objection.

George v. *The King*, 35 Can. S.C.R. 376.

The Supreme Court of Nova Scotia, by the Nova Scotia Judicature Act, is composed of seven judges of whom four

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constitute a quorum. *Held*, that a quorum of four judges had jurisdiction to hear criminal as well as civil appeals. *Vide Booth* v. *Ratté, supra*, p. 6.

Final judgment.

(*e*) 'final judgment' means any judgment, rule, order or decision, whereby the action, suit, cause, matter or other judicial proceeding, is finally determined and concluded.

The original Supreme and Exchequer Courts Act contained no interpretation of the expression "final judgment." The above definition is first found in 42 Vict. c. 39, s. 9 (15th May, 1879). Section 17 of the original Act, 38 Vict. c. 11, gave an appeal to the Supreme Court "from all final judgments of the highest court of final resort."

In *Danjou* v. *Marquis*, 3 Can. S.C.R. 251, January, 1879, Strong, J., interpreted the words "final judgment" in section 17 of the old Act as meaning final as regards the particular motion or application, and not necessarily final and conclusive of the whole litigation, and this opinion was expressed before the amendment of 1879, where "final judgment" first receives its specific interpretation. Indeed the amendment would appear to have been made to give the words "final judgment" the interpretation placed upon them by Strong, J., in that case.

In the English Judicature Act the right of appeal from an order is determined by the consideration as to whether the order is final or interlocutory, but the distinction between such orders is in no place expressly stated.

In re Lewis, 31 Chy. Div. p. 623, Mr. Justice Chitty says:—

"I do not hesitate to say that it is difficult to define what is a final and what is an interlocutory order, and I shall not attempt to give any definition. The Court of Appeal has not attempted to give an exhaustive definition, and the Legislature in the Judicature Act of 1875, sec. 12, has not given such a definition."

Notwithstanding the above interpretation of "final

judgment" in the Supreme Court Act, the same difficulty appears to arise in applying the definition to the particular facts of each case as arises under the Judicature Act, and the only assistance that can be given is to shew how the question has been dealt with in the many decisions of the Supreme Court.

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Morris v. *The London & Canadian Loan Co.*, 19 Can. S.C.R. 434.

In this case the plaintiffs brought an action upon twelve debentures issued by a municipality. The action was commenced by a writ of summons specially endorsed, a copy of which was served upon the defendants, and upon their appearing thereto, the plaintiffs took out a summons pursuant to section 34 of the Court of Queen's Bench Act, 1885, Manitoba, for leave to sign final judgment for the amount so specially endorsed upon the writ. After argument the Chief Justice made an order allowing the plaintiffs to sign final judgment. Before final judgment was signed, defendants appealed from the order to the full court, where the appeal was dismissed. Thereupon an appeal was taken to the Supreme Court of Canada. The respondents moved to quash, which, after argument, was granted.

Ritchie, C.J., in giving his reasons for judgment accepted the definition of Brett, L.J., in *Standard Discount Co.* v. *Lagrange*, 3 C.P.D. 67, which had also been subsequently adopted by the Court of Appeal in *Salamon* v. *Warner* (1891), 1 Q.B. 734, namely, that

"No order, judgment or other proceeding can be final which does not at once affect the status of the parties for whichever side the decision may be given; so that if it is given for the plaintiff it is conclusive against the defendant, and if it is given for the defendant it is conclusive against the plaintiff, and no order in an action will be found to be final unless a decision upon the application out of which it arises, but given in favour of the other party to the action, would have determined the matter in dispute."

Lord Esher, in *Salamon* v. *Warner*, restated the definition in this way:

"If the decision, whichever way it is given will, if it

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stands, finally dispose of the matter in dispute, I think that for the purposes of the rules it is final. On the other hand, if the decision if given in one way will finally dispose of the matter in dispute, but if given in the other will allow the action to go on, then I think it is not final but interlocutory."

In *Morris* v. *The London & Canadian Loan Co.*, above, Strong, J., without giving an reasons, expressed the opinion that the judgment was not a final judgment, while Fournier and Gwynne, JJ., without giving any reasons, concurred in quashing the appeal. Patterson, J., dissenting, was of the opinion that "The definition of 'final judgment' in the Interpretation clause of the Act was more comprehensive than the definition given by the Court of Appeal in the above cases which were decisions under the English orders that limit the time for appealing."

In 1903, the Court of Appeal in England, in the case of *Bozson* v. *Altrincham Urban District Council* (1903), 1 K.B. 547, overruled *Salamon* v. *Warner*. This was an action brought to recover damages for breach of contract. An order in the following terms was made in Chambers:—

"It is ordered that the action be transferred to the non-jury list. Questions of liability and breach of contract only to be tried. Rest of case (if any) to go to official referee."

The case came on for trial where the learned judge held that there was no binding contract between the parties, and made an order dismissing the action, upon which judgment was subsequently entered for the defendants. The plaintiff appealed from the order in Chambers. Lord Halsbury held that the order in Chambers was a final order, while Lord Alverstone, C.J., said: "It seems to me that the real test for determining this question ought to be this, does the judgment or order as made finally dispose of the rights of the parties? If it does then I think it ought to be treated as a final order, but if it does not, it is then, in my opinion, an interlocutory order."

Sir F. H. June concurred.

Since this decision, therefore, it would appear that *Morris* v. *The London & Canadian Loan Co.*, so far as it is based upon the English decisions, is not an authority.

Final judgment—interlocutory in form.

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A judgment may be interlocutory in form having regard to the main action, and yet be final in its effect upon the rights of the parties, and so be the subject of an appeal to the Supreme Court. To this class belong interpleader issues, attachments, oppositions and proceedings of that character. The leading decision is *Macfarlane* v. *Leclaire*, 15 Moo. P.C. 181.

The facts of that case were as follows:—

34 Geo. III. c. 6, s. 30, Lower Canada, now art. 68 C.P., provided that the judgment of the Court of Appeals for Lower Canada should be final in all cases where the matter in dispute did not exceed the sum or value of £500 sterling. The plaintiff L. recovered judgment against D. for £417. L. in his declaration claimed a writ of attachment before judgment against the goods of D., now in the hands of M., which was granted. D. suffered judgment by default. L. obtained judgment upon his writ of attachment and seized goods in the hands of M. to the value of £1,642. M. alleged that he had purchased the goods in question from P., and the Superior Court in Quebec dismissed the proceedings against M. on the ground that P. was not a party thereto. L. appealed to the Court of Queen's Bench where the judgment of the Superior Court was reversed. M. then appealed to the Judicial Committee of the Privy Council, and L. moved to quash on the ground that the judgment below was interlocutory and not final, as to which the Court said:—

"Although the judgment is interlocutory in form, it is final in its effect upon the rights of the appellants. The goods which they claim as their own are finally and conclusively fixed by the judgment to be the property of the original debtor, and must be applied in satisfaction of his debts, and there is no mode by which the appellants can be relieved from it except by an appeal."

This decision is discussed in *Kinghorn* v. *Larue*, 22 Can. S.C.R. 347, but not with respect to that portion of it which deals with final and interlocutory judgments.

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Final judgment—reference as to damages.

There is another class of cases in which very considerable difficulty may be found in determining whether or not the decision is final or interlocutory, namely, those cases in which a judgment has been given in a court below finally determining some legal principle involved in the action, but refers certain questions such as the damages sustained or the taking of accounts, etc., and an appeal is taken from such judgment before the reference has been proceeded with.

Shaw v. *St. Louis*, 8 Can. S.C.R. 385.

In this case the plaintiff sued for a balance due on a building contract. Defendant denied the claim and by an incidental demand (counterclaim) claimed from the plaintiff damages for defective work. The Superior Court in 1877 gave judgment for the plaintiff and dismissed the incidental demand. In 1880 the Court of Queen's Bench on appeal found for the plaintiff, but held the defendant entitled to have the plaintiff's claim reduced by the cost of rebuilding the defective work, and remitted the case to the Superior Court to have this ascertained. Upon a report of experts, the Superior Court in 1881 gave judgment for the balance due to the plaintiff and this judgment was affirmed by the Court of Queen's Bench in 1882. On appeal to the Supreme Court of Canada from the last judgment of the Court of Queen's Bench, it was contended by the respondent that the present appellant not having appealed from the judgment of the Court of Queen's Bench in 1880, that judgment was *chose jugée*, and the correctness of it could not be raised upon the appeal from the judgment of the same court in 1882.

Fournier, J., was of the opinion that an appeal could have been taken to the Supreme Court of Canada from the judgment of 1880. Even if no such appeal lay and that judgment was interlocutory, the defendant had acquiesced in it by taking part in an *expertise* and had under the French jurisprudence thereby disentitled himself to have that judgment reviewed.

Taschereau, J., who gave the judgment of the majority

of the Court, declined to express an opinion as to whether or not an appeal lay from the judgment of 1880, saying:— S. 2, s.-s. (e). Final judgment.

"The judgment, if any, that Shaw has to complain of, is the judgment of 1880, but on an appeal from the judgment of 1882 he is precluded from impeaching this judgment of 1880, and this whether or not he had the right to appeal to this Court from the said judgment of 1880. If he had no right to appeal, there is *chose jugée*. If he had a right to appeal, but did not exercise his right, there is also *chose jugée*. The maxim 'l'interlocutoire ne lie pas le juge' cannot have any application to an interlocutory judgment given by an Appeal Court and transmitted to the Superior Court for execution. This maxim applies to the very tribunal that rendered the interlocutory judgment, that is to say, if the Superior Court, for instance, renders a purely interlocutory judgment, it may, in certain cases, at the final judgment, not be bound by this interlocutory.

"But to extend this doctrine to the judgment of a Court of Appeal, and make it say 'l'interlocutoire de la Cour d'Appel ne lie pas le tribunal de première instance' seems to me untenable."

In *Ontario & Quebec Rly. Co.* v. *Marcheterre*, 17 Can. S.C.R. 141, the preceding case was reviewed. The facts here were as follows:—

The plaintiff, an employee, sued the defendant company for damages resulting from negligence of a co-employee. To this the company pleaded denying plaintiff's allegations generally and specially denying that the plaintiff ever was employed by the company; denying also the damages and any indebtedness, but not claiming that the action was prescribed. The trial judge dismissed the action because over one year had elapsed between the date of the accident and the bringing of the suit. The Superior Court in review reversed the judgment below, holding that prescription had not been pleaded and in any event had been waived by the conduct of the company; and proceeding to deliver the judgment which the court of first instance should have rendered, declared that the plaintiff was entitled to recover damages from the defendants, and ordered the cause to be remitted to the court of first instance for the purpose of

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determining the amount of such damages. The defendants appealed to the Court of Queen's Bench, and the plaintiff moved to quash the appeal.

The Court of Queen's Bench granted the motion to quash, holding that the judgment below was not one which was appealable *de plano* under art. 1116 (now art. 46), and no leave had been obtained under art 1119 (now art. 1211).

An appeal to the Supreme Court of Canada was quashed, the Court holding that the judgment of the Court of Queen's Bench was purely and simply one of a question of procedure which determined nothing, but that the writ of error as issued was illegal and voidable, and that "the judgment quashing the writ of error on an interlocutory proceeding, though final as to that appeal, is an interlocutory judgment in the cause."

Referring to *Shaw* v. *St. Louis* (*supra*, page 12), the appellant argued that he might eventually find himself precluded from appealing to the Supreme Court from the final judgment in the cause. As to this the Court said:—

"Whether that is so or not, a point which of course we have not to determine here, that will be simply because the statute does not provide for an appeal in such case."

Baptist v. *Baptist*, 21 Can. S.C.R. 425.

The plaintiff brought an action to set aside a deed. Before judgment the plaintiff died and the respondent petitioned to be allowed to continue the action on the ground that she was a legatee under plaintiff's will. The appellants contested this alleging that the will set up had been revoked by a later one, to which the respondent replied that the later will was null and void.

The Superior Court upheld the later will, and declared respondent entitled to continue the action. This judgment was reversed by the Court of Queen's Bench.

On appeal the Supreme Court held that although in form this judgment was in one sense interlocutory and only upon a side issue, the controversy between the parties had been, as far as could be in a provincial court, determined and concluded, and although the judgment as to the will would not bind the Supreme Court on the subsequent

appeal from a judgment in the action to set aside the deed, it would remain in force as *res judicata* between the parties upon the validity of the will. The judgment, therefore, was final and the Supreme Court had jurisdiction. S. 2, s.-s. (*e*). Final judgment.

The Queen v. *Clark*, 21 S.C.R. 656.

The respondents had a contract with the Crown for public printing and supplying of stationery, but the contract did not expressly provide that the Crown should be bound to have all the work performed and material supplied solely by the respondents. The Public Printing Act, 32-33 V. c. 7, required that contracts for such work and material must be upon tender. The respondents alone had a contract with the Crown arising out of a tender and made pursuant to such statute. The petition of the respondents alleged that the Crown had purchased large quantities from other persons without public notice of tender therefor, and without order in council, and in violation of the statute, to the loss and damage of the suppliants. To this the Crown pleaded, first, denying that it had purchased stationery from other parties as alleged, and also that the suppliants were not under the tender and contract entitled to supply all the paper required by the Crown.

When the case came on for hearing in the Exchequer Court, in 1887 the contracts as set forth in the petition of right were admitted by counsel for the Crown, and no evidence in support of the defence being offered, a judgment was pronounced referring to referees to report as to what, if any, paper embraced in the contract had been purchased from parties other than the suppliants, and secondly, the loss of profit to the suppliants, and further consideration, and costs were reserved.

An appeal from the final report of the referee finding the loss of profits to be $37,990.00, was taken to the Exchequer Court, but was dismissed. The report of the referee was confirmed, and it was ordered and adjudged that the suppliants were entitled to recover from the Crown the said sum.

Upon appeal to the Supreme Court of Canada from this judgment, the Crown claimed the right to impugn not only

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the ultimate judgment, but also the judgment given at the trial in 1887, but it was held that the first judgment could not be reviewed and that the only matter open upon the appeal was to impugn the finding of the referee as to the quantum of damages, the result of which was to give the suppliant the same benefit as if the final judgment had expressly held that taking the contract and statute together, the suppliants had an exclusive right to supply the work and material mentioned in the contract. Gwynne and Patterson, JJ., dissenting, were of the opinion that the only judgment which adjudicated upon the issue raised by the pleadings was the judgment appealed from.

Desaulniers v. *Payette*, 35 Can. S.C.R. 1.

In this case the appellants filed an opposition *afin de charge* to seizure and sale of property and thereupon the opposants were ordered by the Superior Court to furnish security to indemnify the execution creditor. This judgment was affirmed by the Court of King's Bench. An appeal to the Supreme Court was quashed on the ground that the judgment was interlocutory and not final. The opposants failed to give the security and the opposition was dismissed by the Superior Court which was affirmed by the Court of King's Bench. The opposant now appealed to the Supreme Court and attempted to attack in such appeal the interlocutory judgment above mentioned, but the Court held that the interlocutory judgment was *res judicata* and that when this appeal came before the Court of King's Bench the second time, that Court could not but hold as it did by the judgment now appealed from, that the Superior Court had committed no error when it had simply acted in accordance with the judgment rendered upon the first appeal, and if the Court of Appeal had rendered the judgment that it was bound in law to give, the appellant's attempt to shew error in that judgment necessarily failed, and if there was no error on the part of the Court of King's Bench, the Supreme Court could not reverse it.

Belcher v. *McDonald* (1904), App. Cas. 429.

In this case the plaintiff brought an action to recover, first, the payment of the sum of $50,000 with interest

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thereon due on a note made by defendant McDonald to the plaintiff's testator, dated September 19th, 1898, and, secondly, the sum of $879.80, being for an unpaid balance.

The trial judge on the 23rd of May, 1901, dismissed the action so far as related to the document of September 19th, 1898, and ordered a reference to inquire into the state of the accounts between the plaintiff's testator and the defendant without reference to the said document, and on the 25th September confirmed the referee's report and dismissed the action with costs.

The question in issue was whether or not the judgment of the 23rd May, 1901, was a final one, because if final the parties not having appealed within the time provided by the practice in the court below, the judgment as to the $50,000 was *res judicata;* whereas, if that judgment was not final, an appeal would lie from the above judgment of the 25th September.

Held, that the judgment of the 23rd May was a final judgment and that the judgment in the court below which proceeded upon the assumption that the judgment in September was the only final judgment in the matter, should be reversed and set aside.

Corporation of the City of Toronto v. *The Metallic Roofing Co.*, Supreme Court, April 4th, 1906.

This was an action brought against the appellants claiming for loss and damage under a building contract, the sum of $7,137 and costs. The trial judge held that the plaintiffs were entitled to be paid for the work done, and that there should be a reference to the Master to take accounts on the footing of a *quantum meruit*. Before the accounts were taken the defendants appealed from this judgment, but the appeal was dismissed. On a further appeal taken to the Supreme Court of Canada the respondents moved to quash for want of jurisdiction.

After argument the majority of the Court held that there was jurisdiction to hear the appeal, and the following reasons for judgment were orally delivered:—

"Girouard, J., was of opinion that the amount in controversy exceeded $1,000.

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"Davies, J., was of opinion that applying the decision of the Privy Council in *Belcher* v. *Macdonald* (1903), Appeal Cases, to the present case, an appeal would lie from the judgment *a quo*.

"Idington, J., dissenting, was of opinion that according to the settled jurisprudence of the Court no appeal would lie in this case, and that the use of the words in 60-61 V. c. 24, s. 1, ss. (*c*), "Matter in controversy in the appeal," made it clear that until the amount in controversy was determined by the courts below no appeal would lie.

"Maclennan, J., was of opinion that the Court had jurisdiction."

Johnson's Company v. *Wilson,* Supreme Court, June 5th, 1906.

The plaintiffs, appellants, were the owners of a parcel of land, and the defendants, respondents, were the owners of an adjoining lot. The action was one of bornage to settle the boundaries between the lots. The plaintiffs asked by the conclusion of their action that the boundary be established in accordance with an original survey and subdivision made by one Poudrier. The defendants did not plead to the action. A judge of the Superior Court, according to the practice in the Province of Quebec, upon motion appointed two surveyors to make an examination and report upon the matters in issue. The surveyors differed in their reports, one being in favour of the plaintiff and the other of the defendant. When the case came on to be heard on the merits, the court, in April, 1904, ordered the bornage to be made according to the subdivision originally laid down by Poudrier. The surveyor went on and carried out the instructions of the court, and his report was homologated by the same judge of the Superior Court in June, 1904. An appeal was taken both from the judgment of April and the judgment of June, and the Court of King's Bench reversed the Superior Court and ordered the case to be remitted to the Superior Court and that the experts proceed to establish the line according to the *pretentions* of the defendants. The plaintiffs thereupon appealed to the Supreme Court, and the defendants moved to quash on the ground that the judgment appealed from was interlocutory

and not final. After argument the motion to quash was refused. S. 2, s.-s. (e). Final judgment.

Willson v. *Shawinigan Carbide Co.*, 37 Can. S.C.R. 535.

In this action the Shawinigan Carbide Co., respondents, asked to have certain letters patent of invention issued to the appellant declared invalid and a certain contract declared null and void. To this the appellant filed a *declinatory exception* on the ground of want of jurisdiction of the Superior Court of the Province of Quebec to try the action. This *declinatory exception* was maintained by the Superior Court and the action dismissed, but on appeal to the Court of King's Bench the judgment of the Superior Court was reversed. The present appeal was thereupon taken and the respondents moved to quash on the ground that the judgment dismissing the *declinatory exception* was interlocutory and not final.

Held: "The judgment appealed from does not dispose of the whole case but merely an incident raised by a *declinatory exception* which was maintained by the trial court and rejected by the Court of Appeal. Of course in both the trial court and the Court of Appeal the question cannot be raised again. It is there *chose jugée*, but it can be raised here if, after being disposed of on the merits, the case comes up again before this Court."

Final judgment—demurrers.

Bank of B.N.A. v. *Walker*, Cout. Dig. 88.

Action to recover damages for maliciously causing to be issued a writ of attachment. The county judge granted the defendant's petition for a writ and after same had been executed the order was set aside by the Supreme Court of British Columbia. The declaration contained eight counts, to six of which the jury found a verdict for plaintiff, but judgment was not entered then by the trial judge until the demurrers had been argued before the full court and overruled. The 7th and 8th counts of the declaration were so framed that a verdict thereon in favour of the plaintiff, if supported by the evidence, would stand whatever might be the decision of the Court upon the demurrers.

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Held, that the judgment upon the demurrers was interlocutory and not final.

Reid v. *Ramsay*, Cout. Dig. 86.

In an action (Sup. Ct. P.E.I.) for assault and false imprisonment, defendants justified by *ca. sa.* issued against plaintiff under a judgment against him. By replication plaintiff alleged that the *capias* issued in blank and was filled up with the necessary particulars after the sealing and delivery, and also that it was sealed, issued and delivered without a *præcipe*. To these replications the defendants demurred, and to the latter replication pleaded a rejoinder that after the issue of the writ their attorney transmitted a *præcipe* to the prothonotary. To this rejoinder the plaintiff demurred. Judgment was for the plaintiff on all the demurrers and defendants appealed to the Supreme Court of Canada. The respondent moved to quash upon the ground that the judgment was interlocutory and not final within the meaning of the Supreme & Exchequer Courts Act, there being issues of fact to be decided on the pleadings which were not disposed of by the judgment upon the demurrers. Appeal quashed.

Gladwin v. *Cummings*, Coutlee's Digest, 88.

A judgment upon a demurrer will not be appealable to the Supreme Court unless it has, or if given the other way would have had, the effect of disposing of the plaintiff's claim or some part thereof.

Kandick v. *Morrison*, 2 Can. S.C.R. 12.

In this case the defendant demurred to a declaration on the ground that the action purported to be for a *devastavit*, while no allegation of a *devastavit* was made in the declaration. The court below held that the demurrer was frivolous and irregular. Thereupon the defendant appealed to the Supreme Court. The appeal was quashed on the ground that the rule setting aside the demurrer was simply an order on a mere matter of practice and not a final judgment appealable under the Supreme & Exchequer Courts Act.

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Chevalier v. *Cuvillier*, 4 Can. S.C.R. 605.

This was an appeal from the judgment of the Court of Queen's Bench, appeal side, Quebec, affirming a judgment of the Superior Court which maintained a demurrer of the defendant, respondent, to part of the plaintiff's, appellant's, declaration. Upon appeal to the Supreme Court it was contended that the judgment was not final; that it only decided part of the case, and if the judgment of the court below was reversed, the parties would have to go back to the Superior Court, and when a final judgment in the action was pronounced on the merits the whole case might come back to the Supreme Court again, and that Parliament never contemplated by the Act two appeals to the Supreme Court in the same case. For the appellant it was argued that as the case then stood, the action was dismissed as regards the greater amount claimed and a remedy left only as to the smaller, and that if the appellant should succeed in the Superior Court for the smaller amount still remaining in dispute, he could not appeal from such a judgment in his favour.

Held, that the judgment of the Court of Queen's Bench finally determined and put an end to the appeal, and was a judicial proceeding within the meaning of these words as contained in the interpretation of "final judgment" in section 9 of the Supreme Court Amendment Act (now section 2, Supreme Court Act).

Shields v. *Peak*, 8 Can. S.C.R. 579.

This was an action for goods sold and delivered and contained a count alleging fraud, for the purpose of bringing the defendant within the provision of section 136 of the Insolvent Act. To this the defendant by his third plea alleged that the contract was made in England. The plaintiff demurred. The Court of Common Pleas, Ontario, gave judgment for the plaintiff on the demurrer and this judgment was affirmed by the Court of Appeal. Strong, J., said:—

"In the case of *Chevalier* v. *Cuvillier* it was determined that an appeal was well brought where the judgment in the court of original jurisdiction was not final, but was,

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as in the present case, a judgment on a demurrer to part of the action only; and this decision proceeded upon the ground that the judgment of the provincial court of Appeal from which the appeal to this Court was immediately brought, was a final judgment in a judicial proceeding within the meaning of the third section of the Act of 1879, now section 28 of the Supreme & Exchequer Courts Act."

Rattray v. *Larue*, 15 Can. S.C.R. 102.

Article 269 C.C. provides as follows:—

"If during the tutorship a minor happens to have any interest to discuss judicially with his tutor, he is for such case given a tutor *ad hoc* whose powers extend only to the matters to be discussed."

Articles 220 and 221 C.C.P. provide as follows:—

"220. Every person interested in an action between other parties may intervene therein at any time before judgment."

"221. An intervention is made by a declaration in ordinary form containing all the grounds which justify the party in intervening."

The respondent, as tutor *ad hoc* to minor children, intervened in a suit pending between W.H. in his quality of curator to the institute (*grevé*), and the appellant as trustee appointed to administer the property of the substitution. The appellant demurred to the intervention on the following grounds: —

1. Because the intervening party had no right to become joint plaintiff with the plaintiff as by his intervention he sought to do.

2. Because the grounds of the intervention purported to be in the nature of an answer to the pleas filed by the defendant, and the intervening party could not be heard to urge reasons which the plaintiff could not himself urge.

3. Because the grounds alleged by the intervening party could only be the subject of a direct action against the defendant.

4. Because the intervening party had no right to set up in the present cause any ground of complaint which he had against the plaintiff.

5. Because the intervening party had no legal status as a tutor *ad hoc* to support the ground of his complaint.

The demurrer was maintained by the Superior Court, but this judgment was reversed by the Court of Queen's Bench. On appeal to the Supreme Court of Canada, the judgment of the Superior Court was restored.

Shaw v. *C.P. Rly. Co.*, 16 Can. S.C.R. 703.

In an action for a breach of contract by a railway company to carry the plaintiff's goods in safety, the defendant set up a special contract limiting its liability to $100, to which the plaintiff made two replications, one of which was that the special contract could not avail against the provisions of section 25 of the Railway Act of 1879. The defendant demurred to this replication on the ground that it was a departure from the declaration which was in contract, while the replication was in tort. The demurrer was allowed in the courts below and an appeal to the Supreme Court was quashed on the ground that the judgment was not final.

McKean v. *Jones*, 19 Can. S.C.R. 489.

The defendant demurred to a bill alleging that C. and also B. & C. were necessary parties. The demurrer was overruled and the defendant did not appeal, but raised the same defence by his answer.

Held, Strong and Patterson, JJ., dissenting, that the judgment on the demurrer not having been appealed against it was *res judicata* and it was not open to the defendant to raise the same objection in the Supreme Court, but if so these persons were necessary parties.

Griffith v. *Harwood*, 30 Can. S.C.R. 315.

Held, that a judgment affirming a dismissal of a plea of prescription when other pleas remain on the record, is not a final judgment from which an appeal lies to the Supreme Court.

Simard v. *Townshend*, 6 L.C.R. 147.

In this case the defendant demurred to the plaintiff's declaration. The demurrer was allowed in the court of

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first instance and the action dismissed. An appeal to the Court of Queen's Bench was allowed and the record ordered back to the court below for proof of the facts in issue. The defendant applied to the Court of Queen's Bench for leave to appeal to the Privy Council, but the application was refused, the Court holding that the judgment of the Court of Appeal was interlocutory and not final.

Lacroix v. *Moreau*, 15 L.C.R. 485.

This was an action *au pétitoire*, the plaintiff alleging that he had acquired the lands in question with others from one G. who had bought them from A.R. and M.R., the latter being proprietors in virtue of a judgment which rescinded a sale made to one P. M. was made *mis-en-cause* by R., the defendant, who purchased from him the lands in question, and who pleaded that A.R. and M.R. had sold to one L. everything acquired by them from P. and that the judgment rescinding the sale to P. had been obtained by L. for his own use and benefit and that he had taken possession of the lands affected by the said judgment; that L. had effected a commutation of the tenure; that A.R. and M.R. had ratified and confirmed the sale to L.; that subsequently, in an action brought by one D. the lands in question had been sold and purchased by M., who registered his title and subsequently sold it to one Davidson, from whom the defendant R. had purchased. By a second exception the *mis-en-cause* alleged that the purchase by the plaintiff from G. was fraudulent and that long before this conveyance R. had sold to one J. By a third exception, while denying that G. had acquired any right in the land, defendant claimed to be reimbursed for her improvements made on the land. The plaintiff replied to these exceptions by an allegation of fraud on the part of L. The *mis-en-cause* demurred to this reply on four grounds: first, because the plaintiff did not allege that the fraudulent conveyance had been declared null and that the conclusions of the reply could not arise before such decision or annulling; secondly, because the conveyances in question could not be attacked by a simple reply, but only by a direct action against all the parties; thirdly, because L. had not acquired a right to plead the nullity of the conveyances in question, and

fourthly, because more than ten years had elapsed since the conveyances in question and prescription had arisen against any demand for rescission.

Upon this demurrer, the Superior Court gave judgment maintaining the demurrer with costs and rejecting that part of the special answers referred to in the demurrer. An appeal was taken from this judgment to the Court of Appeal where the judgment was affirmed. The plaintiff then applied for leave to appeal to Her Majesty's Privy Council, but the Court of Queen's Bench refused the application, holding that the judgment in question was interlocutory and not final.

Final judgment—chamber order.

Wallace v. *Bossom*, 2 Can. S.C.R. 488.

Execution having issued upon a judgment in favour of the plaintiff, defendant applied to the Chief Justice of the Supreme Court of Nova Scotia in Chambers to set same aside. The Chief Justice granted a rule *nisi* returnable in Chambers, but the rule was argued in court, and judgment pronounced by the court making the rule absolute.

Held, Strong, J., dissenting, that the order in question was a final judgment.

Morris v. *London & Canadian Loan & Agency Co.*, 19 Can. S.C.R. 434.

The plaintiff obtained an order in Chambers giving him liberty to sign final judgment against defendants for the amount due on certain debentures. An appeal to the full court of Manitoba from this order was unanimously dismissed. A further appeal to the Supreme Court of Canada was quashed on the ground that the judgment was not final.

Gladwin v. *Cummings*, Cout. Dig. 88.

Action of replevin to recover 125 barrels of flour. Plaintiffs were indorsees of a bill of lading of the goods, which were held by the defendant as freight agent of the I.C.R. at Truro. The action was begun and the goods were replevied and the writ was served on 9th April, 1881. A default

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was marked on 25th April, 1881. On 10th September, 1881, plaintiffs' attorney issued a writ of inquiry under which damages were assessed under R.S.N.S. (4 ser. ch. 94, sec. 56). An order *nisi* to remove the default and let in defendant to defend was taken out on 11th October, 1881, and discharged with costs. The judgment being affirmed on appeal (4 Russ. & Geld. 168). R.S.N.S. (4 ser.) ch. 94, sec. 75, enacts that it shall be lawful for the Court or a judge at any time within one year after final judgment to let in defendant to defend upon application supported by satisfactory affidavits accounting for his non-appearance and disclosing a defence upon the merits, etc. *Held*, that the judgment appealed from was not a final judgment within the meaning of section 3 of the Supreme Court Amendment Act of 1879, and was not appealable. *Held*, also, that if the Court could entertain the appeal, the matter was one of procedure and entirely within the discretion of the court below, and this Court would not interfere. Appeal dismissed with costs.

Stanton v. *Canada Atlantic Rly. Co.*, Cout. Dig. 89.

On motion to quash an interim injunction, Mathieu, J., suspended its operation until final adjudication on the merits. Both parties appealed to the Queen's Bench, which quashed the injunction absolutely. An application to one of the judges of Queen's Bench for leave to appeal was refused on the ground that the judgment quashing the writ was not a final judgment, and "notwithstanding the offer and sufficiency of the security." Appellants served notice of further application to a judge of the Supreme Court to be allowed to give proper security to the satisfaction of that Court, or of a judge thereof, for the prosecution of an appeal to that Court, notwithstanding the refusal in the court below, and the lapse of thirty days from the rendering of the judgment from which they desired to appeal, and further to obtain an extension of time for settling the case in appeal. Henry, J., in Chambers, enlarged the motion for hearing in court where it was argued at length, and it was held, that the judgment of the Court of Queen's Bench (21 C.L.J. 355) quashing the interim injunction

was not a final judgment from which an appeal would lie. Motion refused. S. 2, s.-s. (e). Final judgment. Chamber order.

This case was reviewed by Fournier, J., in *Mackinnon* v. *Keroack*, who says, p. 121 (15 Can. S.C.R.) :—

"Là, il ne s'agissait que d'un ordre rendu sur une demande d'injonction ne devant avoir d'effet que jusqu'à ce qu'il en eut été ordonné autrement par la cour ou un juge. Cet ordre était évidemment d'un caractère interlocutoire et n'avait aucune finalité."

Schroeder v. *Rooney*, Nov., 1885.

The plaintiffs by their agent Patrick R. procured a judgment to be signed against Peter R., the defendant, who suffered the judgment to go by default. No execution was ever issued thereon. After the death of Peter, the plaintiffs assigned the judgment to the wife of Patrick R. and upon her application an order was made in the court below allowing execution to issue against the executors of Peter R. The executors applied to set aside the judgment as having been fraudulently obtained, which was granted by Wilson, C.J., in Chambers.

This order was affirmed on appeal by the Common Pleas Divisional Court.

On appeal to the Court of Appeal for Ontario, although the members of the court were all of opinion that the order below was wrong, they did not agree as to the extent to which it should be modified, and the appeal was accordingly dismissed without costs.

Held, that it was doubtful whether an appeal would lie to the Supreme Court of Canada from the judgment of a Divisional Court of the High Court in a case which originated in the decision of a judge in Chambers, from whose judgment an appeal lay to the Divisional Court.

But see *Plisson* v. *Duncan*, 36 Can. S.C.R. 647.

McCall v. *Wolff*, 13 Can. S.C.R. 130.

Goods and chattels covered by a chattel mortgage were seized under an execution against the mortgagor. The mortgagees interpleaded. The title to the goods was tried in Chambers where it was declared that the mortgage was void and judgment was given for the execution creditor. The court *in banc* refused to set aside this judgment and

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their judgment was affirmed on appeal by the Supreme Court.

Martin v. *Moore*, 18 Can. S.C.R. 634.

The judge in Chambers refused to set aside a writ of summons and his order was affirmed by the full Court. *Held*, that this was not a final judgment from which an appeal would lie to the Supreme Court.

Howland v. *The Dominion Bank*, 22 Can. S.C.R. 130.

Where the Master in Chambers set aside his own order renewing a writ of summons, and this order was affirmed by a judge in Chambers, the Divisional Court and the Court of Appeal, the Supreme Court dismissed the appeal for the reasons given by one of the judges of the court below. In this case it would appear that no question of jurisdiction was raised and no motion to quash made.

Maritime Bank v. *Stewart*, 20 Can. S.C.R. 105.

An order having been made by a judge of the High Court of Ontario, staying proceedings in an action in Ontario, owing to bankruptcy proceedings then pending in England, this order was affirmed by the Divisional Court and the Court of Appeal. *Held*, that this order was not a final judgment from which an appeal would lie to the Supreme Court of Canada.

Canadian Pacific Rly. Co. v. *St. Thérèse*, Cout. Dig. 70; 16 Can. S.C.R. 606.

The respondent petitioned for an order for payment to them of $4,000 deposited by appellants for land taken for railway purposes and a judge of the Superior Court in Chambers after formal answer and hearing of the parties granted the order under the Railway Act. The company appealed to the Court of Queen's Bench, which affirmed the order. *Held*, that the order having been made by a judge sitting in Chambers, and further, acting under the statute as *persona designata*, the proceedings had not originated in a Superior Court within the meaning of section 28 of the Supreme & Exchequer Courts Act, and the case was therefore not appealable.

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McGugan v. *McGugan*, 21 Can. S.C.R. 267.

An application to have a solicitor's bill referred to the taxing officer for taxation was refused by the judge to whom the application was made. This judgment was reversed by the Divisional Court, but restored by the Court of Appeal. Upon appeal to the Supreme Court it was held by a majority of the Court that assuming the Court had jurisdiction it would not interfere with the decision of a provincial court in such matters. Per Taschereau, J., the judgment was not final within the meaning of the Supreme Court Act. Per Patterson, J., it was a discretionary order and therefore not appealable.

Halifax v. *Reeves*, 23 Can. S.C.R. 340.

Under the charter of the city of Halifax, if a building is erected close to the street line, the corporation could petition the Supreme Court of the province or a judge thereof and obtain a summons directing the defendant to shew cause why the building should not be removed if erected without a certificate of the city engineer. Proceedings were instituted in this way before the Honourable Mr. Justice Townshend in Chambers, where evidence was taken and judgment given for the corporation. This judgment was reversed by the Supreme Court of the province and an appeal taken to the Supreme Court of Canada. A motion to quash the appeal in the latter Court was dismissed.

Hockin v. *Halifax & C.B. Rly. & Coal Co.*, Cout. Dig. 88.

The Railroad Act of Nova Scotia, being chapter 70 of the Revised Statutes, 3rd series, provided that the railway could expropriate lands, and by section 44 it is provided that on the first Tuesday of June in every year, or at such other time and times as shall be fixed by a judge of the Supreme Court, etc., the prothonotary of every county in which a railway is being constructed, etc., draw from the grand jury box the names of twenty-eight persons, etc. And by section 49 it is provided that a panel from this jury should value the lands taken by the railway and estimate the damages to property. And by section 52 it is provided that the custos or clerk of the peace on behalf of the company or any party interested who might deem him-

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self aggrieved might apply by affidavit to the Supreme Court or a judge thereof for a summons or order to set the proceedings aside in whole or in part, or to alter the valuation, etc.

By certain other acts of the Legislature these provisions of the Railroad Act it is claimed were made applicable to the Halifax & Cape Breton Railway & Coal Co., and the said company having taken proceedings to expropriate lands, certain persons who were owners of property through which the railway passed, applied to the Chief Justice of the Supreme Court of Nova Scotia on the 26th April, 1877, and obtained an order under section 44 requiring the prothonotary of Pictou to proceed to draw and strike a jury for the purpose of fixing the indemnity to be paid the land owners.

Pursuant to this order the prothonotary summoned a jury who made their appraisement. On the 1st March, 1879, on the application of Daniel Hockin, the custos of the county of Pictou, a rule *nisi* was granted by the Supreme Court of Nova Scotia to quash and set aside the order of the Chief Justice on the ground that the lands were not taken under the statutes hereinbefore mentioned, and on other grounds; and on the 27th March, 1880, after argument, the rule *nisi* was discharged, the Court holding that the county was estopped by the action of the custos and of the Legislature, and could not dispute the validity of the appraisements. The custos thereupon appealed to the Supreme Court of Canada, and by his factum the respondent, the Railway & Coal Co., claimed that the Supreme Court had no jurisdiction. After argument a motion to quash was granted, the Court holding that the order of the Chief Justice which this appeal sought to set aside, was not a final order.

Final judgment—Master or referee's report.

Bickford v. *G.T.R.*, 1 Can. S.C.R. 697.

(This decision was before the amendment of 1879 which gave a right of appeal in equity cases irrespective of the question whether the judgment was final or not.)

In an equity proceeding a consent decree was made

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referring the taking of mortgage accounts to the Master. His report was affirmed by the Vice-Chancellor, and on appeal, by the Court of Appeal. Upon appeal to the Supreme Court the latter decision was reversed.

Doull v. *McIlreith*, 14 Can. S.C.R. 739.

Here, the Supreme Court of Nova Scotia affirmed the appeal of the Master on a reference. The Supreme Court reversed the court below on the ground that the Master had exceeded his authority and reported on matters not referred to him.

McDougall v. *Cameron*, 21 Can. S.C.R. 379.

In an action by a firm of solicitors to recover from their clients the amount of certain bills of costs, an order was made referring the bills to the taxing officer for taxation, who ruled that the plaintiffs must give defendants credit for a certain sum paid to one of the plaintiffs. The plaintiffs' appeal to the Divisional Court from the report of the taxing officer was allowed, and this judgment affirmed by the Court of Appeal. On appeal to the Supreme Court, *Held*, per Strong, Gwynne and Patterson, JJ., that there was great doubt respecting the jurisdiction of the Court to hear the appeal. Per Taschereau, J., the judgment appealed from was not final.

Grant v. *Maclaren*, 23 Can. S.C.R. 310.

The Supreme Court of Canada, on appeal from a decision affirming the report of a referee in a suit to remove executors and trustees which report disallowed items in accounts previously passed by the Probate Court, will not reconsider the items so dealt with, two courts having previously exercised a judicial discretion as to the amounts, and no question of principle being involved.

Booth v. *Ratté*, 21 Can. S.C.R. 637.

In an action against several mill owners for obstructing the Ottawa river by throwing sawdust and refuse into it from their mills a reference was made to the Master to ascertain the amount of damages. *Held*, affirming the judgment appealed from, that the Master rightly treated

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the defendants as joint tort-feasors; that he was not called upon to apportion the damages according to the injury inflicted by each defendant, and that he was not obliged to apportion them according to the different grounds of injury claimed by the plaintiff. *Held*, further, that the Master was the final judge of the credibility of the witnesses and his report should not be sent back because some irrelevant evidence may have affected his judgment, especially as no appeal was taken from his ruling on the evidence.

On a reference to a Master, the latter, provided he sufficiently follows the directions of the decree, is not obliged to give his reasons for, or enter into a detailed explanation of his report to the court.

Bell v. *Wright*, 24 Can. S.C.R. 656.

In an action for the construction of a will and for administration, the judgment directed a reference to a referee who made a ruling in his office against the claim of a solicitor for priority of his costs as between solicitor and client over certain costs in the action directed to be paid by the client to the parties. On appeal Mr. Justice Rose reversed the referee. Upon a further appeal to the Court of Appeal this judgment was reversed and the ruling of the referee affirmed.

The Supreme Court of Canada reversed the Court of Appeal and re-instated the judgment of Rose, J., in favour of the solicitor's lien.

Colchester v. *Valad*, 24 Can. S.C.R. 622.

In an action by V. against a municipality for damages from injury to property by the negligent construction of a drain, a reference was ordered to an official referee "for inquiry and report pursuant to section 101, Judicature Act, and Rule 552 of the High Court of Justice." The referee reported that the drain was improperly constructed, and that V. was entitled to $600 damages. The Divisional Court held that an appeal was too late, no notice having been given within the time required by Cons. Rule 848, and refused to extend the time for appealing. On motion for judgment on the report by V. it was claimed on behalf of the municipality that the whole case should be gone into

upon the evidence, which the Court refused to do. *Held*, affirming the decision appealed from, that the appeal not having been brought within one month from the date of the report as required by Cons. Rule 848, it was too late; that the report had to be filed by the party appealing before the appeal could be brought, but the time could not be enlarged by his delay in filing it; and that the refusal to extend the time was an exercise of judicial discretion with which an appellate court would not interfere. *Held*, also, Gwynne, J., dissenting, that the report having been confirmed by lapse of time and not appealed against, the Court on the motion for judgment was not at liberty to go into the whole case upon the evidence, but was bound to adopt the referee's findings and to give the judgment which those findings called for. *Freeborn* v. *Vandusen*, 15 Ont. P.R. 264, approved of and followed.

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Final judgment.
Interpleader.

McCall v. *Wolff*, 13 Can. S.C.R. 130.

Goods and chattels covered by a chattel mortgage were seized under an execution against the mortgagor. The mortgagees interpleaded. The title to the goods was tried in Chambers where it was declared that the mortgage was void and judgment was given for the execution creditor. The Court *in banc* refused to set aside this judgment and their judgment was affirmed on appeal by the Supreme Court.

Hovey v. *Whiting*, 14 Can. S.C.R. 515.

Per Gwynne, J.: "The findings and judgment in an interpleader issue having been in favour of the execution creditor that judgment was a judicial determination of the High Court of Justice upon the merits of the matter in contestation, as much as a like judgment upon matters in contestation between plaintiff and defendant in an action originating in a writ of summons would be." . . . "An order, it is true, might be required to be made for the payment out of court of such monies as may have been realised by the sheriff," . . . "but such an order could

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have no effect whatever of the nature of making the adjudication upon the merits of the question tried on the interpleader issue a whit more final than it already was by the judgment of the Court rendered in favour of the execution creditor." . . . "The judgment of the Court upon an interpleader issue tried on the application of the sheriff for protection from claims made to property seized in execution confirming the value of the seizure in execution and determining conclusively until reversed by some court of competent jurisdiction the rights of the execution creditors to the fruits of the seizure as against the claimants, is, in my opinion, of a different character from a judgment on an interpleader issue ordered in the progress of a suit for the purpose of determining the point necessary in the opinion of the Court to be determined before judgment should be pronounced on the matters in contestation in the suit, during the progress of which the interpleader had been ordered."

Lynch v. *Seymour*, 15 Can. S.C.R. 341.

L. having obtained judgment against the H. I. Co. goods and chattels were seized under an execution issued on said judgment. S. claimed a sum of money for rent of the premises on which the goods were seized under 8 Anne, ch. 14, and an interpleader issue was brought to contest his right to the goods on such claim. The verdict at the trial was in favour of the defendant, but on appeal this was set aside, and judgment ordered to be entered for the plaintiff. A further appeal to the Supreme Court of Canada was dismissed with costs.

Donohoe v. *Hull*, 24 Can. S.C.R. 683.

D. purchased land and had the conveyance made to his wife, who paid the price and obtained a certificate of ownership, D. having transferred all his interest to her. She sold the land to M. and executed a transfer acknowledging payment of the purchase money, which transfer in some way came into the possession of M.'s solicitors, who had it registered and a new certificate of title issued in favour of M., though the purchase money was not in fact paid. M.'s solicitors were also solicitors of judgment creditors of D.,

and judgment having been obtained on their debts the purchase money of said transfer was garnished in the hands of M. An issue was directed as between the judgment creditors and the wife of D. to determine the title to the money under the garnishee order, and the money was by consent paid into court. The judgment creditors claimed the money on the ground that the transfer of the land to D.'s wife was voluntary and void under the Statute of Elizabeth, and that she, therefore, held the land and was entitled to the purchase money on the re-sale as trustee for D. *Held*, reversing the decision appealed from, that under the evidence the original transfer to the wife of D. was *bonâ fide;* that she paid for the land with her own money and bought it for her own use and that, if it was not *bonâ fide*, the Supreme Court of the North-West Territories, though exercising the functions and possessing the powers formerly exercised and possessed by courts of equity could not, in these statutory proceedings grant the relief that could have been obtained in a suit in equity.

S. 2, s.-s. (*e*). Final judgment. Interpleader.

Final judgment.
Oppositions.

By the Code of Civil Procedure of the Province of Quebec, where property is sold under execution, a person making any claim to the proceeds of the sale may file an opposition to the monies being paid over.

Dawson v. *Macdonald*, Cout. Dig. 1243; 10 June, 1880.

A writ of execution was issued against the appellant in an action upon a promissory note. Appellant alleged that the first he knew of any action was a letter from the sheriff informing him that the judgment had been placed in his hands for execution, and filed an opposition *afin d'annuler* in the proceedings under which the execution had been obtained. The opposition was dismissed by the Superior Court and this judgment affirmed by the Court of Queen's Bench. On appeal to the Supreme Court it was held that the only way the appellant could get rid of the appearance filed by his solicitor was by a regular disavowal according to the articles of the Code of Civil Procedure, and dis-

S. 2, s.-s. (e). Final judgment. Oppositions.

missed the appeal. Appellant thereupon took regular proceedings in disavowal against the attorney, and while the proceedings were pending a new writ of execution was issued. To this the appellant filed an opposition and petition to stay the proceedings pending the decision of the proceedings on disavowal. The Superior Court dismissed the opposition on the ground that there was *res judicata*, and this judgment was affirmed by the Court of Queen's Bench on the same ground. On appeal to the Supreme Court of Canada, *Held*, reversing the judgment appealed from, Ritchie, C.J., and Strong, J., dissenting, that there was no *res judicata*, and that all proceedings in the cause and on the writ mentioned in the opposition should be stayed until the decision of the proceedings in disavowal, and of the action in revocation of judgment.

Lionais v. *Molsons Bank*, 10 Can. S.C.R. 526.

The will declared the property devised *insaisissable*, save for debts of the succession. Upon seizure of property of the estate in execution of a judgment obtained in respect of a debt contracted by the executor and one of the beneficiaries in a transaction *dehors* the succession, the beneficiaries under the will contested the execution by opposition *afin d'annuler*. *Held*, that the beneficiaries were not obliged to contest by means of tierce opposition and were not entitled to oppose the execution as they had done on the ground that the judgment was the result of *res inter alios acta* and the property could not be seized thereunder.

The City of Quebec v. *Quebec Central*, 10 Can. S.C.R. 563.

In this case, in an action by the W.N. Co. against the L. & K. Rly. Co., the latter company was sold for $192,000 to the Q.C. Rly. Co. The Q.C. Rly. Co. filed an opposition claiming $272,537, being the amount of certain bonds of the L. & K. Ry. Co. held by them. The city of Quebec also filed an opposition upon a number of other bonds alleged to be held by them. The opposition of the city of Quebec was contested by the Q.C. Rly. Co. on the ground that the bonds were illegally issued and this contestation was maintained by the Superior Court, and this judgment was affirmed by

the Court of Queen's Bench, but reversed by the Supreme Court of Canada. S. 2, s.-s. (e). Final judgment. Oppositions.

Dubuc v. *Kitson*, 16 Can. S.C.R. 357.

In this case the Supreme Court exercised jurisdiction in an appeal from a judgment of the Court of Queen's Bench (appeal side) affirming a judgment of the Superior Court maintaining an opposition *afin d'annuler*, filed by the respondents to a writ of *pluries fieri facias* issued at the instance of the appellant.

Turcotte v. *Dansereau*, 26 Can. S.C.R. 578.

The plaintiff sued the defendant and recovered judgment by default for $1,997.92 principal and interest from date of service of writ, in all $2,419.77. The defendant under the practice in Quebec, attacked the judgment by the filing of an opposition. The opposition was dismissed by the Superior Court and this judgment was affirmed by the Court of Queen's Bench. Upon a motion to quash an appeal to the Supreme Court it was held that an opposition filed for the purpose of setting aside a judgment was a judicial proceeding within the meaning of section 29 of the Supreme & Exchequer Courts Act and that when the opposition was filed the amount due on the judgment was upwards of $2,000 and consequently an appeal would lie.

King v. *Dupuis*, 28 Can. S.C.R. 388.

Held, that an opposition *afin de distraire* for the withdrawal of goods from seizure is a judicial proceeding within the meaning of section 2, sub-section (*e*) of the Supreme & Exchequer Courts Act.

Magann v. *Auger*, 31 Can. S.C.R. 186.

In a suit upon a contract brought in the Superior Court of Quebec, the defendant, who was served substitutionally, opposed a judgment entered against him by default by petition in revocation of judgment, first by preliminary objection taking exception to the jurisdiction of the court over the cause of action, and then constituting himself incidental plaintiff making a cross demand for damages to be set off against plaintiff's claim. The judgment of

S. 2, s.-s. (*e*). Final judgment. Intervention.

the Superior Court dismissed the defendant's petition in revocation of judgment, and this judgment was affirmed by the Court of Queen's Bench, but was reversed by the Supreme Court.

Final judgment.
Intervention.

Article 220 of the Code of Civil Procedure provides that "Every person interested in an action between other parties may intervene therein at any time before judgment."

Hamel v. *Hamel*, 26 Can. S.C.R. 17.

A case of *Hamel* v. *Hamel* was pending in the Superior Court by one executor of an estate to have another removed. A third party, already *mis-en-cause*, presented a petition to the Superior Court asking to be permitted to intervene for the purpose of having both executors removed. The petition was refused by the Superior Court, the court holding that the intervening party should bring a separate action for the relief he wished to obtain. On appeal the petition was granted by the Court of Review, and the latter judgment was reversed by the Court of Queen's Bench. The petitioner now appealing to the Supreme Court, his appeal was quashed, the Court holding that the judgments below were interlocutory and not final.

Guertin v. *Gosselin*, 27 Can. S.C.R. 514.

In this case certain lands were sold by the sheriff and a judgment of distribution was prepared and homologated according to the practice in the Province of Quebec fixing the priorities and rights of the appellant and respondent as hypothecary creditors. The present appellant gave notice of appeal to the Court of Queen's Bench from the judgment homologating the report. The present respondent, Gosselin, thereupon presented a petition to the Court of Queen's Bench attacking the *locus standi* of Guertin, and succeeded in obtaining a judgment of that court dismissing Guertin's appeal. The latter then appealed to the Supreme Court, when it was held that although the subject of appeal

was a question of procedure it was so important, affecting as it did the very rights of the parties to the land, that the appeal should be heard. S. 2, s.-s. (e). Final judgment. Intervention.

Connolly v. *Armstrong*, 35 Can. S.C.R. 12.

The respondent applied by petition to the Superior Court for leave to intervene to protect his rights in a suit then pending. The petition was refused by the Superior Court, but this judgment was reversed by the Court of King's Bench. A motion to quash an appeal to the Supreme Court was allowed on the ground that the judgment was purely interlocutory, following *Hamel* v. *Hamel*, 26 Can. S.C.R. 17.

Vide Macfarlane v. *Leclaire*, *supra*, p. 11.

Demande en nullité de décret.

Article 784 of the Code of Civil Procedure, Quebec, provides that "Sheriffs' sales may be vacated at the instance of the judgment debtor or of any creditor or other interested party." A proceeding of this character is intituled "une demande en nullité de décret."

Dufresne v. *Dixon*, 16 Can. S.C.R. 596.

The respondent's lands had been sold for $1,350.00 under an execution against another party and only after the completion of the sale did she become aware of the fact. Her petition to have the sheriff's sale vacated by *demande en nullité de décret* was granted by the Superior Court, and this judgment was affirmed by the Court of Queen's Bench, and subsequently on appeal to the Supreme Court of Canada.

Lefeuntun v. *Veronneau*, 22 Can. S.C.R. 203.

The respondent had obtained judgment for $433.41 and costs against the appellant and seized and sold his lands under a writ of execution. The appellant attacked the sheriff's sale by *demande en nullité de décret* for irregularity. His petition was dismissed by the Superior Court and this judgment affirmed by the Court of Queen's Bench. A motion to quash a further appeal to the Supreme Court of Canada was dismissed, the Court holding that a judgment in a petition *en nullité de décret* was appealable.

S. 2, s.-s. (e). Final judgment. Recusation.

Recusation.

Article 237 of the Code of Civil Procedure of Quebec provides that a judge may be disqualified from acting in a proceeding if he has an interest in favouring any of the parties, and on other grounds, and a proceeding to disqualify him is intituled a "recusation."

Ethier v. *Ewing*, 29 Can. S.C.R. 446.

A judgment of the Superior Court dismissed a petition for the recusation of the respondent as a Commissioner in expropriation proceedings taken for street improvements in the city of Montreal. This judgment was affirmed by the Court of Review. A further appeal to the Supreme Court of Canada was quashed on the ground that the judgment of the Court of Review was not a final judgment within the meaning of the Supreme Court Act.

Incidental demand.

Archibald v. *deLisle*, 25 Can. S.C.R. 1.

It is only as regards the principal action that the action in warranty is an incidental demand. Between the warrantee and the warrantor it is a principal action, and may be brought after judgment on the principal action, and the defendant in warranty has no interest to object to the manner in which he is called in where no question of jurisdiction arises and he suffers no prejudice thereby.

But if a warrantee elect to take proceedings against his warrantors before he has himself been condemned he does so at his own risk, and if an unfounded action has been taken against the warrantee, and the warrantee does not get the costs of the action in warranty included in the judgment of dismissal of the action against the principal plaintiff, he must bear the consequences.

Jurisdiction of Court over its own officers.

Wilkins v. *Geddes*, Cout. Dig. 80.

An order by a Superior Court exercising its summary jurisdiction over its own immediate officers, on an application by a third party to obtain an order for the payment

over of interest received by such officer on moneys held by him on deposit as an officer of the court, is a final order from which an appeal will lie to the Supreme Court of Canada, under 38 Vict. ch. 11, sec. 11. (Fournier, J., dissenting; Taschereau, J., dubitante.)

S. 2, s.-s. (e). Final judgment. Jurisdiction of Court over its officers.

Attorney-General of Ontario v. *Scully*, 33 Can. S.C.R. 16.

The Ontario courts have held that a person acquitted on a criminal charge can only obtain a copy of the record on the fiat of the Attorney-General. S. having been refused such fiat applied for a writ of mandamus, which the Divisional Court granted, and this judgment was affirmed by the Court of Appeal. *Held*, that the question raised by the proposed appeal if not one of practice, was a question of the control of provincial courts over their own records and officers with which the Supreme Court should not interfere.

Order relating to standing of counsel or attorney.

Lenoir v. *Ritchie*, Cout. Dig. 80.

A judgment of the Supreme Court of Nova Scotia making absolute a rule *nisi* to grant rank and precedence to a Queen's Counsel is one from which an appeal would lie to the Supreme Court of Canada, Fournier, J., dissenting.

In re Cahan, 21 Can. S.C.R. 100.

By a statute of Nova Scotia, special privileges were given to graduates of the Dalhousie Law School wishing to be admitted to practise the profession in that province. The appellant Cahan applied to the Supreme Court of Nova Scotia for admission as an attorney, relying upon the provisions of the statute, which was refused. *Held*, per Taschereau and Patterson, JJ., the judgment below was not a final one and appeal should be quashed. And per Strong and Taschereau, JJ., it was never intended that this Court should interfere in matters respecting the admission of attorneys and barristers in the several provinces.

S. 2, s.-s. (e). Final judgment. Contempt.

Contempt.

Ellis v. *Baird*, 16 Can. S.C.R. 147.

A rule *nisi* issued by the Supreme Court of New Brunswick was made absolute calling upon appellant to shew cause why an attachment should not issue against him or he be committed for contempt of court in publishing certain articles in a newspaper. *Held*, that this was not a final judgment from which an appeal would lie to the Supreme Court.

In re O'Brien, 16 Can. S.C.R. 197.

The decision of a provincial court in a case of constructive contempt is not a matter of discretion in which an appeal is prohibited by section 27 (now section 45). The Supreme Court has jurisdiction to entertain such an appeal from the judgment of the Court of Appeal of the province not only under section 24 (*a*) (now section 36) of the Supreme & Exchequer Courts Act, as a final judgment in an action or suit, but also under sub-section 1 of section 26 (now section 42) as a final judgment "in a matter or other judicial proceeding."

Entry of judgment deferred.

Ellis v. *The Queen*, 22 Can. S.C.R. 7.

In proceedings by attachment for contempt of court, *Held*, that a memorandum in minute book of clerk of court that appellant was "found guilty of contempt" and no formal judgment entered, was not a final judgment from which an appeal will lie to the Supreme Court.

Toronto Type Co. v. *Mergenthaler Co.*, 36 Can. S.C.R. 593.

In this case the defendants demurred to the plaintiff's statement of claim, and after argument of the demurrer the judge of the Exchequer Court adjudged that the demurrer should be disposed of at the trial of the action. Upon a motion for leave to appeal to the Supreme Court from this order, *Held*, that the order in question was not a judgment upon the demurrer, but merely a postponement of judgment until the trial, and that no appeal lay from this order to the Supreme Court.

S. 2, s.-s. (e). Final judgment. Order for security.

Order to furnish security.

Desaulniers v. *Payette*, 33 Can. S.C.R. 340.

An order requiring opposants *afin de charge* to furnish security that land seized in execution, if sold by the sheriff subject to the charge claimed, should realize sufficient to satisfy the claim of the execution creditor, is merely an interlocutory judgment from which no appeal lies to the Supreme Court.

Vide also *Kirkpatrick* v. *Birks*, 37 Can. S.C.R. 512.

Order refusing trial by jury.

Demers v. *The Bank of Montreal*, 27 Can. S.C.R. 157.

In this case the Superior Court refused an application of the defendants to have the issues in the cause tried by a jury and this refusal was affirmed by the Court of Queen's Bench. A motion to quash an appeal to the Supreme Court was granted, the Court holding that the judgment appealed from was interlocutory and not final.

Virtue v. *Hayes, In re Clark*, Cout. Dig. 83, 9th Apl., 1889.

Judgment was recovered in *Virtue* v. *Hayes* to realize mechanics' liens, and C., the owner of the land on which the work was done, petitioned to have judgment set aside as a cloud upon his title. On this petition an order was made allowing C. to come in and defend the action for lien on terms, which not being complied with, the petition was dismissed, and the judgment dismissing it was affirmed by the Divisional Court and the Court of Appeal. *Held*, that the judgment appealed from was not a final judgment within the meaning of section 24 (*a*) of the Supreme & Exchequer Courts Act, or, if it was, it was a matter in the judicial discretion of the court, from which by section 27 no appeal lies to the Supreme Court of Canada.

Interim injunction.

Kearney v. *Dickson*, Cass. Dig. 431.

Plaintiff brought an action of trespass claiming damages and an injunction restraining the defendant from proceeding with the digging of trenches and laying of pipes on

S. 2, s.-s. (e). Final judgment. Interim injunction.

her land. Upon the *ex parte* application of the plaintiff an interim injunction was granted until the hearing of the cause. Upon the defendant's motion the injunction was set aside and an appeal from this order was dismissed by the Supreme Court of Nova Scotia. The appeal of the plaintiff to the Supreme Court of Canada was quashed on the ground that the order appealed from was interlocutory and not final.

Attachments.

Molson v. *Barnard,* 18 Can. S.C.R. 622.

An article of the Code of Civil Procedure, Quebec, provides, "If there is no other remedy equally convenient, but beneficial and effectual, the plaintiff may obtain a conservatory attachment (*saisie conservatoire*) upon an affidavit shewing" (amongst other things) "that he is entitled to rank by preference upon the price of moveable property and that it is being dealt with in such a manner as to defeat his remedy, or that he is entitled by reason of some provision of law to have moveable property placed in judicial custody in order to insure the exercise of his rights over it."

In this case the plaintiff, claiming a solicitor's lien upon certain monies in court issued a writ of attachment (*saisie conservatoire*) attacking monies in the hands of the prothonotary of the Superior Court. The defendant petitioned to have the writ set aside, alleging that it was illegal, null and void, and that the affidavit upon which the writ issued did not disclose any legal ground for the attachment. By his declaration attached to his affidavit, the plaintiff claimed $3,932.17 for services as solicitor to protect, for the defendant, the money in court. The Superior Court quashed the writ of attachment, but this judgment was reversed by the Court of Queen's Bench, and it was ordered that the hearing of the petition should be proceeded with at the same time as the hearing of the main action, and that the two proceedings be joined. Upon appeal by the defendant to the Supreme Court of Canada, it was *held,* Strong, J., dissenting, that the judgment was interlocutory and not final.

Capias.

S. 2, s.-s. (e). Final judgment. Capias.

Goldring v. *La Banque d'Hochelaga*, 5 App. Cas. 371.

A judgment of the Court of Queen's Bench (Quebec) affirming the judgment of the Superior Court, which rejected the appellant's petition that a certain writ of *ca, re,* issued against him under articles 798 and 801 C.C.P. might be set aside, is not a final judgment within the meaning of article 1178, now article 68, which reads as follows:—

"68. An appeal lies to Her Majesty in Her Privy Council from final judgments rendered in appeal by the Court of Queen's Bench;

"1. In all cases where the matter in dispute relates to any fee of office, duty, rent, revenue, or any sum of money payable to Her Majesty;

"2. In cases concerning titles to lands or tenements, annual rents or other matters in which the rights in future of the parties may be affected;

"3. In all other cases wherein the matter in dispute exceeds the sum or value of five hundred pounds sterling."

Mackinnon v. *Keroack,* 15 Can. S.C.R. 111.

Where a capias had issued under article 798 of the C.C.P. (P.Q.) and the prisoner petitioned to be discharged under article 819 C.C.P., which petition was dismissed after issue joined on the pleadings under article 820 C.C.P., and the judgment of dismissal was affirmed by the Court of Queen's Bench for Lower Canada, *held,* that the judgment was a final judgment in a judicial proceeding within the meaning of section 28, Supreme & Exchequer Courts Act, and therefore appealable.

Carter v. *Molson,* 8 App. Cas. 530.

Held, that under article 1178 C.C.P., now article 68, no appeal lies as of right from a judgment of the Court of Queen's Bench (Quebec) in proceedings arising out of the arrest of a debtor under a writ of *ca. re.*

(*f*) 'appeal' includes any proceeding to set aside or vary any judgment of the court appealed from;

(*g*) 'the court appealed from' means the court from which

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the appeal is brought directly to the Supreme Court, whether such court is one of original jurisdiction or a court of appeal;

(h) 'witness' means any person, whether a party or not, to be examined under the provisions of this Act. R.S., c. 135, ss. 2 and 96.

3. The court of common law and equity in and for Canada now existing under the name of The Supreme Court of Canada, is hereby continued under that name, as a general court of appeal for Canada, and as an additional court for the better administration of the laws of Canada, and shall continue to be a court of record. 6 Edw. VII. c. 50, s. 1.

This section by 6 Edw. VII. c. 50, was substituted for section 3 of the Revised Statutes, 1886, c. 135, as amended by 50-51 V. c. 16, s. 57. The old section read as follows:—

"The court of common law and equity, in and for Canada, now existing under the name of 'The Supreme Court of Canada,' is hereby continued under such name, and shall continue to be a court of record."

The amendment was made in connection with the substitution of a new section for section 37 of the old Act (now section 60), and the object Parliament had in view in amending the statute appears in the notes to section 60, *infra*.

Section 101 of the B.N.A. Act, 1867, provides as follows: "The Parliament of Canada may, notwithstanding anything in this Act, from time to time, provide for the constitution, maintenance and organization of a general court of appeal for Canada, and for the establishment of any additional courts for the better administration of the laws of Canada."

For the appellate jurisdiction of the Supreme Court *vide* sec. 35 *et seq.*

In the case of the *Credit Valley Rly. Co.* v. *Grand Trunk Rly. Co.*, 27 Gr. 232 (Ont.), an application was

S. 3.
Per saltum appeals.

made to Taschereau, J., in Chambers on the 6th February, 1880, for leave to appeal from a judgment of the Court of Chancery of Ontario without any intermediate appeal to the Ontario Court of Appeal. The application was refused on the ground that under section 101 of the B.N.A. Act, the Federal authority had power to grant an appeal only from the provincial courts of last resort and that the provision of the Supreme Court Amendment Act, 1879 (42 V. c. 39, s. 6), which permitted of an appeal *per saltum* without any appeal to any intermediate court of appeal in the province, was *ultra vires* of the Dominion Parliament. (Doutre, Constitution of Canada, p. 337).

This decision was, however, not followed, and on the 22nd of June, 1882, in the case of the *Bank of British North America* v. *Walker*, Cout. Dig. 88, the Supreme Court granted leave to appeal from the judgment of the trial judge without any intermediate appeal to the full Court of the Supreme Court of British Columbia.

In *L'Association St. Jean Baptiste de Montreal* v. *Brault*, 31 Can. S.C.R. 172, an appeal from the Court of Review to the Supreme Court of Canada, it was contended by counsel that the provision made by 64-55 V. c. 25, s. 3, for an appeal from the Superior Court in Review in cases which were not appealable to the Court of Queen's Bench, was *ultra vires* of the Parliament of Canada, and that the appeal should be quashed. This motion was refused, the Court pointing out that the respondent's contention must be that all appeals heard in the Supreme Court from all over the Dominion, since its creation in 1875 in cases not governed by the Federal laws were determined without jurisdiction, and that if Parliament had not the power to authorize an appeal in such cases from the Court of Review in Quebec, it had not the power to authorize it from the courts of final jurisdiction in the other provinces.

Privy Council appeals from provincial courts.

In addition to the right of appeal to the Supreme Court of Canada from the provincial courts, an appeal also lies direct from these courts to the Judicial Committee of the Privy Council.

S. 3. Appeals to Privy Council direct from Provincial Courts.

Appeals to the Judicial Committee of the Privy Council from the highest appellate judicial tribunal in any colony are governed by the provincial legislation limiting appeals where the Crown has delegated to the Colonial Legislature the duty of framing provisions on the subject of appeals. It is doubtful if the Crown has power to grant special leave to appeal in cases from the Provinces of Ontario and Quebec where an appeal is denied by the provisions on the subject of appeal enacted by the Legislatures of these provinces. These provisions are contained in R.S.O. c. 48, and in the Code of Civil Procedure, Quebec, article 68.

The Constitutional Act, 1791, 31 Geo. III. c. 31, provides that the Governor, Lieutenant-Governor, or person administering the Government of each of the provinces of Canada, together with the Executive Council, should be a court of civil jurisdiction for hearing and determining appeals, subject to such appeal therefrom as such appeals might before the passing of that Act have been heard and determined by the Governor and Council of the Province of Quebec; but subject nevertheless to such further or other provisions as may be made in this behalf by any Act of the Legislative Council and Assembly of either of the said provinces respectively, assented to by His Majesty, his heirs or successors.

34 Geo. III. c. 6, s. 30, provides as follows:—

"And be it further enacted by the authority aforesaid, that the judgment of the said court of appeals of this province shall be final in all cases where the matter in dispute shall not exceed the sum or value of five hundred pounds sterling; but in cases exceeding that sum or value, as well as in all cases where the matter in question shall relate to any fee of office, duty, rent, revenue, or any sum or sums of money payable to His Majesty, titles to lands or tenements, annual rents or such like matters or things where the rights in future may be bound, an appeal shall lie to His Majesty in his Privy Council, though the immediate sum or value appealed for be less than five hundred pounds sterling."

And by the 43rd section of this Act, it is provided that nothing therein contained shall be construed in any man-

ner to derogate from any other right or prerogative of the Crown whatsoever.

S. 3. Appeals to Privy Council direct from Provincial Courts.

In the case of *Cuvillier* v. *Aylwin*, 2 Knapp 72, the question was raised as to whether or not the King in Council could grant leave to appeal from the judgment of the Court of Appeals, Quebec, where the case did not fall within the provisions of section 30 above, and the Master of the Rolls held that "The King, acting with the other branches of the Legislature, as one of the branches of the Legislature, has the power of depriving any of his subjects in any of the countries under his dominion of any of his rights." And the petition for leave to appeal was therefore dismissed.

This decision was subsequently reviewed in *Re Marois*, 15 Moo. P.C.C., p. 189, when Lord Chancellor Chelmsford said:—

"Their Lordships are not satisfied that the subject received (in *Cuvillier* v. *Aylwin*) that full and deliberate consideration which the great importance of it demanded. The report of the judgment of the Master of the Rolls is contained in a few lines, and he does not appear to have directly adverted to the effect of the proviso contained in the 43rd section of the Act on the prerogative of the Crown. Their Lordships must not be considered as intimating any opinion whether this decision can be sustained or not, but they desire not to be precluded by it from a further consideration of the serious and important question which it involves. The petitioner must understand that the prayer of his petition (for leave to appeal) will be granted, but at the risk of a petition being hereafter presented from the opposite party, upon which his appeal may be dismissed as incompetent."

By 3 & 4 Wm. IV. c. 41, the appeal to His Majesty in Council only lay from courts of error or courts of appeal, but by 7 & 8 V. c. 69, it provided as follows:—

"Whereas by the laws now in force in certain of Her Majesty's colonies and possessions abroad no appeals can be brought to Her Majesty in Council for the reversal of the judgments, sentences, decrees and orders of any courts of justice within such colonies, save only of the courts of error or courts of appeal within the same, and it is expedient that

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Her Majesty in Council should be authorized to provide for the admission of appeals from other courts of justice within such colonies or possessions. Be it therefore enacted by the Queen's most excellent Majesty by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that it shall be competent to Her Majesty, by any order or orders to be from time to time for that purpose made with the advice of her Privy Council to provide for the admission of any appeal or appeals to Her Majesty in Council, from any judgments, sentences, decrees or orders of any court of justice within any British colony or possession abroad, although such court shall not be a court of error or a court of appeal within such colony, or possession; and it shall also be competent to Her Majesty, by any such order or orders as aforesaid, to make all such provisions as to Her Majesty in Council shall seem meet for the instituting and prosecuting any such appeals, and for carrying into effect any such decisions or sentences as Her Majesty in Council shall pronounce thereon."

This statute was passed in view of the decision of the Privy Council in *Re Cambridge*, 3 Moo. 175, where it was held that no appeal lay from the Supreme Court of Prince Edward Island to the King in Council where no appeal had been taken from the Supreme Court to the Governor in Council, and where the Royal instructions to the Governor authorized him to allow appeals from the Supreme Court of the Island, and for that purpose to issue a writ returnable before himself and the Executive Council. The Act applies equally to colonies where the appeal lies to a court of error within the colony, and to those in which the Supreme Court is a final court and no provision exists for appeals to the Sovereign. *Flint* v. *Walker*, 5 Moo. 179.

In the Province of Ontario, therefore, it would appear that an appeal will lie by leave of the Privy Council from the High Court of Justice of that province; and similarly, in the Province of Quebec, with leave, an appeal will lie from the Superior Court, and in such cases leave may be granted although the case is one in which, had it been carried to the Court of Appeal in either province, any

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further appeal to the Privy Council could not be taken by reason of the case not being one falling within the limitations placed upon appeals to the Privy Council by the Provincial Legislatures respectively.

For a form of petition for special leave to appeal direct without having recourse to an intermediate Court of Appeal, see *In re Barnett*, 4 Moo. 453.

The provisions for appeal differ in the different provinces.

Privy Council appeals—Ontario.

In Ontario the right of appeal is regulated by the Revised Statutes of 1897, c. 48, which provides as follows:—

"1. Where the matter in controversy in any case exceeds the sum or value of $4,000, as well as in any case where the matter in question relates to the taking of any annual or other rent, customary or other duty, or fee or any like demand of a general and public nature affecting future rights, of what value or amount soever the same may be, an appeal shall lie to Her Majesty in Her Privy Council; and except as aforesaid no appeal shall lie to Her Majesty in Her Privy Council.

"2. No such appeal shall be allowed until the appellant has given security in $2,000 to the satisfaction of the court appealed from, that he will effectually prosecute the appeal, and pay such costs and damages as may be awarded in case the judgment appealed from is confirmed.

"3. Upon the perfecting of such security, execution shall be stayed in the original cause.

"4. Subject to entry to be made by the judges authorized to make rules with reference to the High Court and Court of Appeal under the Judicature Act, the practice applicable to staying executions upon appeals to the Court of Appeal in force prior to 16th April, 1895, shall apply to an appeal to Her Majesty in Her Privy Council.

"5. A judge of the Court of Appeal shall have authority to approve of and allow the security to be given by a party who intends to appeal to Her Majesty in Her Privy Council, whether the application for such allowance be made during the sitting of the said court, or at any other time.

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"6. The preceding sections shall not apply to an appeal to Her Majesty in Her Privy Council from a judgment of any court on a reference under the Revised Statute for Expediting the Decision of Constitutional and other Provincial Questions.

"7. Costs awarded by Her Majesty in Her Privy Council upon an appeal shall be recoverable by the same process as costs awarded by the Court of Appeal."

Privy Council appeals—Quebec.

In the Province of Quebec the right of appeal is regulated by articles 68 and 69 of the Code of Civil Procedure, which provide as follows:—

"68. An appeal lies to Her Majesty in her Privy Council from final judgments rendered in appeal by the Court of Queen's Bench.

"1. In all cases where the matter in dispute relates to any fee of office, duty, rent, revenue or any sum of money payable to Her Majesty.

"2. In cases concerning titles to lands or tenements, annual rents or other matters in which the rights in future of the parties may be affected.

"3. In all other cases wherein the matter in dispute exceeds the sum or value of five hundred pounds sterling.

"69. Causes adjudicated upon in review, which are susceptible of appeal to Her Majesty in Her Privy Council, but the appeal whereof to the Court of Queen's Bench is taken away by articles 43 and 44 may, nevertheless, be appealed to Her Majesty."

Privy Council appeals—Alberta and Saskatchewan.

In the Provinces of Alberta and Saskatchewan, the right of appeal to the Privy Council is governed by an Imperial Order in Council dated 30th July, 1891, which provides as follows:—

"Whereas by an Act of the Parliament of Canada passed in the forty-ninth year of Her Majesty's reign, chapter twenty-five, intituled 'An Act further to amend the law respecting the North-West Territories,' a Supreme Court of Record or original and appellate jurisdiction was

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Appeals to Privy Council direct. Alberta and Saskatchewan.

constituted and established in and for the North-West Territories, called 'the Supreme Court of the North-West Territories;'

"And whereas by chapter fifty of the Revised Statutes of Canada intituled the North-West Territories Act, the said court was continued under the name aforesaid, but no provision has yet been made for the prosecution and regulation of appeals to Her Majesty in Council from the said court;

And whereas it is expedient that provision should be made by this order to enable parties to appeal from the decisions of the said court to Her Majesty in Council, it is hereby ordered by the Queen's most excellent Majesty, by and with the advice of Her Privy Council, as follows:—

"1. Any person or persons may appeal to Her Majesty, her heirs and successors in her or their Privy Council, from any final judgment, decree, order, or sentence of the said Supreme Court of the North-West Territories in such manner, within such time and under and subject to such rules, regulations and limitations as are hereinafter mentioned; that is to say,

"In case any such judgment, decree, order or sentence shall be given or pronounced for or in respect of any sum or matter at issue above the amount or value of three hundred pounds sterling (£300), or in case such judgment, decree, order or sentence shall involve directly or indirectly any claim, demand or question to or respecting property, or any civil right amounting to or of the value of three hundred pounds sterling (£300), the person or persons feeling aggrieved by any such judgment, decree, order or sentence may within fourteen days next after the same shall have been pronounced, made, or given, apply to the said court by motion or petition for leave to appeal therefrom to Her Majesty, her heirs and successors, in her or their Privy Council;

"In case such leave to appeal shall be prayed by the party or parties who is or are directed to pay any such sum of money or perform any duty, the said court may either direct that the judgment, decree, order or sentence appealed from shall be carried into execution, or that the

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execution thereof shall be suspended pending the said appeal as to the said court may appear to be most consistent with real and substantial justice;

And in case the said court shall direct such judgment, decree, order or sentence to be carried into execution, the person or persons in whose favour the same shall be given shall, before the execution thereof, enter into good and sufficient security to be approved by the said court for the due performance of such order as Her Majesty, her heirs and successors shall think fit to make upon such appeal;

In all cases security shall also be given by the party or parties appellant in a bond or mortgage or personal recognizance not exceeding the value of five hundred pounds sterling (£500) for the prosecution of the appeal, and the payment of all such costs as may be awarded by Her Majesty, her heirs and successors, or by the Judicial Committee of Her Majesty's Privy Council, to the party or parties respondent; and if such last-mentioned security shall be entered into within three months from the date of such motion or petition for leave to appeal, then, and not otherwise, the said court shall admit the appeal, and the party or parties appellant shall be at liberty to prefer and prosecute his, her or their appeal to Her Majesty, her heirs and successors, in her or their Privy Council, in such manner and under such rules as are or may be observed in appeals made to Her Majesty from Her Majesty's colonies and plantations abroad.

"2. It shall be lawful for the said Supreme Court at its discretion on the motion or petition of any party who considers himself aggrieved by any preliminary or interlocutory judgment, decree, order or sentence of the said Supreme Court, to grant permission to such party to appeal against the same to Her Majesty, her heirs and successors, in her or their Privy Council, subject to the same rules, regulations and limitations as are herein expressed respecting appeals from final judgments, decrees, orders and sentences.

"3. Nothing herein contained doth or shall extend or be construed to extend to take away or abridge the undoubted right and authority of Her Majesty, her heirs and succes-

S. 3. Appeals to Privy Council direct. Alberta and Saskatchewan.

sors, upon the humble petition of any person or persons aggrieved by any judgment or determination of the said court at any time to admit his, her, or their appeal therefrom, upon such terms as Her Majesty, her heirs or successors, shall think fit, and to reverse, correct or vary such judgment, or determination in such manner as to Her Majesty, her heirs and successors shall seem meet.

"4. In all cases of appeal admitted by the said court or by Her Majesty, her heirs or successors, the said court shall certify and transmit to Her Majesty, her heirs or successors, in her or their Privy Council, a true and exact copy of all evidence, proceedings, judgments, decrees and orders had or made in such cases appealed so far as the same have relation to the matter of appeal, such copies to be certified under the seal of the said court, and the said court shall also certify and transmit to Her Majesty, her heirs and successors, in her or their Privy Council, a copy of the reasons given by the judges of such court, or by any of such judges, for or against the judgment or determination appealed against, where such reasons shall have been given in writing, and where such reasons shall have been given orally, then a statement in writing of the reasons given by the judges of such court, or by any of such judges, for or against the judgment or determination appealed against.

"5. The said court shall, in all cases of appeal to Her Majesty, her heirs or successors, conform to and execute, or cause to be executed, such judgments and orders as Her Majesty, her heirs and successors shall think fit to make in the premises in such manner as any original judgment, decree or decretal order, or other order or rule of the said court should or might have been executed.

And the Right Honourable Lord Knutsford, one of Her Majesty's principal Secretaries of State, is to give the necessary directions herein accordingly."

Privy Council appeals—British Columbia.

In the Province of British Columbia, the appeals are regulated by 12-13 Vict. (Imp.), ch. 48 (for original statute see Safford & Wheeler's Privy Council Practice, p. 375); and the Imperial Order in Council dated 12th July, 1887.

S. 3. Appeals to Privy Council direct. Manitoba.

The terms of this Order in Council are, *mutatis mutandis*, the same as those contained in the Order in Council regulating appeals from the North-West Territories, *supra*.

Privy Council appeals—Manitoba.

In the Province of Manitoba, the right of appeal to the Privy Council is governed by Imperial Order in Council dated 26th November, 1892. The terms of the order are the same as those for the North-West Territories. For preamble, *vide* Safford & Wheeler's Privy Council Practice, p. 378.

Privy Council appeals—New Brunswick.

In the Province of New Brunswick, the appeal to the Privy Council is regulated by an Order in Council dated 27th November, 1852, practically identical with the order governing appeals from the North-West Territories and the Province of Manitoba. For preamble, *vide* Safford & Wheeler's Privy Council Practice, p. 380.

Privy Council appeals—Nova Scotia.

An appeal from the Supreme Court of Nova Scotia lies to the Judicial Committee of the Privy Council under the Order in Council of the 20th March, 1863. The terms of this order are also substantially identical with those of the North-West Territories, *supra*. For the preamble, *vide* Safford & Wheeler's Privy Council Practice, p. 391.

Privy Council appeals—Prince Edward Island.

In the Royal instructions issued to the early Governors of Prince Edward Island, provision was made for an appeal from the Supreme Court to the Governor in Council and the same instructions provided that where a party was dissatisfied with the decision of the Governor in Council, an appeal should be allowed to the King in Council subject to certain limitations. These Royal instructions were discontinued after the passing of the Statute 3 & 4 Wm. IV. ch. 41, being an Act for the better Administration of Justice in His Majesty's Privy Council. Up to the present

time no Imperial Order in Council has been passed providing for a direct appeal from the Supreme Court of this province. Appeals now can only be taken after leave has been granted by the Judicial Committee.

S. 3. Appeals to Privy Council direct. P. E. Island.

For Practice on appeals to His Majesty's Privy Council, *vide*, p. 252, *infra*.

THE JUDGES.

4. The Supreme Court shall consist of a chief justice to be called the Chief Justice of Canada, and five puisné judges, who shall be appointed by the Governor in Council by letters patent under the Great Seal. 59 V., c. 14, s. 1.

By the Imperial Act 58-59 Vict. ch. 44, it is provided as follows:—

1. (1) If any person being or having been Chief Justice or a judge of the Supreme Court of the Dominion of Canada, or of a Superior Court in any province of Canada, or any of the Australasian colonies mentioned in the schedule to this Act, or of either of the South African colonies mentioned in the said schedule, or of any other Superior Court in Her Majesty's Dominions named in that behalf by Her Majesty in Council, is a member of Her Majesty's Privy Council, he shall be a member of the Judicial Committee of the Privy Council.

(2) The number of persons being members of the Judicial Committee by reason of this Act shall not exceed five at any one time.

(3) The provisions of this Act shall be in addition to, and shall not affect, any other enactment for the appointment of or relating to members of the Judicial Committee.

2. This Act may be cited as the Judicial Committee Amendment Act, 1895.

Pursuant to this Act His Lordship Sir Henry Strong, Chief Justice of Canada, and the present Chief Justice, Sir Elzear Taschereau, have been sworn in as members of the Privy Council, and by the terms of the Act are members of the Judicial Committee.

5. Any person may be appointed a judge who is or has been a judge of a superior court of any of the provinces

S. 5. Judges. Who may be.

of Canada, or a barrister or advocate of at least ten years' standing at the bar of any of the said provinces. R.S., c. 135, s. 4.

6. Two at least of the judges shall be appointed from among the judges of the Court of King's Bench, or of the Superior Court, or the barristers or advocates of the Province of Quebec. R.S., c. 135, s. 4.

7. No judge shall hold any other office of emolument either under the Government of Canada or under the government of any province of Canada. R.S., c. 135, s. 4.

8. The judges shall reside at the city of Ottawa, or within five miles thereof. R.S., c. 135, s. 4.

9. The judges shall hold office during good behaviour, but shall be removable by the Governor-General on address of the Senate and House of Commons. R.S., c. 135, s. 5.

10. Every judge shall, previously to entering upon the duties of his office as such judge, take an oath in the form following:

"I, , do solemnly and sincerely promise and swear that I will duly and faithfully, and to the best of my skill and knowledge, execute the powers and trusts reposed in me as chief justice (*or* as one of the judges) of the Supreme Court of Canada. So help me God." R.S., c. 135, s. 9;—50-51 V., c. 16, s. 57.

11. Such oath shall be administered to the Chief Justice before the Governor-General, or person administering the Government of Canada, in Council, and to the puisné judges by the Chief Justice, or, in his absence or illness, by any other judge present at Ottawa. R.S., c. 135, s. 10.

Sections 7 and 8 of the Supreme & Exchequer Courts Act, R.S.C. ch. 135, provided for the salaries of the judges

of the Supreme Court, and their superannuation. These provisions are now found in the Judges Act, R.S. c. 138. S. 11. Salaries.

When taking office, every judge of the Supreme Court takes the following oath of allegiance to the Sovereign, pursuant to the provisions of R.S. c. 78:—

"I, , do sincerely promise and swear that I will be faithful and bear true allegiance to His Majesty King Edward VII. (or reigning Sovereign for the time being) as lawful Sovereign of the United Kingdom of Great Britain and Ireland, and of this Dominion of Canada, dependent on and belonging to the said Kingdom, and that I will defend him to the utmost of my power against all traitorous conspiracies or attempts whatsoever, which shall be made against his person, Crown and dignity, and that I will do my utmost endeavour to disclose and make known to His Majesty, his heirs or successors, all treasons or traitorous conspiracies and attempts which I shall know to be against him or any of them; and all this I do swear without any equivocation, mental evasion or secret reservation. So help me God."

REGISTRAR AND OTHER OFFICERS.

12. The Governor in Council may, by an instrument under the Great Seal, appoint a fit and proper person, being a barrister of at least five years' standing, to be Registrar of the Supreme Court. R.S., c. 135, s. 11.

13. The Registrar shall hold office during pleasure and shall reside and keep an office at the city of Ottawa. R.S., c. 135, s. 11.

14. The Registrar shall have the rank of a Deputy Head of a Department and shall be paid a salary beginning on his appointment at three thousand five hundred dollars per annum with an annual increase of one hundred dollars, until a maximum salary is reached of four thousand dollars. 3 E. VII., c. 69, s. 1.

S. 15. Registrar. Functions.

15. The Registrar shall, subject to the direction of the Minister of Justice, oversee and direct the officers, clerks and employees appointed to the Court. 3 E. VII., c. 69, s. 3.

16. The Registrar shall give his full time to the public service and shall not receive any pay, fee or allowance in any form in excess of the amount hereinbefore provided. 3 E. VII., c. 69, s. 3.

17. The Registrar shall, under the supervision of the Minister of Justice, have the management and control of the Library of the Court and the purchase of all books therefor. 51 V., c. 37, s. 4.

18. The Registrar shall, until otherwise provided, publish the reports of the decisions of the Court. 50-51 V., c. 16, s. 57.

19. The Registrar shall have such authority to exercise the jurisdiction of a judge sitting in Chambers as may be conferred upon him by general rules or orders made under this Act. 50-51 V., c. 16, s. 57.

Section 109, *infra*, empowers the Supreme Court to make general rules and orders authorizing the Registrar to exercise the jurisdiction of a judge of the Court sitting in Chambers, and such rules are given the same force and effect as if expressly provided for in the Act.

General Order No. 83, *infra*, p. 451, made in pursuance of section 109, confers upon the Registrar all the authority and jurisdiction which may be exercised by a judge sitting in Chambers except,

(*a*) granting writs of *habeas corpus*, and adjudicating upon the return thereof; and

(*b*) granting writs of *certiorari*.

20. The Governor in Council may appoint a reporter and assistant reporter who shall report the decisions of the Court and who shall be paid such salaries respectively as the Governor in Council determines. 50-51 V., c. 16, s. 57.

S. 21. Clerks and servants.

21. The Governor in Council may, from time to time, appoint such other clerks and servants of the Court as are necessary, all of whom shall hold office during pleasure. R.S., c. 135, s. 11; 50-51 V., c. 16, s. 57.

22. The provisions of the Civil Service Act and of the Civil Service Superannuation and Retirement Act shall so far as applicable extend and apply to such officers, clerks and servants at the seat of Government. R.S., c. 135, s. 14.

Sections 21 and 22, *supra*, have been construed by the Department of Justice to authorize the Governor in Council to appoint clerks and servants of the Court independently of the provisions of the Civil Service Act, but upon the appointment being made the Civil Service Act and the Civil Service Superannuation and Retirement Act become applicable.

23. The Sheriff of the county of Carleton, in the Province of Ontario, shall be *ex-officio* an officer of the Court and shall perform the duties and functions of a sheriff in connection therewith. R.S., c. 135, s. 15.

BARRISTERS AND SOLICITORS.

24. All persons who are barristers or advocates in any of the Provinces of Canada may practise as barristers, advocates and counsel in the Supreme Court. R.S., c. 135, s. 16;—50-51 V., c. 16, s. 57.

In *Halifax City Rly. Co.* v. *The Queen*, Cout. Dig. 1118, the Court refused to hear a member of the Bar of the State of New York who desired to appear on behalf of the appellants.

In the *Steamship Calvin Austin* v. *Lovitt*, on February 27th, 1905, counsel for the respondent called the attention of the Court to the fact that a member of the Massachusetts Bar had been heard in this appeal in the Admiralty Court below, and requested that he be heard by the Supreme Court. Counsel for the appellant not objecting, the Court granted the application and counsel was called

S. 24. Foreign. counsel.

within the Bar and took part in the argument of the appeal on behalf of the respondent.

25. All persons who are attorneys or solicitors of the superior courts in any of the provinces of Canada may practise as attorneys, solicitors and proctors in the Supreme Court. R.S., c. 135, s. 17;—50-51 V., c. 16, s. 57.

26. All persons who may practise as barristers, advocates, counsel, attorneys, solicitors or proctors in the Supreme Court shall be officers of the Court. R.S., c. 135, s. 18;—50-51 V., c. 16, s. 57.

SESSIONS AND QUORUM.

27. Any five of the judges of the Supreme Court shall constitute a quorum and may lawfully hold the Court. 51 V., c. 37, s. 1.

28. It shall not be necessary for all the judges who have heard the argument in any case to be present in order to constitute the Court for delivery of judgment in such case, but in the absence of any judge, from illness or any other cause, judgment may be delivered by a majority of the judges who were present at the hearing. 51 V., c. 37, s. 1.

Where a judge has died between the argument of the appeal and the delivery of judgment, the Court has held that this section authorized a delivery of judgment according to the opinions of a majority of the judges who sat upon the appeal exclusive of the opinion of the deceased judge.

Where one of the judges who sat during the hearing of an appeal in which judgment had been reserved, resigned his Commission before the judgment was rendered, and thereby became disqualified from adjudicating upon the appeal, the case was ordered to be reheard at the next following session of the Court. *Wright* v. *The Queen*, Mch. 15th, 1895.

S. 29. Opinion of absent judge.

29. Any judge who has heard the case and is absent at the delivery of judgment, may hand his opinion in writing to any judge present at the delivery of judgment, to be read or announced in open court, and then to be left with the Registrar or reporter of the Court. 51 V., c. 27, s. 1.

30. No judge against whose judgment an appeal is brought, or who took part in the trial of the cause or matter, or in the hearing in a court below, shall sit or take part in the hearing of or adjudication upon the proceedings in the Supreme Court.

2. In any cause or matter in which a judge is unable to sit or take part in consequence of the provisions of this section, any four of the other judges of the Supreme Court shall constitute a quorum and may lawfully hold the court. 52 V., c. 37, s. 1.

This section has been construed to disqualify a judge from sitting in appeal on a case in which he was a member of the court below, but took no part in the judgment of that court. *Grant* v. *Maclaren*, May 9th, 1894.

The Court being fully constituted for the hearing of an appeal under sub-section 2 of this section, judgment may be given dismissing the appeal where the members of the Court are equally divided in opinion, differing in this respect from appeals heard under the next following section.

Where the members of the Supreme Court are equally divided in opinion so that the decision appealed against stands unreversed, the result of the decision affects the actual parties to the litigation only, and the Supreme Court in similar cases brought before it is not bound by the result of the previous case. *Re Stanstead Election*, 20 Can. S.C.R. 12.

31. Any four judges shall constitute a quorum and may lawfully hold the court in cases where the parties consent to be heard before a court so composed. 59 V. c. 14, s. 2.

S. 31. Quorum by consent.

"It is the invariable practice of the Court to direct a re-argument where a case is argued before four judges by consent of parties, and the members of the Court are equally divided in opinion, the practice differing in this respect from the case where four constitute a quorum of the Court by reason of one of the judges being disqualified from sitting under the preceding section." October 9th, 1905.

Rule 73 provides that:—

"If it happens at any time that the number of judges necessary to constitute a quorum for the transaction of the business to be brought before the court is not present, the judge or judges then present may adjourn the sittings of the court to the next day or some other day, and so on from day to day, until a quorum shall be present."

32. The Supreme Court, for the purpose of hearing and determining appeals, shall hold in each year, at the city of Ottawa, three sessions.

2. The first session shall begin on the third Tuesday of February, the second on the first Tuesday in May, and the third on the first Tuesday in October, in each year.

3. Each of the said sessions shall be continued until the business before the court is disposed of. R.S., c. 135, s. 20;—54-55 V., c. 25, s. 1.

33. The Supreme Court may adjourn any session from time to time and meet again at the time appointed for the transaction of business.

2. Notice of such adjournment and of the day fixed for the continuance of such session shall be given by the Registrar in the *Canada Gazette*. R.S., c. 135, s. 21.

34. The Court may be convened at any time by the Chief Justice, or, in the event of his absence or illness, by the senior puisné judge, in such manner as is prescribed by the rules of Court. R.S., c. 135, s. 22.

S. 34. Special sessions.

Rule 12 provides as follows:—

"The notice convening the court under section 14 of the Act (now section 34) for the purpose of hearing election or criminal appeals, or appeals in matters of *habeas corpus*, or for other purposes, shall, pursuant to the directions of the chief justice or senior puisné judge as the case may be, be published by the Registrar in the *Canada Gazette*, and shall be inserted therein for such time before the day appointed for such special session as the said chief justice or senior puisné judge may direct, and may be in the form given in Schedule A. to these rules appended."

35. The Supreme Court shall have, hold and exercise an appellate, civil and criminal jurisdiction within and throughout Canada. R.S. c. 135, s. 23.

The generality of the section is qualified as follows:—

(*a*) No appeal lies from a judgment made in the exercise of the judicial discretion of the court below.

Section 45, *infra*, p. 159, provides as follows:—

"No appeal shall lie from any order made in any action, suit, cause, matter or other judicial proceeding made in the exercise of the judicial discretion of the court or judge making the same; but this exception shall not include decrees and decretal orders in actions, suits, causes, matters or other judicial proceedings in equity, or in actions or suits, causes, matters or other judicial proceedings in the nature of suits or proceedings in equity instituted in any superior court."

As to what is an exercise of judicial discretion, *vide* notes to section 45.

(*b*) No appeal lies to the Supreme Court from a reference to the court below by the Lieutenant-Governor in Council.

Union Colliery Co. v. *Attorney-General of British Columbia*, 27 Can. S.C.R. 637.

The Lieutenant-Governor of British Columbia in Council made a reference to the Supreme Court of British Columbia pursuant to the provisions of 54 V. c. 5 (B.C.) (now R.S.B.C. 1897, c. 56, ss. 98-103), intituled "An Act

S. 35. Jurisdiction. Provincial references.

for expediting the decision of constitutional and other provincial questions," for hearing and consideration of a case submitted to ascertain whether in the opinion of that court the legislature of the province had jurisdiction to pass the Act 53 V. c. 33 (B.C.) intituled "An Act to amend the Coal Mines Regulation Act."

Section 102 provides as follows:—"The opinion of the court or judge shall be deemed a judgment of the court and an appeal shall lie therefrom as in the case of a judgment in an action."

The full Court after argument certified to the Provincial Secretary that the conclusion arrived at was that the statute in question was within the scope of the legislative authority of the Province of British Columbia. An appeal having been taken from the judgment of the Supreme Court of British Columbia to the Supreme Court of Canada, and the respondents having moved to quash, *Held*, per Taschereau, J., for the Court: "We have clearly no jurisdiction to entertain the appeal. There is no judgment to be appealed from. The British Columbia statute itself says, 'shall be deemed a judgment.' That is saying that it is not a judgment. There is no action, no parties, no controversy, perhaps, and the British Columbia Legislature, did it intend to do so, cannot extend our jurisdiction and create a right to appeal to this Court."

The Revised Statutes of Ontario, ch. 84, contains provisions for a reference by the Lieutenant-Governor in Council to the Court of Appeal or to the High Court similar to those contained in the British Columbia statute referred to in the preceding case, and section 6 of the Act contains a similar provision that the opinion of the Court should be deemed a judgment of the Court and that an appeal should lie therefrom as in the case of a judgment in an action.

It would appear that references under this statute are not appealable to the Supreme Court of Canada.

Section 7 of said chapter 84, R.S.O., provides that "an appeal to Her Majesty in Her Privy Council from a judgment of any court on a reference under this Act shall not be subject to the restrictions contained in the Revised Statutes of this province respecting appeals to Her Majesty in Her Privy Council."

S. 35. Jurisdiction. Provincial references.

In a reference intituled "In re Assignments and Preferences Act, sec. 9," to the Court of Appeal for Ontario (20 A.R. 489), under the statute in question, the judgment of the Court of Appeal was reversed by the Judicial Committee of the Privy Council (1894, A.C., p. 189).

The Ontario Judicature Act, R.S.O. c. 51, s. 57, sub-s. 2, provides as follows:—

"The High Court shall have jurisdiction to entertain an action at the instance of either the Attorney-General for the Dominion or the Attorney-General of this province for a declaration as to the validity of any statute, or any provision in any statute of this Legislature, though no further relief should be prayed or sought; and the action shall be deemed sufficiently constituted if the two officers aforesaid are parties thereto. A judgment in the action shall be appealable like other judgments of the said court."

Under this provision an action was brought (*Atty.-Gen. of Canada* v. *Atty.-Gen. of Ontario*), for a declaration touching the validity of a statute of Ontario passed in 1888, 51 V. c. 5, intituled "An Act respecting the executive administration of the laws of this Province." The judgment of the Court of Appeal for Ontario, 19 A.R. 31, was affirmed, 33 Can. S.C.R. 458.

The Revised Statutes of Nova Scotia, 1900, c. 166, provides for a reference by the Lieutenant-Governor in Council to the Supreme Court of Nova Scotia, and by section 6 give an appeal therefrom to the Supreme Court of Canada and to Her Majesty in Council.

It would appear from the above decision in *Union Colliery Co.* v. *Attorney-General of British Columbia* that even if the Legislature of the province has, as in the case of the Province of Nova Scotia, provided for an appeal in matters of reference to the Supreme Court of Canada, this will not confer jurisdiction, and that legislation to this effect is *ultra vires.*

In re Teachers in Roman Catholic Schools. Feb. 20th, 1906.

In this case an application was made on consent for leave to appeal from the judgment of the Court of Appeal

S. 35. Jurisdiction. Provincial references.

for Ontario in a reference by the Lieutenant-Governor in Council.

The motion was refused, the Court holding that it had no jurisdiction and was bound by its decision in the *Union Colliery Co.* v. *The Attorney-General of British Columbia.*

For the jurisdiction of the Supreme Court in disputed matters of jurisdiction between the Dominion of Canada and any province, *vide* notes to section 67, *infra*, p. 276.

(*c*) No appeal where the court or judge is *curia designata.*

Halifax & Cape Breton Coal & Ry. Co. v. *Gregory*, Cass. Prac. 20.

Where the plaintiff in an action obtained a verdict, which was affirmed by the Supreme Court of Nova Scotia, the defendants appealed to the Supreme Court of Canada, and agreed with the plaintiff, the Government of Nova Scotia becoming a party to such agreement, that the appeal should be decided on the merits irrespective of the pleadings or any technical defence raised thereon, and limiting the amount in question, the balance being otherwise satisfied. The Supreme Court having affirmed the judgment appealed from, an application for leave to appeal to the Judicial Committee of the Privy Council was refused, on the ground that in deciding the appeal the Supreme Court was not acting in its ordinary jurisdiction as a court of appeal, but was acting under the special reference made to it by the agreement.

McGreevy v. *The Queen*, 14 Can. S.C.R. 735.

The Petition of Right Act of the Province of Quebec, 46 V. c. 27, provides that the Superior Court of the Province of Quebec sitting in the District of Quebec shall have exclusive original jurisdiction in matters of Petitions of Right, and also provides that an appeal shall lie from the final judgment of the Superior Court to the Court of Queen's Bench sitting in appeal.

The suppliant McGreevy being dissatisfied with the amount awarded him by arbitrators appointed to settle a disputed claim between him and the Government of the

Province of Quebec, instituted proceedings by way of petition of right to set aside the award. The judgment of the Superior Court in his favour was reversed by the Court of Queen's Bench, appeal side. An appeal being taken to the Supreme Court, counsel for the government moved to quash the appeal on the ground that the remedy by petition of right was a statutory remedy and that the statute having provided for an appeal only to the Court of Queen's Bench no further appeal lay to the Supreme Court. This pretension was rejected by the Court and the motion to quash dismissed.

Canadian Pacific Rly. Co. v. *St. Thérèse*, 16 Can. S.C.R. 606.

The railway company on the 17th August, 1886, gave notice of expropriation of land under the Railway Act, R.S. c. 109, and on the 1st October following obtained an order enabling them to take possession at once, paying into the bank $4,000 as security in pursuance of the order. Arbitrators were appointed on the 28th October. The company proceeded to take gravel from the land in question, but finding it insufficient in quantity, gave notice of abandonment of the notice of expropriation, and by tender offered $2,500 as compensation for the damages sustained. At that time the arbitrators had not made any award, but they did so on the 27th October following, assessing the damages at $7,000. On the 2nd December, 1887, the plaintiff petitioned for an order for payment to him of the $4,000, and after hearing the order was made. An appeal from this order was dismissed by the Court of Queen's Bench. The company thereupon appealed to the Supreme Court of Canada where the appeal was quashed, the Court holding that where in the Railway Act a judge of the Superior Court has conferred upon him power to make various orders, he acts as *persona designata* and does not represent the court to which he is attached, and that no appeal lay from his orders.

Quære, per Gwynne and Patterson, JJ., whether an appeal lay to the Court of Queen's Bench from orders made by the Superior Court in matters in which that court had jurisdiction conferred upon it under section 8 of the Act.

S. 35. Jurisdiction. Curia designata.

C.P. Rly. Co. v. *Fleming*, 22 Can. S.C.R. 33.

Where by the practice and procedure of a province the issue must be tried by a jury, if the parties by consent withdraw the case from the jury and refer it to the Court, the latter acts as *quasi arbitrator* and its decision is not open to review on appeal.

Birely v. *Toronto & Hamilton Rly. Co.*, 25 A.R. (Ont.) 88.

Under section 161 of the Railway Act, 51 V. c. 29 (D.), an appeal lies by either party from an award of compensation to the Court of Appeal or to the High Court of Justice. *Held*, that "while therefore not interfering in any way with the existing law and practice as to setting aside awards, the Act creates a special appellate tribunal for reviewing the decision of the arbitrators, on the law and the facts. . . It may be that by force of section 24 (*f*), (now section 39 (*b*)), of the Supreme Court Act, there is an appeal to that court, but no second appeal to any provincial court is given by the Act, and, therefore, so far as provincial courts are concerned, the decision of the court selected by the appellant is final."

In *Ottawa Electric* v. *Brennan*, 31 Can. S.C.R. 311, an application was made for leave to appeal direct to the Supreme Court *per saltum* from the judgment of Mr. Justice MacMahon with respect to the amount awarded by arbitrators as to the value of lands expropriated, and counsel for the applicant cited the above case of *Birely* v. *Toronto & Hamilton Rly. Co.*, and contended that the decision was wrong, and asked that if the motion could not be granted because of it, that the decision be overruled. In pronouncing judgment orally, the Chief Justice said:—

"It has not been shewn that there was any right of appeal to the Court of Appeal which is necessary to give us jurisdiction. On the contrary, it appears that there is no such right of appeal"; and the motion was refused with costs.

In the matter of the South Shore Rly. Co. and the Quebec Southern Rly. Co. *Morgan* v. *Beique*, March 1st, 1906.

3 Edw. VII. c. 21, s. 1, confers jurisdiction upon the

Exchequer Court in connection with the sale or foreclosure of railways, and by 4 & 5 Edw. VII. c. 158, after reciting that certain railways were in the hands of a receiver and that it was desirable that they should be sold under the order of the Exchequer Court, it is provided that the Exchequer Court might order the sale of the railways and that they might be sold separately or together as in the opinion of the Exchequer Court would be for the best interests of the creditors, and that the sale should have the same effect as a sheriff's sale of immovables under the laws of the Province of Quebec, and that the buyer should have, under such sale, clear title, free from all charges, hypothecs, privileges and incumbrances whatever.

The judge of the Exchequer Court having accepted a certain tender for the combined railways, although having separate tenders which together amounted to more than the tender accepted, parties who were creditors appealed from his order to the Supreme Court objecting to the discretion exercised by him in accepting the tender in question. The respondents moved to quash on the ground that the Exchequer Court was *curia designata*, and that no appeal lay from the order of the Exchequer Court judge. The Supreme Court, without determining the motion to quash, gave judgment dismissing the appeals with costs.

(*d*) *Exercise of disciplinary powers by a competent body.*

Ash v. *Methodist Church*, 31 Can. S.C.R. 497.

The appellant having been prevented by the Methodist Conference from pursuing his calling of a minister, and deprived of the emoluments attached to such position, brought an action for damages and claimed a mandamus for re-instatement, but failed at the trial and in the Court of Appeal. *Held*, that the matter was one clearly within the powers of a domestic forum, and the Court had no right to interfere.

(*e*) *Practice and procedure of courts below.*

Although having an appellate jurisdiction the Supreme Court will not exercise it in matters relating to the practice and procedure of the courts below except under special circumstances.

S. 35. Jurisdiction. Practice and procedure.

Kandick v. *Morrison*, 2 Can. S.C.R. 12.

An order setting aside a demurrer as frivolous and irregular under the Nova Scotia Practice Act, R.S.N.S., 4th series, c. 94, is an order on a matter of practice and not a final judgment within the meaning of the expression "judgment" as defined by section 2, R.S. c. 135.

Gladwin v. *Cummings*, Cout. Dig. 88 (Nov. 3, 1883).

Action of replevin to recover 125 barrels of flour. Plaintiffs were indorsees of a bill of lading of the goods, which were held by the defendant as freight agent of the I.C.R. at Truro. The action was begun and the goods were replevied and the writ was served on 9th April, 1881. A default was marked in 25th April, 1881. On 10th Sept., 1881, plaintiffs' attorney issued a writ of inquiry, under which damages were assessed under R.S.N.S. (4 ser.) c. 94, s. 56. An order *nisi* to remove the default and let in defendant to defend was taken out, on 11th October, 1881, and discharged with costs. The judgment being affirmed on appeal (4 Russ. & Geld. 168). R.S.N.S. (4 ser.) c. 94, s. 75, enacts that it shall be lawful for the court or a judge at any time within one year after final judgment, to let in defendant to defend upon application supported by satisfactory affidavits accounting for his non-appearance, and disclosing a defence upon the merits, etc. *Held*, that if the judgment appealed from was a final judgment within the meaning of section 3 of the Supreme Court Amendment Act of 1879, that the matter was one of procedure and entirely within the discretion of the court below, and this Court would not interfere. Appeal dismissed with costs.

Dawson v. *Union Bank*, Cout. Dig. 125 (17 Feb., 1885).

Defendant applied by motion for permission to file new pleas, which was refused by the Superior Court on account of insufficiency of the affidavit in support thereof, and, therefore, defendant served notice of intention to appeal from this interlocutory judgment to the Court of Queen's Bench. Notwithstanding this notice plaintiff moved for and obtained judgment in the Superior Court and this judgment was affirmed by the Court of Queen's Bench. On appeal to the Supreme Court of Canada, *Held*, per Ritchie,

C.J., and Strong and Taschereau, JJ., that on a question of procedure an appellate court should not interfere. Per Fournier and Henry, JJ., that the affidavit filed by the appellant in support of his amended plea was insufficient, not being sufficiently positive and precise. Per Taschereau, J., only a rule for leave to appeal would have the effect of staying proceedings, not a mere service of a motion for leave to appeal. Appeal dismissed with costs.

Scammell v. *James*, 16 Can. S.C.R. 593.

On application to a judge in Chambers an order was made in *capias* proceedings for the discharge of the bail on account of delay in entering up judgment and the full Court refused to set aside such order. *Held*, that an appeal would not lie as the matter was simply one of practice in the discretion of the court below.

Baker v. *La Société de Construction Métropolitaine*, 22 S.C.R. 364.

In their declaration the plaintiffs alleged that the defendants had been in possession of certain property since 9th May, 1876, and after the *enquête* they moved the court to amend the declaration by substituting for the "9th May, 1876," the words "1st Dec., 1886." The motion was refused by the Superior Court, which held that the admission amounted to a judicial avowal from which they could not recede, and this decision was affirmed by the Court of Queen's Bench.

On appeal to the Supreme Court, it was *held*, reversing the judgment of the court below, Fournier, J., dissenting, that the motion should have been allowed by the Superior Court, so as to make the allegation of possession conform with the facts as disclosed by the evidence. Art. 1245 C.C.

Ferrier v. *Trépannier*, 24 Can. S.C.R. 86.

In this case the appellants took exception *in limine* to an amendment made by leave of the court below, whereby they were sued in a different capacity from that set up in the writ. The Court said: "The amendment in question consisted in adding them to the case in their quality of trustees. Their objection to this proceeding cannot prevail. It

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rests upon a mere question of procedure and upon such questions the decisions of the provincial courts according to a well-established jurisprudence of this court cannot be interfered with except under special circumstances, none of which appear in this case. The Court of Queen's Bench has sanctioned the act of the Superior Court in the matter and we cannot be asked to reverse the concurrent decisions of the two courts on a question of this nature even were we inclined to doubt its legality."

Arpin v. *The Merchants Bank*, 24 Can. S.C.R. 142.

An opposition filed to a sale of lands was dismissed. A writ of *venditioni exponas* was issued by the Superior Court in the District of Montreal. The appellant contended it should have issued in the District of Iberville. The writ was upheld by the Superior Court and affirmed by the Court of Queen's Bench. The Court declined to interfere on a point of practice and dismissed the appeal.

Bradshaw v. *Foreign Mission Board*, 24 Can. S.C.R. 351.

53 V. c. 4, s. 85 (N.B.), provides that in an equity suit either party may apply for a new trial to the judge before whom the trial was had. In this case the trial was had before Mr. Justice Palmer who had resigned from the Bench. An application to the then present Judge in Equity, Mr. Justice Barker, for a new trial was refused by him on the ground that he had no jurisdiction under the statute and his judgment was affirmed by the full Court. The Supreme Court reversed this judgment on appeal; Taschereau, J., dissenting, was of opinion, following the preceding case, that the matter was one of practice and procedure and the Court should not interfere.

Lamb v. *Armstrong*, 27 Can. S.C.R. 309.

Held, that although the jurisprudence of the Court is not to entertain appeals on questions of practice and procedure, yet questions of practice cannot be ignored by the Supreme Court where their decision involves the substantial rights of the litigants, or sanctions a great injustice.

Eastern Townships Bank v. *Swan*, 29 Can. S.C.R. 193.

When a grave injustice has been inflicted upon a party

to a suit the Supreme Court will interfere for the purpose of granting appropriate relief, although the question involved upon the appeal may be one of mere local practice only.

(*Lamb* v. *Armstrong*, followed.)

Dueber Watch Case Co. v. *Taggart*, Cout. Dig. 127. 24th Apl., 1900.

The Supreme Court of Canada will not entertain an appeal from an order made upon a motion in a practice matter in the appellate court below.

Home Life v. *Randall*, 30 Can. S.C.R. 97.

Under the Ontario Judicature Act, the performance of conditions precedent to a right of action must still be alleged and proved by the plaintiff.

Price v. *Fraser*, 31 Can. S.C.R. 505.

The defendant died between the hearing of the case and rendering of judgment, and his solicitor by inadvertence inscribed the case in review in the name of deceased defendant, but the court in review allowed an amendment substituting the names of his executors for the defendant and gave judgment in their favour. The Court of King's Bench reversed the court in review holding that the latter court had no jurisdiction to allow the amendment. On appeal to the Supreme Court it was held that although only a question of procedure was involved, it injuriously effected one of the parties and the Supreme Court would interfere. The appeal was allowed and the action remitted to the court below to be heard on the merits.

Currie v. *Currie*, 24 S.C.R. 712. 6th May, 1895.

An action for annulment of a will, the execution of which was procured when, as alleged, the testator was not capable of making it, it was dismissed because all necessary parties had not been summoned. The Court of Queen's Bench (Q.R. 3 Q.B. 552) reversed this decision, *held*, that the execution of the will had been procured by undue influence, and annulled it.

The Supreme Court of Canada, affirmed the decision of the Court of Queen's Bench, as to parties, holding that

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the Superior Court should itself have summoned the parties deemed necessary. It also affirmed the judgment as to the will on the ground that the onus was on the party procuring the execution to prove capacity, and that he had not only failed to do so, but the evidence was overwhelming against him.

The appeal was dismissed with costs.

Higgins v. *Stephens*, 32 Can. S.C.R. 132.

The judgment appealed from held that in an action *pro socio*, it was sufficient for the plaintiff in his statement of claim to allege facts that would justify inquiry into all the affairs of the partnership and for the liquidation of the same, without producing full and regular accounts of the partnership affairs. *Held*, that the appeal involved merely a question of procedure in a matter where the appellant had suffered no wrong and, therefore, that the appeal should be dismissed.

Gibson v. *Nelson*, Cout. Dig. 127. 9th Dec., 1902.

The Supreme Court of Canada refused to interfere with the decision of the provincial court on matters of procedure, but, under the special circumstances of the case, the appeal was dismissed without costs.

Toronto Rly. Co. v. *Balfour*, 32 Can. S.C.R. 239.

Held, that the Supreme Court would not interfere with a decision of the Court of Appeal that the verdict of the jury should be deemed general and not special, it being a matter purely of procedure.

Finnie v. *City of Montreal*, 32 Can. S.C.R. 335.

In this case the Supreme Court refused to interfere with the action of the courts below in a matter of procedure where no injustice was suffered, although there were irregularities in the pleadings which brought before the Court a different issue from what was the real matter in controversy. *Vide* also notes to s. 45, p. 161, *infra*.

(*f*) Although having an appellate jurisdiction the Supreme Court will not exercise it in matters of costs except under special circumstances.

S. 35. Jurisdiction. Costs.

O'Donohoe v. *Beatty*, 19 Can. S.C.R. 356.

In an appeal from a judgment of the Court Appeal for Ontario arising out of the taxation of a solicitor's bill of costs, the Court expressed doubt if a matter of this kind relating to practice and procedure of the High Court was a proper subject of appeal to the Supreme Court.

Moir v. *Huntingdon*, 19 Can. S.C.R. 363.

A by-law the validity of which was in question having been repealed after its legality had been upheld by the Court of Queen's Bench so that a question of costs only was involved in the appeal, the Court dismissed the appeal with costs.

McGugan v. *McGugan*, 21 Can. S.C.R. 267.

By R.S.O. (1887), c. 147, s. 42, any person not chargeable as the principal party who is liable to pay or has paid a solicitor's bill of costs may apply to a judge of the High Court or of the County Court for an order of taxation. In an action against school trustees, a ratepayer of the district applied to a judge of the High Court for an order under this section to tax the bill of the solicitor of the plaintiff, who had recovered judgment. The application was refused, but on appeal to the Divisional Court, this judgment was reversed (21 O.R. 289). There was no appeal as of right from the latter decision, but on leave to appeal being granted it was reversed and the original judgment restored (19 Ont. App. R. 56). *Held*, per Ritchie, C.J., and Strong and Gwynne, JJ., that assuming the Court had jurisdiction to entertain the appeal, the subject matter being one of taxation of costs, this Court should not interfere with the decision of the provincial courts which are the most competent tribunals to deal with such matters. Per Ritchie, C.J., and Patterson, J., that a ratepayer is not entitled to an order for taxation under said section. *Held*, per Taschereau, J., that the Court had no jurisdiction to entertain the appeal, as the judgment appealed from was not a final judgment within the meaning of the Supreme Court Act; the matter was one in the discretion of the courts below and the proceedings did not originate in a superior court.

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Cowan v. *Evans*, 22 Can. S.C.R. 328.

The plaintiff claimed to have a building contract for $1,900 rescinded, damages $1,000 and material $545. The Superior Court dismissed claim for damages from which plaintiff did not appeal, but acquiesced, and reserved to plaintiff his rights to the building material. Since the institution of the action the building in question had been completed, so that there was no question before the Supreme Court of annulling the contract, the only question being one of costs and $545 for bricks for which the judgment of the Court of Queen's Bench reserved the appellant's recourse. On these facts, a motion to quash an appeal to the Supreme Court was granted.

McKay v. *Hinchinbrooke*, 24 Can. S.C.R. 55.

This was an action brought to have the valuation roll of a municipality which had been duly homologated set aside because the valuators had been illegally appointed. The Superior Court maintained the action which was reversed by the Court of Queen's Bench. *Held*, that the Court had no jurisdiction to hear the appeal as the case did not fall under section 39, *infra*, and that it was not a proceeding to annul a by-law. It was also held that the matter in dispute was only one of costs and on that ground should be dismissed.

Archbald v. *Delisle*, 25 Can. S.C.R. 1.
Baker v. *Delisle*, 25 Can. S.C.R. 1.

One Cotté was the bookkeeper for two estates represented in the action by the plaintiffs Archbald, and the defendants Delisle, respectively. The bookkeeper having defaulted the plaintiff brought an action to obtain contributions from the defendants towards the loss sustained by them by the defalcation. The defendants besides pleading to the principal action, brought an action in warranty against the estate represented by Baker. The judgment below dismissed the principal action and in the proceedings in warranty held that the defendants were rightly sued and maintained that action, but concludes that as the principal action had been dismissed the court could only condemn the defendants to the costs of the action. The defendants

in both actions appealed to the Supreme Court and the respondent in warranty action moved to quash the appeal on the ground that this was only an appeal as to costs. The motion was rejected, the Court holding that the case was distinguishable from *Moir* v. *Huntingdon*, 19 Can. S.C.R. 363; *McKay* v. *Hinchinbrooke*, 24 Can. S.C.R. 55, as here the plaintiffs in the original action were appealing to the Supreme Court, and if they succeeded and the defendants in warranty had not appealed, the judgment of the court below against them being *res judicata*, they were exposed to the risk of suffering from the consequences of the judgment which declared them to be warrantors of the plaintiffs in warranty and were consequently entitled to be heard upon their appeal asking to be relieved from that judgment.

This case falls under the rule laid down in the Privy Council in *Yeo* v. *Tatem* (L.R. 3 P.C. 696), viz., although an appeal will not lie in respect of costs only, yet when there has been a mistake upon some matter of law which governs or affects the costs, the party prejudiced is entitled to have the benefit of correction by appeal. The rule is also expressed thus by Lord Brougham in *Inglis* v. *Mansfield* (3 Cl. & F. 371). "In the House of Lords, as well as in the Privy Council and Court of Chancery, you cannot appeal for costs alone, but you can bring an appeal on the merits, and if that is not a colourable ground of appeal for the purpose of introducing the question of costs, the Court of Review will treat that not as an appeal for costs, but will consider the question of costs as fairly raised."

Smith v. *St. John City Railway*, 28 Can. S.C.R. 603.

Held, that it is only in extreme cases where some fundamental principle of justice has been ignored or where some gross error appears that this Court will interfere with the discretion of the provincial court in awarding or withholding costs.

Schlomann v. *Dowker*, 30 Can. S.C.R. 323.

In this case there was *acquiescement* by the appellant in the judgment sought to be appealed from. *Held*, that there being nothing but a question of costs involved in the appeal, the Court would decline to entertain jurisdiction

S. 35. Jurisdiction. Key for determining.

though not incompetent to do so, and that a motion to quash the appeal was the proper procedure in such a case.

Key for determining jurisdiction of the Court.

Sections 36 to 49, both inclusive, set out in detail the jurisdiction of the Supreme Court in appeals from the various provinces of Canada. The Court having a limited jurisdiction, and its extent not being the same in all the provinces, difficulty is occasionally found in determining whether or not an appeal lies in a particular case. For the purpose of facilitating the determination of this question, the following key has been prepared. The key is applied as follows:—

If the appeal is not eliminated by the preliminary exceptions enumerated in the notes to the preceding section, the first inquiry will be, Is the judgment final or not? If in doubt as to whether the judgment is final or interlocutory, *vide, supra* p. 8. If this question is answered in the negative, the practitioner will proceed to B and its subdivisions.

If the answer is in the affirmative, he will proceed to sub-division I. of A. and inquire, Is it an appeal from the highest court of final resort? For the courts of final resort in each province, *vide,* p. 83, *infra.* If the answer to this latter inquiry is in the negative, he will drop to II. and its sub-divisions.

If the answer is in the affirmative, he will proceed to the next sub-division (1) and inquire, Was the court of original jurisdiction a superior court? The courts of superior jurisdiction in each province are set out p. 86, *infra.* If the answer to this inquiry is in the negative he will proceed to (2) and apply its sub-divisions to the case in hand.

If the answer to the latter inquiry is in the affirmative there only remains to consider whether or not, in the particular province from which the appeal is taken, the case falls within any of the sub-divisions of (1).

The key does not include election appeals, appeals from the Exchequer Court or under the Winding-Up Act, or appeals provided for by special statutes. In all such cases the statute conferring jurisdiction must be looked at.

With respect to appeals under section 39, *infra, vide* notes to that section.

KEY

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Except where the judgment is made in the exercise of the judicial discretion of the Court below, or is a case wherein the Supreme Court, although having jurisdiction, will refuse to exercise it because the matter in dispute involves only the practice and procedure of the court below, or only relates to costs, or the Court below is *curia designata* by statute, or consent of parties, an appeal lies to the Supreme Court of Canada in civil cases from

A. Final judgments

I. Of the highest Court of final resort.

(1) Where the court of original jurisdiction is a superior court, and

In Quebec

(a) Involves the question of the validity of an Act of the Parliament of Canada, or of the legislature of any of the Provinces of Canada, or of an ordinance or Act of any of the councils or legislative bodies of any of the territories or districts of Canada; or
(b) Relates to any fee of office, duty, rent, revenue, or any sum of money payable to His Majesty, or to any title to lands or tenements, annual rents and other matters or things where rights in future might be bound; or
(c) Amounts to the sum or value of two thousand dollars.

In Ontario

(a) The title to real estate or some interest therein is in question; or
(b) The validity of a patent is affected; or
(c) The matter in controversy in the appeal exceeds the sum or value of one thousand dollars exclusive of costs: or
(d) The matter in question relates to the taking of an annual or other rent, customary or other duty or fee, or a like demand of a general or public nature affecting future rights; or
(e) Special leave of the Court of Appeal for Ontario or of the Supreme Court of Canada to appeal to such last mentioned court is granted.

In the Yukon Territory

(a) The matter in question relates to the taking of an annual or other rent, customary or other duty or fee, or a like demand of a public or general nature affecting future rights; or
(b) The title to real estate or some interest therein is in question; or
(c) The validity of a patent is affected; or
(d) It is a proceeding for or upon a Mandamus, Prohibition or Injunction; or
(e) The matter in controversy amounts to the sum or value of two thousand dollars or upwards.

In the other Provinces of Canada

No limitation with respect to the amount involved or the nature of the action.

(2) Where the court of original jurisdiction is not a superior court.

(a) In the Province of Quebec if the matter in controversy involves a question of or relates to any fee of office, duty, rent, revenue, sum of money payable to His Majesty, or to any title to lands or tenements, annual rents and other

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matters or things where rights in future might be bound; or amounts to or exceeds the sum or value of two thousand dollars;
(b) In the Province of Nova Scotia, New Brunswick, British Columbia and Prince Edward Island, if the sum or value of the matter in dispute amounts to two hundred and fifty dollars or upwards, and in which the court of first instance possesses concurrent jurisdiction with a superior court;
(c) In the Provinces of Alberta and Saskatchewan by leave of the Supreme Court of Canada or a judge thereof;
(d) From any judgment on appeal in a case or proceeding instituted in any Court of Probate in any Province of Canada other than the Province of Quebec, unless the matter in controversy does not exceed five hundred dollars;
(e) In the Yukon Territory in the case of any judgment upon appeal from the Gold Commissioner.

II. Not of the highest Court of final resort.

(1) In Quebec:

In the Province of Quebec an appeal shall lie from any judgment of the Superior Court in Review where that Court confirms the judgment of the court of first instance; and its judgment is not appealable to the Court of King's Bench; but is appealable to His Majesty in Council.

(2) An appeal shall lie directly to the Supreme Court without any intermediate appeal being had to any intermediate Court of appeal in the Province

(a) From the judgment of the Court of original jurisdiction by consent of parties.
(b) By leave of the Supreme Court or a judge thereof from any judgment pronounced by a superior court of equity or by any judge of equity, or by any superior court in any action, cause, matter or other judicial proceeding in the nature of a suit or proceeding in equity, and—
(c) By leave of the Supreme Court or a judge thereof from the final judgment of any superior court of any Province other than the Province of Quebec in any action, suit, cause, matter or other judicial proceeding originally commenced in such superior court.

B. Interlocutory judgments

I. Of the highest Court of final resort.

(1) Court of original jurisdiction a superior Court.

(a) Upon any motion to enter a verdict or nonsuit upon a point reserved at the trial.
(b) Upon any motion for a new trial.
(c) In any action, 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 judgment in any action, suit, cause, matter or judicial proceeding, in the nature of a suit or proceeding in equity, originally instituted in any superior court in any Province of Canada other than the Province of Quebec.

II. Not from the highest Court of final resort.

(1) The Court of original jurisdiction a superior Court.

(a) An appeal shall lie direct to the Supreme Court without any intermediate appeal being had to any intermediate court of appeal, by leave of the Supreme Court or a judge thereof, from any judgment pronounced by a superior court of equity or by any judge of equity, or by any superior court in any action, cause, matter or other judicial proceeding in the nature of a suit or proceeding in equity.

S. 36. Jurisdiction.

36. Except as hereinafter otherwise provided, an appeal shall lie to the Supreme Court from any final judgment of the highest court of final resort now or hereafter established in any province of Canada, whether such court is a court of appeal or of original jurisdiction, in cases in which the court of original jurisdiction is a superior court: Provided that,—

(*a.*) there shall be no appeal from a judgment in any case of proceedings for or upon a writ of *habeas corpus, certiorari* or prohibition arising out of a criminal charge or in any case of proceedings for or upon a writ of *habeas corpus*, arising out of any claim for extradition made under any treaty;

(*b.*) there shall be no appeal in a criminal case except as provided in the Criminal Code. R.S., c. 135, ss. 24 and 31;—54-55 V., c. 25, s. 2;—55-56 V., c. 29, ss. 742 and 750.

The expression "except as hereinafter otherwise provided" refers to the limitation placed upon appeals in the Provinces of Ontario, Quebec and the Yukon Territory by sections 46, 48 and 49, *infra*.

Final judgment.

For definition and distinction between final and interlocutory judgments, *vide supra*, p. 8.

Highest court of final resort.

The highest courts of final resort in civil matters in the different provinces of Canada are as follows:—

Province of Ontario:—

"The Court of Appeal for Ontario" (R.S.O. c. 51, s. 6).

Province of Quebec:—

"The Court of King's Bench sitting in appeal" (C.C.P. s. 40).

Province of New Brunswick:—

"The Supreme Court of New Brunswick" (R.S.N.B. c. 111, s. 2).

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Province of Nova Scotia:—

"The Supreme Court of Nova Scotia" (R.S.N.S. c. 155, s. 3).

Province of Prince Edward Island:—

"The Supreme Court of Judicature" and "the Court of Appeal in Equity" (32 V. (P.E.I.), c. 4, s. 8).

Province of Manitoba:—

"The Court of Appeal" (5-6 E. VII., c. 18).

Provinces of Alberta and Saskatchewan:—

Until the Legislatures of these Provinces have constituted independent provincial courts of appeal, "The Supreme Court of the North-West Territories" (4-5 Edw. VII. c. 3, s. 16 and 4-5 Edw. VII. c. 42, s. 16).

Province of British Columbia:—

"The Supreme Court of British Columbia" (R.S.B.C. c. 56, s. 4).

Yukon Territory:—

"The Territorial Court" (61 V. c. 6, s. 10).

It is to be borne in mind that in some of the provinces and territories, where there is no court of appeal a judge of the Supreme or Territorial Court, while sitting alone, has all the powers of the court, and his judgment may properly be styled a judgment of the court. Such a judgment is not appealable *de plano* to the Supreme Court. The court whose judgment is meant by this section is the judgment of the full Court as it is styled in British Columbia (R.S.B.C. c. 56, s. 72), or of the court sitting *in banco* as it is styled in Nova Scotia (R.S.N.S. c. 155, s. 25), or of the court sitting *in banc* as it is styled in Manitoba the North-West Territories and the Yukon Territory (R.S.M. c. 40, s. 12; R.S. c. 50, s. 49; 2 Edw. VII. c. 35, s. 5).

In 1879 the Supreme Court was called upon to interpret the words "highest court of last or final resort" in the case of *Danjou* v. *Marquis*, 3 Can. S.C.R. 251. It was there contended that inasmuch as the case in question was not appealable to the Court of Queen's Bench by reason of

S. 36. Jurisdiction. Highest court of final resort.

the provisions of article 1033 of the Code of Civil Procedure, the judgment of the Superior Court was a judgment of the court of *last* resort *quoad* the appellant. The Supreme Court rejected this contention and held that the only court in the Province of Quebec from which an appeal would lie to the Supreme Court was the Court of Queen's Bench. This was followed in *Macdonald* v. *Abbott*, 3 Can. S.C.R. 278. In 1891 (54-55 V. c. 25, s. 3) the Supreme Court Act was amended giving an appeal from the Superior Court in Review "in cases where, and so long as no appeal lies from the judgment of that court, when it confirms the judgment rendered in the court appealed from, which by the law of the Province of Quebec are appealable to the Judicial Committee of the Privy Council."

Farquharson v. *The Imperial Oil Co.*, 30 Can. S.C.R. 188.

Section 77, sub-sec, 2, of the Judicature Act, Ontario (R.S.O. c. 51), read as follows: "In case a party appeals to a Divisional Court of the High Court in a case in which an appeal lies to the Court of Appeal, the party so appealing shall not be entitled to afterwards appeal from the said Divisional Court to the Court of Appeal, but any other party to the action or matter may appeal to the Court of Appeal from the judgment or order of the Divisional Court." *Held*, by Mr. Justice Gwynne in Chambers, that in such a case the judgment of the Divisional Court in appeal is absolutely final and conclusive and is the only court of final resort which under the circumstances has jurisdiction in the Province of Ontario within the meaning of section 24, sub-section (*a*) of the Act, and that an appeal lies without leave in such case directly to the Supreme Court of Canada.

Subsequent to the above decision of Mr. Justice Gwynne, by 62 V. c. 11, s. 27, the legislature of Ontario amended section 77, sub-section 2, so as to give an appeal to the party taking the appeal to the Divisional Court, as well as to the other party. Since then the reasons for his decision no longer apply and the Court of Appeal for Ontario is now the only highest court of last resort in Ontario from which an appeal will lie to the Supreme Court *de plano*.

S. 36. Jurisdiction. Court of appeal.

"Court of Appeal or of original jurisdiction."

In the Provinces of Ontario and Quebec alone are there courts of appeal. In all the other provinces the court of final resort is the court of original jurisdiction sitting *in banco.*

"The Court of original jurisdiction a superior court."

The following are superior courts (R.S. 1906, c. 1, s. 34, sub-s. 26), *vide addenda et corrigenda.*

Province of Ontario:—

The Court of Appeal for Ontario and the High Court of Justice for Ontario.

Province of Quebec:—

The Court of King's Bench and the Superior Court.

Province of New Brunswick:—

The Supreme Court of New Brunswick and the Supreme Court in Equity.

Province of Nova Scotia:—

The Supreme Court of Nova Scotia.

Province of Prince Edward Island:—

The Supreme Court of Judicature and the Court of Appeal in Equity.

Province of Manitoba:—

His Majesty's Court of King's Bench for Manitoba.

Provinces of Alberta and Saskatchewan:—

The Supreme Court of the North-West Territories.

Province of British Columbia:—

The Supreme Court of British Columbia.

Yukon Territory:—

The Territorial Court.

Tucker v. *Young*, 30 Can. S.C.R. 185.

Held, that there is no appeal to the Supreme Court of Canada in a case in which the action was commenced in the county court (Ontario) and transferred by order to the High Court of Justice, in which all subsequent proceedings were carried on.

North British Canadian Investment Co. v. *Trustees St. John School District*, 35 Can. S.C.R. 461. S. 36. Jurisdiction. Superior court.

Held, that a confirmation of a tax sale transfer by a judge of the Supreme Court of the North-West Territories under section 97 of the Land Titles Act, 1894, is a matter or proceeding originating in a court of superior jurisdiction and an appeal will lie from the final judgment of the full Court affirming the same.

Sub-sections (*a*) and (*b*) deprive the Supreme Court of any appellate jurisdiction in a criminal case with respect to the judgment of a provincial court, except where a person has been convicted of an indictable offence and one of the judges of the appellate court below has dissented from the opinion of the majority. *Vide* Criminal appeals, *infra*, p. 00.

By section 62, *infra* p. 268, a judge of the Supreme Court has concurrent jurisdiction to issue a writ of *habeas corpus* in a criminal case with judges of the provincial courts, and there is an appeal from his decision to the full Court.

In re Boucher, 15th November, 1879, per Ritchie, C.J.:

"As regards *habeas corpus* in criminal matters, the Court has only a concurrent jurisdiction with the judges of the Superior Courts of the various provinces, and not an appellate jurisdiction, and there is no necessity for an appeal from the judgment of any judge or court, or any appellate court, because the prisoner can come direct to any judge of the Supreme Court individually, and upon that judge refusing the writ or remanding the prisoner, he could take his appeal from that judgment to the full Court."

Gaynor and Greene v. *United States of America*, 36 Can. S.C.R. 247.

A motion for a writ of prohibition to restrain an extradition commissioner from investigating a charge of a criminal nature upon which an application for extradition has been made, is a proceeding arising out of a criminal charge within the meaning of section 24 (*g*) of the Supreme Court Act, as amended by 54 & 55 V. c. 25, s. 2, and, in such a case no appeal lies to the Supreme Court Court of

Canada. *In re Woodhall* (20 Q.B.D. 832), and *Hunt* v. *The United States* (16 U.S.R. 424) referred to.

S. 37. Jurisdiction. Court of original jurisdiction not a superior court.

37. Except as hereinafter otherwise provided, an appeal shall lie to the Supreme Court from any final judgment of the highest court of final resort now or hereafter established in any province of Canada, whether such court is a court of appeal or of original jurisdiction, where the action, suit, cause, matter or other judicial proceeding has not originated in a superior court, in the following cases:—

(*a.*) In the Province of Quebec if the matter in controversy involves the question of or relates to any fee of office, duty, rent, revenue, sum of money payable to His Majesty, or to any title to lands or tenements, annual rents and other matters or things where rights in future might be bound; or amounts to or exceeds the sum or value of two thousand dollars;

(*b.*) In the Provinces of Nova Scotia, New Brunswick, British Columbia and Prince Edward Island, if the sum or value of the matter in dispute amounts to two hundred and fifty dollars or upwards, and in which the court of first instance possesses concurrent jurisdiction with a superior court;

(*c.*) In the Provinces of Alberta and Saskatchewan by leave of the Supreme Court of Canada or a judge thereof;

(*d.*) From any judgment on appeal in a case or proceeding instituted in any court of probate in any province of Canada other than the Province of Quebec, unless the matter in controversy does not exceed five hundred dollars;

(*e.*) In the Yukon Territory in the case of any judgment upon appeal from the Gold Commissioner. 50-51 V., c. 16, s. 57;—51 V., c. 37, ss. 2 and 3;—52 V., c. 37, s. 2;—54-55 V., c. 25, s. 3;—56 V., c. 29, s. 2;—2 E. VII., c. 35, s. 4.

S. 37. Jurisdiction. Court of original jurisdiction not a superior court.

The expression "except as hereinafter otherwise provided" refers to the limitation placed upon appeals in the Provinces of Ontario, Quebec and the Yukon Territory by sections 46, 48 and 49, *infra*.

Section 36 gives an appeal to the Supreme Court where the judgment appealed from has three characteristics, namely,

1st. *The judgment is final;* 2nd. It is a judgment of the *highest court of final resort;* and 3rd. *The action arose in a superior court.*

This section deals with appeals lacking one of the three characteristics, namely, that the action originate in a superior court, and states that the only cases in which an action arising in an inferior court can be carried in appeal to the Supreme Court of Canada.

37 (*a*).

Previous to 54-55 V. c. 25 (Sept. 30th, 1891), in the Province of Quebec there was no appeal to the Supreme Court except from the Court of Queen's Bench. On this state of the law it was held that no appeal lay to the Supreme Court where the action arose in the Circuit Court of the Province of Quebec.

Major v. *City of Three Rivers,* Cout. Dig. 71. 17th Nov., 1882.

Appeal from the Court of Queen's Bench, Three Rivers, setting aside a seizure for a tax of $10 imposed by by-law of the City of Three Rivers on strangers and non-residents selling goods by samples. The case was settled and agreed to by both parties, who took no objection to the jurisdiction. *Held,* that an appeal will not lie to the Supreme Court of Canada in cases where the court of original jurisdiction is the Circuit Court for the Province of Quebec. Appeal quashed without costs, the objection having been taken by the Court.

Terrebonne v. *Sisters of Providence,* Cout. Dig. 72. 18th May, 1886.

The action was brought in the Circuit Court, District of Terrebonne, for $125 and interest for taxes imposed upon real estate. The respondents moved to quash appeal for

S. 37. Court of original jurisdiction not a superior court.

want of jurisdiction, relying on section 3 of the Supreme Court Amendment Act of 1879. Appellants contended that in Montreal and some other districts in the Province of Quebec such an action, in which future rights would be bound, would be brought in the Superior Court, and only by virtue of a special statute was it brought in the Circuit Court of Terrebonne; that such statute was applicable to only some of the districts of the province, and that if the contention of the counsel for appellants was correct, the anomaly would arise that in such a case if the action were brought in one district there would be no appeal, while, if brought in another district there would be an appeal, and argued that, in this case, the Circuit Court must be considered as substituted for and in lieu of the Superior Court. *Held*, that the statute was clear, and in no case would an appeal lie in an action which originated in the Circuit Court. *Major* v. *Corporation of Three Rivers* (Cout. Dig. 71) followed. Motion granted and appeal quashed with costs. The objection to the jurisdiction was taken by the respondents in the factum.

By virtue of the above amendment of 1891, there is now an appeal from the Circuit Court in the Province of Quebec subject to the conditions and limitations above expressed.

As to the meaning to be attached to the expressions "fee of office," "title to lands," "future rights," etc., contained in this sub-section, *vide infra* p. 170, *et seq.*

37 (*b*).

Previous to 50-51 V. c. 16 (1887), no appeal lay to the Supreme Court from the Provinces of New Brunswick, Nova Scotia, British Columbia and Prince Edward Island, where the action arose in an inferior court. But by Schedule A. to the above Act, the Supreme & Exchequer Courts Act was amended by the addition of the provisions contained in this sub-section.

37 (*c*).

Prior to 50-51 V. c. 16, Schedule A. (1887), no appeal lay to the Supreme Court from an inferior court in the North-West Territories.

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Angus v. *Calgary School Trustees*, 16 Can. S.C.R. 716.

By an ordinance of the North-West Territories an appeal lies from the decision of the Court of Revision for adjudicating upon assessments for school rates to the district court of the school district; on such appeal being brought the clerk of the court issues a summons, making the ratepayer plaintiff and the school trustees defendants, which summons is returnable at the next sitting of the court when the appeal is heard. The district is now merged in the Supreme Court of the Territories.

Held, that an appeal will not lie from the judgment of the Supreme Court affirming a decision of the Court of Revision in such case, as the proceedings do not originate in a superior court.

An appeal in such case will lie since the passing of 51 V. c. 37, s. 5, which allows an appeal from the decision of the Supreme Court of the Territories, although the matter may not have originated in a superior court.

For the grounds upon which leave to appeal will be granted *vide infra* p. 220.

37 (*d*).

This sub-section was incorporated into the Supreme & Exchequer Courts Act by 52 V. c. 37, and as the law stood previous to the amendment it was held in *Beamish* v. *Kaulback*, 3 Can. S.C.R. 704, that the Court of Wills and Probate for the County of Lunenburg, N.S., was not a superior court within the Supreme and Exchequer Courts Act, and that no appeal would lie from that court to the Supreme Court of Canada.

Since the amendment there have been appeals to the Supreme Court in cases originating in the Court of Probate in the Province of Nova Scotia. *Lambe* v. *Cleveland*, 19 Can. S.C.R. 78; *British & Foreign Bible Society* v. *Tupper*, 37 Can. S.C.R. 100.

37 (*e*).

Hartley v. *Matson*, 32 Can. S.C.R. 575.

By an ordinance of the Governor-General in Council passed on the 18th March, 1901, pursuant to section 8 of the Yukon Territory Act, 61 V. c. 6, the Gold Commis-

S. 37. Jurisdiction. Court of original jurisdiction not a superior court.

sioner has jurisdiction to hear and determine various disputes relating to mining claims, and an appeal is given from his judgment to the Territorial Court. The same ordinance declares that the judgment of the Territorial Court should be final and conclusive.

Held, that previous to 2 Edw. VII. c. 35, expressly giving an appeal to the Supreme Court from a judgment of the Territorial Court sitting in appeal from the Gold Commissioners, the Supreme Court had jurisdiction in such a case under 62-63 V. c. 11, and that this jurisdiction could not be taken away by an ordinance which declares that the judgment of the Territorial Court should be final.

Other cases.

Proceedings by certiorari against a conviction by a justice of the peace.

The Queen v. *Nevins*, Cout. Dig. 71.

A conviction by a justice of the peace for selling liquor contrary to the "Canada Temperance Act, 1878," and papers connected therewith were brought before the Court of Queen's Bench for Manitoba by *certiorari*, and a rule *nisi* to quash the conviction was made absolute. *Held*, that an appeal would not lie, the cause not having arisen in a superior court of original jurisdiction. The question of costs was reserved. The Court subsequently determined that the respondent should have the costs of appeal, although the objection had been taken by the court.

Action originating in County Court (Ontario).

Tucker v. *Young*, 30 Can. S.C.R. 185.

Held, that an action begun in a county court in Ontario and removed, under the provisions of the Judicature Act, into the High Court, was not appealable to the Supreme Court as the action had not originated in a superior court.

38. Except as hereinafter otherwise provided, an appeal shall lie to the Supreme Court from the judgment, whether final or not, of the highest court of final resort now or hereafter established in any province of Canada, whether such

S. 38. Jurisdiction. Interlocutory judgments.

court is a court of appeal or of original jurisdiction, where the court of original jurisdiction is a superior court, in the following cases:

(*a.*) Upon any motion to enter a verdict or nonsuit upon a point reserved at the trial;

(*b.*) Upon any motion for a new trial;

(*c.*) In any action, 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 judgment in any action, suit, cause, matter or judicial proceeding, in the nature of a suit or proceeding in equity, originally instituted in any superior court in any province of Canada other than the Province of Quebec. R.S., c. 135, s. 24;—54-55 V., c. 25, s. 2.

The expression "except as hereinafter otherwise provided" refers to the limination placed upon appeals in the Provinces of Ontario, Quebec and the Yukon Territory by sections 46, 48 and 49, *infra*.

Section 36 gives an appeal to the Supreme Court where the judgment appealed from has three characteristics, namely, 1st. The judgment is *final;* 2nd. It is a judgment of the *highest court of final resort;* and 3rd. *The action arose in a superior court.*

The cases provided for in section 37 differed from those in 36 in that the court of original jurisdiction was an inferior court. In the cases provided for by this section, the distinction between them and the cases provided for by section 36 is that the judgment is not final, but interlocutory.

38 (*a*).

Trustees St. John Y.M.C.A. v. *Hutchinson,* 23rd Feb., 1880 (Cout. Dig. 998).

A rule for nonsuit pursuant to leave reserved at trial was made absolute on the ground that damages and injury must concur to afford a right of action, and the evidence shewed only an ordinary and legitimate use of the defend-

S. 38(a). Jurisdiction. Cases of non-suit.

ants' own land, which did not constitute an injury, and therefore they were not liable. *Held*, affirming the judgment appealed from (2 Pugs. & Bur. 523), that the declaration did not cover the appellant's case, and therefore the nonsuit was correct.

Levy v. *Halifax & Cape Breton Ry. & Coal Co.*, 24th Feb., 1886 (Cout. Dig. 998).

On the trial plaintiff was nonsuited, and on argument of a rule to set such nonsuit aside, and for a new trial, it was contended that the nonsuit was voluntary. The minutes of the trial judge merely stated that a nonsuit was moved for, that the plaintiff's counsel replied, and that judgment of nonsuit was entered, and the judge himself said that he believed the understanding to be that a rule was to be granted. The Supreme Court of Nova Scotia held the judgment of nonsuit to be voluntary, and discharged the rule. On appeal the Supreme Court *Held*, that as there was a doubt as to what took place at the trial, the parties were entitled to the benefit of that doubt, and the rule to be set aside the nonsuit must be made absolute.

Archibald v. *McLaren*, 21 Can. S.C.R. 588.

The action was tried three times, each trial resulting in a nonsuit, which was set aside and a new trial ordered. From the judgment ordering the third new trial A. appealed, and the judges being equally divided, the order stood. On this last trial it was shewn that A. had requested the inspector for the division in which M.'s house was situate to inquire about it, and that, after the information, the inspector reported that there were frequent rows in the house, but he thought there was nothing in the charge. The trial judge held that want of reasonable and probable cause was not shewn and withdrew the case from the jury. The Divisional Court held that he should have asked the jury to find on the fact of A.'s belief in the statement on which he acted in bringing the charge. *Held*, Taschereau, J., dissenting, that A. was justified in acting on the statement, and, the facts not being in dispute, there was nothing to leave to the jury and the trial judge rightly held that no want of reasonable and probable cause had been shewn.

Lister v. *Perryman*, L.R. 4 H.L. 521, followed; *Abrath* v. *North Eastern Rly. Co.*, 11 App. Cas. 247, considered. S. 38(a). Jurisdiction. Cases of non-suit.

Andreas v. *Canadian Pacific Rly. Co.*, 37 Can. S.C.R. 1.

This action was brought under Lord Campbell's Act by the administratrix of Nicholas Andreas, and at the close of the plaintiff's case counsel for defendants moved for a nonsuit, which was refused. The case went to the jury, and before the entry of judgment upon their findings, counsel again moved for judgment, but the trial judge entered judgment for the plaintiff upon the verdict of the jury. From this judgment an appeal was taken to the full Court, where the Chief Justice was of the opinion that upon the answers to the questions of the jury the trial judge should have entered judgment for the defendants. The majority of the Court set aside the judgment below and ordered a new trial. Plaintiff thereupon appealed to the Supreme Court and the respondents, by cross appeal, asked for a nonsuit and judgment for the defendants. *Held*, that the cross-appeal should be allowed and the action dismissed with costs.

38 (*b*).

Judgment on motion for a new trial is interlocutory and not final.

Lambkin v. *South Eastern Rly. Co.*, 12th Dec., 1877. 21 L.C.J. 325; 22 L.C.J. 21.

The verdict of a special jury awarded the plaintiff $7,000 damages for injuries sustained in a railway accident, and judgment was rendered against the defendants by the Superior Court, Montreal, in accordance with the verdict. This judgment being reversed and a new trial ordered by the Queen's Bench in appeal, the plaintiff moved for leave to appeal to the Judicial Committee of the Privy Council. The court rejected the application on the ground that the judgment being interlocutory was not susceptible of appeal.

The Judicial Committee of the Privy Council considered that though this was an interlocutory judgment, it was of such a nature that an appeal should be allowed, and, in the exercise of their discretion, granted leave to appeal.

S. 38(*b*). Jurisdiction. Cases of new trial.

The original Supreme & Exchequer Courts Act, 38 V. c. 11, ss. 20 and 22, provided as follows:—

"20. An appeal shall lie from the judgment upon any motion for a new trial upon the ground that the judge has not ruled according to law.

"22. When the application for a new trial is upon a matter of discretion only, as on the ground that the verdict is against the weight of evidence or otherwise, no appeal to the Supreme Court shall be allowed."

Upon this state of the law the following judgments were rendered.

Boak v. *Merchants Marine Ins. Co.*, 1 Can. S.C.R. 110.

In this case the verdict for the plaintiff was moved against and a new trial granted. An appeal to the Supreme Court was quashed, the Court holding that the verdict was set aside as against the weight of evidence, and not upon the ground that the judge had not ruled according to law, and that the application for a new trial to the court below being upon a matter of discretion only under section 22, no appeal lay to the Supreme Court.

Moore v. *Connecticut Mutual*, 6 Can. S.C.R. 634. (1879).

This was an action upon a policy of life insurance and a verdict entered by the trial judge upon the findings of the jury. A rule *nisi* to set aside the verdict for the plaintiff and to enter a nonsuit or verdict for the defendant was made absolute. On appeal to the Court of Appeal for Ontario the court being equally divided, the appeal was dismissed. On appeal to the Supreme Court of Canada, *Held*, that the court below might have ordered a new trial upon the ground that the finding of the jury upon the questions submitted to them was against the weight of evidence, but they exercised their discretion in declining to act or in not acting on this ground; and therefore no appeal to the Supreme Court of Canada would lie. Upon appeal to the Judicial Committee of the Privy Council it was held that section 38 of the Supreme & Exchequer Courts Act (now section 51), confers upon the Supreme Court power to give any judgment which the court below might or ought to have given. The Court then proceeded to say:—

S. 38(*b*). Jurisdiction. Cases of new trial.

"Their Lordships have to consider whether this power, conferred by those two sections, is taken away by the 22nd section, or, in other words, whether the 22nd section applies to a case of this kind. It is true that an application was made to the court below for a new trial, but not only for a new trial; it was also an application, and this was the main point of the application to enter a verdict for the defendants. The Court of Queen's Bench were of opinion that the defendants were entitled in point of law to have a verdict entered for them, and did not apply their minds to the question of the granting or withholding of a new trial, nor did they exercise their discretion upon that subject. No appeal is brought in this case against the exercise or non-exercise of the discretion of the inferior court. It seems to their Lordships that section 22 applies only where an appeal is brought from a judgment of the court below in which they have exercised a discretion; and that as no such judgment was given, and no appeal on that subject has been brought in the present case, the power of the court was the same as if no application had originally been made for a new trial, and that the Supreme Court could have ordered a new trial on the ground of the verdict being against evidence, if the Court of Queen's Bench ought to have done so. However, this question ceases to be of any general importance, an Act recently passed enabling the Court to exercise this very power."

In 1880 the Supreme Court Act was amended and section 22 repealed, and the following substituted therefor (section 52, *infra*):—

"In all cases of appeal, the court may in its discretion order a new trial if the ends of justice may seem to require it, although such new trial may be deemed necessary upon the ground that the verdict is against the weight of evidence."

The following decisions were given after the above amendment was made:—

Eureka Woollen Mills v. *Moss*, 11 Can. S.C.R. 91 (1885).

The court below in ordering a new trial considered the evidence greatly preponderated in favour of plaintiffs. *Held*, that the Supreme Court would not encourage appeals

S. 38(*b*). Jurisdiction. Cases of new trial.

in such cases and that where the court below has ordered new trial on the ground that the verdict is against the weight of evidence the Supreme Court will not interfere.

Howard v. *Lancashire*, 11 Can. S.C.R. 92.

The Supreme Court of Nova Scotia having set aside a verdict in favour of plaintiff and ordered a new trial on the ground that the plaintiff had an insurable interest in property covered by a policy of insurance, which was the only course open as under the practice in Nova Scotia a verdict for defendant could not be entered. The Supreme Court heard the appeal, holding the case was distinguishable from the preceding one.

Cassels v. *Burns*, 14 Can. S.C.R. 256.

The jury having found on a question of fact and their verdict having been affirmed by the Supreme Court of New Brunswick, the Supreme Court would not interfere with the finding.

O'Sullivan v. *Lake*, 16 Can. S.C.R. 636.

Held, that the judgment of the Court of Appeal did not proceed upon the ground that the trial judge had not ruled according to law as provided in section 20 of the Act and no appeal would lie to the Supreme Court.

The Accident Insurance Co. v. *McLachlan*, 18 Can. S.C.R. 627 (decided before 54-55 V. c. 25. Sept., 1891).

The Court of Queen's Bench having *suo motu* ordered a new trial on the ground that the assignment of facts was defective and insufficient and the answers of the jury insufficient and contradictory, the Supreme Court quashed the appeal.

Halifax Street Rly. Co. v. *Joyce*, 17 Can. S.C.R. 709.

Held, that section 24 (*d*) of R.S.C. c. 135, allowing appeals to the Supreme Court "from the judgment on a motion for a new trial upon the ground that the judge has not ruled according to law," applies to jury cases only.

By 54-55 V. c. 25, s. 2 (Sept., 1891), the grounds upon which an appeal would lie upon a motion for a new trial

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was changed, and the expression "upon the ground that the judge has not ruled according to law," in old section 22, *supra*, and at that time being 24 (*d*) of R.S. c. 135, was eliminated, and from that date the statute with respect to motions for a new trial has remained as now appears in the text 38 (*b*); and the decisions of the Supreme Court in cases of motions for new trial will be found collected *sub nom.* "*Weight to be attached to findings of fact in the court below,*" *infra* p. 280.

Mutual Reserve v. *Dillon*, 34 Can. S.C.R. 141.

Held, that the defendant having asked for a nonsuit, and in the alternative for a new trial, and the new trial having been granted by the Court of Appeal, no appeal will lie to the defendant from that judgment to the Supreme Court.

Corporation of Delta v. *Wilson*, March, 1905.

This was an action brought by the appellant against the respondent for over-due taxes under the Municipal Clauses Act of British Columbia. The respondent defended on the ground that the by-laws were invalid, and the assessments unauthorized and illegal, and also counterclaimed for damages for injuries by reason of the negligent construction, operation and maintenance of the works constructed under the by-law, and for an injunction.

The trial judge dismissed both the claim and counterclaim. The plaintiff appealed to the full Court, his notice of appeal reading, omitting unnecessary words, as follows: "Take notice that the court will be moved by counsel on behalf of the plaintiff that so much of the judgment of the trial judge as dismisses the action of the plaintiff may be reversed on the following amongst other grounds" (setting out the grounds).

The Revised Statutes of British Columbia, c. 56, s. 76, sub-s. 3, provides as follows: "Every appeal from a final judgment, order or decree, shall be deemed to include a motion for a new trial unless the notice of appeal expressly states otherwise."

The full Court of British Columbia ordered a new trial, and the plaintiff thereupon appealed to the

S. 38(*b*). Jurisdiction. Cases of new trial.

Supreme Court of Canada. When the case came on for hearing counsel for the respondent moved to quash for want of jurisdiction, and following the decision in *Mutual Reserve* v. *Dillon*, the appeal was quashed accordingly.

Central Vermont v. *Franchère*, 35 Can. S.C.R. 68.

In this case the Supreme Court being dissatisfied with the verdict only as regards the amount of damages awarded, directed a new trial to assess damages only unless the plaintiff (respondent) consented to have his damages reduced to the amount fixed by the Court.

Bustin v. *Thorne*, 37 Can. S.C.R. 532.

In this case a motion was made to the Supreme Court of New Brunswick for a new trial. The court was equally divided, and the order made was "The rule (for a new trial) drops and the verdict entered for the plaintiff on the trial stands."

Upon appeal to the Supreme Court of Canada the respondent moved to quash for want of jurisdiction on the ground that there was no final judgment of the court below, but the majority of the Court held that it had jurisdiction as, if the judgment was not final, it was a judgment upon a motion for a new trial within the meaning of section 24 (*d*), now section 38 (*b*).

Discretion of court below in cases of new trial, *vide* p. 159, *infra*.

38 (*c*).

Not only was it conceded in Parliament when this section was under consideration that decrees in equity were appealable whether final or not, but the Court has so determined on many occasions. *Vide* Attorney-General Sir John Macdonald in the House of Commons, 1879, Hansard Reports. *Langevin* v. *St. Marc*, 18 Can. S.C.R. 599.

It will be noticed that this sub-section does not apply to appeals from the Province of Quebec. The reason therefor probably is that equity jurisprudence, as it is understood in England and the other provinces of Canada, is unknown to the French law, although relief in cases of

accident, mistake, fraud, etc., is specifically provided for in the Code.

S. 38(c). Jurisdiction. Injunctions.

Injunction.

The remedy by injunction was unknown in the Province of Quebec until 1878, 41 V. c. 14 (Que.), when provision was made for the issue of a writ of injunction. In 1897 the new Code brought the remedy by injunction into conformity with the practice which obtained in the Province of Ontario and the writ of injunction was done away with, but provision was made for the granting of an order of injunction as a remedy incidental to an action instituted by writ of summons. Since the amendment of 60-61 V. s. 34, which placed a limitation upon appeals to the Supreme Court from judgments of the Court of Appeal for Ontario, *infra*, section 48, the jurisdiction of the Supreme Court in matters of injunction in the Provinces of Ontario and Quebec has been assimilated, and now unless the matter in controversy involves, in the Province of Quebec $2,000, and in the Province of Ontario $1,000, or falls within the class of cases provided for by sections 46 and 48, *infra*, no appeal from a judgment or order awarding an injunction will lie as of right to the Supreme Court of Canada.

There can be little doubt that the legislation contained in 60-61 V. c. 34, was adopted by Parliament without a full appreciation of the effect it would have upon appeals to the Supreme Court, or that the result would be to take away the long established appeals in matters of *habeas corpus*, *certiorari* and prohibition not arising out of a criminal charge, mandamus and judgments quashing municipal by-laws, provided by 24 (*g*). for a reference to which, *vide* notes to section 48, *infra*.

Similarly, this legislation has had the effect of depriving the Supreme Court of jurisdiction in many cases in which relief alone lies in the equity jurisdiction of the High Court of Justice, and no damages are asked, nor is there directly a question of money involved. The Supreme Court has held that the collateral effect of a judgment cannot be taken into consideration when its jurisdiction depends upon the pecuniary amount involved, or whether the sub-

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ject matter of the appeal is one of those provided for in the statute limiting the appeal: *Toussignant* v. *Nicolet*, 32 Can. S.C.R. 353.

This was an action brought for the annulment of a *procès-verbal* establishing a highway in the Province of Quebec, and charging the appellants' land with the expenses of construction amounting to $2,000, and $400 a year for maintenance of the road. The Court in quashing the appeal said:—

"The constant jurisprudence of the court is against our right to entertain the appeal. The fact that the *procès-verbal* attacked by the appellants' action may have the result to put upon them the cost of the work in question, alleged to be over two thousand dollars, does not make the controversy to be one of two thousand dollars. It is settled law that neither the collateral effects nor any contingent loss that a party may suffer by reason of a judgment are to be taken into consideration when the jurisdiction depends upon the pecuniary amount or upon any of the subjects mentioned in section 29."

Injunction—generally.

The following decisions, although arising in the Province of Quebec, have now, by virtue of the provisions contained in section 47, application to appeals from the Province of Ontario.

Joly v. *Macdonald*, 2 Legal News 104 (1879).

Article 68, C.C.P., provides for an appeal to the Judicial Committee of the Privy Council from the Court of Queen's Bench subject substantially to the same provisions as regulate appeals to the Supreme Court of Canada under section 46, except that the amount involved must exceed £500 sterling.

In this case the appellant had obtained an injunction against the respondent in a matter involving the possession of a railway of the value of over $1,000,000. The Court of Queen's Bench, appeal side, set aside this injunction, and the respondent applied to the same court to allow his security on an appeal to the Privy Council. Sir A. A. Dorion, C.J., made an order allowing the security

stating that "whether the case were considered as relating to the possession of real estate or as involving an amount of $1,000,000, the respondent had a right to go to the Privy Council."

In *Dobie* v. *Board of Temporalities*, 3 Legal News 308 (Sept., 1880), an application was made to the Court of Queen's Bench, appeal side, to allow security upon an appeal to Her Majesty's Privy Council. In giving judgment the Court said:—

"The report of *O'Farrell* v. *Brassard*, 4 Q.L.R. 214, was not quite correct. It had not been held that no appeal lay from a prohibition, but that no appeal lay where there was no matter in dispute exceeding the sum or value of £500 sterling. The same may be said of the short holding in *Pacaud* v. *Gagné* (17 L.C.R. 357). Mondelet, J., said that this case did not fall within any of the dispositions of the statute regulating appeals to Her Majesty (p. 375). The appeal was also refused on the same ground in *Bellefeuille* v. *Doucet* (1 Q.L.R. 250). But we granted the appeal in *Joly* v. *Macdonald* (2 Legal News 104), because there was in dispute a sum exceeding £500 sterling. There is also in this case a matter in dispute greatly exceeding that amount, and, therefore, leave to appeal should be granted. Leave to appeal is granted, however, without suspending the effect of the judgment dissolving the injunction."

It will be noted that the Court speaks of granting leave to appeal, an expression still retained in the Province of Quebec, where an appeal lies *de plano* and all the Court has power to do is to allow the security.

Stanton v. *Canada Atlantic Rly. Co.*, Cout. Dig. 89, 18th Mch., 1885.

In this case the plaintiffs, appellants, presented a petition for a writ of injunction to Mr. Justice Torrance of the Superior Court of the Province of Quebec, pursuant to the provisions of the Injunction Act, 41 V. c. 14, and the writ of injunction, enjoining the respondents *until otherwise ordered by the said judge or the court*, issued and was duly served with a declaration embodying the plaintiffs' claim

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which was to prevent the completing, issuing or negotiating of certain bonds by the company.

Subsequently, the defendants, besides filing certain preliminary exceptions to the jurisdiction and to the form, presented a motion to quash the injunction to Mr. Justice Mathieu who suspended the operation of the injunction under section 8, sub-section 2 of the Injunction Act, which reads as follows:—

"The injunction contained in the original writ may from time to time be suspended as the court or judge may deem necessary, and for such period and upon such conditions as to security or otherwise as the court or judge may deem reasonable, etc."

The judge denied his right to quash the same.

The appellants and respondent respectively obtained leave to appeal from the said judgment to the Court of Queen's Bench and the last mentioned court on the 21st January, 1884, quashed the injunction absolutely.

The appellants then applied to Mr. Justice Monk in the court below to allow their security for an appeal to the Supreme Court, but the application was refused upon the ground that the judgment quashing the writ of injunction was not a final judgment. The appellants then applied to Mr. Justice Henry of the Supreme Court of Canada to have the security allowed, who referred the application to the Court where, after argument, it was held that the Judgment of the Court of Queen's Bench quashing the interim injunction was not a final judgment from which an appeal would lie.

It would appear from the facts of this case that the appeal might also have been quashed on the ground that the case did not fall within the provisions of section 8 of the Supreme Court Amendment Act, 1879, 42 V. c. 39 (now section 46), limiting appeals from the Province of Quebec.

Hall v. *Dominion of Canada Land & Colonization Co.*, 8 Can. S.C.R. 631.

In this case the writ of injunction restrained the defendants from prosecuting lumbering operations upon certain lands claimed by the plaintiffs. The Supreme Court heard the appeal. No question of jurisdiction, under the

provisions then in force equivalent to present section, was raised. Leave to appeal in this case was granted by the Privy Council, but the appeal was never prosecuted.

Quebec Warehouse v. *Levis*, 11 Can. S.C.R. 666.

In this case the Superior Court made perpetual an injunction against the defendants restraining the corporation of Levis from proceeding further to carry out a by-law in favour of the Quebec Central Railway upon the ground that the by-law of the municipality was *ultra vires*. This judgment was reversed by the Court of Queen's Bench, appeal side, but reinstated by the Supreme Court. The proceedings were instituted under the old practice and a writ of injunction granted after pleadings filed which involved no question of a money demand. The jurisdiction of the Supreme Court in this appeal can only be supported on the ground that it was a case of a municipal by-law, which by section 30 (now section 47) is excluded from the limitation with respect to appeals from the Province of Quebec under section 8 of the Supreme Court Amendment Act, 42 V. c. 39, 1879 (now section 46), of the Act.

Chicoutimi v. *Légaré*, 27 Can. S.C.R. 329.

In this case the appellants petitioned the Superior Court in November, 1895 (previous to the adopting of the new Code), for a writ of injunction against the respondent to restrain him from carrying on certain works and excavations upon certain streets in the town of Chicoutimi of a nature to obstruct the highways, to the great damage and nuisance of the general public, and without the permission of the plaintiffs, until the final judgment should be given in the action; and also asked that a final judgment should be rendered making the interlocutory judgment final and perpetual. The answer of the defendant to the injunction was that the plaintiffs' council had granted permission to the defendant to construct an aqueduct in the town of Chicoutimi according to certain conditions which appeared in the resolution of the council, and that in conforming to this resolution he had constructed the aqueduct and he had done nothing beyond what he was authorized by resolution of the council to do.

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The writ issued, and a petition to suspend its operation was refused. By the final judgment on the merits the Superior Court made the injunction perpetual on the ground that the resolution of the council was illegal, but this was reversed by the Court of Queen's Bench. An appeal to the Supreme Court was heard, no exception to the jurisdiction being taken, and the judgment of the Court of Queen's Bench was set aside and that of the Superior Court re-instated.

It is not at all clear what provision of section 29 (now section 46) of the Act gave jurisdiction to the Supreme Court to entertain this appeal. No question being raised as to its jurisdiction, it may not be deemed a binding authority in another case where the facts are similar.

Came v. *Consolidated Car Heating Co.*, 11 R.J.Q. K.B. 114.

The action of the company respondent was for $15,000, but the respondent subsequently consented that judgment should go for $25. In the course of the suit the respondent obtained a writ of injunction against the appellant to restrain any infringement of the respondent's rights under a patent. This injunction was maintained by the final judgment of the Superior Court, but the judgment was reversed in appeal. The respondent then moved for leave to appeal to His Majesty's Privy Council.

Held, that the "matter in dispute" being the damages which the appellant would suffer if the respondent acted contrary to the order of the Court, and these damages being contingent and not susceptible of determination, it was impossible to say that the matter in dispute exceeded the sum of value of £500 sterling and the case did not fall within the terms of article 68, sub-section 3 of the Code of Civil Procedure, Quebec.

Article 68 reads in part as follows:—

"68. An appeal lies to Her Majesty in Her Privy Council from final judgments rendered in appeal by the Court of Queen's Bench:—

"1. In all cases where the matter in dispute relates to any fee of office, duty, rent, revenue or any sum of money payable to Her Majesty;

"2. In cases concerning titles to lands or tenaments, annual rents or other matters in which the rights in future of the parties may be affected; S. 38(*c*). Jurisdiction. Injunctions.

39. Except as hereinafter otherwise provided, an appeal shall lie to the Supreme Court,—

(*a.*) from the judgment upon a special case, unless the parties agree to the contrary, and the Supreme Court shall draw any inference of fact from the facts stated in the special case which the court appealed from should have drawn;

(*b.*) from the judgment upon any motion to set aside an award or upon any motion by way of appeal from an award made in any superior court in any of the provinces of Canada other than the Province of Quebec;

(*c.*) from the judgment in any case of proceedings for or upon a writ of *habeas corpus, certiorari* or prohibition not arising out of a criminal charge;

(*d.*) in any case or proceeding for or upon a writ of *mandamus;* and,

(*e.*) in any case in which a by-law of a municipal corporation has been quashed by a rule or order of court or the rule or order to quash has been refused after argument. R.S., c. 135, s. 24;—54-55 V., c. 25, s. 2.

39 (*a*).

It is not clear, in view of the fact that section 24 of the Supreme & Exchequer Courts Act gave in general terms an appeal from final judgments of the highest court of last resort where the court of original jurisdiction was a superior court, why it was considered necessary to make special provision in that Act for the class of cases contained in this section, unless it were deemed advisable *ex abundanti cautêla.* It might have been argued that without the provisions of (*a*) and (*b*) the original tribunal was *persona designata,* and that no appeal would lie from a judgment

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in cases such as are therein provided. Appeals under this Act are governed by sections 44, 46, 47, 48 and 49, *infra*.

Draper v. *Radenhurst*, 14 Ont. P.R. 376.

In this case it was contended on behalf of the respondents that every appeal to the Supreme Court was upon a special case and therefore a notice was required to be given under section 41 of the Supreme & Exchequer Courts Act, now section 70, and if not so given the appeal would not lie. In pronouncing judgment Maclennan, J.A., said:—

"Under the old common law practice, both in England and in Ontario, a special case was something well known and which had a precise and definite meaning. It is thus described in the third edition of Chitty's Archbold's Practice (1836), at page 383: 'Where a difficulty in point of law arises, the jury may, instead of finding a special verdict, find a general verdict for the plaintiff, subject to the opinion of the judge or the court above, or a special case stated by counsel on both sides with regard to the matter of law; which has this advantage of a special verdict, that it is attended with much less expense and obtains a much speedier decision. On the other hand, however, as nothing appears upon the record but the general verdict, the parties are thereby precluded from the benefit of a writ of error, if dissatisfied with the judgment of the court or judge upon the point of law.'

"By section 154 and following sections of the C.L.P. Act of Upper Canada, provision was made for stating questions of law, and also for stating the facts of the case, by consent and by order of a judge, in the form of a special case for the opinion of the court, and for judgment thereon. Under the old practice before the C.L.P. Act, it will be observed that error could not be brought upon a judgment on a special case without express provision being made therefor; so under the C.L.P. Act, the proceeding being by consent of parties, the like result would follow, and there could be no appeal from the judgment without an enactment to that effect. For that reason, doubtless, we find in the Act relating to the Court of Error and Appeal, 20 V. c. 5, s. 13, a section declaring that an appeal shall lie from a judgment on a special case in the same manner as from

a judgment upon a special verdict, unless the parties agree to the contrary, and that the court shall draw any inference of fact from the facts stated in the special case, which the court by which the case was originally decided ought to have drawn. S. 39(a). Jurisdiction. Special case.

"Such being the well known nature of a special case, and of a judgment thereon, and one of the features of such a judgment being that it was not appealable without express enactment, I cannot have any doubt that the judgment upon a special case intended in section 41 (now sec. 70) of the Supreme Court Act is a judgment on the kind of case well known by that name, and that it has no reference to the case which, by the practice of this Court, is prepared for the purpose of the appeal.

"I am, therefore, of opinion that no notice of appeal under section 41 was required in this case, and there being no other objection to the allowance of the bond, it must be allowed."

Smyth v. *McDougall*, 1 Can. S.C.R. 114.

"Where a case has, by consent of parties been turned into a special case, and the judge's minutes of the evidence taken at the trial agreed to be considered as part of the said special case, the Court has no power to add anything, except with the like consent, and has no power to order any further evidence to be taken."

Halifax & Cape Breton Coal & Rly. Co. v. *Gregory*, Cass. Prac. 20.

Where the plaintiff in an action obtained a verdict, which was affirmed by the Supreme Court of Nova Scotia, the defendants appealed to the Supreme Court of Canada, and agreed with the plaintiff, the Government of Nova Scotia becoming a party to such agreement, that the appeal should be decided on the merits irrespective of the pleadings or any technical defence raised thereon, and limiting the amount in question, the balance being otherwise satisfied. The Supreme Court having affirmed the judgment appealed from, an application for leave to appeal to the Judicial Committee of the Privy Council was refused, on the ground that in deciding the appeal the Supreme

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Court was not acting in its ordinary jurisdiction as a court of appeal, but was acting under the special reference made to it by the agreement.

Blackburn v. *McCallum*, 33 Can. S.C.R. 65.

The question in this case to be determined was whether a restraint on alienation contained in a will was valid. The cause was heard by Meredith, C.J., upon a stated case prepared by the parties pursuant to the Judicature Act and Rules. The trial judge felt himself bound by a decision of the Court of Appeal in *Earls* v. *McAlpine*, 6 A.R. 145. The parties thereupon signed a consent pursuant to section 26, sub-section 2 (now 42(*a*)), that an appeal should be taken direct to the Supreme Court of Canada from the judgment of Meredith, C.J., and the case was accordingly heard, although no intermediate appeal had been taken to the Court of Appeal for Ontario.

39 (*b*).

Arbitration under order in a pending action.

St. George's Parish v. *King*, 2 Can. S.C.R. 143.

After causes at issue under a rule of reference, all matters in difference were referred to arbitration, and it was provided that the award of the arbitrators or of any two of them was to be final. Two of the arbitrators having made an award in favour of the plaintiff, the defendant obtained a rule *nisi* in the Supreme Court of Nova Scotia to set aside the award, and after argument the rule was made absolute. Upon appeal to the Supreme Court of Canada, the Court said that "As to that part of the award which directs the defendant to pay the cost of the reference and award, it was admitted on the argument that it was bad, and there is no doubt the plaintiffs may abandon it as they offered to do, and they can be restrained from enforcing that part of it if they attempt to do so," but allowed the appeal with costs and discharged the rule *nisi* in the court below to set aside the award.

Oakes v. *City of Halifax*, 4 Can. S.C.R. 640.

After action was at issue the matters in dispute were by a rule of the Supreme Court of Nova Scotia referred to

arbitration. After the making of the award and before the amount found due by the arbitrators had become a judgment in the pending action, a rule *nisi* was obtained by the respondent from a judge in Chambers returnable before the court in banc to set aside the reference and award. After argument the rule was made absolute and the award set aside. From this judgment the appellant appealed to the Supreme Court. The respondent moved to quash on the ground that the rule appealed from was not a final judgment within the meaning of the Supreme & Exchequer Courts Act, but his motion was refused. The decision was apparently given upon the Act as it stood prior to the Supreme Court Amendment Act of 1879, which by section 4 gave an appeal to the Supreme Court in matters of *awards*, and by section 9 placed an interpretation upon the words *final judgment*.

Awards in municipal drainage cases.

Chatham v. *Dover*, 12 Can. S.C.R. 321.

The Municipal Act of Ontario contains provisions whereby in the event of it being necessary to continue drainage works beyond the limits of the municipality in which the same were instituted, and in the event of the two municipalities being unable to agree with respect to the cost for the said work respectively to be borne by them, arbitrators might be appointed. In this case an award of arbitrators was made under the above Act in a drainage dispute between the municipalities of Dover and Chatham. The former being dissatisfied, moved the court to set aside the award on the ground that a majority of the arbitrators had no authority to sign it in the absence of the third arbitrator, and on other grounds. The award was set aside and an appeal taken to the Court of Appeal for Ontario which affirmed the judgment below, the court being equally divided. A further appeal to the Supreme Court of Canada was dismissed with costs.

Ellis v. *Hiles; Ellis* v. *Crooks*, 23 Can. S.C.R. 429.

These were actions brought by the plaintiffs against the municipality for injuries sustained by reason of certain

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drainage works. The Drainage Trials Act, 54 V. c. 51, provided for the appointment of a referee who should be an officer of the High Court, and have all the power of arbitrators under the Municipal Act, and that his decisions be subject to an appeal to the court. By section 11 of the same Act, actions for damages for the construction and operation of drainage works might at any time after the issue of a writ be referred to the referee by the court or a judge thereof. This was done in the present actions, and the referee gave his judgment holding certain by-laws invalid, and awarded damages to the plaintiffs. An appeal was taken to the Court of Appeal for Ontario where the judgments of the referee were maintained, and a further appeal was taken to the Supreme Court, where the appeal in *Hiles's case* was allowed in part, and in *Crook's case* the judgment was varied.

Harwich v. *Raleigh*, 18th May, 1895.

This was also a case under the Drainage Trials Act referred to in the preceding case. Sections 580 and 581 of the Municipal Act of 1887, ch. 184, provided for an appeal from a report of an engineer with respect to drainage works to arbitrators, and by virtue of the Act 54 Viet. an appeal lay from the report of the engineer to the referee. In this case Harwich being dissatisfied with the report of the engineer, appealed to the referee, who dismissed the appeal and confirmed the report. From his decision an appeal was taken to the Court of Appeal where the appeal was dismissed with costs. A further appeal was taken by Harwich to the Supreme Court of Canada, where it was held that the award of the referee under the provisions of "The Drainage Trials Act of 1891" was not appealable to the Supreme Court of Canada under subsection (*f*) of section 24 (now sub-section (*b*) of section 39), Gwynne, J., dissenting. The question as to jurisdiction having been taken by the Court the appeal was dismissed without costs.

Awards in municipal matters generally.

Toronto Junction v. *Christie*, 25 Can. S.C.R. 551.

The Consolidated Municipal Act of Ontario, 55 V. c.

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42, provides for arbitration in the event of a town altering the grade of a street and injuriously affecting the property of a private individual. Section 403 provides that the award should be subject to the jurisdiction of the court where it might be reviewed on the merits, and should also be subject to the jurisdiction of the court as if made on a submission by a bond containing an agreement for making the submission a rule or order of such court. The claimant moved before Rose, J., to set aside the award, but his motion was dismissed. On appeal to the Court of Appeal this judgment was affirmed upon an equal division of opinion. An appeal taken to the Supreme Court of Canada was dismissed with costs.

Langley v. *Duffy*, 30th May, 1899.

The corporation of the township of Langley, pursuant to the provisions of the Municipal Clauses Act, B.C., passed a by-law for the opening up of a certain roadway through the property of the respondent Duffy, and served a notice calling upon him to appoint an arbitrator to act with the appellant's arbitrator for the purpose of deciding upon what compensation the respondent was entitled to by reason of the expropriation of his property. The arbitrators made an award which was set aside by the court, and the matters in question referred back to the arbitrators for reconsideration and re-determination. The arbitrators reconsidered the matters and awarded the respondent Duffy $400 and the costs of the arbitration, amounting to $286.40. The respondent Duffy served a notice upon the municipality that unless they complied with its terms, an application would be made to the court for liberty to enforce the award. The municipality having ignored the notice the respondent Duffy moved the court for leave to enforce the award, and the appellant gave notice of motion to set aside the award. The two motions were heard by the court when an order was made refusing for the present the application of the respondent to enforce the award, and at the same time referring the award back to the arbitrators for further consideration. An appeal was taken from this order to the full Court when an order was made allowing the respondent Duffy to enter up judgment for the

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amount of the award. From this order an appeal was taken to the Supreme Court of Canada when a motion to quash was made on behalf of the respondent on the ground that the judgment appealed from was not a judgment upon a motion to set aside an award, nor a judgment upon a motion by way of an appeal from an award, and after argument the appeal was quashed accordingly.

Osgoode v. *York*, 24 Can. S.C.R. 282.

This action was brought for a declaration that an award under the Ditches and Water Courses Act, R.S.O. 1887, c. 20, was made without jurisdiction because the requisition filed was not accompanied by the preliminaries referred to in section 6 of the Act, and for an injunction. The interim injunction was granted and upon motion to continue the same the motion was refused. At the trial the action was dismissed and an appeal taken to the Divisional Court was also dismissed. On appeal, the Court of Appeal reversed the Divisional Court and gave judgment for the plaintiff, and this judgment was affirmed by the Supreme Court of Canada.

Awards in railway cases.

Bickford v. *The Can. Southern Rly.*, 14 Can. S.C.R. 743.

By consent of parties in the action all matters in dispute were by order of the court referred to the arbitration of a county judge with a provision in the submission that there should be an appeal from the award as is given by the 189th section of the C.L.P. Act, R.S.O. c. 50, which provides that an appeal shall lie from the award in the same way as an appeal from a Master's report. The award having been upheld by the Superior Court and the judgment affirmed by the Court of Appeal, an appeal to the Supreme Court was dismissed, affirming the judgment of the Court of Appeal.

Judah v. *Atlantic & North-West Rly. Co.* (unreported).

On the 9th of April, 1887, the respondent railway company served upon the appellant Judah a notice under the Railway Act of certain lands which it required for the purposes of the railway, and offered the sum of $15,000 as

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compensation for the land and damages, at the same time appointing the company's arbitrator. The appellant Judah protested the railway company on the 22nd April, 1887, alleging that the notice was illegal, null and void, but under reserve of the protest appointed an arbitrator.

The arbitrators met and took evidence, and an award was made by a majority of them on the 17th July, 1888, awarding to the appellant the sum of $30,575. Thereupon the appellant Judah presented a petition, dated the 14th August, 1888, to the Superior Court wherein he prayed that a writ of appeal might be ordered to issue requiring the arbitrators to transmit to the Superior Court the award and papers filed on the arbitration, and praying that the arbitrators might be summoned to appear before the court for the purpose of having it declared and adjudged that the award should have been rendered for a sum of $94,817.75. From this petition an order was made by Mr. Justice Taschereau on the 16th August, 1888, directing the writ of appeal to issue, and thereupon, pursuant to the practice of the Province of Quebec, the respondent company filed an answer to the petition setting up that the Superior Court had no power to revise the award; that the proceedings before the arbitrators were legal and binding upon the proprietor; that the proprietor could not appeal from an award of the arbitrators upon matters not apparent on the face of the record of proceedings before the arbitrators, nor upon matters of fact, but upon questions of law only, and prayed that the award might be declared legal and binding and the petition dismissed.

The respondent company further answered to the petition by alleging that the petitioner was not entitled by law or by the evidence to a larger compensation than that awarded by the arbitrators.

The petition was heard by Mr. Justice Gill of the Superior Court on the 1st April, 1889, and judgment given on the 25th.

The Railway Act of 1888, 51 V. c. 29, came into force on the 22nd May, 1888, and section 161 provides that there should be an appeal on questions of law or fact to the Superior Court, and that upon the hearing the court should

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decide the same upon the evidence taken before the arbitrators, and that the practice and proceedings should be as nearly as possible the same as upon an appeal from the decision of an inferior court to such Superior Court.

In his judgment Mr. Justice Gill says: "Seeing that the company opposed the said appeal alleging that the said arbitrators having proceeded with the arbitration before the coming into force of the Railway Act of 1888, were not able to appeal upon the facts"; and in his *considérants* he says that the court is in possession of all the facts of the case, and that the award having been rendered under the provisions of the Railway Act of 1888, the court was entitled to apply the law with respect to appeals as provided in section 161 of that Act, and proceeded to increase the indemnity awarded by the arbitrators to the sum of $52,500, with interest.

On appeal the Court of Queen's Bench held that the court below had not proceeded on a proper principle in fixing the valuation of the lands and reduced the damages to $30,575, homologating the award of the arbitrators made on the 17th July, 1888.

From this judgment an appeal was taken to the Supreme Court, and when the case came on for hearing, of its own motion, the Court took objection to its jurisdiction, and after argument of counsel the appeal was quashed without costs for want of jurisdiction.

It does not appear in what respect the Supreme Court considered it had no jurisdiction to hear this appeal, whether it was because the proceedings were instituted previous to the coming into force of the Railway Act of 1888, which for the first time gave an appeal from the arbitrators, or because the Court considered the judgment of the Superior Court interlocutory and not final, or because the court of first instance was *curia designata*.

The same case came before the Court (23 Can. S.C.R. 232) on an appeal by the railway company from an order subsequently made by the Superior Court requiring the appellants to pay interest on the sum of $30,575, and ordering them to proceed to the confirmation of title in order to the distribution of the money. No question of the jurisdic-

tion of the Court was raised upon this appeal and the same was heard on the merits and the appeal allowed with costs.

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Quebec, Montmorency, etc., Rly. Co. v. *Mathieu*, 19 Can. S.C.R. 426.

In a railway expropriation case the respondent in naming his arbitrator declared that he only appointed him to watch over the arbitrator of the company, but the company recognized him officially and subsequently an award of $1,974.25 damages and costs for land expropriated was made under article 5164 R.S.Q. The demand for expropriation as formulated in their notice to arbitrate by the appellants was for the width of their track, but the award granted damages for three feet outside of the fences on each side as being valueless. In an action to set aside the award, *Held*, affirming the judgment of the courts below that the appointment of respondent's arbitrator was valid under the statute and bound both parties, and that in awarding damages for three feet of land injuriously affected on each side of the track, the arbitrators had not exceeded their jurisdiction.

Strong and Taschereau, JJ., doubted if the amount in controversy was sufficient to give the Court jurisdiction to hear the appeal.

Benning v. *Atlantic & North-West Rly. Co.*, 20 Can. S.C.R. 177.

In this case an award made pursuant to the expropriation clauses of the Railway Act was attacked by action instituted in the Superior Court, when the award was upheld and the judgment affirmed by the Court of Queen's Bench. An appeal to the Supreme Court was heard; no question of jurisdiction was raised, although the award was made prior to the Railway Act of 1888, which gave an appeal from the award of arbitrators made under the Railway Act.

Grand Trunk Rly. v. *Coupal*, 28 Can. S.C.R. 531.

An award of arbitrators under the Railway Act of 1888 was set aside by the Superior Court, but was reinstated by the Court of Queen's Bench. The Supreme Court reversed

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the latter judgment, saying that although respect was to be paid to awards made under the Railway Act, yet when the arbitrators grossly err in the principle adopted by them in fixing the compensation to be allowed the landowner, the Court is called upon to set them right. *Vide C.P.R.* v. *St. Thérèse*, 16 Can. S.C.R. 606, *supra*, p. 69.

Ottawa Electric v. *Brennan*, 31 Can. S.C.R. 312.

Held, that leave to appeal direct to the Supreme Court cannot be granted from a judgment of a judge of the High Court of Justice for Ontario sitting in appeal from an award of arbitrators under the Railway Act from which no appeal lies to the Court of Appeal.

Birely v. *Toronto Rly Co.*, 25 Ont. App. Rep. 88, followed, that the judge under the Railway Act acts *persona designata* and no appeal lies from his judgment.

Arbitration under special Act of Parliament.

Province of Ontario v. *Province of Quebec, Re Common School Fund*, 30 Can. S.C.R. 306.

A reference to arbitration provided that the arbitrators should not be bound to decide according to strict rules of law or evidence but might decide upon equitable principles, and when they did proceed on their view of a disputed question of law the award shall set forth the same at the instance of either or any party, and any award on a disputed question of law should be subject of appeal to the Supreme Court. At the time of rendering the award the arbitrators did not declare, but refused to declare that in rendering the said award they had proceeded as on a disputed question of law. An appeal being taken to the Supreme Court and a motion having been made to quash, the Court quashed the appeal on the ground that the award did not on its face shew that the arbitrators had proceeded on a disputed question of law.

39 (*c*)—*Habeas corpus not arising out of a criminal charge.*

Habeas corpus proceedings not arising out of a criminal charge include cases where parties have been convicted

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of offences against what are treated as police regulations rather than crimes, and cases of imprisonment for debt.

Section 47, *infra*, expressly provides that the limitations placed upon appeals from the Province of Quebec do not apply to cases of *habeas corpus*.

Section 75, sub-section 2, *infra*, provides that no security for costs shall be required in proceedings for or upon a writ of *habeas corpus*.

Fraser v. *Tupper*, Cass. Dig. (2nd ed.) 421.

The prisoner was convicted before the stipendiary magistrate of Truro, N.S., of violating the license laws in force in the town and fined $40 and costs as for a third offence. Execution issued in the form given in the R.S. N.S. (4 ser.), ch. 75, under which F. was committed to jail. While there he was convicted of a fourth offence and fined $80 and costs, and was detained under an execution in the same form. The Supreme Court (N.S.) on motion to make absolute a rule *nisi* granted under R.S.N.S. (4 ser.), ch. 99, discharged the rule. Before the institution of the appeal to the Supreme Court of Canada, the time for which the appellant had been imprisoned had expired and he was at large. On motion to dismiss for want of jurisdiction, *Held*, that an appeal will not lie in any case of proceedings for or upon a writ of *habeas corpus* when at the time of bringing the appeal the appellant is at large.

In re George R. Johnson, 20th February, 1886.

J. was in custody on an execution for debt, and applied to a judge of the County Court under chapter 118, R.S. (N.S.), 5th series, to be examined as to his affairs with a view to obtaining his discharge. The examination was held by the County Court judge, who, on January 23rd, 1886, made an order to the effect that J. was adjudged guilty of fraud in respect to the delay of payment of his debt to the execution creditors, and in regard to the disposal of his property, and by such order remanded J. to jail, without privilege of jail limits, for a further period of six months from date of remand. When the order was drawn up it was dated 24th of January, 1886, which was Sunday, and directed that J. be confined in the county jail for six months from that date.

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J. was taken back to jail, the order dated on Sunday being delivered to the jailer, and the counsel for the execution creditors on Monday, January the 25th, procured from the County Court judge another order dated the 25th, ordering J. to be imprisoned for six months from January 23rd.

Application was made to the Supreme Court of Nova Scotia for the discharge of the prisoner on *habeas corpus*, which was refused, the majority of the court holding that he was rightly held in custody, if not on the order of the County Court judge, then on the original cause of his detention, the writ of execution.

On appeal to the Supreme Court of Canada, *Held*, that the appeal must be dismissed. Appeal dismissed without costs.

In re Smart, 16 Can. S.C.R. 396.

The writ was issued to obtain possession of children from their mother. After the case had been opened Ferguson, J., made an order directing that no further proceedings be taken on the writ, but that the matter should be brought before the court by way of petition by the applicant. On appeal from this order the Divisional Court varied it by directing that the writ of *habeas corpus* should remain in force and that the questions for trial under the return thereto should be tried at the same time and place as the questions under the petition directed by the said order to be filed. The judgment of the Divisional was affirmed by the Court of Appeal. The mother of the infant children then appealed to the Supreme Court of Canada, seeking to have the original order of Ferguson, J., restored. Notice of intention to appeal to the Supreme Court was given, but nothing further was done until more than sixty days had elapsed from the pronouncement of the judgment of the Court of Appeal. Upon motion to quash for want of jurisdiction, *Held*, that "In appeals in *habeas corpus* proceedings no security being required, the first proceeding must necessarily be the filing of the case in the Supreme Court, and that step must be taken within sixty days from the date on which the judgment appealed from was pronounced." The appeal was therefore quashed.

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Seid Sing Kaw v. *Bowes*, 17th May, 1898; Cout. Dig. 105.

Upon the calling for hearing of the appeal (which was from a judgment of the Supreme Court of British Columbia, refusing a writ of *habeas corpus*, for the possession of Quai Sing, a Chinese female under age), counsel for the respondent produced to the Court an order of the Supreme Court of British Columbia dated subsequently to the judgment appealed from, by which it appeared that the respondent, the matron of a rescue home, had been appointed by that court as guardian to the infant in question, whereupon the Chief Justice intimated that, under the circumstances, it was useless to proceed with the hearing of the appeal, it being impossible that any order could be made thereon respecting the possession of the infant being given to the appellant. The appeal was consequently dismissed with costs.

The adjudication upon *habeas corpus* matters is expressly excluded from the jurisdiction of the Registrar, General Order 83.

The Rules applicable to *habeas corpus* appeals are 46, 47, 48 and 49, *infra*.

Rule 12 provides that a special session of the Supreme Court under the powers conferred by section 34, *supra*, may be called for the hearing of appeals in matters of *habeas corpus*.

Certiorari.

The Supreme Court has original jurisdiction to issue a writ of *certiorari* under section 66, *infra*. The *certiorari* proceedings referred to in this section are those which have originated in the court below.

The practice in *certiorari* in criminal matters, and the same practice appears to prevail in the provinces of Canada where this procedure is applied in civil proceedings, is stated in Paley on Convictions as follows:—

"If a rule *nisi* only be granted in the first instance the argument on such rule generally decides the case, and if it be made absolute after argument, the conviction is quashed

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almost as a matter of course, when it is afterwards brought up on the *certiorari*."

In *The Queen* v. *Troop*, *infra*, p. 123, Mr. Justice King for the Court said:—

"It is settled in cases where no restraint is imposed by the Legislature upon a review by *certiorari* that an adjudication by a tribunal having jurisdiction over the subject matter is, if no defect appears on the face of it, to be taken as conclusive of the facts stated therein and that the court will not on *certiorari* quash such an adjudication on the ground that any such fact, however essential, has been erroneously found, but where the right is taken away by statute it is to be deemed as still existing in cases of want or excess of jurisdiction, or fraud."

Section 24(*g*) of the Supreme & Exchequer Courts Act, containing the original of this sub-section in the first place only applied to *habeas corpus* proceedings, but in 1891, Sir John Thompson introduced a bill amending the section and making it applicable to prohibition and *certiorari* proceedings. In stating to the House his reasons for the amendment, the Minister of Justice said:—

"In some provinces, especially New Brunswick, the courts have power to review on *certiorari* a great many matters in which the superior courts have no original jurisdiction. For example, questions of assessment are reviewed by the Supreme Court of the province under *certiorari*, although the suit did not begin in a superior court."

The provision relating to quashing assessments by *certiorari* proceedings in the Statutes of New Brunswick at the time the amendment was made, are contained in the Consolidated Statutes of New Brunswick, 1877, ch. 100. Section 111 provides "No such rate or any proceeding touching any such rate shall in any case be quashed for defect either in form or substance unless and until in the event of the court being unable to give the relief or make the order or orders hereinafter mentioned."

"112. On any rule *nisi* being granted for a *certiorari* to bring up any rate or any proceeding touching any such rate, with a view to quashing the same, the Court shall

have and exercise the following powers in reference thereto." Then follow special provisions.

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On this state of the law there arose the case of *Ex parte James D. Lewin,* 11 Can. S.C.R. 484, in which a rule *nisi* was granted calling upon the assessors of rates for the City of St. John to shew cause why a writ of *certiorari* should not issue to remove into the Supreme Court the assessment list, whereby the said James D. Lewin was assessed as President of the Bank of New Brunswick in the sum of $12,760, and all proceedings upon which said assessment was based, with a view to the same being quashed. After argument the rule was discharged. An appeal was thereupon taken to the Supreme Court of Canada when the judgment below was reversed and the appeal allowed with costs.

This decision was in 1885 and prior to the amendment, and the fact that the Supreme Court had exercised jurisdiction in matters of *certiorari* does not seem to have come to the knowledge of the Minister of Justice.

Similarly before this amendment and when no express jurisdiction was conferred upon the Supreme Court in matters of prohibition, jurisdiction was exercised in an appeal from a judgment of the Court of Queen's Bench (Quebec), arising out of a writ of prohibition—*Coté* v. *Morgan,* 7 Can. S.C.R. 1—and the amendment was therefore not considered necessary by the Supreme Court to give it jurisdiction in matters of prohibition.

The Queen v. *Sailing Ship "Troop,"* 29 Can. S.C.R. 662.

An action was brought by the Imperial Board of Trade in the name of Her Majesty against the defendant before the police magistrate at St. John to recover the amount paid for hospital fees and board at Hong Kong incurred on behalf of a seaman on board a ship of the defendant, who was injured and left at Hong Kong, and also the expenses of carrying the seaman to London. The Supreme Court of New Brunswick made absolute a rule nisi for a *certiorari* to remove the proceedings before the police magistrate, with a view to having the order made therein quashed. On appeal to the Supreme Court of Canada the

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judgment below was reversed and the appeal allowed with costs.

No question of jurisdiction was raised, but as the case did not originate in a superior court it would appear that following the decision in *Queen* v. *Nevins, supra*, p. 92, there was no jurisdiction to hear this appeal.

Jones v. *City of St. John*, 30 Can. S.C.R. 122.

This appeal originated by an order *nisi* made by one of the judges of the Supreme Court of New Brunswick in an application by the appellant calling upon the Common Council of the City of St. John, the Board of Assessors of the city, and the appeals committee of the Common Council to shew cause why a writ of *certiorari* should not issue to remove into the Supreme Court of New Brunswick, the assessment against the appellant. The report of the Appeals Committee and the order of the Common Council adopted the report with a view of quashing the assessment report and order. After argument before the full Court the order *nisi* was discharged. Upon appeal to the Supreme Court the judgment below was reversed.

Jones v. *City of St. John*, 31 Can. S.C.R. 320.

Previous to the proceedings in the next preceding case, the appellant had, under protest, for some years paid assessments similar to that in issue in the appeal to the Supreme Court and in which the rule *nisi* for a writ of *certiorari* was similarly discharged by the Supreme Court of New Brunswick, but no appeal from that decision was taken. After the judgment of the Supreme Court the appellant instituted an action to recover the assessments so previously paid under protest, but the Supreme Court affirmed a judgment of the court below, holding that the judgment in the earlier assessment not having been appealed from the matter was *res judicata* and could not be recovered now in an action.

Bigelow v. *The Queen*, 31 Can. S.C.R. 128.

Upon appeal to the Supreme Court of Canada from a judgment of the Supreme Court of Nova Scotia vacating the order of Ritchie, J., for a *certiorari* on a conviction

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against the appellant, on the ground that the affidavit required by section 117 of the Liquor License Act of 1896 had not been produced on the application for the writ of *certiorari*, the appeal was dismissed with costs.

In re Trecothic Marsh, 37 Can. S.C.R. 79.

Appeal from the judgment of the Supreme Court of Nova Scotia (38 N.S. Rep. 23), setting aside an order made by Mr. Justice Graham, on the application of the appellants, directing that a writ of *certiorari* should issue to remove into the said court the record and proceedings of the Board of Commissioners for the Trecothic Marsh assessing a rate upon the lands of the appellants for expenses incurred in the drainage and dyking of the marsh.

The company applied for an order to have the record and proceedings removed into the Supreme Court, by way of *certiorari*, within the time prescribed, but the judge reserved his judgment upon the application and made the order for the issue of the writ only some days after its expiration. The judgment now appealed from set aside the order upon the merits of the case, holding that the assessment upon the lands of the appellant had been properly imposed.

Appeal dismissed with costs.

Prohibition.—Decisions prior to Amendment of 1891.

As mentioned in the note to *certiorari, supra*, the Supreme Court exercised jurisdiction in prohibition proceedings long before the amendment of 1891 expressly conferring jurisdiction.

Coté v. *Morgan*, 7 Can. S.C.R. 1.

The municipal corporation of the County of H., in the Province of Quebec, made an assessment roll according to law in 1872. In 1875, a triennial assessment roll was made and the property subject to assessment was assessed at $1,745,588.58. In 1876 without declaring that it was an amendment of the roll of 1875, the corporation made another assessment in which the property was assessed at $3,138,550. Among the properties that contributed towards this augmentation were those of appellants, who by their

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petition, or *requête libellée*, addressed to the Superior Court, alleged that the sectretary-treasurer of the County of H. was about to sell their real estate for taxes under the provisions of the municipal code for the Province of Quebec, 34 V. c. 68, s. 998, *et seq.*, and prayed to have the assessment roll of 1876, in virtue of which the officer of the municipality was proceeding to sell, declared invalid and null and void, and that a writ of prohibition should issue to prevent the respondents from proceeding to sell. The Superior Court directed the issue of the writ restraining the defendants as prayed, but upon the merits, held the roll of 1876 valid as an amendment of the roll of 1875. The Court of Queen's Bench reversed this judgment on the merits, and held the roll of 1876 to be substantially the new roll, and therefore null and void.

On appeal to the Supreme Court of Canada, the Court being equally divided, the appeal was dismissed without costs.

Poulin v. *Corporation of Quebec*, 9 Can. S.C.R. 185.

Under the authority of the Act of the Legislature of Quebec, 42 & 43 V. c. 4, s. 1, a penal suit was, on the 20th of January, 1880, instituted against P. in the name of the corporation of Q., before the Recorder's Court of the City of Q., alleging that "on Sunday the 18th day of January, 1880, the said defendant had not closed during the whole of the day, the house or building in which he the said defendant sells, causes to be sold, or allowed to be sold, spirituous liquors by retail, in quantity less than three half pints at a time, the said house or building situate, etc." P. was convicted.

A writ of prohibition to have the conviction revised by the Superior Court was subsequently issued, and upon the merits was set aside and quashed.

Upon appeal to the Supreme Court of Canada, the members of the Court being equally divided, the appeal was dismissed without costs.

Molson v. *Lambe*, 15 Can. S.C.R. 253 (1888).

The inspector of licenses for the revenue district of Montreal charged R., a drayman in the employ of J. H. R.

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M. & Bros., duly licensed brewers under the Dominion Statute, 43 V. c. 19, before the Court of Special Sessions of the Peace at Montreal, with having sold beer outside the business premises of J. H. R. M. & Bros., but within the said revenue district in contravention of the Quebec License Act, 1878, and its amendments, and asked a condemnation of $95 and costs against R. for said offence. Thereupon J. H. R. M. & Bros. and R., claiming *inter alia* that being licensed brewers under the Dominion Statute, they had a right of selling beer by and through their employees and draymen without a provincial license, and that 41 V. c. 3 (P.Q.), and its amendments were *ultra vires*, and if constitutional did not authorize the complaint against R., caused a writ of prohibition to be issued out of the Superior Court enjoining the Court of Special Sessions of the Peace from further proceeding with the complaint against R.

Held, per Ritchie, C.J., and Strong, Fournier and Henry, JJ., that the Quebec License Act and its amendments were *intra vires*, and that the Court of Special Sessions of the Peace of Montreal having jurisdiction to try the alleged offence and being the proper tribunal to decide the questions of fact and law involved, a writ of prohibition did not lie.

Wallace v. *O'Toole*, 16th February, 1885.

An action of trover was brought against defendants in the County Court, at Halifax, N.S., to which they pleaded a number of pleas including one to the jurisdiction of the court. This plea was based on an allegation that the goods for which the action was brought, were of the value of $600, the jurisdiction of the court in actions of tort being limited to $200. The plaintiff demurred to the plea of want of jurisdiction, and after argument the demurrer was overruled. No appeal was taken from the judgment overruling the demurrer, but the plaintiff gave notice of trial, and entered the cause for trial at Chambers before the County Court judge, who announced his intention of trying the same on the remaining pleas. The defendants obtained a rule *nisi* for a writ of prohibition to restrain the judge from trying the cause, on the ground that the

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judgment on the demurrer disposed of the whole case, and on argument of the said rule *nisi* it was discharged.

On appeal to the Supreme Court of Canada, *Held*, Strong, J., dissenting, that the effect of the judgment on the demurrer was to quash the writ, and the rule *nisi* for a writ of prohibition should be made absolute.

Per Strong, J., dissenting, that the judgment of the County Court judge on the demurrer did not dispose of the case, but he had a right to reconsider the same on the trial of the issues raised by the other pleas; that the plea to the jurisdiction by attorney was null and void and if judgment had been entered of record on the demurrer such judgment would have been likewise null and void; and that the amount claimed by the plaintiff's declaration being over $200 the court had jurisdiction.

Appeal allowed with costs.

Attorney-General v. *Flint*, 16 Can. S.C.R. 707.

Proceedings were taken in the Vice-Admiralty Court at Halifax on the information of the Attorney-General of Canada against the defendant to enforce the payment of penalties for breaches of the Inland Revenue Act. The court held it had jurisdiction, whereupon the defendant Flint applied to the Supreme Court of Nova Scotia for an order for a writ of prohibition to stay further proceedings in the Vice-Admiralty Court, which was granted. The Attorney-General thereupon appealed to the Supreme Court of Canada where his appeal was allowed with costs.

Godson v. *City of Toronto*, 18 Can. S.C.R. 36 (1890),

The city council, under R.S.O. 1887, c. 184, s. 477, passed a resolution directing a County Court judge to inquire into dealings between the city and persons who were or had been contractors for civic works and ascertain if the city had been defrauded in connection with contracts; to inquire into the whole system of tendering, awarding, carrying out, fulfilling and inspecting contracts with the city; and to ascertain in what respect, if any, the system of city business in that respect was defective. G., who had been a contractor and whose name was mentioned in the resolution, attended before the judge and claimed

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that the inquiry as to his contracts should proceed only on specific charges of malfeasance or misconduct, and the judge refusing to order such charges to be formulated, he applied for a writ of prohibition. *Held*,, affirming the judgment appealed from (16 Ont. App. R. 452), Gwynne, J., dissenting, that the County Court judge was not acting judicially in holding this inquiry; that he was in no sense a court and had no power to pronounce judgment imposing any legal duty or obligation on any person; and he was not, therefore, subject to control by writ of prohibition from a superior court. *Held*, per Gwynne, J., that the writ of prohibition would lie and in the circumstances shewn it ought to issue.

The cases following arose since the amendment of 1891.

Tremblay v. *Bernier*, 21 Can. S.C.R. 409.

The Syndic of the Board of Notaries of the Province of Quebec made a complaint before the Board against the appellant charging him with improper conduct. The appellant was summoned to appear before the Committee of Discipline to answer to these charges. He appeared by his attorney and filed a declaration taking exception to the jurisdiction of the Committee. His preliminary objection being overruled, the appellant pleaded that as the charge against him amounted to a felony, the Committee had no power to try him until he had been tried by a competent criminal court. The complaint, however, was proceeded with and the appellant obtained a writ of prohibition from the Superior Court restraining the respondents in their proceedings. This judgment was reversed by the Court of Queen's Bench and an appeal to the Supreme Court of Canada was dismissed with costs.

Shannon v. *Montreal Park & Island Rly. Co.*, 28 Can. S.C.R. 374.

The controversy between the parties arose from proceedings upon an arbitration under the Railway Act of 1888. The arbitrators were proceeding to render their award when the railway company obtained from the Superior Court a writ of prohibition enjoining them from receiving evidence or to do any official act in connection with the

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expropriation. The appellant was *mis-en-cause* in the case and contested the petition. The Superior Court maintained the contestation, dismissed the petition and quashed the writ of prohibition, but the Court of Queen's Bench maintained the writ and granted the conclusions of the company's petition. Upon appeal to the Supreme Court of Canada the respondents objected that there was no appeal from judgments rendered in matters of prohibition in the Province of Quebec, but the Court held that the Act of 1891, 54-55 V. c. 25, s. 2, applies to the whole Dominion and allowed the appeal with costs.

Honan v. *Bar of Montreal*, 30 Can. S.C.R. 1.

In pursuance of statutory powers, the Bar of Montreal suspended a practising advocate after holding an inquiry into charges against him which, however, had been withdrawn by the private prosecutor before the council had considered the matter. It did not appeal that witnesses had been examined upon oath during the inquiry and no notes in writing of the evidence of witnesses adduced had been taken. The effect of such absence of written notes, it was claimed by the appellant, was that he had been deprived of an opportunity of effectively prosecuting an appeal to the General Council of the Bar of the Province of Quebec. The appellant sued out a writ of prohibition in the Superior Court, but on the argument of the return it was quashed. On appeal to the Superior Court sitting in review, the judgment below was reversed, and the writ maintained, and the Bar of Montreal declared to have acted illegally in suspending the appellant. This judgment was reversed by the Court of Queen's Bench. Upon appeal to the Supreme Court of Canada the appeal was dismissed with costs.

O'Farrell v. *Brassard*, 4 O.L.R. 214.

Held, by the Court of Queen's Bench, there is no appeal from a judgment of that court to Her Majesty in Her Privy Council in a matter of prohibition.

39 (*d*)—*Mandamus.*

Section 47, *infra*, expressly provides that the limitations

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placed upon appeals from the Province of Quebec do not apply to cases of mandamus.

In the Province of Ontario there is no appeal from the Court of Appeal in proceedings for or upon a writ of mandamus unless the case is one of those provided for by section 48, *infra*.

Cases from the Province of Quebec.

An appeal to the Supreme Court of Canada in any case or proceeding for or upon a writ of mandamus was granted by section 23 of the original Act constituting the Court, 38 V. c. 11.

Danjou v. *Marquis*, 3 Can. S.C.R. 251 (1879).

A municipal council, of which the appellant was the presiding officer, having passed a by-law in which the respondent had an interest, the latter obtained from the Superior Court a writ of mandamus in order to compel the appellant to sign the minutes of the meeting of the council at which the by-law had been passed. After service of the writ, the appellant signed the minutes. The Superior Court or a judge thereof in Chambers, gave judgment adjudging the present appellant to pay the costs. From that judgment the appellant appealed to the Court of Queen's Bench for the Province of Quebec, but that court rejected the appeal for want of jurisdiction, holding that the judgment of the Superior Court was final and in last resort. The appellant thereupon appealed to the Supreme Court of Canada from the judgment of the Superior Court and not from the Court of Queen's Bench, when the appeal was quashed, the Court holding that no appeal lay from the Province of Quebec to the Supreme Court of Canada except from the Court of Queen's Bench.

Subsequently, by 54-55 V. c. 25, s. 3, an appeal was expressly given from the Superior Court in Review to the Supreme Court of Canada subject to certain limitations. *Infra*, section 40.

Sulte v. *Three Rivers*, 11 Can. S.C.R. 25.

This was an appeal from the Court of Queen's Bench (Quebec) in a proceeding by petition for a peremptory

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mandamus directed to the officers of a municipal corporation requiring them to issue a saloon license to petitioner without payment of $200 license fee imposed by the municipality by virtue of a charter granted by the Legislature of the Province of Quebec.

The petition also alleged that the act of the local legislature was *ultra vires* of its powers. The Superior Court granted the petition, but this was reversed by the Court of Queen's Bench. A further appeal to the Supreme Court of Canada was dismissed with costs.

Tremblay v. *The Commissioners St. Valentine*, 12 Can. S.C.R. 546.

The Superintendent of Education having ordered the division of a school district and the school commissioners having passed a resolution that the district should not be divided, the Superior Court ordered a peremptory writ of mandamus to issue. This judgment was reversed by the Court of Queen's Bench, but reinstated by the Supreme Court.

Brady v. *Stewart*, 15 Can. S.C.R. 82.

The appellant sued respondents, the liquidators of the St. Gabriel Mutual Building Society, claiming a mandamus to compel them to acknowledge him as a shareholder in the society, and to collocate him for dividends on certain shares. The respondents set up a plea of litigious rights which was maintained by the Court of Queen's Bench and the Superior Court and affirmed by the Supreme Court.

Langevin v. *St. Marc*, 18 Can. S.C.R. 599.

The appellant applied to the Superior Court for a writ of mandamus against respondents. The writ having been granted, returnable before a judge of the Superior Court in Chambers, respondents, according to the practice in Quebec, filed pleas to the petition upon which the writ issued, to which the appellants demurred. The Superior Court maintained the appellants' demurrers, but this judgment was reversed by the Court of Queen's Bench, the court saying that the corporation had the right to proceed to an *enquête* to establish certain alleged irregularities which

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would invalidate the decree of the Superintendent of Education in question, and finding there was error in the interlocutory judgment of the Superior Court, annulled it and dismissed the demurrers. On appeal to the Supreme Court it was held that under section 24(*g*) (now 39(*d*)) allowing proceedings for or upon a writ of mandamus, the decision sought to be appealed from must be a final judgment, and not being so in this case the appeal was quashed, but when the Superior Court directed a peremptory mandamus to issue and in default condemned the defendant to pay $2,000, the Supreme Court exercised jurisdiction. *Held*, that judgment in this sub-section means final judgment, per Fournier and Taschereau, JJ.

Patterson, J., dissenting, pointed out that the effect of section 30 (section 47, *infra*) was to provide that there should be an appeal in cases of mandamus where the judgment was not final, as that section expressly says that appeals in cases of mandamus were not to be affected by the provisions of section 28 (section 44, *infra*), which provides that an appeal shall only lie from final judgments. The judgments of the majority of the Court do not deal with the effect to be given to section 30.

Hus v. *St. Victoire*, 19 Can. S.C.R. 477.

The facts of this case being similar to those existing in *Langevin* v. *St. Marc*, but evidence having been given upon the allegation set up in the pleas filed in answer to the petition for a mandamus, thereupon the Superior Court granted a peremptory mandamus and ordered the school commissioner to obey the order of the Superintendent of Education and in default be condemned to pay $2,000. The Supreme Court exercised jurisdiction and dismissed the appeal on the merits.

St. Charles v. *Cordeau*, Cout. Dig. 808; 9th Dec., 1895.

"Under the provisions of article 2055 of the Revised Statutes of Quebec, as amended by 55 & 56 V. c. 24, ss. 18 and 19, certain ratepayers of a school district appealed to the Superintendent of Public Instruction for the Province of Quebec, who thereupon rendered a decision and gave orders and directions respecting the erection of a school

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house, which, however, the School Commissioners neglected to perform. *Held*, affirming the judgment appealed from that in such case the decision of the Superintendent of Public Instruction was final; that no appeal therefrom would lie to the Superior Court, and that the proper remedy to enforce the execution of the orders and directions of the superintendent was by mandamus."

Cadieux v. *Montreal Gas Co.*, 28 Can. S.C.R. 382.

In this case the Supreme Court reversed the judgment of the Court of Queen's Bench which reversed the judgment of the Superior Court ordering a peremptory writ of mandamus to issue against the defendants.

Beach v. *Stanstead*, 29 Can. S.C.R. 736.

The plaintiff was proprietor of a hotel in the township of Stanstead, where no by-law prohibiting the sale of intoxicating liquors existed, and being desirous of obtaining a license, made the necessary deposit of money and filed a certificate as required under the Quebec License Law. It did not appear that there existed any cause such as is set forth in the statute for the refusal of the confirmation of the certificate, but the municipal council passed a resolution refusing so to do. The plaintiff thereupon took an action for a mandamus to compel the corporation to confirm the certificate, and by a judgment of the Superior Court sitting in review it was ordered that a peremptory mandamus should issue enjoining the council to confirm the certificate, which was accordingly done. Plaintiff afterwards brought the present action for damages against the corporation for the loss of business caused by the wrongful act, as alleged, of the council. The Superior Court decided in favour of the plaintiff, but its judgment was reversed by the Court of Queen's Bench. On appeal to the Supreme Court, *Held*, that in deciding the present appeal the Supreme Court was not bound by the judgment of the Superior Court in the matter of the mandamus, but even if it were, there were other grounds upon which the Court might hold that the action was not maintainable. The Court was also of the opinion that the municipal council

had a discretion in the matter for the exercise of which no action would lie.

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Ontario cases prior to 60-61 *V. c.* 34.

Ontario & Quebec Rly. Co. v. *Philbrick*, 12 Can. S.C.R. 288.

A railway company, having taken certain lands for the purposes of their railway, made an offer to the owner in payment of the same which offer was not accepted, and the matter was referred to arbitration under the Con. Railway Act, 1879. On the day that the arbitrators met the company executed an agreement for a crossing over the said land, in addition to the money payment, and it appeared that the arbitrators took the matter of the crossing into consideration in making their award. The amount of the award was less than the sum offered by the company, and both parties claimed to be entitled to the costs of the arbitration, the company because the award was less than their offer, and the owner because the value of the crossing was included in the sum awarded which would make it greater than the offer.

The statute under which the claim for costs was made was section 9, sub-section 19 of the Con. Railway Act, which provides as follows:—

"If, in any case, when three arbitrators have been appointed, the sum awarded is not greater than that offered, the costs of the arbitration shall be borne by the opposite party, and be deducted from the compensation; but if otherwise they shall be borne by the company, and, in either case, they may, if not agreed upon, be taxed by the judge."

Application was made to Mr. Justice Galt for a mandamus to compel the judge to tax the company costs, and also for a writ of prohibition to restrain him from taxing costs against them.

The learned judge held that the agreement or offer for the crossing was made by the company before the arbitration, and was included in the sum awarded for damages, and he refused both applications. The Court of Appeal sustained this judgment, holding, as to the manda-

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mus, that as the notice by the company contained no mention of a crossing and the award did, the latter was not made upon the basis of the matter contained in the notice; and as to the writ of prohibition, that if the costs against the company were taxed the writ was useless, and if the judge had no power to tax, the taxation would be futile.

Held, affirming the judgment of the Court of Appeal, and the judgment of the Divisional Court (5 O.R. 674), Gwynne, J., dissenting, that under the circumstances neither party was entitled to costs.

Appeal dismissed with costs.

Williams v. *Raleigh*, 21 Can. S.C.R. 103.

Sub-section 2 of section 583 of R.S.O. 1887 enacts that: "Any such municipality neglecting or refusing so to do (that is, to make the necessary repairs to drainage works within its own limits) upon reasonable notice being given by any party interested therein, and who is injuriously affected by such neglect or refusal, may be compellable by mandamus to be issued by any court of competent jurisdiction to make from time to time the necessary repairs to preserve and maintain the same; and shall be liable to pecuniary damages to any person who or whose property is injuriously affected by reason of such neglect or refusal."

This was an action to recover $2,000 damages and claiming a mandamus in connection with certain drainage works. The trial judge referred the matters in dispute to the County Court judge with all the powers conferred by the rules of court upon a referee or arbitrator, and all costs were reserved until his report had been made. The County Court judge reported that the plaintiff was entitled to a mandamus and damages and upon a motion for judgment the trial judge gave judgment for the plaintiff for $850 and a mandamus. On appeal to the Court of Appeal for Ontario the appeal was allowed and the action dismissed. On a further appeal to the Supreme Court of Canada, *Held*, per Strong and Gwynne, JJ., Ritchie, C.J., and Patterson, J., *contra*, and Taschereau, J., taking no part in the judgment, that the drain causing the injury being wholly within the limits of the municipality in which it was commenced, and not benefiting lands in an adjoining

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municipality, it did not come under the provisions of section 583 of the Municipal Act and W. was not entitled to a mandamus under that section.

Held, per Strong and Gwynne, JJ., that though W. was not entitled to the statutory mandamus, it could be granted under the Ontario Judicature Act (R.S.O. 1887, c. 44).

Sombra v. *Chatham*, 21 Can. S.C.R. 305.

Under the drainage provisions of the Municipal Act, R.S.O. (1887) c. 184, respondent undertook the construction of a drain along the town line between Chatham and Sombra, but the work was not fully completed according to the plans and specifications, and owing to its imperfect condition the drain overflowed and flooded the adjoining lands of M., who joined in an action against the township, alleging that the effect of the work on the drain was to stop up the outlets to other drains in Sombra, back the waters thereof and flood roads and lands in the township, and they asked an injunction to restrain Chatham from so interfering with existing drains and mandamus to compel the completion of the drain so undertaken as well as damages for injury to M.'s land and other land in Sombra. *Held*, per Ritchie, C.J., Strong and Gwynne, JJ., that section 583 of the Municipal Act providing for mandamus to compel the making of repairs to preserve and maintain a drain does not apply to this case in which the drain was never fully made and completed, but that the Township of Sombra was entitled to a mandamus under Ont. Jud. Act, R.S.O (1887) c. 44.

Mandamus since 60-61 *V. c.* 34.

Attorney-General v. *Scully*, 33 Can. S.C.R. 16.

The respondent applied to a judge of the High Court of Ontario for a peremptory writ of mandamus to compel the clerk of the peace to furnish him with a copy of the proceedings in a criminal charge on which he had been acquitted, but the application was refused on the ground that the documents in question were held by the clerk of the peace and that a certified copy could not be given without the fiat of the Attorney-General, in whose discretion

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it lay whether or not the fiat should issue. This judgment was reversed by the Divisional Court, and a further appeal to the Court of Appeal was dismissed. An application was thereupon made to the Supreme Court of Canada for leave to appeal under paragraph (*e*) of section 1, 60-61 V. c. 34. The Supreme Court refused the application with costs.

It was admitted that no appeal would lie in this case except by leave. *Vide Aurora* v. *Markham*, 32 Can. S.C.R. 457, *infra*, p. 141.

Mandamus—other cases.

Town of Dartmouth v. *The Queen*, 9 Can. S.C.R. 509.

The proceedings herein commenced by a rule *nisi* taken out at the instance of the sessions for the County of Halifax for a writ of mandamus to compel the municipal officers of Dartmouth to forthwith assess upon property in Dartmouth a sum of $15,000 required for school purposes. This rule was made absolute and the writ of mandamus ordered to issue. An appeal therefrom was dismissed by the Supreme Court, and it was further held the mandamus here ordered was not a peremptory mandamus, and that it was open to Dartmouth, upon the return of the writ to shew cause why the whole amount claimed in these proceedings should not be levied.

The writ which issued pursuant to this judgment in its operative part commanded the wardens and council of Dartmouth to forthwith assess the said sum, etc., "or that you shew us cause to the contrary thereof," etc. The warden and council of Dartmouth in their return to the writ simply set up the legal defences to the claim, to which action the sessions of Halifax demurred. Two points were raised on argument, one *in limine*, that under the practice in Nova Scotia, there can be no demurrer to a return and secondly, upholding the sufficiency of the return. Judgment was against Dartmouth on both points, and a peremptory mandamus ordered to issue. From this judgment an appeal was taken to the Supreme Court and the same objection was taken by the appellants in the court below that there could be no demurrer to a return to a writ

of mandamus. This objection was overruled and the appeal proceeded on the merits.

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Drysdale v. *Dominion Coal Co.*, 34 Can. S.C.R. 328.

The appellant was a member of the Executive Government of the province, and as such held the office of Commissioner of Public Works and Mines. By statute he was given jurisdiction to inquire into and decide upon applications involving mining rights, and his decision was made the subject of an appeal to the highest court in the province. The commissioner having refused to investigate an application it was held that the court below had power to order the issue of a writ of mandamus commanding the commissioner to take into consideration an application of the respondent for a lease of certain lands for mining purposes.

39 (*e*)— *Municipal by-laws—Ontario cases.*

Prior to 60-61 V. c. 34, 1897 (*infra*, section 48), appeals lay to the Supreme Court from the Province of Ontario in any case in which a by-law of a municipal corporation had been quashed by a rule or order of court, or the rule or order to quash had been refused after argument. (R.S. c. 135, s. 24.) Since 60-61 V. c. 34, cases of this character cannot be appealed to the Supreme Court unless they fall within its provisions.

Vide Aurora v. *Markham*, *infra*, p. 141.

The following cases were decided prior to 60-61 V. c. 34.

Gibson v. *North Easthope*, 24 Can. S.C.R. 707.

An action to have a drainage by-law quashed and for damages for injury to the plaintiff's property from improper construction and want of repair of a drain made under the by-law attacked.

Broughton v. *Gray and Elma*, 27 Can. S.C.R. 495.

An action to set aside a drainage by-law and for an injunction.

McKillop v. *Logan*, 29 Can. S.C.R. 702.

An action in which the township of Logan sought to

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recover from the defendants a sum of money as a statutory debt of $360.38, by virtue of the provisions of the Ontario Statute, 57 V. c. 55. The by-law involved the validity of an award by the engineer under the Ditches and Watercourses Act of 1894, the award being attacked on the ground that the party initiating the proceedings was not an owner under the Act. The judgment of Armour, C.J., was reversed by the Court of Appeal, but restored by the Supreme Court of Canada.

Cases subsequent to 60-61 *V. c.* 34.

Sutherland-Innes v. *Romney,* 30 Can. S.C.R. 495.

This was an action to set aside certain drainage by-laws on the ground that they were *ultra vires* of the municipal corporation passing the same. The plaintiffs' lands were assessed in connection with the by-laws to the amount of $1,130, and they gave notice of their intention to move to have them quashed, but did not proceed with their motion. The trial judge dismissed the action. On appeal the judgment below was affirmed. On a further appeal to the Supreme Court the appeal was allowed.

Elizabethtown v. *Augusta,* 32 Can. S.C.R. 295.

In this case proceedings were taken under the Municipal Act to determine the cost of certain drainage works extending from one municipality into another. An engineer's report was made finding that the lands of the appellant municipality should be assessed for $4,986, and the respondent municipality for the sum of $764. The respondents refusing to pay the appellants brought an action and the defence raised was that there was no jurisdiction to pass the by-law under which the works were made by reason of the petition not being signed by a majority of the persons in the last revised assessment roll. The trial judge dismissed the action, and on appeal to the Court of Appeal the court being equally divided in opinion the appeal was dismissed. A further appeal having been taken to the Supreme Court of Canada, the appeal was allowed with costs.

Challoner v. *Lobo,* 32 Can. S.C.R. 505.

The plaintiff's action was brought claiming to have a

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drainage by-law declared null and void, and restraining defendants from proceeding to carry out certain drainage works provided by the by-law and damages generally. The question in issue was what construction should be placed upon the words "last revised assessment roll" in the Drainage Act. The Supreme Court affirmed the judgment of the Court of Appeal.

Aurora v. *Markham,* 32 Can. S.C.R. 457.

The municipal council of the Town of Aurora passed a by-law granting a bonus to persons who proposed to establish a certain industry in that municipality. The by-law having passed the council was duly assented to by a majority of the ratepayers of the municipality according to the provisions of the Municipal Act. An application was made to the High Court of Justice to quash the by-law, which was refused, but on appeal to the Court of Appeal, the by-law was quashed. The Town of Aurora thereupon applied to the Supreme Court of Canada for leave to appeal under 60-61 V. c. 34, par. (*e*) (s. 48, *infra*). Upon the argument of the motion it was suggested that leave to appeal was not requisite inasmuch as it was open to the applicants to appeal *de plano,* but as to this the Court said:

"We are of opinion that, as regards the Province of Ontario, there can be no appeal in the case of an application to quash a municipal by-law without leave so to do having been previously granted either by the Court of Appeal or by this Court.

"Under the Act originally constituting this Court it was by section 24 authorized to entertain appeals 'in any case in which a by-law of a municipal corporation has been quashed by a rule or order of court.'

"By this Act no leave to appeal was required.

"Subsequently, by Statute 60 & 61 V. c. 34, Parliament enacted that no appeal should lie to the Supreme Court of Canada from any judgment of the Court of Appeal of Ontario except in certain enumerated cases amongst which proceedings to quash by-laws were not included. It then proceeded to provide that there might be an appeal 'in other cases where the special leave of the Court of Appeal

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for Ontario, or of the Supreme Court of Canada to appeal to such last-mentioned court is granted.'

"In the face of this provision it is manifest that the unqualified jurisdiction to entertain appeals in this class of cases conferred by the original act is restricted and is by it limited to those in which leave to appeal is first obtained, either from the Court of Appeal or from this Court."

39 (*e*)—*Municipal by-laws—Quebec Cases.*

Section 47, *infra*, expressly provides that the limitations placed upon appeals from the Province of Quebec do not apply to cases of municipal by-laws.

It is pointed out in *Webster* v. *Sherbrooke*, 24 Can. S.C.R. 52, *infra*, p. 144, that the only municipal by-law cases in the Province of Quebec in which 24 (*g*), now 39 (*e*), applies, are those in which the proceedings are taken in the interests of the public, and that this section has no application to a private action in which the validity of a by-law is impugned.

Longueuil Navigation Co. v. *City of Montreal*, 15 Can. S.C.R. 566.

Jurisdiction exercised in a case where the action was to have a by-law of the City of Montreal imposing a tax of $200 on each ferry boat employed by the appellant company between Montreal and Longueuil, set aside and the Provincial Act, 39 V. c. 52, under the authority of which the by-law was passed, declared unconstitutional and *ultra vires*.

Sherbrooke v. *McManamy*, 18 Can. S.C.R. 594.

The plaintiff sued defendants to recover the amount of two business taxes of $100 and $50 respectively under the authority of a municipal by-law. The defendants pleaded that the by-law was illegal and *ultra vires* of the municipal council and also that the statute conferring power upon the municipal council to tax was *ultra vires* of the Legislature of Quebec. The Superior Court held that both statute and by-law were *intra vires* and gave judgment for the municipality. On appeal the Court of Queen's Bench confirmed this judgment as regard[s] the validity of the

statute, but set aside the tax of $100 as not being authorized. The Supreme Court quashed an appeal to that Court on the ground that section 24 (*g*) did not apply to this case as no by-law was quashed.

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Per Taschereau, J.—"The appellant has attempted to support his appeal on sub-section (*g*) of section 24 of the Supreme Court Act, as being in a case in which a by-law of a municipal corporation has been quashed by rule or order of court. But that enactment, probably of no possible application in the Province of Quebec, does not help the appellant. There is no by-law quashed by a rule or order here. In fact there is none quashed at all by the judgment appealed from. We are all agreed on this point I believe, neither could it be contended that the case is appealable because it relates to a tax or duty (*vide* section 46(*b*), *infra*). The statute gives a right of appeal only in matters relating to a duty payable to Her Majesty where rights in future might be bound, which the tax in controversy could it be called a duty, is clearly not.

"It is contended, however, that the appeal in this case lies because the matter in controversy involves the question of the validity of an Act of the legislature of the Province of Quebec. If that was so, the appeal would undoubtedly lie. But I cannot see that there is anything in controversy on such a point on the appeal to this Court, as the case is presented to us."

Verchères v. *Varennes*, 19 Can. S.C.R. 365.

The Municipality of Verchères adopted a *procès-verbal* for the building and maintaining of a bridge over a stream separating it from the Municipality of Varennes. Subsequently Verchères homologated a *procès-verbal* by an engineer defining who were liable for the work and maintenance. Thereupon Varennes brought an action in the Superior Court to have the *procès-verbal* set aside and quashed. The plaintiffs' action was dismissed, but this decision of the Superior Court was reversed by the Court of Review, and on appeal affirmed by the Court of Queen's Bench. An appeal to the Supreme Court was quashed on the ground that this was not a case of a rule or order to quash referred to in section 24(*g*) (now 39(*e*)).

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Bell Telephone Co. v. *City of Quebec*, 20 Can. S.C.R. 230.

In an action instituted for the purpose of annulling a by-law of the defendants, the City of Quebec, imposing a tax of $800 on the plaintiffs, the judgment of the Superior Court setting aside the by-law was reversed by the Court of Queen's Bench. An appeal to the Supreme Court was quashed following *Verchères* v. *Varennes*, 19 Can. S.C.R. 315; *Sherbrooke* v. *McManamy*, 18 Can. S.C.R. 594.

Webster v. *Sherbrooke*, 24 Can. S.C.R. 52.

The proceedings in this case were commenced in the Superior Court (Quebec) by petition to annul a municipal by-law taken under section 4389 of the Revised Statutes of Quebec, which reads as follows: "Any municipal elector may in his own name by a petition presented to the Superior Court or to one of the judges thereof, demand and obtain, on the ground of illegality, the annulment of any by-law of the council with costs against the corporation."

The Superior Court declared one section of the by-law invalid, which was reversed by the Court of Queen's Bench. Upon a motion to quash an appeal to the Supreme Court it was held that this application was in effect a motion to quash a by-law to which 24(*g*) (now 39(*e*)) applied and the case was not similar to the cases of *Verchères* v. *Varennes*, 19 Can. S.C.R. 365; *Sherbrooke* v. *McManamy*, 18 Can. S.C.R. 594, which were private actions impugning by-laws and the proceedings were not to quash or annul by-laws. The motion to quash was dismissed.

St. Cunégonde v. *Gougeon*, 25 Can. S.C.R. 78.

The plaintiffs, respondents, presented a petition to the Superior Court asking to have a by-law of the defendants, appellants, annulled, which was granted. The defendants' appeal to the Court of Queen's Bench was quashed on the ground that a section of the Town Incorporation Act prohibited an appeal from any judgment of the Superior Court respecting municipal matters. From this judgment the defendants appealed to the Supreme Court, but the appeal was quashed on the ground that an appeal to the Court of Queen's Bench did not lie and that court having properly

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refused to entertain jurisdiction therein it followed that no appeal would lie to the Supreme Court.

Town of Chicoutimi v. *Price*, 29 Can. S.C.R. 135.

By his petition filed in the Superior Court the respondent alleged that a by-law of the appellants purporting to grant a bonus to the Chicoutimi Pulp Co. should be declared illegal and void, and that an injunction should issue restraining the municipality from issuing bonds to the extent of the bonus. The Superior Court by its judgment in this case declared absolute an injunction restraining the appellants from issuing bonds in payment of the bonus, and at the same time annulled the by-law. This judgment was affirmed by the Court of Queen's Bench, and subsequently by the Supreme Court.

Toussignant v. *County of Nicolet*, 32 Can. S.C.R. 353.

This was an action to annul a *procès-verbal* establishing a public highway and charging appellant's lands with expense of construction and maintenance amounting to over $2,000. An appeal to the Supreme Court was quashed, the Court holding that this was a private action and not a petition to annul a by-law under article 4389, R.S.P.Q., such as in *Webster* v. *Sherbrooke*. Also, this was the case of a *procès-verbal* and not a by-law.

Vide Stevenson v. *City of Montreal, infra*, p. 179.

Vide Reburn v. *St. Anne, infra*, p. 177.

Vide Dubois v. *St. Rose, infra*, p. 178.

Other cases.

C. P. Ry. Co. v. *City of Winnipeg*, 30 Can. S.C.R. 558.

By-law No. 148 of the City of Winnipeg, passed in 1881, exempted forever the C.P.R. Co. from "all municipal taxes, rates and levies and assessments of every nature and kind." *Held*, reversing the judgment of the Court of Queen's Bench (12 Man. L.R. 581), that the exemption included school taxes. The by-law also provided for the issue of debentures to the company, and by an Act of the Legislature, 46 & 47 V. c. 64, it was provided that by-law 148 authorizing the issue of debentures granting by way of bonus to the C.P.R. Co. the sum of $200,000 in considera-

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tion of certain undertakings on the part of the said company; and by-law 195 amending by-law No. 148 and extending the time for the completion of the undertaking . . . be and the same are hereby declared legal, binding and valid. . . *Held*, that notwithstanding the description of the by-law in the Act was confined to the portion relating to the issue of debentures the whole by-law including the exemption from taxation was validated.

40. In the Province of Quebec an appeal shall lie to the Supreme Court from any judgment of the Superior Court in Review where that court confirms the judgment of the courts of first instance, and its judgment is not appealable to the Court of King's Bench, but is appealable to His Majesty in Council. 54-55 V., c. 25, s. 2.

Prior to the Amendment to the Supreme & Exchequer Courts Act, 54-55 V. c. 25, s. 3 (1891), it had been held (*Danjou* v. *Marquis*, 3 Can. S.C.R. 251; *Macdonald* v. *Abbott*, 3 Can. S.C.R. 278), that in the Province of Quebec no appeal would lie from the Court of Review, but only from the Court of Queen's Bench. The effect of this amendment was to give an appeal to the Supreme Court of Canada from the Court of Review in cases where no appeal lay from the Court of Review to the Court of Queen's Bench, and where the case was one which, by the law of the Province of Quebec, was appealable to the Judicial Committee of the Privy Council.

A similar appeal to His Majesty in Council from the judgment of the Court of Review is given by article 69, C.C.P., and the provisions governing appeals to the Privy Council are set out in article 68 as follows:—

1. In all cases where the matter in dispute relates to any fee of office, duty, rent, revenue, or any sum of money payable to His Majesty.

2. In cases concerning titles to lands or tenements, annual rents or other matters in which the rights in future of the parties may be affected.

3. In all other cases wherein the matter in dispute exceeds the sum or value of five hundred pounds sterling.

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The provision of the Code of Civil Procedure which limits appeals to the Court of King's Bench from the judgment of the Court of Review, referred to in this section, is sub-section 4 of section 43, the said section reading as follows:—

"43. Unless where otherwise provided by statute, an appeal lies to the Court of Queen's Bench sitting in appeal, from any final judgment rendered by the Superior Court, except:—

"1. In matters of *certiorari;*

"2. In matters concerning municipal corporations or offices, as provided in article 1006;

"3. In matters in which the sum claimed or value of the thing demanded is less than two hundred dollars, and in which judgment has been rendered by the Court of Review;

"4. At the instance of any party who has inscribed in review any cause other than those mentioned in the preceding paragraph, and has proceeded to judgment on such inscription, when such judgment confirms that rendered in first instance."

Section 46, sub-section 2, *infra,* provides that:—

"In the Province of Quebec whenever the right to appeal is dependent upon the amount in dispute, such amount shall be understood to be that demanded and not that recovered, if they are different."

It has been held, *Couture* v. *Bouchard,* 21 Can. S.C.R. 281, *infra; Dufresne* v. *Guévremont,* 26 Can. S.C.R. 216, *infra,* that no appeal will lie to the Supreme Court from the Court of Review unless the amount involved is £500, whereas $2,000 is all that is required in appeals from the Court of King's Bench.

Citizens Light & Power Co. v. *Parent,* 27 Can. S.C.R. 316.

In this case the plaintiff (respondent) sued for $5,000 damages and recovered $2,000 in the Superior Court which was affirmed by the Court of Review. The respondent having moved to quash an appeal to the Supreme Court on the ground that no appeal would lie because the amount involved was not £500, which was necessary to give an appeal to the Privy Council, *Held,* following *Dufresne* v.

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Guévremont, 26 Can. S.C.R. 216, that the appeal should be quashed.

Barrington v. *City of Montreal*, 25 Can. S.C.R. 202.

In this case the appellants petitioned the Superior Court for a writ of mandamus to compel the City of Montreal to proceed with certain works on the streets of the city under the provisions of a statute of the province. The Superior Court ordered a peremptory writ of mandamus to issue which was reversed by the Court of Review. The petitioners having taken an appeal to the Supreme Court from the Court of Review, and the City of Montreal having moved to quash, the Court held it had no jurisdiction as the statute only provided there should be an appeal when the judgment of the court of first instance had been affirmed in review, and where there was no appeal to the Court of Queen's Bench, whereas in the present case the Court of Review had reversed the judgment of the court of first instance.

Simpson v. *Paliser*, 29 Can. S.C.R. 6.

Held, that where the Superior Court sitting in review has varied a judgment on appeal from the Superior Court by increasing the amount of damages, the judgment rendered in the court of first instance is not thereby confirmed so as to give an appeal direct from the judgment of the Court of Review to the Supreme Court of Canada.

Ethier v. *Ewing*, 29 Can. S.C.R. 446.

The appellant's petition to the Superior Court for the recusation of the respondent as a commissioner in expropriation proceedings taken for the improvement of a public street in the City of Montreal was dismissed and this judgment affirmed by the Court of Review. An appeal to the Supreme Court was quashed, the Court holding that there was in the case no appeal *de plano* to the Privy Council and consequently no appeal to this Court.

41. An appeal shall lie to the Supreme Court from the judgment of any court of last resort created under provincial legislation to adjudicate concerning the assessment of

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property for provincial or municipal purposes, in cases where the person or persons presiding over such court is or are by provincial or municipal authority authorized to adjudicate, and the judgment appealed from involves the assessment of property at a value of not less than ten thousand dollars. 52 V. c. 37, s. 2.

In 1889 there existed in the Province of British Columbia a Court of Revision and Appeal in each district of the province, having jurisdiction to hear appeals where parties were dissatisfied with the assessment of their property by the local assessors. The members of this court were appointed by the Lieutenant-Governor in Council.

In 1889 an amendment was made whereby an appeal could be taken from the Court of Revision and Appeal to the Supreme Court of the province and these provisions are now contained in the Revised Statutes of British Columbia, 1897, c. 179, ss. 64-75.

In 1889 there was also, in the Province of Nova Scotia, provision for an appeal by persons dissatisfied with the assessment of their property to a Board of Revision (51 V. c. 2, ss. 21 and 73), and by section 62 the party dissatisfied with the decision of the Board might appeal to the County Court of the county; and the proceedings both of the Board and County Court were removable by *certiorari* to the Supreme Court of the province. These provisions of the law are still in force in Nova Scotia. R.S.N.S., 1900, c. 73, ss. 55-59.

Similarly at the same time in the Province of New Brunswick the Act relating to rates and taxes provided for the appointment of three county valuators, to be called the Board of Valuators, who should revise assessments in their counties, and the rates and assessments were subject to be removed by *certiorari* to the Supreme Court of the province.

It was to permit of appeals in such cases that Sir John Thompson amended 24(*g*) R.S. c. 139 (1886), and made provision for appeals in cases of *certiorari* and *prohibition*.

In 1889, in the Province of Ontario also there was provision in the Assessment Act for an assessment appeal being taken to a Court of Revision in each municipality, and an

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appeal lay from this Board to the county judge (R.S.O., 1887, c. 193, ss. 68-70), and by section 74 the decision of the county judge was made final and conclusive.

Subsequently the Assessment Act was amended, and in that province an appeal was given to a Board of county judges where the assessment amounted to twenty thousand dollars. By 60 V. c. 45, s. 70, an appeal was given from the decision of the county judges to the Court of Appeal.

Upon this state of the law in the different provinces Sir John Thompson, in March, 1889, introduced an amendment to the Supreme and Exchequer Courts Act, which will be found as 24(*j*) of the old Act, and in so doing he made use of the following words:—

"The facts which led to the framing of this section are these. Courts are actually constituted in various provinces for the purpose of regulating the assessment of property in those provinces, and it has been the practice in two or three of the provinces of late years to give those courts, although they are not in the ordinary sense courts of justice and although sometimes they are not presided over by professional men, very large jurisdiction, indeed. In some cases it has been brought to our notice that adjudications have been made by these courts involving taxation to the amount of tens of thousands of dollars a year. There is no appeal to the Supreme Court by reason of the fact that these courts are not in any sense superior courts, and it is provided that there shall only be an appeal from a superior court."

No case under this section was brought to the Supreme Court until 1897, when an appeal was taken in *Toronto* v. *Toronto Street Railway Company*, 27 Can. S.C.R. 640.

This was an appeal from a judgment of the County Court judges above mentioned, and at this time there was no appeal from the Board of County Court judges to the Court of Appeal.

On this state of facts the appeal was quashed, the court holding that the County Court judges having been appointed by the Federal Government, they did not, within the meaning of this section, constitute a court appointed "by provincial or municipal authority." Mr. Justice King

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dissented from the judgment of the court, and held that this case was quite within the purview of the amendment giving appellate jurisdiction to the Supreme Court in certain assessment cases. The above decision nullified the effect of this section of the Supreme and Exchequer Courts Act, because in all the provinces the highest court sitting in review on municipal assessments is composed of judges either of the County Court or of the Superior Court.

To give effect to the intention of Parliament the words of the section "appointed by provincial or municipal authority" by the commissioners for the revision of the statute were altered to read as in the section provided, and the objection taken by the Supreme Court in the above case will no longer apply.

Ethier v. *Ewing*, 29 Can. S.C.R. 446, *supra*, p. 148.

In quashing the appeal in this case the Chief Justice in pronouncing the judgment of the Court said that the judgment below did not come within the provisions of section 24(*j*) (now section 41).

42. Except as otherwise provided in this Act or in the Act providing for the appeal, no appeal shall lie to the Supreme Court but from the highest court of last resort having jurisdiction in the province in which the action, suit, cause, matter or other judicial proceeding was originally instituted, whether the judgment or decision in such action, suit, cause, matter or other judicial proceeding was or was not a proper subject of appeal to such highest court of last resort: Provided that, an appeal shall lie directly to the Supreme Court without any intermediate appeal being had to any intermediate court of appeal in the province.

(*a.*) from the judgment of the court of original jurisdiction by consent of parties;

(*b.*) by leave to the Supreme Court or a judge thereof from any judgment pronounced by a superior court of equity or by any judge in equity, or by any superior court

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in any action, cause, matter or other judicial proceeding in the nature of a suit or proceeding in equity; and,

(*c.*) by leave of the Supreme Court or a judge thereof from the final judgment of any superior court of any province other than the Province of Quebec in any action, suit, cause, matter or other judicial proceeding originally commenced in such superior court. R.S., c. 135, s. 26.

"Except as otherwise provided in this Act." The exceptions are only appeals from the Court of Review in Quebec, under section 40, *supra*; Assessment appeals under section 41, *supra;* and appeals *per saltum* under this section.

"Or in the Act providing for the appeal." This exception includes criminal appeals, election appeals, admiralty appeals.

"Whether the judgment or decision, etc., was or was not a proper subject of appeal to such highest court of last resort" refers to cases where the court of last resort has assumed jurisdiction and given judgment. *Vide Blachford* v. *McBain*, 19 Can. S.C.R. 42; *St. Cunégonde* v. *Gougeon*, 25 Can. S.C.R. 78.

42 (*a*).

Severn v. *The Queen*, 2 Can. S.C.R. 70.

This was an appeal from a judgment of the Court of Queen's Bench for Ontario, overruling the demurrer of the defendant John Severn to the criminal information filed against him by the Attorney-General of the said province on behalf of Her Majesty the Queen in the said court on the 23rd day of January, 1877. The appeal was brought directly to the Supreme Court by consent of parties under section 27 of the original Supreme & Exchequer Courts Act (now section 42(*a*)).

Blackburn v. *McCallum*, 33 Can. S.C.R. 65.

The question in this case to be determined was whether a restraint on alienation contained in a will was valid. The cause was heard by Meredith, C.J., upon a stated case pre-

S. 42 (*a*). Appeals *per saltum* by consent.

pared by the parties pursuant to the Judicature Act and Rules. The trial judge felt himself bound by a decision of the Court of Appeal in *Earls* v. *McAlpine*, 6 A.R. 145. The parties thereupon signed a consent pursuant to section 26, sub-section 2 (now 42(*a*)), that an appeal should be taken direct to the Supreme Court of Canada from the judgment of Meredith, C.J., and the case was accordingly heard, although no intermediate appeal had been taken to the Court of Appeal for Ontario.

42 (*b*).

The appeals provided for by this sub-section are equity cases, and the word "judgment" there includes an interlocutory as well as a final judgment.

42 (*c*).

Special circumstances must be shewn before the Supreme Court or a judge thereof will grant leave to appeal *per saltum*.

Bank B.N.A. v. *Walker*, Cout. Dig. 88 (1882).

"On appeal brought from a judgment overruling demurrers to some of the counts of a declaration only, while re-hearing was pending upon an order to enter final judgment on the whole case upon the verdict rendered: *Held*, that as the judgment on the demurrers was not a final judgment the appeal must be quashed for want of jurisdiction, but on the application of the appellant, made at the same time as the motion to quash, leave was given to appeal *per saltum* (after the expiration of the 30 days limited by the Act) on the whole case upon terms, and the deposit already made in court was ordered to remain on deposit to avail as security for this appeal." For full statement of facts, *vide* Cass. Dig (2 ed.), p. 214.

This decision so far as it is an authority for the Supreme Court extending the time within which an appeal may be brought to the Supreme Court, must be taken as overruled by *Stuart* v. *Skulthorpe*, 1894; *Roberts* v. *Donovan*, 1895, *and Barrett* v. *Syndicat Lionnais du Klondyke*, 33 Can. S.C.R. 667, *infra*, p. 339.

S. 42(c). Appeals *per saltum* by leave.

Schultz v. *Wood*, 6 Can. S.C.R. 585.

The Chief Justice of the Supreme Court, under section 6 of the Supreme Court Amendment Act of 1879, allowed an appeal direct to the Supreme Court of Canada, it being shewn that there were then only two judges on the bench in Manitoba, the plaintiff (Chief Justice) and Dubuc, J., from whose decree the appeal was brought.

Sewell v. *British Columbia Towing Co.*, Cout. Dig. 112 (1881).

Upon an application for leave to appeal direct from the judgment of Begbie, C.J., without intermediate appeal, the affidavit set out that in British Columbia the court of final resort consisted of five judges, two of whom had been previously engaged as counsel in the cause, and refused to adjudicate; that another judge was absent and it was uncertain if he ever would resume judicial functions; that a new Administration of Justice Act, 1881, had recently come into operation, but no rules had been made thereunder and section 28 of said Act required three judges to constitute a quorum of the full Court to be held only once in each year. Fournier, J., in Chambers referred the application to the full Court. *Held*, that the circumstances disclosed did not warrant the Court in granting the application. Motion refused with $20 costs.

Lewin v. *Wilson*, 9 Can. S.C.R. 637.

In this case leave to appeal *per saltum* to the Supreme Court of Canada from the Supreme Court in Equity of New Brunswick was granted by the judge of the Supreme Court in Equity of New Brunswick, Hon. A. L. Palmer, without an intermediate appeal to the Supreme Court of New Brunswick. No exception to the validity of this order was taken in the Supreme Court and it is questionable if the attention of the Court was called to the fact that a judge of the court below and not of the Supreme Court had granted leave to appeal *per saltum*. It is stated in *Lewin* v. *Howe*, 14 Can. S.C.R. 722, that this appeal had come to the Supreme Court by consent, but the order of the judge of the Equity Court expressly states that it was made under the Supreme Court Amendment Act of 1879, which

S. 42(c). Appeals *per saltum* by leave.

contains the provision relating to *per saltum* appeals, while the previous statute allowing appeal direct to the Supreme Court from the court of first instance is contained in the original Supreme & Exchequer Courts Act of 1875.

Lewin v. *Howe*, 14 Can. S.C.R. 722.

The judgment of the Supreme Court of Canada in *Lewin* v. *Wilson* having been reversed by the Judicial Committee of the Privy Council, and the plaintiffs being dissatisfied with the form of the decree made by the judge in equity for the purpose of carrying out the judgment of the Judicial Committee, an application was made to the Registrar of the Supreme Court for leave to appeal *per saltum* from the Supreme Court in Equity to the Supreme Court of Canada, alleging that the time for appealing to the Supreme Court of New Brunswick had elapsed; that the cause had never been before the Supreme Court of New Brunswick; that owing to arrears of business in that court the hearing could not be had for several months and the delay would seriously affect the plaintiff's interests; that the action had been commenced upwards of six years previous to that date, and that owing to the defendant's opposition the plaintiffs had been unable to collect the amount of their debt. The application was referred by the Registrar to the Court, when leave to appeal *per saltum* was granted, Taschereau and Gwynne, JJ., dissenting.

Moffatt v. *Merchants Bank*, 11 Can. S.C.R. 46.

Leave to appeal *per saltum* from judgment of the Chancery Division of the High Court (Ontario), granted by Gwynne, J., on the ground that the Court of Appeal would be bound by a previous decision of its own, whereas the appellant sought to avoid the effect of that decision in the present action.

Dumoulin v. *Langtry*, 13 Can. S.C.R. 258.

The plaintiff Langtry having recovered a judgment against the defendant Dumoulin, the Rector of St. James' Church, Toronto, which was affirmed by the Chancery Divisional Court, the defendant refused to appeal to the Court of Appeal although requested to do so by his churchwardens. The latter applied to the Court of Appeal for

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leave to appeal in their own name or in the name of the Rector as their trustee, claiming that they had interests separate from those of the Rector. This application being refused by the Court of Appeal, they applied to the Supreme Court for leave to appeal *per saltum* from the judgment of the Chancery Divisional Court, which was granted upon a proper indemnity being given to Dumoulin.

Kyle v. *The Canada Company*, 15 Can. S.C.R. 188.

Upon an application for leave to appeal to the Supreme Court from the judgment of the trial judge without any intermediate appeal to the Divisional Court or the Court of Appeal for Ontario, *Held*, per Strong, J., that this section authorizes an order being made in a proper case as well where the proceeding in the court below is an action at law as where it is a suit in equity. That leave may be granted from the judgment of the trial judge as well as from the judgment of the Divisional Court; that it was not a ground for allowing an appeal *per saltum* because the Court of Appeal had in another case decided the point in dispute, and that this case differed from *Moffatt* v. *Merchants Bank*, 11 Can. S.C.R. 46, in that in the latter case the Court of Appeal had not only decided the same legal question which the proposed appellant sought to raise, but had decided it upon the same actual state of facts and virtually upon the same evidence, oral and documentary, as that upon which the decision which it was proposed to appeal from had proceeded.

Hislop v. *McGillivray*, 15 Can. S.C.R. 191.

Per Henry, J.: *Held*, that it was not a ground for granting an appeal *per saltum*, that the Court of Appeal below in another case had decided the same point as arose in the present case.

Attorney-General v. *Vaughan Road Co.*, Cass. Prac. (2 ed.) 37.

Leave to appeal *per saltum* directly from a decision of the Chancellor of Ontario was granted where it appeared that the Court of Appeal had already given a decision upon the merits by its order on an application for an injunction in the case.

S. 42(c). Appeals *per saltum* by leave.

Bartram v. *London West*, 24 Can. S.C.R. 705.

In this case a judgment in favour of the plaintiff corporation was affirmed by the Divisional Court. No appeal lay to the Court of Appeal except by leave of that court, which was refused. An application to the Registrar for leave to appeal *per saltum* was refused and his decision, on appeal to the Court, was affirmed.

Lewis v. *City of London*, Cass. Prac. (2 ed.) 37.

On January 13th, 1896, an application for leave to appeal *per saltum*, was made to the Registrar sitting as a judge in Chambers, in a case of *Lewis* v. *The City of London*, based on the ground that it had, in effect, been already decided by the Court of Appeal in another case of *Lewis* (the same appellant) v. *Alexander*. The Registrar refused to make the order inasmuch as, though the two cases might have been identical as to the facts, the questions of law were not the same, and to allow the appeal *per saltum* they must be identical in both respects.

Farquharson v. *The Imperial Oil Co.*, 30 Can. S.C.R. 188.

Section 77, sub-section 2, of the Judicature Act (Ontario) provides that a party appealing to the Divisional Court instead of the Court of Appeal in a case in which the appellant has an option as to which court he will select, no appeal is open to such party from the Divisional Court to the Court of Appeal. *Held*, that the Supreme Court under this section can in such case grant leave to appeal *per saltum* from the Divisional Court to the Supreme Court of Canada. Referred to in *Ontario Mining Co.* v. *Seybold*, 31 Can. S.C.R. 125, *infra*. But see *Ottawa Electric Co.* v. *Brennan*, *infra*.

Ontario Mining Co. v. *Seybold*, 31 Can. S.C.R. 125.

Held, that the fact that an important question of constitutional law was involved, and that neither party would be satisfied with the judgment of the Court of Appeal, afforded sufficient ground for granting leave to appeal *per saltum*.

S. 42(c). Appeals *per saltum* by leave.

Ottawa Electric v. *Brennan*, 31 Can. S.C.R. 312.

Held, that the case was not one in which leave to appeal *per saltum* could be granted as it was not shewn that there was any right of appeal to the Court of Appeal which was necessary to give jurisdiction.

The decision of a judge on an application for leave to appeal *per saltum* is not subject to review by the full Court. *Vide Kay* v. *Briggs*, 22 L.R., Q.B.D. 343; *Lane* v. *Esdale*, 1891, A.C. 210; *Ex parte Stevenson*, 1892, 1 Q.B.D. 394; *Farquharson* v. *Imperial Oil Co.*, 30 Can. S.C.R. 188, at p. 201.

Applications for leave to appeal *per saltum* are made in the first place to the Registrar sitting as a judge in Chambers, and his decision is subject to review by a judge of the court sitting in Chambers. *Farquharson* v. *Imperial Oil Co.*, 30 Can. S.C.R. 188.

43. Notwithstanding anything in this Act contained the court shall also have jurisdiction as provided in any other Act conferring jurisdiction. R.S., c. 135, s. 25.

Provision for an appeal to the Supreme Court is given by a number of public and private statutes.

In Criminal Cases—The Criminal Code, *infra*, p. 531.

In Exchequer & Admiralty Cases—The Exchequer Court Act. *infra*, p. 479.

In Election Cases—The Controverted Elections Act, *infra*, p. 491.

In Winding-up Cases—The Winding-up Act, *infra*, p. 525.

The Board of Railway Commissioners—The Railway Act, *infra*, p. 517.

44. Except as provided in this Act or in the Act providing for the appeal, an appeal shall lie only from final judgments in actions, suits, causes, matters and other judicial proceedings originally instituted in the Superior Court of the Province of Quebec, or originally instituted in

a superior court in any of the provinces of Canada other than the Province of Quebec. R.S., c. 135, s. 28.

S. 44. Appeals from Superior Court.

"Except as provided in this Act" refers to the exceptions contained in sections 37 and 38, *supra*.

"Or in the Act providing for the appeal." This applies in Election cases, Admiralty cases, etc.

45. No appeal shall lie from any order made in any action, suit, cause, matter or other judicial proceeding made in the exercise of the judicial discretion of the court or judge making the same; but this exception shall not include decrees and decretal orders in actions, suits, causes, matters or other judicial proceedings in equity, or in actions or suits, causes, matters or other judicial proceedings in the nature of suits or proceedings in equity instituted in any superior court. R.S., c. 135, s. 27.

Discretion in cases of new trials.

Section 22 of the original Supreme & Exchequer Courts Act read as follows:—

"When the application for a new trial is upon matters of discretion only, as on the ground that the verdict is against the weight of evidence or otherwise, no appeal to the Supreme Court shall be allowed."

This section was repealed in 1880 by 43 V., s. 4, and the following substituted therefor:—

"In all cases of appeal the Court may in its discretion order a new trial if the ends of justice may seem to require it, although such new trial may be deemed necessary upon the ground that the verdict is against the weight of evidence. Now sec. 52, *infra*, p. 230.

The following cases were decided before the repeal of old section 22:—

Boak v. *Merchants' Marine Ins. Co.*, 1 Can. S.C.R. 110.

Under section 22 of the Supreme & Exchequer Courts Act, no appeal lies from the judgment of a court granting

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a new trial, on the ground that the verdict was against the weight of evidence, that being a matter of discretion.

Vide Moore v. *Connecticut Mutual, supra*, p. 96.

Vide McGowan v. *Mockler*, Cout. Dig. 122.

The following cases were decided after the Amendment of 1880 and before the amendment of 54-55 V. c. 25, s. 2, (1891), which gave an appeal without the limitation that the case must be one in which the trial judge had erred in a matter of law. *Vide* notes to section 38, *supra*.

Eureka Woollen Mills Co. v. *Moss*, 11 Can. S.C.R. 91.

Held, that the Supreme Court will not hear an appeal from a judgment of the court below, in the exercise of its discretion ordering a new trial on the ground that the verdict is against the weight of evidence.

Vide O'Sullivan v. *Lake*, 16 Can. S.C.R. 636.

Barrington v. *Scottish Union*, 18 Can. S.C.R. 615.

On the findings of the jury, the Court of Review refused to enter a verdict for either party, but granted a new trial, and were influenced in coming to this conclusion by the belief that the answer to one of the questions was insufficient to enable it to dispose of the interests of the parties on the findings of the jury as a whole. The Court of Queen's Bench affirmed this judgment. An appeal to the Supreme Court of Canada was quashed. *Held*, per Strong, J.: "The Court of Queen's Bench did what it had a perfect right to do in the exercise of its discretion, without subjecting its judgment to be reviewed on appeal to this Court."

Accident Ins. Co. v. *McLachlan*, 18 Can. S.C.R. 627.

In this case both parties moved before the Court of Review for judgment on the findings of the jury, and the defendant's motion was granted and the action dismissed. On appeal to the Court of Queen's Bench both parties claimed to have judgment entered in their favour on the findings of the jury, but the court rejected both motions, and *suo motu* ordered a new trial. An appeal to the Supreme Court was quashed, the Court holding that the order for a new trial by the court below had been made in

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the exercise of its discretion for the purpose of eliciting further information as to the facts, and that no appeal would lie to the Supreme Court.

Molson v. *Barnard,* 18 Can. S.C.R. 622.

The Court of Queen's Bench reversed the judgment of the Superior Court which quashed a seizure before judgment taken by the plaintiff against the defendant on monies in the hands of a third party. The defendant took proceedings to quash the seizure on various grounds, and succeeded in the Superior Court. In reversing the judgment of the Superior Court the Court of Queen's Bench ordered that the hearing of the petition contesting the seizure should be proceeded with at the same time as the hearing of the main action, and for this purpose directed that the petition should be joined to the said action to be decided at the same time as the merits of the action. Upon a motion to quash an appeal to the Supreme Court, *Held,* that the Court of Queen's Bench in reversing the judgment of the Superior Court did so without adjudicating upon the petition or upon the respondent's right to a seizure before judgment, and simply ordered that the merits of the proceeding and of the action should be tried together, and that the case was not appealable.

Discretion in other matters.

Gladwin v. *Cummings,* Cout. Dig. 88.

Action of replevin to recover 125 barrels of flour. Plaintiffs were indorsees of a bill of lading of the goods, which were held by the defendant as freight agent of the I.C.R. at Truro. The action was begun and the goods were replevied and the writ was served on 9th April, 1881. A default was marked on 25th April, 1881. On 10th Sept., 1881, plaintiffs' attorney issued a writ of inquiry under which damages were assessed under R.S.N.S. (4 ser.) c. 94, s. 56. An order *nisi* to remove the default and let in defendant to defend, was taken out on 11th Oct., 1881, and discharged with costs. The judgment being affirmed on appeal (4 Russ. & Geld. 168). R.S.N.S. (4 ser.) c. 94, s. 65, enacts that it shall be lawful for the court or a judge at any time within one year after final judgment,

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Morris v. *London & Canadian Loan*, 19 Can. S.C.R. 434.

Per Patterson, J.—An order allowing judgment to be entered on a specially endorsed writ, is one in the exercise of judicial discretion, and no appeal lies therefrom.

Maritime Bank v. *Stewart*, 20 Can. S.C.R. 105.

An order having been made by a judge of the High Court of Ontario staying proceedings in an action in Ontario, owing to bankruptcy proceedings then pending in England, this order was affirmed by the Divisional Court and the Court of Appeal.

Held, that this order was not a final judgment from which an appeal would lie to the Supreme Court of Canada.

Held, per Patterson, J., that if it were a final judgment the order plaintiffs wished to get rid of was made in the exercise of judicial discretion as to which section 27 (now section 45) of the Supreme Court Act does not allow an appeal.

McGugan v. *McGugan*, 21 Can. S.C.R. 267.

By R.S.O. (1887) c. 147, s. 42, any person not chargeable as the principal party who is liable to pay or has paid a solicitor's bill of costs may apply to a judge of the High Court or of the County Court for an order of taxation. In an action against school trustees, a ratepayer of the district applied to a judge of the High Court for an order under this section to tax the bill of the solicitor of the plaintiff, who had recovered judgment. The application was refused, but on appeal to the Divisional Court this judgment was reversed (21 O.R. 289). There was no appeal as of right from the latter decision, but on leave to appeal being granted it was reversed and the original judgment restored (19 Ont. App R. 56). *Held*, per Patterson, J. The making or refusing to make the order applied for is a matter of discretion and the case therefore not appealable.

Grant v. *Maclaren*, 23 Can. S.C.R. 310.

The Supreme Court of Canada, on appeal from a decision affirming the report of a referee in a suit to remove

executors and trustees which report disallowed items in accounts previously passed by the Probate Court, will not reconsider the items so dealt with, two courts having previously exercised a judicial discretion as to the amounts, and no question of principle being involved.

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Township of Colchester South v. *Valad*, 24 Can. S.C.R. 622.

In an action by V. against a municipality for damages from injury to property by the negligent construction of a drain, a reference was ordered to an official referee "for inquiry and report pursuant to section 101 of the Judicature Act and rule 552 of the High Court of Justice." The referee reported that the drain was improperly constructed and that V. was entitled to $600 damages. The municipality appealed to the Divisional Court from the report, and the court held that the appeal was too late, no notice having been given within the time required by Con. Rule 848, and refused to extend the time for appealing. A motion for judgment on the report was also made by V. to the court on which it was claimed on behalf of the municipality that the whole case should be gone into upon the evidence, which the court refused to do. *Held*, affirming the decision of the Court of Appeal, that the appeal not having been brought within one month from the date of the report, as required by Cons. Rule 848, it was too late; that the report had to be filed by the party appealing before the appeal could be brought, but the time could not be enlarged by his delay in filing it; and that the refusal to extend the time was an exercise of judicial discretion with which the Supreme Court would not interfere.

Williams v. *Leonard*, 26 Can S.C.R. 406.

The question in issue in this case was the possession of a certain chattel. The plaintiff made title as well by a chattel mortgage as by purchase from the manufacturer. The defendants simply claimed to be a *bonâ fide* purchaser for value, and did not attack in their plea the validity of the chattel mortgage. At the trial the defendants applied to amend by alleging that the chattel mortgage was void under a section of the Bills of Sale Act,

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but the amendment was refused. On appeal the Divisional Court allowed the amendment and their judgment was affirmed by the Court of Appeal. On appeal to the Supreme Court it was held that the order granting leave to amend would not be interfered with whatever opinion the Court might have as to the propriety of amendment, such an order being a matter of procedure within the discretion of the court below.

City of Kingston v. *Drennan*, 27 Can. S.C.R. 46.

An appellate court should not interfere with the discretion exercised by the trial judge in dispensing with notice of action against a municipal corporation guilty of gross negligence as provided by the Ontario Municipal Act in respect to the condition of winter sidewalks. (23 Ont. App. R. 406, affirmed.)

O'Donohoe v. *Bourne*, 27 Can. S.C.R. 654.

After judgment has been entered by default in an action in the High Court of Justice, it is in the discretion of the Master in Chambers to grant or refuse an application by the defendant to have the proceedings re-opened. No appeal lies to the Supreme Court from such a discretionary order.

Smith v. *St. John City Rly. Co.*
Consolidated Electric Co. v. *Atlantic Trust Co.*
Consolidated Electric Co. v. *Pratt*, 28 Can. S.C.R. 603.

It is only when some fundamental principle of justice has been ignored or some other gross error appears that the Supreme Court will interfere with the discretion of provincial courts in awarding or withholding costs.

Lord v. *The Queen*, 31 Can. S.C.R. 165.

This was an appeal from a judgment of the Court of Queen's Bench, Quebec, whereby that court, *ex mero motu*, dismissed the petitioner's appeal from the judgment of the Superior Court, holding that the delay in proceeding with the appeal allowed by law had expired prior to the inscription in appeal and that the court was without jurisdiction to entertain it, and could not acquire any such jurisdiction by consent of parties; and that the order of the

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Lieutenant-Governor in Council waiving the delay and consenting to the appeal being heard was *ultra vires.*

Held, the provisions of articles 1020 and 1209 C.P.Q., limiting the time for inscription and prosecution of appeals to the Court of Queen's Bench, are not conditions precedent to the jurisdiction of the court to hear the appeal and they may therefore be waived by the respondent. *Cimon* v. *The Queen,* 23 Can. S.C.R. 62, referred to. Compare *Park Iron Gate Co.* v. *Coates,* L.R. 5 C.P. 634.

Price v. *Fraser,* 31 Can. S.C.R. 505.

Between the hearing of a case and the rendering of the judgment in the trial court, the defendant died. His solicitor by inadvertence inscribed the case for revision in the name of the deceased defendant. The plaintiffs allowed a term of the Court of Review to pass without noticing the irregularity of the inscription, but, when the case was ripe for hearing on the merits, gave notice of motion to reject the inscription. The executors of the deceased defendant then made a motion for permission to amend the inscription by substituting their names *es qualité* The Court of Review allowed the plaintiffs' motion as to costs only, permitted amendment and subsequently reversed the trial court judgment on the merits. The Court of King's Bench (appeal side) reversed the judgment of the Court of Review on the ground that it had no jurisdiction to allow the amendment and hear the case on its merits and that, consequently, all the orders and judgments given were nullities. *Held,* reversing the judgment appealed from (Q.R. 10 K.B. 511), the Chief Justice and Taschereau, J., dissenting, that the Court of Review had jurisdiction to allow the amendment and that, as there had been no abuse of discretion and no parties prejudiced, the Court of King's Bench should not have interfered.

Porter v. *Pelton,* 33 Can. S.C.R. 449.

The Supreme Court refused to interfere with the discretion of the court below in refusing an amendment to the statement of claim.

And *vide infra,* p. 245. *Fontaine* v. *Payette, infra,* p. 328.

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46. No appeal shall lie to the Supreme Court from any judgment rendered in the Province of Quebec in any action, suit, cause, matter or other judicial proceeding unless the matter in controversy,—

(*a.*) involves the question of the validity of an Act of the Parliament of Canada, or of the legislature of any of the provinces of Canada, or of an ordinance or act of any of the councils or legislative bodies of any of the territories or districts of Canada; or

(*b.*) relates to any fee of office, duty, rent, revenue, or any sum of money payable to His Majesty, or to any title to lands or tenements, annual rents and other matters or things where rights in future might be bound; or

(*c.*) amounts to the sum or value of two thousand dollars.

2. In the Province of Quebec whenever the right to appeal is dependent upon the amount in dispute, such amount shall be understood to be that demanded and not that recovered, if they are different. R.S., c. 135, s. 29:—54-55 V., c. 25, s. 3, 56 V., c. 29, s. 1.

No section of the Supreme & Exchequer Courts Act has caused more difficulty or called for interpretation by the court more frequently than this section, which limits appeals in the Province of Quebec. The section is hoary with age, having its origin in an Act passed by the first Parliament of Lower Canada held at Quebec in 1793, which provides for appeals to His Majesty from the judgments of the Court of Appeals which was then being constituted. These provisions read as follows:—

34 Geo. III., c. 6, s. 30.

"And be it further enacted by the authority aforesaid, that the judgment of the said Court of Appeals of this province shall be final in all cases where the matter in dispute shall not exceed the sum or value of five hundred pounds sterling; but in cases exceeding that sum or value, as well as in all cases where the matter in ques-

tion shall relate to any fee of office, duty, rent, revenue, or any sum or sums of money payable to His Majesty, titles to lands or tenements, annual rents or such like matters or things where the rights in future may be bound, an appeal shall lie to His Majesty in his Privy Council, though the immediate sum or value appealed for be less than five hundred pounds sterling."

This was reproduced in the statutes of 1849 (12 V. c. 37, s. 19); 1860 (C.S.L.C. c. 77, s. 52); 1867 (38 V. c. 11), the first Code of Procedure as article 1178 and now is contained in article 68 C.C.P.

The original Supreme & Exchequer Courts Act did not contain this provision; it was introduced in the amendment of 1879 (42 V. c. 39, s. 8). The object of the amendment was, no doubt, to place appeals to the Supreme Court on substantially the same footing as appeals to the Judicial Committee of the Privy Council from the Court of Queen's Bench.

Notwithstanding the generality of the preceding sections conferring appellate jurisdiction upon the Supreme Court of Canada, no appeal lies from the courts in the Province of Quebec unless the case complies with some one or more of the conditions required to give a right of appeal herein provided, subject, however, to the exceptions contained in section 47, *infra*.

46 (*a*).

Constitutional question involved.

Reed v. *Mousseau*, 8 Can. S.C.R. 408.

In this case the Supreme Court heard an appeal from the Court of Queen's Bench (Quebec) reversing a judgment of the Superior Court making absolute a rule *nisi* for contempt against the prothonotaries of the Superior Court for the District of Montreal, for refusing to receive and fyle an exhibit unaccompanied by a stamp to the amount of ten cents. The case raised the question of the constitutionality of 43-44 V. c. 9 (Quebec) and the Attorney-General for the province obtained leave to intervene.

S. 46 (*a*). Appeals. Quebec. Constitutional questions.

L'Association Pharmaceutique v. *Livernois*, 30 Can. S.C.R. 400.

To an action claiming $325 as penalties for an offence against the Pharmacy Act one plea was that the Act was *ultra vires*. In the courts below the action was dismissed for want of proof of the alleged offence. A motion to quash an appeal to the Supreme Court was refused, the Court holding that if it should be of the opinion that there was error below in the judgment the respondent would still be entitled to a decision on his plea of *ultra vires*, and that an appeal would therefore lie.

L'Association Pharmaceutique v. *Livernois*, 31 Can. S.C.R. 43.

After the decision of the Court in this case (30 Can. S.C.R. 400) and when the appeal came on to be heard on the merits, counsel for respondent stated that he abandoned his plea attacking the jurisdiction of the Provincial Legislature, but the Court held that the appellants could not be deprived of their right to appeal by such withdrawal of the plea of *ultra vires*.

In 1893 by 56 V. c. 29, s. 1, the words in the original section "or such like matters and things where the rights in future might be bound," were changed to read "and other matters and things where the rights in future might be bound. The Court has frequently held (*Bank of Toronto* v. *Le Curé*, 12 Can. S.C.R. 25; *Gilbert* v. *Gilman*, 16 Can. S.C.R. 189; *Sherbrooke* v. *McManamy*, 18 Can. S.C.R. 594; *Verchères* v. *Varennes*, 19 Can. S.C.R. 365; *Larivière* v. *School Commissioners*, 23 Can. S.C.R. 723), that the words "such like matters or things where the rights in future might be bound," must be read as being qualified by the matters and things described in the words immediately preceding in accordance with the legal maxim *noscitur a sociis*.

46 (*b*).

Fee of office, duty, rent, revenue or sum of money payable to His Majesty.

Chagnon v. *Normand*, 16 Can. S.C.R. 661.

In an action in the Province of Quebec to recover

penalties for bribery against a person who was not a candidate, the defendant was condemned to pay $400. *Held*, that even if the effect of the judgment was to disqualify him from holding office under the Crown, it was not a matter relating to a fee of office within this section, in which an appeal to the Supreme Court would lie.

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Darling v. *Ryan*, Cout. Dig. 57.

Motion to quash appeal from the Court of Queen's Bench (Que.) on ground that the amount involved ($222.80) was below $2,000 and that the case did not come within any of the exceptions provided for in 42 V. c. 39, s. 8. Two actions (combined at trial) which constituted the case in appeal, were brought by D., an importer of crockery, against the collector of customs at Montreal for the recovery of difference between 20 and 30 per cent. *ad valorem* duty on value of importations of "printed ware." The Tariff Act of 1879, 42 V. c. 15, Sch. A., imposed 30 per cent. *ad valorem* duty on "earthenware, white granite or iron stoneware, a 'C.C.' or cream-coloured ware," the only enumerated class under which the goods in question could come. At the end of the schedule all unenumerated goods and goods not declared free were subjected to a duty of 20 per cent. The collector insisted upon duty being paid by appellant under the class enumerated as above. D. claimed that they should not be classified, but came under the unenumerated class and should only pay 20 per cent., paid the 30 per cent, and brought the action to recover the difference. The importations in question were in spring and summer of 1883. Judgment was given (Jan., 1884) in favour of defendant and the Queen's Bench dismissed an appeal in May, 1885. In 1884 (47 V. c. 30, s. 2, schedule) Parliament amended the Tariff Act as to earthenware as follows: "Earthenware, decorated, printed or spanged, and all earthenware not elsewhere specified, 30 per cent. *ad valorem*," thus distinctly covering D.'s description of his own importations and declaring such goods subject to 30 per cent., and making it relate back to March, 1884. Counsel contended that if before the Act of 1884 the matter in question was a proper subject of appeal, 42 V. c. 39, s. 8, by reason of its relation to

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a duty or revenue payable to the Crown in respect of which the decision appealed from might affect appellant's future rights, it ceased to be such a case by virtue of the Act of 1884, because that amending Act declared distinctly that from March, 1884, and for the future, the particular class of goods in question was to be subject to a 30 per cent. duty, and that, therefore, appellant's future rights could not be affected. *Held*, 1. That there might have been importations of the same class of goods by D. subsequent to those in question in the appeal and before the amendment of 1884 effected a change, in respect of which the decision in the present cases would bind appellant, and that, therefore, the case in that respect at least would still come within the meaning of 42 Vict. c. 39, s. 8, that is to say, being in respect of a duty payable to the Crown, the decision of which might affect the then future rights of the appellant. 2. That there might be a dispute still as to whether the amending Act of 1884 expressly covered the same class of goods as were in question in this case, in order to decide which the evidence and merits would require to be discussed, and that this should not be discussed on a motion to quash. 3. That if the appellant had a right to appeal, such right could only be taken away by express and clear words, and there was nothing to shew that such right was taken away. Motion refused with $25 costs.

Walsh v. *Heffernan*, 14 Can. S.C.R. 738.

This was a petition to the Superior Court, District of Montreal, of Matthew Walsh, who claimed that he was a member of the St. Bridget Total Abstinence and Benefit Society, a body politic duly incorporated, having its principal office in the City of Montreal; that he had been elected vice-president of the society by the majority of duly qualified votes, but that against his protest certain votes had been received at an election, whereby the defendant had been declared elected first vice-president in place of the petitioner, and that thereby he had been unduly deprived of his office of vice-president of the society, and concluded by asking that a writ issue calling upon the defendant to establish the authority by virtue of which he

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occupied the position of vice-president of the said society, and to have it declared that the defendant had no right to exercise the office and that he should be excluded therefrom.

The petition was dated 17th January, 1885. The proceedings were taken under section 1016 of the old Code which provided that a complaint alleging that a person unlawfully usurps an office should be brought before the Superior Court or a judge thereof, who might order the defendant to be ousted from his office and condemned to pay a fine, or dismiss the complaint with costs and contained no provision that the judgment of the Superior Court should be final and conclusive.

In this case the petition was presented to Mr. Justice Caron, of the Superior Court, who ordered that a writ should issue returnable on a day therein fixed.

The Superior Court dismissed the petition, but this judgment was set aside by the Court of Review. On appeal to the Court of Queen's Bench the judgment in review was set aside and the judgment of the Superior Court reinstated. The petitioner thereupon appealed to the Supreme Court of Canada, but the respondent having moved to quash for want of jurisdiction, his motion was allowed.

In the report of this decision (14 Can. S.C.R. 738) it is said that the "appeal was quashed on motion for want of jurisdiction, the proceedings being by *quo warranto* as to which there is no appeal by the statute." If by this is meant that there is no appeal to the Supreme Court in cases of *quo warranto*, this decision is not an authority for so broad a proposition. All that the decision holds is that there is no appeal from the Court of Queen's Bench in the Province of Quebec in *quo warranto* proceedings.

Decisions after amendment of 56 V. c. 29, s. 1, by which the words "such like matters or things" were changed to "other matters or things."

Larivière v. *Three Rivers*, 23 Can. S.C.R. 723.

A school mistress by her action claimed $1,243 as fees due to her collected by the School Commissioners of Three

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Rivers. The action was dismissed in the court below. An application to allow security in the Supreme Court, refused by the Registrar, on appeal to the Court was affirmed, the Court holding that the position of school-mistress was not an office within the meaning of this section, and that the words "where rights in future might be bound" in sub-section (*b*) section 29, govern the preceding words "fee of office, etc.," affirming *Chagnon* v. *Normand*, 16 Can. S.C.R. 661, and *Gilbert* v. *Gilman*, 16 Can. S.C.R. 189.

46 (*b*).

Title to lands or tenements.

The statute of 34 Geo. III., c. 6, set out *supra*, p. 48, is reproduced in precisely the same language in C.S.L.C., c. 77, s. 52 (1860), and the French version accords with that of the old statute.

In the first Code of 1867 we have a change, and the clause providing for an appeal when title to lands is involved reads:—

"*Lorsqu'il s'agit de droits immobiliers, rentes annuelles, etc., etc.*"

Strange to say, the words "title to lands" are given as the equivalent of these words in the English version of the Code, treating "*droits immobiliers*" as synonymous with "*titre de terres,*" and in the Code as in force to-day in Quebec the words "title to lands" has in the French version the words "*droits immobiliers*" as its equivalent. That they are by no means synonymous has been held by the Supreme Court in the case of *Wineberg* v. *Hampson*, *infra*, p. 182.

In giving judgment the Court said:—

"The appellant in order to sustain his appeal contended that a question of 'real rights' arose in this suit. I cannot find such an expression in the Supreme Court Act." But see *Chamberland* v. *Fortier*, *infra*, p. 183; *McGoey* v. *Leaming*, *infra*, p. 188.

Tax cases.

Bank of Toronto v. *Le Curé, etc.*, 12 Can. S.C.R. 25.

In this case the declaration alleged that the defendant

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was proprietor of certain lands in the plaintiffs' parish; that the property was subject to a tax in favour of the plaintiffs for $165.82 charged thereon while in the possession of the defendant's vendor, a Roman Catholic. By its conclusion the declaration asked that the property might be declared charged with the payment of the said tax and the defendants condemned to pay the same, and in default that the lands might be sold. The Superior Court gave judgment in favour of the plaintiff in the following language: "Déclare les dits immeubles affectés et hypothéqués au paiement de la dite somme de cent soixante et cinq piastres, etc., et condamne la dite défenderesse comme propriétaire, possesseur et détentrice des dits immeubles à les délaisser en justice, pour qu'ils soient vendus par décret au plus offrant et dernier enchérisseur, en la manière ordinaire et accoutumée, sur le curateur qui sera créé au délaissement, pour sur le prix de la dite vente être les dits demandeurs payés de la dite somme de cent soixante et cinq piastres, etc."

This judgment was affirmed by the Court of Queen's Bench and on appeal to the Supreme Court it was held that the case did not fall within any of the provisions of 42 V. c. 29, s. 8 (now section 46 (*b*)), and the appeal was quashed for want of jurisdiction, the Court, per Taschereau, J., saying: "The title to this land is not disputed nor in controversy, nor do the words 'such like matters or things where the rights in future might be bound' support the appeal. The right of the plaintiffs to tax this property is not disputed here, nor is its liability to future taxation in contestation. and the fact that the taxes claimed are payable by instalment some of which may not yet be due, cannot render the case appealable. The present liability of the bank, or rather the lien on this property, is the only matter in controversy."

The defendant filed an admission, that the taxes claimed were based upon a regular roll and that the amount claimed by the action was due by the defendant as proprietor and occupant of the lands mentioned in the declaration, if the exemption claimed in this defence was not allowed by the court.

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Les Commissaires d'Ecoles St. Gabriel v. *Les Soeurs de la Congrégation-Montréal*, 12 Can. S.C.R. 45.

This action was brought to recover the sum of $808.50 for three years' school taxes (1878, 1879, 1880) imposed by the appellants upon certain immovable property owned by the respondents within the limits of the village of St. Gabriel.

The respondents alleged by their defence, that they were an educational institution and that the lands mentioned in appellants' declaration as being their property were exempt from the payment of municipal and school taxes, inasmuch as the said parcels of land were held by the respondents for the objects for which they were established.

By their answer the appellants denied that the property taxed was held by the respondents for educational objects, but contended that the respondents carry on the school for the purposes of deriving an income therefrom. The respondents admitted the truth of the declaration and relied solely upon the exemption pleaded by them.

The judgment of the Superior Court in favour of the defendants was affirmed by the Court of Queen's Bench, but on appeal to the Supreme Court of Canada the appeal was allowed with costs. This judgment was delivered the same day as the *Bank of Toronto* v. *Le Curé, etc.*, 12 Can. S.C.R. 25. It is not clear in what way the Court distinguished these two cases. The amount involved here was under $2,000, and it does not appear to fall within any of the other classes of cases mentioned in old section 29 (now 46).

Wylie v. *Montreal*, 12 Can. S.C.R. 384.

In an action brought by the City of Montreal to recover $408 for taxes, the defence being that the defendants were an educational institution within the meaning of 41 V. c. 6, s. 26 (Q.), and entitled to exemption. The judgment of the Superior Court sustaining the city's contention was affirmed by the Court of Queen's Bench, but was reversed by the Supreme Court.

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Atty.-General of Canada v. *City of Montreal*, 13 Can. S.C.R. 352.

The Government of Canada were lessees of land in the City of Montreal under a lease whereby the lessees covenanted to pay taxes. In an action by the city against the landlord for three years' taxes amounting to $1,832, the Attorney-General of Canada intervened contending that as against the Crown the lands were exempt. This intervention was dismissed by the Superior Court and the judgment affirmed by the Court of Queen's Bench, but was reversed on appeal to the Supreme Court. It is pointed out in the judgment of the majority of the Court that C.S.L.C., c. 4, s. 2, expressly exempted from taxation property such as that in question in the action.

Central Vermont v. *St. Johns*, 14 Can. S.C.R. 288.

The railway company presented a petition to the Superior Court for a writ of injunction restraining the corporation from proceeding to enforce a distress warrant to collect $559,26 claimed to be due from the petitioners for taxes upon the appellant's railway bridge, etc., over the River Richelieu. The petition was opposed by a demurrer and pleas to the merits. The Superior Court held that notwithstanding that the river was a navigable one and its bed and waters under the control of the Federal authority for the purpose of commerce and navigation, nevertheless private constructions erected in the bed of the river were not part of the public domain and were liable to taxation. Upon appeal the Supreme Court of Canada held that the property was not legally liable to taxation and allowed the appeal.

(This judgment was affirmed by the Privy Council, 14 App. Cas. 590.)

Reburn v. *Corporation of Parish of St. Anne*, 15 Can. S.C.R. 92.

By a *procès-verbal* duly homologated, made by the municipal corporation of St. Anne du Bout de l'Isle, a portion of the road fronting the land of appellant was ordered to be improved by raising and widening it. Upon appellant's refusal to do the work the council had it per-

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formed, paid $200 for it, and subsequently sued appellant for this sum. *Held*, per Fournier, Henry and Gwynne, JJ. (Strong and Taschereau, JJ., dissenting, and Ritchie, C.J., passing no opinion on the point), that although the matter in controversy did not amount to $2,000, yet as it related to a charge on the appellant's land whereby his rights in future might be bound, the case was appealable.

In *Toussignant* v. *Nicolet*, 32 Can. S.C.R. 353, it is said that since the decision in *Dubois* v. *Ste. Rose, infra*, this case is no longer a governing authority.

Dubois v. *Village of St. Rose*, 21 Can. S.C.R. 65.

In an action for the recovery of a sum of $262.14, money paid by the respondents for macadam work done on the road fronting upon appellant's land, the work being imposed under a by-law of the respondent corporation, the appellants set up the nullity of the by-law. *Held*, that the future rights which might be bound did not relate to a fee of office, duty, rent, revenue, etc., or to any title to lands or tenements, annual rents and other matters or things where the rights in future might be bound referred to in this section.

Les Ecclesiastiques de St. Sulpice de Montréal v. *City of Montreal*, 16 Can. S.C.R. 399.

In an action brought to recover $361.90, amount of a special assessment for a drain along the property of the defendants, the amount of the taxes was not contested, the defence being that the property was exempt from taxation under 41 V. c. 6, s. 26 (Que.). The Court held that the case was appealable as coming within the words "such like matters or things where the rights in future might be bound," and that if the rate struck was found to be insufficient and another rate imposed, the parties would be bound by the judgment in this case.

McKay v. *Hinchinbrooke*, 24 Can. S.C.R. 55.

Held, that a judgment in an action by a rate payer contesting the validity of a homologated valuation roll, is not a judgment appealable to the Supreme Court of Canada, and does not relate to future rights within the meaning

of section 29 (*b*) of the Supreme & Exchequer Courts Act (now section 46 (*b*)). S. 46 (*b*). Appeals. Quebec. Tax cases.

Stevenson v. *Montreal*, 27 Can. S.C.R. 187.

A by-law was passed for the widening of a street and the necessary expropriation therefor, including the assessment of the properties benefited. Certain proprietors dissatisfied with the assessment, petitioned the Superior Court to set aside the assessment roll. The petition was dismissed by the Superior Court and this judgment affirmed by the Court of Queen's Bench. Upon an application to allow security for an appeal to the Supreme Court referred by the Registrar to a judge of the court, it was held that the question in this case was whether certain proprietors should bear a greater or lesser burden of taxation not only as the result of expropriation which had already been made, but also as the result of expropriation to be made; that the appeal would settle the liability of the property of the petitioners both as regards past and future assessments, and that although no question of title to lands within the meaning of these words used in the section arose, yet it fell within the words "other matters or things where rights in future might be bound," and that the rights questioned, if not real rights were analogous to real rights, and therefore within the contemplation of the statute.

Followed *Stevenson* v. *City of Montreal*, 27 Can. S.C.R. 593.

Murray v. *Westmount*, 27 Can. S.C.R. 579.

In this case the defendant corporation passed a by-law for widening a certain street and that the cost of expropriating the lands for that purpose should be raised in part by a special tax levied upon the properties abutting upon the street, and the balance by the other properties benefited by the expropriation. The plaintiff, a property owner, affected by the by-law, brought an action to have the by-law declared null and void. The plaintiff's action was dismissed by the Superior Court and this judgment was affirmed by the Court of Queen's Bench. A motion to quash an appeal to the Supreme Court was dismissed, the

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Court holding that the controversy related to a title to land and the case was therefore appealable.

Vide Sherbrooke v. *McManamy, supra,* p. 142.

White v. *City of Montreal,* 29 Can. S.C.R. 677.

By his petition to the Superior Court the appellant alleged that an assessment roll prepared in connection with the widening of a street was irregular, illegal and void and ought to be annulled and set aside. This petition was dismissed by the Superior Court and this judgment affirmed by the Court of Review, but the Supreme Court reversed these judgments and quashed the assessment and declared it to be null and void.

City of Montreal v. *Belanger,* 30 Can. S.C.R. 574.

A petition to set aside an assessment roll for the cost of widening a street dismissed by the Superior Court was reversed by the Court of Queen's Bench and restored by the Supreme Court of Canada.

Toussignant v. *Nicolet,* 32 Can. S.C.R. 353.

This was an action for annulment of a *procès-verbal* establishing a public highway in the County of Nicolet, providing for the opening of the road and charging the lands of the appellants with the expenses of construction amounting to $2,000, and of maintenance of the road estimated at about $400 per year. The respondent having moved to quash, *held*:—

"The constant jurisprudence of this Court is against our right to entertain the appeal. The fact that the *procès-verbal* attacked by the appellants action may have the result to put upon them the cost of the work in question, alleged to be over $2,000, does not make the controversy one of $2,000. There is no pecuniary amount in controversy. In other words, there is no controversy as to a pecuniary amount or of a pecuniary nature. It is settled law that neither the probative force of a judgment, nor its collateral effects, nor any contingent loss that a party may suffer by reason of a judgment are to be taken into consideration when our jurisdiction depends upon the pecuniary amount or upon any of the subjects mentioned in section 29 of the Supreme

Court Act. *Fréchette* v. *Simmoneau*, 31 Can. S.C.R. 12, and cases there cited. Compare *Ross* v. *Prentiss*, 3 How. 771. And there is here no title to lands or other matters or things of that nature, *ejusdem generis*, where the rights in future might be bound that the controversy relates to as there words of that section of the Act have been authoritatively construed. . . The fact that the lands of the appellants will be assessed for the cost of the work does not make the controversy one relating to the title to these lands nor to anything of that nature. That is the consequence of the judgment, but that is not the judgment." Followed in *Leroux* v. *Ste. Justine*, 37 Can. S.C.R. 321.

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City of Montreal v. *Land & Loan Co.*, 34 Can. S.C.R. 270.

In this case the respondents, together with other land owners, were taxed under a special assessment, and the sheriff was directed to levy upon respondents' lands amount of this assessment of $316.88. The value of the respondents' lands seized exceeded $2,000 and value of the lands assessed exceeded $50,000. The respondents filed an opposition to the seizure which was maintained by the Superior Court and affirmed by the Court of King's Bench. An appeal to the Supreme Court was quashed, the Court holding that the amount in controversy was $316; that the whole amount of the roll was not in controversy; that the value of the land seized was not the amount in controversy, nor did the controversy relate to any title to lands, and that neither the collateral effect of the judgment, nor any loss that a party might suffer by reason of the judgment, should be taken into consideration.

City of Montreal v. *Cantin*, 35 Can. S.C.R. 223.

In this case the appellants caused the sheriff to seize certain lands belonging to respondent for the recovery of a special assessment of $24,000. The respondents, by an opposition, asked the annulment of the seizure on the ground that the appellants' claim was prescribed. The opposition was maintained by the Superior Court and Court of King's Bench and finally by the Supreme Court.

Servitudes.

A servitude is defined as follows: Article 499 C.C.

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(Que.): "A real servitude is a charge on one real estate for the benefit of another, belonging to a different proprietor."

Decisions before 56 V. c. 29, s. 1, when the section read "or such like matters," etc.

Wheeler v. *Black*, 14 Can. S.C.R. 242.

In 1843, B. *et al.* (the plaintiffs) by deed obtained the right of draining their property by passing a drain through an alley left open between two houses on another lot in the town of St. Johns. In 1880, W. *et al.* (defendants) built a barn covering the alley under which the drain was constructed and used it to store hay, etc., the flooring being loose and the barn resting on wooden posts. In 1881 the drain needing repairs, the plaintiffs brought an action *confessoria* against defendants as proprietors of the servient land, praying that they (plaintiffs) may be declared to have a right to the servitude constituted by the deed of 1843, and that the defendants be ordered to demolish such a portion of the barn as diminished the use of the drain, and rendered its exercise more inconvenient, and claiming damages; the defendants pleaded *inter alia* that there was no change of condition of the servient land contrary to law, and prayed for the dismissal of plaintiffs' action.

Held, Gwynne, J., dissenting, that by the building of the barn in question, the plaintiffs' means of access to the drain had been materially interfered with and rendered more expensive, and therefore that the judgment of the court below ordering the defendants to demolish a portion of their barn covering the said drain, in order to allow the plaintiffs to repair the drain as easily as they might have done in 1843, when said drain was not covered, and to pay $50 damages, should be affirmed.

Wineberg v. *Hampson*, 19 Can. S.C.R. 369.

The parties owned adjoining properties separated by a lane. The drainage of the defendant's houses was carried by a French drain of loose stones down the land into the city sewers. The plaintiff claimed his cellars were flooded from the French drain and claimed that the

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defendant should cease to use it in such manner as to be a source of danger to his property. The defendant alleged that if water flooded the plaintiff's cellars it must come from the natural flow of water from the higher to the lower ground excepting through fissures in the rocks, a servitude to which all like properties were liable. A report of experts in favour of the plaintiff was adopted by the Superior Court and affirmed by the Court of Queen's Bench. A motion to quash an appeal to the Supreme Court was allowed, the Court holding that the controversy did not relate to title to lands or such like matters or things where rights in future might be bound, and that the fact that a question of a right of servitude arose would not give jurisdiction; that the words "title to lands" are only applicable in a case where a title to the property or a right to the title are in question.

Macdonald v. *Ferdais*, 22 Can. S.C.R. 260.

The respondent claimed a right of way over part of a lot owned by one of the appellants and which he had enjoyed for some years. The plaintiff having been prevented from using the road by one of the appellants, brought an action (*confessoire*). The Superior Court maintained the plaintiff's claim as to the right of way. This judgment was affirmed by the Court of Queen's Bench, and upon appeal thereto by the Supreme Court of Canada. The preceding case was not cited.

After 56 V. c. 29, s. 1, by which the words "or such like matters" were changed to "and other matters."

Chamberland v. *Fortier*, 23 Can. S.C.R. 371.

This was an action to have a certain lot of land declared free from all servitude of right of way in favour of the defendant. The Supreme Court upon a motion to quash an appeal from the Court of Queen's Bench held that since the amendment 56 V. c. 29, s. 1, which altered section 29 of the Act by substituting for the words "such like matters and things where the rights in future might be bound" to "and other matters or things," etc., an action such as this is now appealable to the Supreme Court.

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Berthier v. *Denis*, 27 Can. S.C.R. 147.

In 1768 the Seigneur of Berthier granted an island called "l'Ile du Milieu," lying adjacent to the "Common of Berthier" to M., his heirs and assigns (ses hoirs et ayants cause), in consideration of certain fixed annual payments and subject to the following stipulation: "En outre à condition qu'il fera à ses frais, s'il le juge nécessaire, une clôture bonne et valable, à l'épreuve des animaux de la Commune, sans aucun recours ni garantie à cet égard de la part de sieur seigneur, lesquelles conditions ont été acceptees du dit sieur preneur, pour sureté de quoi il a hypothéqué tous ses biens présents et à venir, et spécialement la dite isle qui y demeure affectée par privilège, une obligation ne dérogeant à l'autre."

Held, reversing the decision of the Court of Queen's Bench, Strong, C.J., dissenting, that the clause quoted did not impose merely a personal obligation on the grantee, but created a real charge or servitude upon l'Ile du Milieu for the benefit of the "Common of Berthier."

Riou v. *Riou*, 28 Can. S.C.R. 53.

In 1831 the owners of several contiguous farms purchased a roadway over adjacent lands to reach their cultivated fields beyond a steep mountain which crossed their properties, and by a clause inserted in the deed, to which they all were parties, they respectively agreed "to furnish roads upon their respective lands to go and come by the above purchased road for the cultivation of their lands, and that they would maintain these roads and make all necessary fences and gates at the common expense of themselves, their heirs and assigns." Prior to this deed and for some time afterwards, the use of a road from the river front to a public highway at some distance farther back, had been tolerated by the plaintiff and his *auteurs*, across a portion of his farm which did not lie between the road so purchased over the spur of the mountain, and the nearest point on the boundary of the defendant's land, but the latter claimed the right to continue to use the way.

In an action (*négatoire*) to prohibit further use of the way;

Held, affirming the decision of the Court of Queen's

Bench that there was no title in writing sufficient to establish a servitude across the plaintiff's land over the roadway so permitted by mere tolerance; that the effect of the agreement between the purchasers was merely to establish servitudes across their respective lands so far as might be necessary to give each of the owners access to the road so purchased from the nearest practicable point of their respective lands across intervening properties of the others for the purpose of the cultivation of their lands beyond the mountain.

La france v. *Lafontaine*, 30 Can. S.C.R. 20.

The appellants claimed by an action *petitoire* to be proprietors of certain lands, the deed to them conveying the water power in the river in front of the land conveyed. The respondent was riparian owner of land on a lower level and had been permitted by the appellants for a number of years to take water necessary to operate his mill, and did not deny the appellants' right of property in the land, but denied, however, that they had any exclusive property free of a servitude in favour of the respondent in respect to the water power. The Supreme Court of Canada affirmed the judgment of the Court of Queen's Bench, and dismissed the appeal.

Title to lands, etc., generally.

Before 56 V. c. 29, s. 1, when the statute read "or such like matters," etc.

Bourget v. *Blanchard*, 29th November, 1882.

Bourget, the plaintiff, obtained a judgment in the Superior Court of Quebec against the defendants for a sum of $723, and issued an execution therefor against the defendants' immoveable property, in virtue of which a certain lot and building were seized. To this seizure the defendants filed an opposition on the ground that their late father's will, under which they held this property, contained a clause prohibiting them to alienate it. To this opposition Bourget filed a contestation, but the Superior Court dismissed this contestation, and maintained the defendants' opposition, holding the prohibition to alienate

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in the said will legal and valid, and quashing the plaintiff's seizure of the property. The plaintiff, Bourget, appealed from that judgment to the Court of Queen's Bench, but was again unsuccessful and his appeal was dismissed.

He then applied to Mr. Justice Tessier, of the Q.B., in Chambers, for leave to appeal to the Supreme Court of Canada, but was refused, on the ground that an appeal would not lie in such a case, under section 8 of the S.C. Am. Act, 1879. (See 9 Q.L.R. 262.)

The plaintiff then made a motion in the Supreme Court of Canada, asking leave to appeal from the judgment of the Court of Queen's Bench (appeal side), and praying that the order of Mr. Justice Tessier be rescinded, and that the said judge, or any other judge of the said Court of Queen's Bench, be ordered to receive security.

Held, that the Supreme Court had no jurisdiction to grant the conclusions of the motion, even if the appellant had a right to appeal in such a case.

Klock v. *Chamberlain,* 15 Can. S.C.R. 325.

The Court exercised jurisdiction where the matter in dispute was whether a certain conveyance was intended to be an absolute *bonâ fide* sale of lands or was simulated and only intended to operate by way of security for debts of the plaintiff's husband. But see *Fréchette* v. *Simmoneau,* 31 Can. S.C.R. 12 (*infra,* page 189).

Blachford v. *McBain,* 19 Can. S.C.R. 42.

In this case the plaintiff had leased certain lands to the defendant for one year from 1st May, 1888, at a rental of $138, but refused to deliver up possession to the landlord at the expiration of the term, alleging a title in herself by virtue of a verbal agreement for sale between plaintiff and one M. and a further agreement between M. and the defendant. The plaintiff brought an action of ejectment in the Circuit Court. This action of the plaintiff was dismissed by the Circuit Court upon exception to the form inasmuch as the writ and declaration did not disclose or state the occupation or quality of the plaintiff as required on pain of nullity, reserving the right to plaintiff to bring another action for the same cause.

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Article 887 of the Code of Civil Procedure provides that actions arising from the relation of lessor and lessee are instituted either in the Superior Court or the Circuit Court according to the value or the amount of the rent or the amount of the damages, and article 1105 provides that the Circuit Court has jurisdiction in cases between lessors and lessees, whenever the rent or the annual value or the amount of the damages claimed does not exceed $200.

The plaintiff then instituted his action in the Superior Court asking that the lease should be declared to have terminated and appellant ordered to give him possession, and be condemned to pay $46 rent, and the judge of first instance dismissed the action holding that the Superior Court had no jurisdiction, but only the Circuit Court as the action was brought to resiliate or rescind the lease. The Court of Review reversed this judgment, holding that the action was brought to obtain possession of the immoveable and not to resiliate the lease and consequently there was jurisdiction. The Court of Queen's Bench reversed the Court of Review and re-instated the judgment of court of first instance. On appeal to the Supreme Court it was held that the question of the jurisdiction of the Supreme Court did not depend in any way upon the articles of the Code, but solely upon sections 24, 28 and 29 of the Supreme Court Act, and that by the pleadings the matter in controversy clearly related to title to lands and that rights in future would be bound. Strong, J., dissenting.

The plaintiff then instituted a new action in the Superior Court which was dismissed by the trial judge on the ground that the jurisdiction was solely in the Circuit Court. This was reversed by the Court of Review, but re-instated by the Court of Queen's Bench. The plaintiff's claim in the Supreme Court is stated by Mr. Justice Taschereau in this case, reported in 20 Can. S.C.R. 269, at p. 272, as follows:—

"L'action de l'appelant est pour obtenir la possession d'un certain immeuble par lui loué à raison de $138.00 par an à l'intimée, qui en retient la possession illégalement, malgré que le bail soit expiré. Il y joint une demande pour $46.00 valeur d'après le bail même, de cette occupation illégale, et une saisie-gagerie."

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Emerald Phosphate Co. v. *Anglo-Continental*, 21 Can. S.C.R. 422.

In this case the appellants and respondents were owners of adjoining lots numbered 19 and 18 respectively. The appellants alleging that the respondents had trespassed on their lot 19, took proceedings (changed now by the new Code) by petition to obtain a writ of injunction restraining the respondents from trespassing and mining upon lot 19. The respondents opposed the proceedings, alleging that all their work was done on their own lot 18. Upon issue joined and evidence taken, the Superior Court maintained the writ of injunction. The Court of Appeal held the proper proceedings should have been by an action *en bornage*, and an injunction did not lie, and set aside the judgment below. On motion to quash an appeal to the Supreme Court, it was held that there was no controversy between the parties as to their respective titles. The cause of litigation was the boundary between their lots, and that under the laws of the Province of Quebec, the right to the title to this lot or to the possesison thereof could not be determined in proceedings for a writ of injunction; that no judgment either *au possessoire* or *au petitoire* could be given in such an action; that no title to land was in issue and no appeal would lie. (See, however, *Delisle* v. *Arcand*, 36 Can. S.C.R. 23.)

After 56 V. c. 29, s. 1, when the words "or such like matters" were changed to "and other matters," etc.

McGoey v. *Leamy*, 27 Can. S.C.R. 193.

The parties executed a deed for the purpose of settling the boundary between contiguous lands of which they were respectively proprietors, and named a provincial surveyor as their referee to run the line. The line thus run being disputed, an action was brought to have the line declared the true boundary, and to revendicate a disputed strip of land lying upon the plaintiff's side of the line. *Held*, that an appeal would lie to the Supreme Court, although the action was not actually in the form of an action *en bornage*, as the plaintiff sought such relief as is usually granted in such cases, and that this was a con-

troversy involving questions of "title to lands or tenements, annual rents or other matters or things where rights in future may be bound."

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Delorme v. *Cusson*, 28 Can. S.C.R. 66.

In this case the defendant (appellant) in good faith when erecting a valuable building upon his own land, through the mutual mistake of both himself and his neighbour, caused his wall to encroach slightly upon the latter's land. A motion to quash an appeal to the Supreme Court on the ground that the action was possessory in its nature and did not involve any question of title to lands was dismissed, the Court saying: "Nous n'hésitons pas à décider qu'il s'agit ici du titre à un terrain indépendammant du titre à la nue propriété, qui n'est pas contesté."

Cully v. *Ferdais*, 30 Can. S.C.R. 330.

The respondent, in execution of a judgment of the Superior Court in an action of *Macdonald* v. *Ferdais*, issued a writ of possession ordering the sheriff to put him in possession of a road described in the judgment. The appellant filed an opposition to the writ of execution alleging that he had delivered to the respondent a right of way over his land though not the one described in the judgment, and this had been accepted by the respondent as a due compliance with the judgment. The opposition was maintained by the Superior Court, but set aside by the Court of Queen's Bench. An appeal to the Supreme Court was quashed, the Court holding that this was merely a contestation upon the execution of a judgment and no rights relating to land were in controversy. *Held*, further, that the case was not free from doubt; that the right to appeal was not clear, and the Court would not assume jurisdiction in a doubtful case.

Fréchette v. *Simmoneau*, 31 Can. S.C.R. 12.

In this case the plaintiff was the lessee and the defendant, respondent, the lessor in a lease for a term of years. The action was brought to have it declared that the deed was simulated and the appellant was always the owner of the property mentioned in the lease. The Superior Court

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gave judgment for the plaintiff, but this was reversed by the Court of Queen's Bench on the ground that the court below erred in holding that the plaintiff had made a *commencement de preuve par écrit* which let in parol evidence to contradict the written lease.

A motion to quash an appeal to the Supreme Court was granted, the Court holding that the title to the ownership of the property leased was not the matter directly in controversy, and there was no decision of the Court of Queen's Bench on any such question.

Davis v. *Roy*, 33 Can. S.C.R. 345.

In a possessory action claiming $200 damages, the defendant (appellant) admitted plaintiff's title, but claimed to retain possession as tenant. The trial judge dismissed the possessory conclusions, but gave judgment for $200 rent of the premises in question. An appeal to the Supreme Court was quashed, as nothing was in question but a personal condemnation to pay $200.

Attorney-General v. *Scott*, 34 Can. S.C.R. 282.

An action *au petitoire* was brought by the City of Hull against the respondents claiming certain real property which the Government of Quebec had sold to the city for the sum of $1,000. The Attorney-General of Quebec was permitted to intervene and take up the *fait et cause* of the plaintiffs. *Held*, that an appeal would lie notwithstanding that the liability of the intervenant might merely be for the return of the $1,000 as the sole point in issue was the title to the lands in question.

Hull City v. *Scott*, 34 Can. S.C.R. 617.

Where, in an action *au pétitoire* and *en bornage*, the question as to title has been finally settled, a subsequent order defining the manner in which the boundary line between the respective properties shall be established is not appealable to the Supreme Court of Canada. *Cully* v. *Ferdais*, 30 Can. S.C.R. 330, followed.

Delisle v. *Arcand*, 36 Can. S.C.R. 23.

The action was brought *au possessoire* to eject the defendant from the possession of a parcel of land of which

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the plaintiff alleged he was the owner. The Superior Court maintained the plaintiff's action, but this decision was reversed by the Court of King's Bench. In the Supreme Court a motion to quash was dismissed, the Court holding that the uniform jurisprudence of the Supreme Court was to entertain such appeals, the reason being that possessory actions always involve, in a secondary manner, the title to lands.

Carrier v. *Sirois*, 36 Can. S.C.R. 221.

In an action for the price of real estate sold for warranty a plea alleging troubles and fear of eviction under a prior hypothec to secure rent charges on the land does not raise questions affecting the title nor involving future rights so far as to give the Supreme Court of Canada jurisdiction to entertain an appeal.

G. T. Rly Co. v. *Perrault*, 36 Can. S.C.R. 671.

Orders directing the establishment of farm crossings over railways subject to "The Railway Act, 1903," are exclusively within the jurisdiction of the Board of Railway Commissioners for Canada.

The right claimed by the plaintiff's action, instituted in 1904, to have a farm crossing established and maintained by the railway company cannot be enforced under the provisions of the Act, 16 V. c. 37 (Can.), incorporating the Grand Trunk Railway Company of Canada.

Judgment appealed from reversed, Idington, J., dissenting in regard to damages and costs.

An application to have the appeal quashed on the grounds that the cost of the establishing the crossing demanded together with the damages sought to be recovered by the plaintiff would amount to less than $2,000 and that the case did not come within the provisions of the Supreme Court Act permitting appeals from the Province of Quebec was dismissed.

46 (*b*)—*Title to Lands.*

Tolls.

Before 56 V. c. 29, s. 1, when the statute read "or such like matter." etc.

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Galarneau v. *Guilbault*, 16 Can. S.C.R. 579.

The plaintiffs had constructed a toll bridge which was destroyed and during its reconstruction the plaintiffs furnished the public with a ferry. The defendants built a temporary bridge for the public. In an action claiming $1,000 damages and demolition of the bridge, the Superior Court dismissed plaintiffs' action which was affirmed by the Court of Queen's Bench, appeal side (Quebec). Upon an appeal to the Supreme Court an application to quash appeal for want of jurisdiction was dismissed on the ground that defence set up to the action had the effect of placing the plaintiffs' title in question and rendered the case appealable as involving a question of the title to an immoveable, and that the case clearly fell under the words "in any matter which relates to any title to lands or tenements where the rights in future might be bound," and was accordingly appealable to this Court. *Vide* judgment Fournier, J., p. 589, in which Strong and Taschereau, JJ., concurred.

Corporation of Aubert-Gallion v. *Roy*, 21 Can. S.C.R. 456.

The respondent constructed a toll bridge over the Chaudière River under special authority of a statute of the Province of Quebec which gave him exclusive rights for 30 years. The appellants subsequently passed a by-law to erect a toll bridge in close proximity to the former and thereupon the respondent obtained on petition a writ of injunction, and upon the issues joined the Superior Court upheld the by-law and dismissed the writ. The Court of Queen's Bench reversed this judgment. An appeal to the Supreme Court was heard on the merits.

Corporation of St. Joachim v. *Pointe Claire Turnpike Co.*, 24 Can. S.C.R. 486.

In this case the municipal corporation brought an action against the Turnpike Co. in which by its declaration the plaintiff asked to have it declared that the defendant had no right to operate a toll gate in the limits of the municipality; that the appellant might be ordered to cease demanding tolls, to cease operating the toll gate, to

demolish the gate and in default that the plaintiffs be authorized to do so. This was not a proceeding by petition for a writ of injunction, although analogous relief was prayed for. The Superior Court gave judgment in favour of plaintiffs, which was reversed by the Court of Queen's Bench. Upon the application in the Supreme Court to allow the security for the appeal, the Registrar, by his order approving of the bond, required the respondent to move to quash at the then next session of the Court. This motion having been made *in limine* at the hearing the Court said: "As we are of the opinion that we should dismiss the appeal, we assume jurisdiction without determining that question, as we have often done in such cases, and as the Privy Council has done in many instances, amongst others, in *Braid* v. *The Great Western Rly. Co.*, 1 Moo. P.C. 101."

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Rouleau v. *Pouliot*, 36 Can. S.C.R. 26.

The plaintiff's action was for $1,000 for damages for infringement of his toll bridge privileges, in virtue of the Act 58 Geo. III. c. 20 (L.C.), by the construction of another bridge within the limit reserved, and for the demolition of the bridge, etc. The judgment appealed from dismissed the action. On a motion to quash the appeal; *Held*, that the matter in controversy affected future rights and consequently an appeal would lie to the Supreme Court of Canada. *Galarneau* v. *Guilbault*, 16 Can. S.C.R. 579, and *Chamberland* v. *Fortier*, 23 Can. S.C.R. 371, followed.

Vide Toussignant v. *Nicolet* (*supra*, page 180); *Verchères* v. *Varennes* (*supra*, page 143); *Flatt* v. *Ferland* (*infra*, page 202); *Stevenson* v. *Montreal* (*supra*, page 179); *Bourget* v. *Blanchard* (*supra*, page 185); *Champoux* v. *Lapierre* (*infra*, page 197); *Gendron* v. *McDougall* (*infra*, page 198).

Annual rents.

Rodier v. *Lapierre*, 21 Can. S.C.R. 69.

The appellant was entitled to recover under the will of her father, of which her mother, the defendant, was the executrix, a monthly allowance of $100, which had been

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increased to $300 per month by an Act of the Legislature of the Province of Quebec. The defendant having paid the additional allowance for one month refused to pay it for the succeeding month, and thereupon the plaintiff brought her action to recover the $200, and her declaration made no claim for any other relief. An appeal to the Supreme Court was quashed, the Court holding that the words "future rights which might be bound" referred to in section 29 (now 46), are governed by the preceding words of the clause, and that the words "annual rents" in that section mean ground rents (rentes foncières) and not an annuity or any other like charges or obligations.

Future rights.

Beaubien v. *Bernatchez*, Cout. Dig. 57.

D. entered into an agreement with the defendant and others whereby they agreed to furnish for 20 years all the milk of their cows to D. to be manufactured into cheese, at a percentage rate, at his factory, of which the plaintiff subsequently became proprietor and vested with all the rights of D. The defendant, among others, contrary to the agreement, sold his milk to an opposition factory, whereupon the plaintiff sued for damages in the circuit court. The action was evoked on the ground that future rights were in question, and the Superior Court gave plaintiff $8.51 damages for the breach of the agreement. The Court of Queen's Bench having reversed the judgment and dismissed the action, plaintiff applied to a judge of that court for leave to appeal to the Supreme Court, who refused on the ground that the future rights were limited, and that multiplied by their duration they would not reach the amount required for an appeal. On further application to Gwynne, J., of the Supreme Court in Chambers, *Held*, that the case was similar to one of a contract for payment of a sum by instalments to an amount of $170.20 in all, and also that it did not come within the meaning of "rights in future" as used in section 8 of the Supreme Court Amendment Act of 1879 (now section 46), and an appeal did not lie to the Supreme Court of Canada.

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Rattray v. *Larue*, 15 Can. S.C.R. 102.

In this case the Supreme Court heard an appeal from the judgment of the Court of Queen's Bench, appeal side (Quebec), reversing the judgment of the Superior Court which maintained a demurrer to an intervention filed by the respondent as tutor *ad hoc* to minor children.

Query: Whether in view of the later decisions there was jurisdiction in this case to hear the appeal.

O'Dell v. *Gregory*, 24 Can. S.C.R. 661, *infra*, p. 203; *Talbot* v. *Guilmartin*, 30 Can. S.C.R. 482, *infra*, p. 205; *Noel* v. *Chevrefils*, 30 Can. S.C.R. 327, *infra*, p. 205.

Gilbert v. *Gilman*, 16 Can. S.C.R. 189.

In an action for $1,333.36, a balance of one of several money payments of $2,000 each, payable by defendant to plaintiff annually, *Held*, that the words "such like matters or things where the rights in future might be bound" in section 29 (now 46) are governed by the preceding words, that the doctrine *noscitur a sociis* applied, and that the future rights to be bound must relate to some or one of the matters or things previously specified in the sub-section, namely, to a fee of office, duty, rent, revenue or sum of money payable to Her Majesty or to some title to lands or tenements or to some like matter or thing. Appeal quashed.

Dionne v. *The Queen*, 24 Can. S.C.R. 451.

The suppliant by petition of right claimed from the Government of the Province of Quebec to have set aside a surrender of his pension which he had made in consideration of the sum of $382, the pension entitling the suppliant to $21.33 per month for his life, and half this sum to his wife during her widowhood. An appeal to the Supreme Court from the Superior Court in Review was allowed.

In this appeal no question of jurisdiction was raised.

Query: If an appeal would lie in view of *Macdonald* v. *Galivan*, *infra*, p. 196, and *Raphael* v. *McLaren*, *infra*.

Raphael v. *McLaren*, 27 Can. S.C.R. 319.

Held, that the classes of matters which are made appealable to the Supreme Court of Canada under the provisions

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of section 29, sub-section (*b*) of the Supreme and Exchequer Courts Act, as amended by 56 V. c. 29 (now 46), do not include future rights which are merely pecuniary in their nature and do not affect rights to or in real property or rights analagous to interests in real property. *Rodier* v. *Lapierre*, 21 Can. S.C.R. 69, and *O'Dell* v. *Gregory*, 24 Can. S.C.R. 661, followed.

Macdonald v. *Galivan*, 28 Can. S.C.R. 258.

This was an action "en declaration de paternité," claiming from defendant a specific monthly allowance for the support of the infant. The court below held that this support under ordinary circumstances would cease when the child attained 14 years of age, and if this were so the amount involved would be under $2,000. The appellant contended that in the possible event of the child proving to be an invalid or a cripple, the support might be required for an indefinite period and amount to more than $2,000. *Held*, that even if more than $2,000 might under certain contingencies be involved, an appeal would not lie, following *Rodier* v. *Lapierre*, 21 Can. S.C.R. 69, *supra*, p. 193, and that the attempt to rest the claim under the clause as to "future rights" could not prevail in view of *O'Dell* v. *Gregory*, 24 Can. S.C.R. 661, *infra*, p. 203.

Banque du Peuple v. *Trottier*, 28 Can. S.C.R. 422.

A bank had granted a pension to a former cashier as a retiring allowance at the rate of $3.000 per annum for five years, and at $2,000 thereafter. The cashier assigned his claim for pension to the plaintiff, who sued to recover seven monthly payments amounting to $1,166.69. The plaintiff recovered judgment in the Superior Court which was affirmed in the Court of Review. A motion to quash an appeal to the Supreme Court was allowed, the Court holding that this was not a case of future rights within the meaning of this section, in which an appeal would lie.

Vide Sherbrooke v. *McManamy*, *supra*, p. 142; *Dubois* v. *Ste Rose*, *supra*, p. 178; *Chamberland* v. *Fortier*, *supra*, p. 183; *McGoey* v. *Leamy*, *supra*, p. 188; *Ecclesiastiques of St. Sulpice* v. *Montreal*, *supra*, p. 178; *Macdonald* v. *Galivan*, *supra*, p. 196; *Waters* v. *Manigault*, *infra*, p. 217;

Lapointe v. *Montreal Police Society*, 35 Can. S.C.R. 5; *Winteler* v. *Davidson*, 34 Can. S.C.R. 274; *Chagnon* v. *Normand*, 16 Can S.C.R. 661; *Bank of Toronto* v. *Le Curè, etc.*, 12 Can. S.C.R. 25; *Larivière* v. *Three Rivers*, 23 Can. S.C.R. 723.

46 (*c*)—$2,000 *involved—cases generally.*

Value established by affidavit.

Dreschell v. *Auer Incandescent Light Mfg. Co.*, 28 Can. S.C.R. 268.

On a motion to quash an appeal where the respondents filed affidavits stating that the amount in controversy was less than the amount fixed by the statute as necessary to give jurisdiction to the appellate court, and affidavits were also filed by the appellants shewing that the amount in controversy was sufficient to give jurisdiction under the statute, the motion to quash was dismissed, but the appellants were ordered to pay the costs as the jurisdiction of the Court to hear the appeal did not appear until the filing of the appellants' affidavits in answer to the motion.

Champoux v. *Lapierre*, Cout. Dig. 56.

Contestation on opposition by respondent to a seizure of lands by appellant on a judgment for $640. The opposition alleged that respondent was a creditor of defendant for $31,000 and asked that seizure be annulled on the ground that by agreement of 17th October, 1876, no property of the defendant should be sold without the respondent's consent. Defendant was a building society, and respondent alleged by appellant to be a director had become a party to and bound by the agreement. The opposition was maintained by the Superior Court and by the majority of the Court of Queen's Bench. *Held*, that the appeal did not come within any of the cases mentioned in 42 V. c. 39, s. 8, providing for appeals from the Province of Quebec (now 46). The demand for $640; the opposition was not for any particular sum and did not ask for the payment of the debt of $31,000, but attacked only the seizure for $640 and sought to interfere with the execution of a judgment for that sum;

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the amount in dispute therefore was this $640, and the question of jurisdiction was governed by this amount and not by the value of property seized, although such value exceeded the sum of $2,000. Henry, J., dissented. Appeal quashed for want of jurisdiction, but without costs, the objection having been raised by the Court.

McCorkill v. *Knight*, Cout. Dig. 56.

The appellant was allowed to shew by affidavit that the amount in dispute was over $2,000.

Muir v. *Carter; Holmes v. Carter*, 16 Can. S.C.R. 473, Cass. Dig. 407.

Where the matter in controversy is bank shares, their actual value at the time of the institution of the action and not their par value will determine the right of appeal under section 29, Supreme and Exchequer Courts Act (now 46) and the actual value of such shares may be shewn by affidavit.

Gendron v. *McDougall*, 4th March, 1885.

The appellants, being creditors of the late Isaac Gouverneur Ogden, Sheriff of the District of Three Rivers, sued and obtained a judgment on the 16th March, 1874, against his sole heir, Isaac Low Evans Ogden, for $528.83, with interest.

The latter having died, the appellants recovered another judgment, on the 18th January, 1881, declaring that the former could be enforced by execution against his representative, Charles Kinnis Ogden, to the extent of $231, with interest and costs.

By virtue of the last judgment, the appellants caused to be made a seizure of an immoveable derived from the succession of Sheriff Ogden by Isaac Low Evans Ogden, and from the succession of the latter by Charles Kinnis Ogden.

The respondents contested the seizure of that lot of land, by an opposition *à fin de distraire*.

They alleged in their opposition, that Isaac Low Evans Ogden had sold them the land seized, for the price of $2,000 paid cash, and they prayed that they might be declared the

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true owners and proprietors of the said lot of land, and that the seizure of it might be annulled and set aside.

The appellants contested this opposition, pleading several pleas, impugning the alleged sale and title of the respondents to the land in question.

On appeal to the Supreme Court of Canada from the judgment rendered by the Court of Queen's Bench for Lower Canada, reversing the judgment of the Superior Court on this contestation, *Held*, that the opposition having been filed in a suit in which the amount in dispute was less than $2,000, the appeal would not lie. *Macfarlane* v. *Leclaire*, 15 Moo. P.C.C. 181, referred to; also *Champoux* v. *Lapierre* (*supra*, p. 197).

Appeal quashed for want of jurisdiction, but without costs, a motion to quash not having been made at the earliest convenient moment.

Action for an account.

L'Heureux v. *Lamarche*, 12 Can. S.C.R. 460.

The plaintiff's declaration alleged that he had abandoned to the defendants immoveable and moveable property, the moveable property consisting of general merchandise of the value of $2,250, and books of account amounting to $627.91, and promissory notes amounting to $718.20, and a hypothec of $182, and that the defendants in default be condemned to pay $5,478.

In this case, Taschereau, J., in delivering the judgment of the Court, said:—

"In 1882 the plaintiff, now appellant, assigned his estate to the defendants, present respondents, for the benefit of his creditors. By his present action he claims from the defendants an account of their administration of his estate. By their plea, the defendants first allege that they are not bound to account to the plaintiff, wherefore they ask the dismissal of the action.

"2nd. They allege that they have already accounted to him before the institution of this action—and this as garnishees in a suit between one Guillet and the plaintiff—so, therefore, they pray for the dismissal of the action. 3rd. They plead the general issue. 4th. They produce a state-

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ment which they ask the Court to declare to be a true and faithful account of their administration, and that the action be consequently dismissed.

"To this extraordinary plea the plaintiff's filed a general answer. The defendants produced evidence to establish their account.

"The Superior Court dismissed the plaintiff's action, on the ground that the account produced was a true and faithful one. The *considérants* refer to the garnishment pleaded, but the *dispositif* clearly shews that the Court was of opinion that the account therein given by the present defendants was not sufficient alone to entitle them to ask for the dismisal of the present action.

"The Court of Review unanimously reversed that judgment on the ground that the issue to be first determined in the case is as to the right of the plaintiff to ask for an account from the defendants, and that, till that point has been adjudicated upon, he, the plaintiff, is not bound to contest or admit the account filed with the plea.

"The Court of Queen's Bench reversed the judgment of the Court of Review and restored the first judgment by which the plaintiff's action had been dismissed. The plaintiff now appeals from that last judgment.

"I am of opinion that the judgment of the Court of Review is the right one, and that the plaintiff's action was wrongly dismissed by the Superior Court."

Gillespie v. *Stephens,* 14 Can. S.C.R. 709.

In this case the plaintiff in his declaration claimed that for years defendant had acted as his agent and received large sums of money arising from sales of the plaintiff's property, for which he had failed to account; that the accounts he rendered were inaccurate, and prayed to have the pretended accounts rendered by defendant to plaintiff declared null and void, and that defendant be ordered to render an account under oath; and that in default of an account defendant be condemned to pay $10,000; that the defendant had not accounted for the receipt of monies amounting in all to over $2,000. After argument the appeal was dismissed.

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Hood v. *Sangster*, Nov. 12th, 1889; 16 Can. S.C.R. 723.

An action was instituted by the respondent against the appellant for the partition and licitation of a cheese factory, etc., in order that the proceeds might be divided according to the rights of the parties who had carried on business as partners. The judgment appealed from ordered the licitation of the factory and its appurtenances. On a motion to quash the appeal by the respondent on the ground that the matter in controversy was under $2,000, the appellant in answer to the respondent's affidavit filed another affidavit shewing that the total value of the property was $3,000, but it being admitted that the respondent (plaintiff) claimed but one-half interest in the property it was *Held*, that the matter in controversy, and claimed by the respondent, not amounting to the sum or value of $2,000, the appeal should be quashed with costs.

Cases generally.

The Quebec, Montmorency, etc., Rly. v. *Mathieu*, 19 Can. S.C.R. 426.

In a railway expropriation case the arbitrators made an award in favour of the land owner for a sum under $2,000. In an action brought to set aside the award judgment was given in favour of the landowner and affirmed by the Court of Queen's Bench. On appeal to the Supreme Court, Strong and Taschereau, JJ., expressed doubts as to the jurisdiction of the Court, the amount of the award being under $2,000, but the appeal was dismissed on the merits.

Dominion Salvage Co. v. *Brown*, 20 Can. S.C.R. 203.

In an action to recover a 10% call on $10,000 of stock subscribed by defendant, *Held*, by the Supreme Court, Gwynne and Patterson, JJ., dissenting, that amount in controversy was $1,000 and no appeal would lie.

Dawson v. *Dumont*, 20 Can. S.C.R. 709.

In this case the plaintiff recovered judgment in a suit of *Macdonald* v. *Simon J. Dawson and W. McD. Dawson*, for over $2,000. Thereupon the defendant, W. McD. Dawson, instituted proceedings in that action as provided by

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the Code of Procedure disavowing the solicitor Dumont, who had entered an appearance for him, alleging that he never authorized him to appear and never knew of the proceedings or the judgment until his property was taken in execution. The petition in disavowal was dismissed by the Superior Court and this judgment was affirmed by the Court of Queen's Bench. On appeal to the Supreme Court it was held that as the judgment obtained against the appellant on the appearance filed by the defendant exceeded the amount of $2,000 the judgment on the petition in disavowal was appealable.

Flatt v. *Ferland*, 21 Can. S.C.R. 32.

Appeal from a decision of the Court of Queen's Bench for Lower Canada (appeal side).

In December, 1889, F. F. Ferland, a trader, sold to Gauthier, one of the respondents, certain real estate in Montreal, which was mortgaged for $7,000, or $8,000, with a right of *reméré* for one year.

In January, 1890, F. F. Ferland made an assignment, and Ira Flatt, *et al.* creditors of Ferland in the sum of $1,880, brought an action against Gauthier to have the deed of sale of the property which was valued at over $11,000 set aside as made in fraud of his creditors. G. pleaded that he was willing to return the property upon payment of the sum of $1,000 which he had advanced to F., and the courts below dismissed F. *et al.'s* action. On appeal to the Supreme Court of Canada:—

Held, that as the appellants' claim was under $2,000 and they did not represent Ferland's creditors, the amount in controversy was insufficient to make the case appealable.

Great Eastern Rly. Co. v. *Lambe*, 21 Can. S.C.R. 431.

The plaintiff, respondent, recovered judgment against the Montreal & Sorel Rly. Co. for $675 and took in execution the railway property of the said company. Thereupon the opposants, appellants, filed an opposition to the writ of execution claiming to have the property sold subject to its claim for $35,000. The Superior Court dismissed the opposition which was affirmed by the Court of Queen's Bench. The opposants then appealed to the Supreme Court.

S. 46 (c). Appeals. Quebec. $2,000 involved.

The respondents thereupon moved to quash on the ground that the amount involved was less than $2,000, viz., $675. The Court, without expressly dismissing the motion to quash, ordered the appeal to be heard on the merits.

Hunt v. *Taplin*, 24 Can. S.C.R. 36.

The plaintiff's claim was for $1,470, balance of account due him as agent for the defendant's testator. By their pleas the defendants, besides denying the plaintiff's claim, alleged that plaintiff was indebted to defendant's testator in the sum of $3,416, and that a deed given by plaintiff to defendant's testator was in truth only a security for said indebtedness, and the taxes and insurance which made up the plaintiff's claim arose out of the said lands and were payable by the plaintiff under the agreement by which the defendant's testator had taken the deed from the plaintiff. The Superior Court found for the defendant, which was reversed by the Court of Queen's Bench. Upon a motion to quash an appeal to the Supreme Court it was held that although the defendant did not claim judgment against plaintiff for balance between plaintiff's claim and the said sum of $3.416, being a sum over $2,000, nevertheless the amount in controversy was the whole of the appellant's claim, and as long as the judgment of the Court of Queen's Bench stood, the defendant could have no action against the plaintiff for balance of his claim, and the defendant's pecuniary interest in the appeal exceeded $2,000. The motion was therefore dismissed.

O'Dell v. *Gregory*, 24 Can. S.C.R. 661.

This was an action brought for *séparation de corps* from the plaintiff's wife. The Superior Court gave judgment for the plaintiff which was reversed by the Court of Queen's Bench. A motion to quash an appeal to the Supreme Court was allowed, the Court holding that although the defendant's right to certain goods and chattels specified in the marriage contract might be accidentally affected by the judgment, yet the value of these articles did not appear to be $2,000; that the words in section 29, "fee of office, duty, rent, revenue or any sum of money payable to Her Majesty," related only to claims against the Crown, and

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that the words "other matters or things where rights in future might be bound" must be construed to mean matters and things *ejusdem generis* with "title to lands or tenements, annual rents" immediately preceding those words. That the word "title" means a vested right or title, something to which the right is already acquired, though the enjoyment may be postponed; that there was no vested right to the annuity during widowhood in case defendant should survive her husband; that had there been some actual right or title to lands or rents or other similar matters or things incidentally involved in the action, it would have been doubtful even then if there would have been jurisdiction.

Lachance v. *La Société de Prêts*, 26 Can. S.C.R. 200.

The respondents proved a claim of over $2,000 against an insolvent estate based upon a hypothec security. The appellant had proved a claim of $920, and contested respondents' security, and claimed that the curator of the insolvent estate had improperly collocated the whole amount in his hands to the respondents, whereas it should be distributed proportionately amongst all the creditors of the estate whose claims amounted to over $10,000. The Court of Appeal having affirmed the collocation of the curator, an appeal therefrom to the Supreme Court was quashed, the Court holding that the pecuniary interest of the party appealing alone could be taken into consideration and that appellant's contestation of the respondents' collocation might result in bringing back to the insolvent estate a sum of over $2,000, but the jurisdiction of the Supreme Court did not depend upon the possible consequences of a possible judgment.

Turcotte v. *Dansereau*, 26 Can. S.C.R. 578.

An opposition filed under the provisions of articles 484 and 487 of the Code of Civil Procedure of Lower Canada for the purpose of vacating a judgment entered by default, is a "judicial proceeding" within the meaning of section 29 of "The Supreme and Exchequer Courts Act" (now 46), and where the appeal depends upon the amount in controversy, there is an appeal to the Supreme Court of Canada if

the amount of principal and interest due at the time of the filing of the opposition under the judgment sought to be annulled is of the sum or value of $2,000.

S. 46 (c). Appeals. Quebec. $2,000 involved.

King v. *Dupuis*, 28 Can. S.C.R. 388.

In this case the plaintiff, present respondent, had recovered a judgment against T. for $119.57, and seized in execution a quantity of logs and lumber valued at $3,500, whereupon the appellants filed an opposition *afin de distraire* claiming ownership. *Held*, that when the judgment appealed from has dismissed the opposition, the amount in controversy is the value of the goods sought to be withdrawn from seizure and not the amount demanded by the plaintiff's action, or for which execution has issued. *Turcotte* v. *Dansereau*, 26 Can. S.C.R. 578; *McCorkill* v. *Knight*, 3 Can. S.C.R. 233, followed. *Champoux* v. *Lapierre*, *supra*, p. 197; *Gendron* v. *McDougall*, *supra*, p. 198, discussed and distinguished.

Noel v. *Chevrefils*, 30 Can. S.C.R. 327.

In this case the Superior Court dismissed a petition for the cancellation of the respondent's appointment as tutrix to her minor children. The Court of Review reversed this judgment, but it was restored by the Court of Queen's Bench. Upon a motion to quash an appeal to the Supreme Court it was held that although the children's estate amounted to over $2,000, the Court had no jurisdiction as there was no pecuniary amount in dispute and the matter in controversy did not fall within the provisions of this section (following *O'Dell* v. *Gregory*, *supra*, p. 203).

Talbot v. *Guilmartin*, 30 Can. S.C.R. 482.

This was an action for *séparation de corps*, instituted by the respondent against her husband, and other relief asked was a condemnation to pay $10,000, money alleged to have come to the hands of the appellant. *Held*, that no appeal would lie to the Supreme Court from the decree for separation (*O'Dell* v. *Gregory*, 24 Can. S.C.R. 661, followed), and the money demanded in the declaration being only incidental to the main cause of action, could not give the Court jurisdiction to entertain the appeal.

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Bastien v. *Filiatrault et ux.*, 31 Can. S.C.R. 129.

A wife after a judicial separation as to property, became a party, along with her husband, to an "Acte de dation en paiement et vente avec faculté de rémérer" in favour of the plaintiff. In an action to recover $1,324 the female defendant attacked the contract alleging that it was made to secure payment of a personal debt of the husband and not a debt of the community, and claimed the benefit of article 1301 of the Civil Code. The Superior Court and the Court of Queen's Bench found in favour of the defendant and on appeal to the Supreme Court judgment was given on the merits dismissing the appeal without determining the question as to the jurisdiction of the Court raised by the respondent upon a motion to quash.

Bell v. *Vipond*, 31 Can. S.C.R. 175.

This was an action for an account and in default payment of $1,000. Defendant admitted the plaintiff's right to an account and filed same, shewing a balance in his favour of $242. The plaintiff contested this, claiming there was an amount exceeding $2,000 due him from the defendant. Upon the trial of this contestation the plaintiff recovered judgment for $2,190, which was reversed by the Court of Queen's Bench and action dismissed. The plaintiff applied to have his security for an appeal to the Supreme Court allowed. The Court held that the amount in controversy was clearly over $2,000, and the security was allowed accordingly.

Donohue v. *Donohue*, 33 Can. S.C.R. 134.

The declaration demanded first an account and in default $2,000. Secondly, that the executors be dismissed from office. The Superior Court ordered the removal of the executors, but did not order the account, reserving to plaintiff a right to make the same claim in another action. This judgment was reversed by the Court of King's Bench. There was no appeal by plaintiff from the judgment of the Superior Court refusing the account. *Held*, that the Supreme Court had no jurisdiction to hear an appeal, following *Noel* v. *Chevrefils*, 30 Can. S.C.R. 327, *supra*, p. 205.

Clement v. *La Banque Nationale*, 33 Can. S.C.R. 343. ,S. 46 (c). Appeals. Quebec. $2,000 involved.

On a contestation of a statement of an insolvent trader by a creditor claiming a sum exceeding $2,000, the judgment appealed from condemned appellant under article 888 C.P. (Quebec) to three months' imprisonment. *Held*, that there was no sum of money in controversy and no appeal would lie to the Supreme Court.

Winteler v. *Davidson*, 34 Can. S.C.R. 274.

The plaintiff had a judgment, payable in quarterly instalments, for $1,500 per annum, for alimony against her husband. Upon his death his executors and universal legatees refused to continue the payment. Three months after the husband's death a case was stated for the opinion of the Superior Court under article 509, Code of Procedure (Quebec) in which the facts were admitted and the question to be determined was the right of the appellant to be paid the annuity after her husband's death. The appellant succeeeded in the Superior Court, but this judgment was reversed by the Court of King's Bench. An appeal to the Supreme Court was quashed, the Court holding that the matter in controversy was the amount due when the case was stated and was under $2,000; that the abstract right to the annuity alone was in question, and that the future payments to which appellant would have been entitled had she succeeded, was not "future rights" within the meaning of the statute.

Beauchemin v. *Armstrong*, 34 Can. S.C.R. 285.

Where the Court of King's Bench affirmed the judgment of the Superior Court dismissing the action, but varied it by ordering the defendant to pay a portion of the costs, *Held*, that although more than $2,000 was demanded by the action, the defendant had no appeal to the Supreme Court as the amount of the costs which he was ordered to pay was less than $2,000, and in this case it was the amount in controversy and not the amount demanded that governed the jurisdiction; the case falling within the principle of the decision in *Allan* v. *Pratt*, 13 A.C. 780.

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Lapointe v. *Montreal Police Society*, 35 Can. S.C.R. 5.

The action was for $62.50, the first monthly instalment of a life pension at the rate of $750 per annum and for a declaration that plaintiff was entitled to such annual pension during the remainder of his life. On a motion to quash an appeal to the Supreme Court, affidavits were filed to shew by actuary tables that the pension was worth $7,000. *Held*, that the amount in controversy was the monthly instalment of $62.50, and the motion was allowed.

Vide Lariviere v. *Three Rivers, supra*, p. 173; *Rattray* v. *Larue, supra*, p. 195; *Stephens* v. *Gerth, infra*, p. 529; *Toussignant* v. *Nicolet* (*supra*, p. 180).

46 (2).

Until 1891 when this sub-section was added (54-55 V. c. 25, s. 3) the Supreme Court Act did not specify any method of determining the amount in controversy when the sum found due by the judgment differed from the amount claimed in the declaration.

The question came up for the first time for determination in the case of *Joyce* v. *Hart, infra*, p. 211, where the Court held "that in determining the sum or value in dispute in cases of appeal by the defendant, the proper course was to look at the amount for which the declaration concludes and not at the amount of the judgment." This was the jurisprudence of the Court on the point until 1888 when the Judicial Committee of the Privy Council held, in *Allan* v. *Pratt*, 13 A.C. 780, on appeal from the Court of Queen's Bench, appeal side (Quebec), that it was the amount in controversy in the appeal as disclosed by the judgment against the proposed appellant in the court below which determined the jurisdiction. The decision in *Allan* v. *Pratt* was followed by the Supreme Court in the following cases, which are decisions prior to 54-55 V. c. 25, s. 3.

Monette v. *Lefebvre*, 16 Can. S.C.R. 387.

Where the plaintiff has acquiesced in the judgment of the court of first instance by not appealing from the same the measure of value for determining his right of appeal is the amount awarded by the said judgment.

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Ontario & Quebec v. *Marcheterre*, 17 Can. S.C.R. 141.

Held, following *Allan* v. *Pratt*, that when a defendant in an action for damages or other money demand seeks to appeal to the Supreme Court he must be able to shew from the judgment that the amount in controversy is not less than $2,000. In other words, he must establish that a judgment to that amount at least has been rendered against him. In this case as the judgment of the Superior Court was in favour of the plaintiff, but directed a reference to ascertain the amount of damages which the plaintiff had sustained, the case was not appealable to the Supreme Court of Canada.

Cossette v. *Dunne*, 18 Can. S.C.R. 222.

The plaintiff recovered judgment against defendant for $2,000. On appeal by defendant the Court of Queen's Bench reduced this judgment to $500. On appeal to the Supreme Court a motion by defendant to quash for want of jurisdiction was dismissed, Taschereau and Patterson, JJ., dissenting. The majority of the Court held that the question was not $1,500, the difference between the amounts awarded respectively by the Court of Review and the Court of King's Bench, but as to whether the plaintiff had the right to have the judgment obtained by him in the Superior Court of $2,000 restored.

Vide Dawson v. *Dumont, supra*, p. 201.

Williams v. *Irvine*, 22 Can. S.C.R. 108. Following the preceding.

Held, that the right of appeal given by 54-55 V. c. 25, does not extend to cases standing for judgment in the Supreme Court prior to the passing of this Act.

Cowan v. *Evans*, 22 Can. S.C.R. 328.

(This case governed by law before 54-55 V. c. 25.)

The plaintiff claimed to have a building contract for $1,900 rescinded, damages $1,000 and material $545. The Superior Court dismissed claim for damages from which plaintiff did not appeal, but acquiesced and reserved to plaintiff his rights to the building material. Since the institution of the action the building in question had been

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completed, so that there was no question before the Supreme Court of annulling the contract, the only question being one of costs and $545 for bricks for which the judgment of the Court of Queen's Bench reserved the appellant's recourse. On these facts, a motion to quash an appeal to the Supreme Court was granted.

To the same effect *Mitchell* v. *Trenholme, Mills* v. *Limoges* (22 Can. S.C.R. 331).

Montreal Street Rly. v. *Carrière,* Cout. Dig. 59.

Prior to the passing of the Act 54 & 55 V. c. 25, the Superior Court at Montreal dismissed an action for $5,000 damages by a judgment which was reversed on appeal, and the entry of judgment for $600 in favour of the plaintiff was ordered by the Court of Queen's Bench. The defendant then appealed to the Supreme Court of Canada. On motion to quash for want of jurisdiction: *Held,* following *Cowen* v. *Evans, Mitchell* v. *Trenholme, and Mills* v. *Limoges,* 22 Can. S.C.R. 331, that the Supreme Court of Canada had no jurisdiction to entertain the appeal.

Labelle v. *Barbeau,* 16 Can. S.C.R. 390.

The appellants petitioned for payment to them of $3,000 paid into court by an insurance company upon the death of one L. The respondent, the widow, claimed one-half. Her claim was maintained by the Court of Queen's Bench, appeal side, affirming judgment of the Superior Court. On appeal to the Supreme Court the appeal was quashed on the ground that the amount in controversy was only $1,500. *Vide Cossette* v. *Dunne* (*supra,* p. 209).

As stated above, previous to the decision of the Privy Council in *Allan* v. *Pratt,* July, 1888, the Supreme Court had adopted the rule of looking to the declaration in determining in Quebec cases whether or not the amount in controversy was under $2,000, the rule, therefore, prior to July, 1888, being the same as has obtained since 1891 when this sub-section (46 (2)) was made part of the Supreme and Exchequer Courts Act.

Cases prior to *Allan* v. *Pratt*, 13 A.C. 780.

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Joyce v. *Hart*, 1 Can. S.C.R. 321.

The 38th V. c. 11, s. 17, enacts that no appeal shall be allowed from any judgment rendered in the Province of Quebec in any case wherein the sum or value in dispute does not amount to two thousand dollars. H. brought an action against J., praying that J. be ordered to pull down wall, and remove all new works complained of, etc., in the wall of H.'s house, and pay $500 damages, with interest and costs. H. obtained judgment for $100 damages against J., who was also condemned to remove the works complained, or pay the value of "*mitoyenneté.*"

Held, Strong, J., dissenting, that in determining the sum or value in dispute in cases of appeal by a defendant, the proper course was to look at the amount for which the declaration concludes, and not at the amount of the judgment.

Per Strong, J., dissenting.—The amount in dispute was the sum awarded for damages and the value of the wall of which the demolition was ordered by the judgment appealed against.

Levi v. *Reed*, 6 Can. S.C.R. 482.

L., appellant, sued R., the respondent, before the Superior Court at Arthabaska, in an action of damages (laid at $10,000) for verbal slander. The judgment of the Superior Court awarded to the appellant a sum of $1,000 for special and vindictive damages. R. appealed to the Court of Queen's Bench (appeal side), and L., the present appellant, did not ask, by way of cross appeal, for an increase of damages, but contended that the judgment for $1,000 should be confirmed. The Court of Queen's Bench partly concurred in the judgment of the Superior Court, but differed as to the amount, because L. had not proved special damages, and the amount awarded was reduced to $500, and costs of appeal were given against the present appellant. L. thereupon appealed to the Supreme Court.

Held, Taschereau, J., dissenting, that L., the plaintiff, although respondent in the court below, and not seeking in that court by way of cross appeal an increase of dam-

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ages beyond the $1,000, was entitled to appeal; for, in determining the amount of the matter in controversy between the parties, the proper course was to look at the amount for which the declaration concluded, and not at the amount of the judgment. *Joyce* v. *Hart*, 1 Can. S.C.R. 321, reviewed and approved.

Ayotte v. *Boucher*, 9 Can. S.C.R. 400.

Held, that although the plaintiff's claim amounted to $2,000 only, he, including in it a demand for interest which was prescribed and for which the plaintiff had no right of action on the face of declaration, nevertheless there was a claim for over $2,000, and therefore the case was appealable to the Supreme Court.

Weir v. *Claude*, 16 Can. S.C.R. 575.

A landowner whose property abutted upon a small stream brought an action claiming $2,000 damages from the defendants and restraining them from polluting the stream. The trial judge condemned the defendants to pay $500 damages and granted an injunction. This judgment was reversed by the Court of Queen's Bench, appeal side. The Supreme Court exercised jurisdiction and dismissed the appeal with costs.

It is to be noted that this case was argued in January, 1889, and judgment pronounced on March 18th, 1889, and no reference is made in the judgment to the then recent decision of *Allan* v. *Pratt*, which overruled *Joyce* v. *Hart*, 1 Can. S.C.R. 321, and the decision seems to be based upon *Joyce* v. *Hart* and possibly was pronounced previous to the report of that decision being had. On the next day, however, decisions were pronounced in *Monette* v. *Lefebvre*, 16 Can. S.C.R. 387, and *Labelle* v. *Barbeau*, 16 Can. S.C.R. 390, in both of which the decision in *Allan* v. *Pratt* is referred to.

Cases after 54-55 V. c. 25, s. 3 (1891), when the section now in question (46 (2)) was added to the Supreme and Exchequer Courts Act.

Kinghorn v. *Larue*, 22 S.C.R. 347.

In this case the appellant K. had recovered judgment

against H. for $1,125, and under a writ of execution seized certain lands which were sold for $950. The defendant L. having filed an opposition *afin de conserver* for $24,000, claimed to be collocated on this sum of $950 *au marc la livre*. K. contested this opposition and the Superior Court maintained his contestation, but this judgment was reversed by the Court of Queen's Bench. On appeal to the Supreme Court it was held (after 54-55 V. c. 25) that the latter statute had no application, and that it was the interest of the party appealing that had to be taken into consideration to determine whether the case was appealable or not; the appellant's judgment was for $1,125, and he was pecuniarily interested only to that amount, and the appeal should be quashed. S. 46 (2). Amount in dispute.

Laberge v. *Equitable Life*, 24 Can. S.C.R. 59.

The declaration claimed $10,000. The Superior Court gave judgment for $285. The defendant appealed to the Court of Queen's Bench which allowed the appeal and dismissed the action. The plaintiff did not cross-appeal to the Court of Queen's Bench. *Held*, that under the amendment of 54-55 V. c. 25, the Court had jurisdiction.

Dufresne v. *Guévremont*, 26 Can. S.C.R. 216.

The plaintiff (respondent) sued defendant on a contract to construct an engine for $3,000, and recovered judgment for $2,150 and interest, in all $2,559.96, which judgment was affirmed by Court of Review. The defendant appealed to the Supreme Court. The plaintiff moved to quash on the ground that no appeal lay to the Supreme Court unless an appeal also would lie to the Judicial Committee of the Privy Council, and that an appeal only lay to the Privy Council when the amount in controversy amounted to £500, and that excluding interest the amount involved was under £500. The Court held that although interest would be added to the plaintiff for the purpose of giving jurisdiction under the jurisprudence of the Privy Council, nevertheless, this would not apply to appeals from the Province of Quebec wherein it is expressly enacted (article 2311, R.S.Q.) that "wherever the right to appeal is dependent upon the amount in dispute, such amount shall

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be understood to be that demanded and not that recovered, if they are different," and the appeal was accordingly quashed."

Vide Couture v. *Bouchard, infra,* p. 334.

Standard Life v. *Trudeau,* 30 Can. S.C.R. 308.

Held, that issues raised merely by the pleas cannot have the effect of increasing the amount in controversy so as to give the Supreme Court jurisdiction, although the questions raised, if originally demanded in the declaration or introduced by an incidental demand, would have been sufficient to warrant an appeal.

Dufresne v. *Fee,* 35 Can. S.C.R. 8.

The action was for $2,300, the price of a cargo of lumber. After action was instituted by consent the lumber was sold by the plaintiff and the proceeds, $1,524, credited on the amount sued for. The plaintiff recovered judgment for the difference, viz., $775.40, but this was reversed by the Court of King's Bench. A motion to quash an appeal to the Supreme Court was refused, the Court holding that the amount demanded governed and there was jurisdiction.

Montreal Water & Power Co. v. *Davie,* 35 Can. S.C.R. 255.

Held, that where a conditional renunciation reducing the amount of the judgment to a sum less than $2,000 has not been accepted by the defendant, the amount in controversy remains the same as it was upon the original demand, and if such demand exceeds the amount limited by section 29 (now section 46(*c*)), an appeal will lie.

Vide Talbot v. *Guilmartin, supra,* page 205.

47. Nothing in the three sections last preceding shall in any way affect appeals in Exchequer cases, cases of rules for new trials, and cases of *mandamus, habeas corpus,* and municipal by-laws. R.S., c. 135, s. 30.

Sections 17 and 23 of the original Supreme and Exchequer Courts Act, 38 V. c. 11, read as follows:—

"17. Subject to the limitations and provisions herein-

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after made, an appeal shall lie to the Supreme Court from all final judgments of the highest court of final resort, whether such court be a court of appeal or of original jurisdiction, now or hereafter established in any province of Canada, in cases in which the Court of original jurisdiction is a Superior Court; Provided that no appeal shall be allowed from any judgment rendered in the Province of Quebec in any case wherein the sum or value of the matter in dispute does not amount to two thousand dollars; and the right to appeal in civil cases given by this Act shall be understood to be given in such cases only as are mentioned in this section, except Exchequer cases, and cases of *mandamus, habeas corpus* or municipal by-laws, as hereinafter provided.

"23. An appeal shall lie to the Supreme Court in any case of proceedings for or upon a writ of *habeas corpus*, not arising out of a criminal charge, and in any case of proceedings for or upon a writ of *mandamus*, and in any case in which a by-law of a municipal corporation has been quashed by rule of court, or the rule for quashing it has been refused after argument."

In 1879, by 42 V. c. 39, the provision with respect to appeals from the Province of Quebec was amended so as to read substantially as it now appears, in section 46. The amendment of 1879 also introduced the provisions now contained in sections 44 and 45, *supra*, and in addition introduced the provision of this section.

In *Danjou* v. *Marquis*, 3 Can. S.C.R. 251, the question was discussed whether or not under sections 17 and 23 above, an appeal would lie to the Supreme Court in the matters mentioned in section 23, where the judgment was not a final judgment of the highest court of last resort, and Strong, J., was of the opinion it was not necessary that the judgment appealed from should have been a final judgment. The subject was discussed later in a number of cases, but the question was finally settled by the judgment in *Langevin* v. *St. Marc*, 18 Can. S.C.R. 599, where it was held, that reading this section with the earlier provisions of the Act, it must be held that a judgment to be appealable in matters of *mandamus, habeas corpus*, and municipal by-laws, must be final, and, subject to the exception

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provided for by section 40, *supra*, giving an appeal in the Province of Quebec from the Superior Court sitting in Review, the appeal must come from the highest court of last resort.

Judgments in cases of rules for new trials need not necessarily be final. *Vide* section 38, *supra*.

The Exchequer Court Act provides that the appeal to the Supreme Court shall be from final judgments, with the one exception of judgments on demurrers. The Supreme Court has frequently held that a judgment on a demurrer is not final if it has not put an end to the action and there are any other issues not finally disposed of by such judgment.

In Admiralty cases an appeal lies from the local judge in Admiralty direct to the Supreme Court.

Vide notes to the Exchequer Court Act, *infra*, p. 479.

It will be perceived that cases of *mandamus, habeas corpus* and municipal by-laws, are not affected by the limitations placed upon appeals from the Province of Quebec by the next preceding section.

In *Sherbrooke* v. *McManamy*, 18 Can. S.C.R. 594, however, Taschereau, J., questions whether the provision with respect to appeals in cases of rules to quash municipal by-laws has any application in the Province of Quebec.

48. No appeal shall lie to the Supreme Court from any judgment of the Court of Appeal for Ontario, unless,—

(*a.*) the title to real estate or some interest therein is in question;

(*b.*) the validity of a patent is affected;

(*c.*) the matter in controversy in the appeal exceeds the sum or value of one thousand dollars exclusive of costs;

(*d.*) the matter in question relates to the taking of an annual or other rent, customary or other duty or fee, or a like demand of a general or public nature affecting future rights; or

(*e.*) special leave of the Court of Appeal for Ontario or

of the Supreme Court of Canada to appeal to such last-mentioned Court is granted.

2. Whenever the right to appeal is dependent upon the amount in dispute such amount shall be understood to be that demanded and not that recovered, if they are different. 60-61 V., c. 34, s. 1.

48 (*a*)—*Title to real estate.*

Jermyn v. *Tew*, 28 Can. S.C.R. 497.

While an action to set aside a second mortgage on lands for $2,000 was pending, the lands were sold under a prior mortgage which only left $270 to apply on second mortgage. A motion having been made to quash the appeal for want of jurisdiction it was urged for the appellant that the title to real estate or some interest therein was in question, but the Court quashed the appeal holding that only the $270 was in question and not any question of a title or interest in land.

Waters v. *Manigault*, 30 Can. S.C.R. 304.

The plaintiff's action was for an injunction to restrain a municipal engineer from proceeding with the cleaning out of a ditch made under the Ditches and Watercourses Act, in such a manner as he claimed would cause injury to his lands by bringing down thereon surface water by artificial means in an illegal and improper manner, and so as to interfere with the enjoyment of his legal rights in the said lands. *Held*, that no appeal would lie to the Supreme Court under the Act in question, 60-61 V. c. 34, s. 1, sub-s. (*a*) (now 48(*a*)).

Canadian Pacific Rly. v. *City of Toronto*, 30 Can. S.C.R. 337.

Upon a reference to a master under the Vendor and Purchaser Act his ruling with respect to covenants which should be contained in a lease was affirmed by a judge of the High Court and by the Court of Appeal. *Held*, that no appeal would lie to the Supreme Court.

Vide cases cited under 46(*b*), *supra—Title to lands.*

S. 48 (*a*). Appeals. Ontario. Title to lands.

Canadian Mutual v. *Lee*, 34 Can. S.C.R. 224.

The plaintiff's action was to have it declared that a mortgage assigned by the mortgagee to the defendant was paid and to recover $460.80 paid to the defendant beyond the principal and interest. The defendants, by counter-claim, claimed a balance due of $79.20. The plaintiff's action was dismissed, but the Court of Appeal reversed the judgment and directed a reconveyance of the mortgaged lands and that judgment be entered for plaintiff for $47.04. An appeal by the defendants to the Supreme Court was quashed, the Court holding that the pecuniary amount in controversy was less than $1,000 and there was no title to real estate or an interest therein in question.

Upon the argument of the motion to quash herein the appellant applied for leave to appeal which was refused, the Court holding that more than 60 days having elapsed since the judgment below, the Supreme Court had no jurisdiction.

Vide O'Brien v. *Allen*, *infra*, p. 226.

48 (*b*)—*Validity of a patent.*

48 (*c*)—*Matter in controversy exceeds* $1,000—*previous to* 60-61 *V.*

Clarkson v. *Ryan*, 17 Can. S.C.R. 251.

Held, the section of the Ontario Judicature Act, 1881, s. 43, which provides that in cases where the amount in controversy is under $1,000 no appeal shall lie from the decision of the Court of Appeal to the Supreme Court of Canada except by leave of a judge of the former court, is *ultra vires* of the legislature of Ontario, and not binding on this Court.

After 60-61 *V.*

Bain v. *Anderson*, 28 Can. S.C.R. 481.

To reconcile paragraphs *c* and *f* of this section (now 48 (*c*) and 48 (2)), the latter should be read as if it meant the amount demanded in the appeal and, therefore, in the Province of Ontario in determining what is the

amount in controversy it is necessary to consider the amount of the judgment recovered, not the amount demanded, if they are different. S. 48 (*c*). Appeals. Ontario. $1,000 involved.

City of Ottawa v. *Hunter*, 31 Can. S.C.R. 7.

Held, that to harmonize sub-sections *c* and *f* of this section (now 48 (*c*) and 48 (2)), the latter sub-section must be construed as if the words "by the appeal" were inserted after the word "demanded." As a result in the Province of Ontario it is the amount in controversy in the appeal which governs the jurisdiction of the Supreme Court and not the amount demanded by the declaration of the plaintiff, as in the Province of Quebec.

Canadian Rly. Accident Co. v. *McNevin*, 32 Can. S.C.R. 194.

Held, that a judgment below for $1,000 and interest from a certain date before action brought was a judgment for more than $1,000 within this section, and the case was appealable. Whether the fact that the defendant had paid a sum of money into Court in satisfaction of plaintiff's claim and filed a plea to that effect operated to make the amount in controversy less than $1,000, the Court was in doubt, but having decided to dismiss the appeal expressed no opinion.

Vide cases cited under 46 (*c*), *supra*.

Dreschell v. *Auer Incandescent Light Mfg. Co.*, 28 Can. S.C.R. 268.

On a motion to quash an appeal where the respondents filed affidavits stating that the amount in controversy was less than the amount fixed by the statute as necessary to give jurisdiction to the appellate court, and affidavits were also filed by the appellants shewing that the amount in controversy was sufficient to give jurisdiction under the statute, the motion to quash was dismissed, but the appellants were ordered to pay the costs as the jurisdiction of the Court to hear the appeal did not appear until the filing of the appellants' affidavits in answer to the motion.

Vide McCorkill v. *Wright*, *supra*, p. 198; *Muir* v. *Carter*, *supra*, p. 198.

S. 48 (*c*). Appeals. Ontario. $1,000 involved.

This decision, so far as it is an authority that the amount in controversy may be shewn by affidavit, must be read in connection with the law as stated in *Toussignant* v. *Nicolet*, 32 Can. S.C.R. 353, where Taschereau, J., speaking for the Court, said:—

"The fact that the *procés-verbal* attacked by the appellants' action may have the result to put upon them the cost of the work in question, alleged to be over $2,000, does not make the controversy one of $2,000. There is no pecuniary amount in controversy; in other words, there is no controversy as to a pecuniary amount or of a pecuniary nature. It is settled law that neither the probative force of a judgment, nor its collateral effects, nor any contingent loss that a party may suffer by reason of a judgment are to be taken into consideration when our jurisdiction depends upon the pecuniary amount or upon any of the subjects mentioned in section 29 of the Supreme Court Act.

Vide O'Brien v. *Allen* (*infra*, p. 226); *Aurora* v. *Markham* (*supra*, p. 141); *Stephens* v. *Gerth* (*infra*, p. 529).

48 (*d*)—*Vide cases cited under* 46 (*b*), *supra*.

48 (*e*)—*Leave to appeal.*

Aurora v. *Markham*, 32 Can. S.C.R. 457.

Held, per Taschereau, J.—"When special leave has been asked of the Court of Appeal for Ontario and refused or granted the case is concluded. It is clearly concluded when granted. I do not see why it is not concluded if refused. If refused by this Court in first instance, it could hardly be contended that the Court of Appeal for Ontario could subsequently grant leave. Yet that would be the consequence if we should decide that a party having elected to ask leave from one of the two courts would, after being refused, have the right to apply to the other court."

Fisher v. *Fisher*, 28 Can. S.C.R. 494.

An action in which less than the sum or value of one thousand dollars is in controversy and wherein the decision

S. 48(e). Appeals. Ontario. Leave to appeal.

involves questions as to the construction of the conditions indorsed upon a benevolent society's certificate of insurance and as to the application of the statute securing the benefit of life insurance to wives and children to such certificates is not a matter of such public importance as would justify an order by the Court granting special leave to appeal under the provisions of sub-section (*e*) of the first section of the statute 60 & 61 V. c. 34 (now 48 (*e*)).

G. T. Rly. Co. v. *Atchison,* Cout. Dig. 116.

In affirming a judgment for $500 damages the Court of Appeal for Ontario (1 Ont. L.R. 168) held that "when a car of a foreign railway company forms part of a train of a Canadian railway company it is 'used' by the latter company within the meaning of section 192 of the Railway Act, 51 V. c. 29 (D.)3, so as to make the company liable in damages for the death of a brakeman caused by the car being so high as not to leave the prescribed headway between it and an overhead bridge." On special application for leave to appeal from this judgment it was urged that the car had been taken over from an American line to which the Act limiting height of cars in the Dominion could not apply; that the company was by statute obliged to accept and haul the car; that in hauling the car the company could not, at most, be subject to any other than the penalty prescribed by statute, and that in any case, deceased was insured against accidents in the company's association and his representatives could claim no more than $250 for which he was insured. The application was refused on the ground that a sufficient *primâ facie* case for granting special leave for an appeal had not been made out.

G.T.R. v. *Vallèe,* Cout. Dig. 116.

On special application for leave to appeal from a judgment (1 Ont. L.R. 224) affirming the trial court judgment awarding less than $1,000 damages, it was urged that the courts below had erred in adhering to rules laid down years ago in respect to granting nonsuits, with which the later English decisions do not accord. The application

S. 48 (*a*). Appeals. Ontario. Leave to appeal.

was refused by the Supreme Court without calling upon respondent's counsel.

Toronto Rly. Co. v. *Robinson,* 29th October, 1901.

The respondent recovered a judgment for $600 damages in an action tried before Falconbridge, C.J., and a jury. On appeal to the Court of Appeal the majority of the court held that there was no evidence to justify a finding of negligence, and set aside the judgment in respondents favour. An application was made to the Court of Appeal for leave to appeal to the Supreme Court. The two judges who dissented upon the appeal were of opinion to grant leave, but the majority refused. A further application for leave to appeal made to the Supreme Court of Canada was refused.

Royal Templars v. *Hargrove,* 31 Can. S.C.R. 385.

Held, that special leave to appeal from a judgment of the Court of Appeal for Ontario will not be granted where the questions involved are not of public importance and the judgment of the Court of Appeal appears to be well founded.

Rice v. *The King,* 32 Can. S.C.R. 480.

This was a motion for leave to appeal from the Court of Appeal for Ontario affirming the conviction of the appellant for murder. *Held,* that the statute 60-61 V. c. 34 (now section 48) only applies to civil cases and that criminal cases are still governed by the Criminal Code.

Attorney-General v. *Scully,* 33 Can. S.C.R. 16.

Held, that special leave to appeal will not be granted on the ground merely that there is error in the judgment of the Court of Appeal. There must be special reasons to support such an application.

Tucker v. *Young,* 30 Can. S.C.R. 185.

Held, that this section merely gives a right to grant leave to appeal in the class of cases which previous to 60-61 V. c. 34, were appealable, but which by that Act are not thereafter appealable *de plano.*

S. 48 (*e*). Appeals. Ontario. Leave to appeal.

Schulze v. *The Queen*, 6 Exch. C.R. 268.

Leave to appeal to the Supreme Court in this case was refused by Gwynne, J., who gave the following oral judgment:—

"I think in all applications to this Court for leave to appeal from the Exchequer Court, when the amount involved is under $500, leave should not be granted unless the judge before whom the motion is made is of the opinion that the judgment of the court below is so clearly erroneous that there is reasonable ground for believing that a court of appeal should reverse the judgment upon a point of law, or upon the ground that the evidence does not at all warrant the conclusions of fact arrived at. In the present case no such grounds appear, and the motion for leave will, therefore, be refused with costs.

Aurora v. *Markham*, 32 Can. S.C.R. 457.

This was a motion for special leave to appeal from the judgment of the Court of Appeal, quashing a by-law of the Town of Aurora. In refusing leave the Chief Justice who gave the judgment of the Court, said:—

"I am of opinion that we ought not to sanction an appeal in a case such as the present. First, for the reason that leave has already been refused by the provincial court. Were we to do so we should be substantially, but indirectly, reviewing the discretion of the Court of Appeal in a matter in which no appeal is given, for it has been held by high authority in England that a decision granting or refusing leave to appeal is not itself the proper subject of an appeal. Parties have the election of making the application to either court and, indeed, according to the words of the Act, to both alternatively, but it does not seem reasonable that having elected to make application to one court they should in case of failure be at liberty to resort to the other. Therefore upon this, treating it as a ground for refusing leave and not as an objection to the jurisdiction of this Court, I think we ought to refuse this application.

"Further, the ground on which the Court of Appeal quashed the by-law is so clear and plain that, taking into consideration the probability or improbability of error being established in the judgment of the court below (a

S. 48 (e). Appeals. Ontario. Leave to appeal.

matter always considered by the Privy Council on an application for leave to appeal), it appears that the judgment cannot be otherwise than right."

With respect to the right to appeal *de plano, vide Aurora* v. *Markham, supra,* p. 141.

Goold Bicycle Co. v. *Laishley,* 35 Can. S.C.R. 184.

In this case the company sought special leave to appeal on the ground that the judgment below was for $1,000, and the costs already amounted to $1,000 more, but the application was refused.

Lake Erie & Detroit River Rly. Co. v. *Marsh,* 35 Can. S.C.R. 197.

Held, leave to appeal might well be granted where the case involves matters of public interest or some important question of law or the construction of Imperial or Dominion Statutes, or a conflict of provincial and Dominion authority, or questions of law applicable to the whole Dominion.

Held, if a case is of great public interest and raises important questions of law, yet the judgment is plainly right, no leave should be granted.

When application must be made.

Application to the Supreme Court for leave must be made within 60 days from the signing, entry or pronouncing of the judgment under section 69.

Vide Canadian Mutual v. *Lee,* 34 Can. S.C.R. 224, *supra,* p. 218.

Connell v. *Connell,* 9th June, 1905.

On this appeal being called, a motion to quash was made on behalf of the respondents on the ground that the case did not fall within any of the provisions of 60-61 V. c. 34 (now section 48), limiting appeals from the Court of Appeal for Ontario to the Supreme Court of Canada. The Court reserved the question of jurisdiction and the argument was partially heard, but before its conclusion the Court announced that there was grave doubt as to its jurisdiction, and that as more than 60 days had elapsed since

S. 48 (c). Appeals. Ontario. Applications for leave.

the judgment below, the Supreme Court had no power to grant leave to appeal, but that the application for leave would require to be made to the Court of Appeal. The argument was thereupon directed to stand over until an opportunity was given to the appellants to obtain such leave. Leave having subsequently been granted, the case was heard on the merits.

48 (2)—*Amount in dispute.*

The jurisprudence of the Supreme Court, as settled in *Ottawa* v. *Hunter, supra,* p. 219, is that, reading sub-sections 48 (*c*) and 48 (2) together, it is the amount in controversy in the appeal which governs and not the amount claimed in the declaration. The decisions, therefore, in the Province of Quebec, between *Allan* v. *Pratt* (July, 1888), and 54-55 V. c. 25, in the year 1891, during which period it was held similarly that it was the amount in controversy in the appeal which governed in the Province of Quebec, are applicable to this section. These decisions are: *Monette* v. *Lefebvre, supra,* p. 208; *Ontario & Quebec* v. *Marcheterre, supra,* p. 209; *Cossette* v. *Dunne, supra,* p. 209; *Dawson* v. *Dumont, supra,* p. 201; *Williams* v. *Irvine, supra,* p. 209; *Cowan* v. *Evans, supra,* p. 209; *Mitchell* v. *Trenholme, supra,* p. 210; *Mills* v. *Limoges, supra,* p. 210; *Montreal Street Rly.* v. *Carrière, supra,* p. 210; *Labelle* v. *Barbeau, supra,* p. 210.

49. No appeal shall lie to the Supreme Court from any final judgment of the Territorial Court of the Yukon Territory, other than upon an appeal from the Gold Commissioner, unless,—

(*a.*) the matter in question relates to the taking of an annual or other rent, customary or other duty or fee, or a like demand of a public or general nature affecting future rights;

(*b.*) the title to real estate or some interest therein is in question;

(*c.*) the validity of a patent is affected;

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(*d.*) it is a proceeding for or upon a *mandamus*, prohibition or injunction; or

(*e.*) the matter in controversy amounts to the sum or value of two thousand dollars or upwards. 2 E. VII. c. 35, s. 4.

49 (*a*).—*Vide notes to* 46 (*b*), *supra*, p. 170.

49 (*b*).—*Vides notes to* 48 (*a*), *supra*, p. 217.

49 (*c*).—*Vide notes to* 48 (*b*), *supra*, p. 218.

49 (*d*)—*Mandamus—prohibition. Vide notes to* 39 (*c*) *and* (*d*), *supra*, pp. 118 and 130.

Injunctions.—This section gives an appeal in all cases in which an injunction is the remedy, or one of the remedies claimed. No similar provision is found in the sections giving an appeal in cases from Quebec or Ontario, and in these provinces the appeal, in cases where an injunction is asked, will only lie if the case falls within one or more of the conditions giving jurisdiction provided for in sections 46 and 48 respectively.

49 (*e*).—*Vide notes to* 48 (*c*), *supra*, p. 218.

O'Brien v. *Allen*, 30 Can. S.C.R. 340.

In this case the executive government of the Yukon Territory granted the appellants the privilege of constructing a toll tramway, and fixed a tariff of charges for the carriage of passengers and freight. The appellants constructed the tramway at an expense of over $45,000. The respondents being required to pay the charge of toll on some freight amounting to $1.25, brought an action for repayment of the amount, and claiming that the appellants had no authority to levy the same. The trial judge gave judgment in favour of the respondents. An appeal to the Supreme Court was allowed.

This decision was given when the Yukon Territory Act, 62-63 V. c. 11 (1899), was in force, which provided for an appeal from the Territorial Court of the Yukon to the Supreme Court of British Columbia, subject to the same

conditions as are now contained in section 49, and by the same Act a like appeal was given to the Supreme Court of Canada. S. 49. Appeals. Yukon.

JUDGMENTS.

50. The Court may quash proceedings in cases brought before it in which an appeal does not lie, or whenever such proceedings are taken against good faith. R.S., c. 135, s. 59.

Motions to quash cannot be made to a judge in Chambers, but must be made to the full Court, and should be brought on for hearing at the earliest moment possible. Otherwise no costs may be allowed. The object of this is to save costs in the event of the motion being granted. The proper course is to set the motion down for the first day of the nearest session, and if counsel consent that the motion shall be taken up when the appeal is called on the merits, the Registrar will enlarge the motion until that date. When it is intended that the motion to quash shall be heard along with the appeal, the respondent should raise his objection to the jurisdiction of the court in his factum.

Where the respondent has been prompt in having the question of jurisdiction disposed of by the court, he will, if the appeal is quashed, be allowed the general costs up to the judgment quashing the appeal, and a counsel fee on the motion to quash. Unless the court directs that the counsel fee to be allowed shall be only as of a motion to quash, and the appeal is quashed when it comes on for hearing on the merits, the Registrar, if the motion to quash has been launched promptly and by consent of parties has stood over until the case was called on the merits, has been accustomed to take into consideration in fixing the counsel fee, the fact that counsel had to be prepared to argue the case on the merits.

Danjou v. *Marquis*, 3 Can. S.C.R. 251.

In this case the respondent moved to quash the appeal for want of jurisdiction. On taxation the respondent was allowed the general costs of the appeal up to the hearing of the motion to quash and a fee on argument of $100.

S. 50. Appeals. Quashing.

Reid v. *Ramsay*, 1879.

In this case the appeal was quashed and the objection to the jurisdiction was taken by the respondent in his factum, the respondent was allowed the costs of a motion to quash.

McGowan v. *Mockler*, 1879.

The appeal was quashed for want of jurisdiction, and the general costs of the appeal to the hearing were allowed.

Le Maire de Terrebonne v. *Les Soeurs de Providence*, 1886.

The motion to quash was granted and the appeal was quashed with costs, the objection to the jurisdiction being taken by the respondent in his factum.

Where the objection to the jurisdiction is taken at the hearing by the court, or is not taken promptly, as a general rule no costs will be given.

Major v. *Three Rivers*, Cout. Dig. 71; *Champoux* v. *Lapierre*, Cout. Dig. 56; *Bank of Toronto* v. *Le Curé*, Cass. Dig. 432; *Gladwin* v. *Cummings*, Cout. Dig. 388.

In these cases the objection was taken by the court.

The Queen v. *Nevins*, 1884.

In this case a conviction by justices of the peace was brought into the Court of Queen's Bench, Manitoba, by a writ of *certiorari*, and a rule *nisi* to quash the conviction was on motion granted, and after argument made absolute. The Supreme Court quashed the appeal for want of jurisdiction, as the cause had not arisen in a superior court of original jurisdiction, but gave the respondents the costs of the appeal, although the objection had been taken by the court.

Gladwin v. *Cummings*, Cout. Dig. 388.

Where an appeal is quashed for want of jurisdiction it will be quashed without costs if the objection has been taken by the court itself.

Gendron v. *McDougall*, Cout. Dig. 56.

No costs were given as the motion was not made at the earliest convenient moment.

Domville v. *Cameron*, Cout. Dig. 122.

In this case the appeal was quashed for want of jurisdiction, but without costs, the appeal having been heard *ex parte*, the respondent not appearing.

Barrington v. *City of Montreal*, 25 Can. S.C.R. 202.

Appeal was quashed without costs, the objection not having been taken in the factum nor by a motion.

Griffith v. *Harwood*, 30 Can. S.C.R. 315.

On this case coming on for hearing the court of its own motion suggested that the judgment appealed from was not a final judgment and that there was no jurisdiction in the court to hear such an appeal. Although the appeal was quashed with costs the latter were limited to those of a motion to quash.

Schlomann v. *Dowker*, 30 Can. S.C.R. 323.

A motion was made to quash the appeal not on the ground that the court had no jurisdiction, but because there had been *acquiescement* in the judgment below, the Court holding that there had been *acquiescement*, quashed the appeal, saying: "This is not exactly a case such as we have hitherto considered as a proper one for a motion to quash, but we are of opinion that in future this proceeding should be adopted in cases like the present, as it has the advantage of avoiding costs." The appeal was accordingly quashed with costs as of a motion to quash.

51. The Court may dismiss an appeal or give the judgment and award the process or other proceedings which the court, whose decision is appealed against, should have given or awarded. R.S., c. 135, s. 60.

Sewell v. *British Columbia Towing Co.*, 9 Can. S.C.R. 527.

In an action for damages for negligently towing a ship

S. 51. Appeals. Relief.

and causing her destruction, the jury answered certain questions put to them by the judge, and were discharged, and on motion to the trial judge on behalf of the plaintiff for judgment, his Lordship directed judgment to be entered for the defendants with costs. The plaintiff thereupon appealed to the full Court, where the judgment below was affirmed. Upon a further appeal to the Supreme Court of Canada, the plaintiff contended that pursuant to the Judicature Act and the Rules of the Supreme Court of British Columbia, the Supreme Court of Canada could direct a judgment to be entered according to the merits of the case, as it had before it all the material necessary for finally determining the questions in dispute, and had the power also to supplement the findings of the jury. *Held*, that the Court, giving the judgment which the court below ought to have given, was in a position to give judgment upon the evidence at large. The appeal was therefore allowed, and judgment directed to be entered for the plaintiff for $80,000 and costs.

Green v. *Miller*, 33 Can. S.C.R. 193.

In this case the Court held that although there was no evidence which could reasonably be left to the jury, and that it was a case in which the Court, had it the power, would have made a final disposition of the matters in issue, yet the Nova Scotia Judicature Act did not permit of this being done, and the appeal was therefore allowed and a new trial directed to be had between the parties.

52. On any appeal, the Court may, in its discretion, order a new trial, if the ends of justice seem to require it, although such new trial is deemed necessary upon the ground that the verdict is against the weight of evidence. R.S., c. 135, s. 61.

This section was introduced into the Supreme and Exchequer Courts Act by 43 V. c. 34 (1880), probably owing to the decision of the Court in *Moore* v. *Connecticut Mutual*, 6 Can. S.C.R. 634, where the Court held that the Court of Queen's Bench below not having thought fit to

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New trial.
Discretion.

grant a new trial upon the ground that the finding of the jury was against the weight of evidence, the Supreme Court, sitting as a court of appeal, had no power to interfere with the exercise of their discretion. This section vests an almost unlimited discretion in the Supreme Court of Canada to direct a new trial in any case, and leaves it unfettered by any decision of the court below refusing or granting a new trial.

Pudsey v. *Dominion Atlantic Rly. Co.*, 25 Can. S.C.R. 691.

After hearing counsel the Court, without reserving judgment, ordered a new trial on the ground that the jury had not properly answered some of the questions submitted. In other respects the judgment appealed from was affirmed.

Vide notes of cases under section 38, *supra*, page 92, and *infra*, page 307.

COSTS.

53. The Court may, in its discretion, order the payment of the costs of the court appealed from, and also of the appeal, or any part thereof, as well when the judgment appealed from is varied or reversed as where it is affirmed. R.S., c. 135, s. 62.

The rule has been to allow costs to the successful party as well where the appeal has been heard on the merits as where it has been quashed for want of jurisdiction, but the respondent may be deprived of his costs where the motion to quash has not been made promptly, or the objection to its jurisdiction has been taken by the Court itself. *Vide* section 50, *supra*.

Beamish v. *Kaulbach*, 5th June, 1879.

When an appeal is quashed for want of jurisdiction, the court may order the taxation and payment of costs.

Dorion v. *Crowley*, Cass. Dig. 709. 1886.

Where an objection that the action had been prescribed was taken by the appellant for the first time on the argu-

S. 53. Costs.

ment of the appeal, the Court held that it was bound to give effect to the objection, but the appeal was allowed without costs in any of the courts.

When Court equally divided.

The Liverpool, London & Globe Ins. Co. v. *Wyld*, 1 Can. S.C.R. 605.

The judges of the Supreme Court being equally divided in opinion, and the decision of the court below affirmed, the successful party was refused the costs of the appeal. "But (per Richards, C.J.,), by 38th V. c. 11, s. 38, the Supreme Court being authorized, in its discretion, to order the payment of the costs of the appeal, the decision in this case will not necessarily prevent the majority of the Court from ordering the payment of the costs of the appeal in other cases where there is an equal division of opinion amongst the judges."

The uniform practice of the Court before 1893 was not to give costs when the Court was equally divided. *Curry* v. *Curry*, 13th March, 1880; *McLeod* v. *N. B. Rly. Co.*, 5 Can. S.C.R. 283; *Coté* v. *Morgan*, 7 Can. S.C.R. 1; *McCallum* v. *Odette*, 7 Can. S.C.R. 36; *Shields* v. *Peak*, 8 Can. S.C.R. 579; *Milloy* v. *Kerr*, 8 Can. S.C.R. 474; *Megantic Election Case*, 8 Can. S.C.R. 169; *Trust and Loan* v. *Lawrason*, 10 Can. S.C.R. 679; *Poulin* v. *City of Quebec*, 9 Can. S.C.R. 185; *MacQueen* v. *The Queen*, 16 Can. S.C.R. 1.

Since 1893 this rule has not been followed, but the practice has been to give the respondent costs in such cases. Cout. Dig. 1108.

Habeas corpus not arising out of a criminal charge.

In re Johnson, Cass. Dig. 677.

J. was in custody on an execution for debt and applied to a judge of the County Court to be examined as to his affairs with a view to obtaining his discharge. The examination was held, when the county judge made an order that J. was guilty of fraud in connection with his affairs, and he was remanded to jail. An application was made to

the Supreme Court of Nova Scotia for the discharge of the prisoner on *habeas corpus*, which was refused. On appeal to the Supreme Court of Canada, held that the appeal must be dismissed, but without costs.

S. 53. Costs. Habeas corpus.

Habeas corpus cases (criminal).

The uniform practice of the Court in these matters is to allow no costs.

In re Sproule, 12 Can. S.C.R. 140; *In re McDonald*, 27 Can. S.C.R. 683; *In re White*, 31 Can. S.C.R. 383; *In re Vincini*, 34 Can. S.C.R. 621; *In re Smitheman*, 35 Can. S.C.R. 189.

Criminal appeals.

The same rule prevails in criminal appeals: *Gosselin* v. *The King*, 33 Can. S.C.R. 255; *Drew* v. *The King*, 33 Can. S.C.R. 228; *George* v. *The King*, 35 Can. S.C.R. 376; *Slaughtenwhite*, 35 Can. S.C.R. 607.

Under special circumstances of the case, however, costs have been allowed.

Fraser v. *Tupper*, Cass. Dig. 421. 21st June, 1880.

The prisoner, Simon Fraser, had been convicted before F. A. Laurence, stipendiary magistrate for the Town of Truro, of violating the license laws in force in the town, and was fined $40 and costs as for a third offence. Execution was issued in the form given in the Rev. Statutes, c. 75, under which Fraser was committed to jail. While there he was convicted of a fourth offence and fined $80 and costs, and was detained under an execution in the same form. The matter came before the Supreme Court of Nova Scotia on a motion to make absolute a rule *nisi* granted by Weatherbe, J., under chapter 99 of the Rev. Stats. of Nova Scotia, for "securing the liberty of the subject." The rule was discharged.

It appeared that before the institution of the appeal to the Supreme Court of Canada, the time for which the appellant had been imprisoned had expired and he was at large.

On motion to dismiss the appeal for want of jurisdiction,

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Held, that an appeal will not lie in any case of proceedings for or upon a writ of *habeas corpus* when at the time of bringing the appeal the appellant is at large.

Appeal dismissed. The question of costs was reserved and subsequently the Court ordered that the respondent should be allowed his general costs of the appeal.

Interlocutory applications.

It is under this section that costs are given on applications made in Chambers.

Rule 57, *infra,* provides that costs between party and party shall be taxed pursuant to the tariff fees contained in Schedule D.

Section 107, *infra,* provides that an order for costs may be enforced by writs of execution issued out of the Supreme Court.

Writs of execution are not issued out of the Supreme Court to enforce payment of costs unless there is some difficulty in enforcing process if issued out of the court below.

Distraction of costs.

Letourneux v. *Dansereau,* 27th May, 1886.

Held, that, in appeal, where distraction of costs has not been asked for by the pleadings, or by the factum, it should be asked for when judgment is rendered. If not then asked for, any subsequent application must be made to the court upon notice to the other side.

See *Converse* v. *Clarke,* 12 L.C.R. 402; *The Water Works Co. of Three Rivers* v. *Dostaler,* 18 L.C.J. 196; *Lator* v. *Campbell,* 7 Legal News 163.

Article 553, C.C.P., provides as follows:—

"Every condemnation to costs involves by the operation of law, distraction in favour of the Attorney of the party to whom they are awarded."

This article was inserted for the first time in the last codification of the Law of Civil Procedure, and since that date the decision in *Letourneux* v. *Dansereau* has no application.

S. 53. Costs. Counsel absent.

No one appearing on behalf of appellant.

Burnham v. *Watson*, 7th Dec., 1881.
Scott v. *The Queen*, 27th March, 1886.
Western Ass. Co. v. *Scanlan*, 27th March, 1886.

Where no one appears on behalf of the appellant when an appeal is called for hearing, and counsel for respondent asks for the dismissal of the appeal, it will be dismissed with costs.

Costs for or against the Crown.

Lovitt v. *Atty-Gen. of Nova Scotia*, 33 Can. S.C.R. 350.

Costs will be given for or against the Crown as in other cases.

Costs—between solicitor and client.

Boak v. *Merchants Mar. Ins. Co.*, 3rd June, 1879.

Application for an order directing Registrar to tax costs between solicitor and client, refused. The Chief Justice stated that the question was duly considered by the judges at the organization of the Court, and it was not thought advisable to regulate costs between solicitor and client.

Paradis v. *Bossé*, 21 Can. S.C.R. 419.

There is no tariff in the Supreme Court as between solicitor and client, but such costs may be recovered in action upon a *quantum meruit*.

Party arguing appeal in person.

Re Charlevoix Election, Valin v. *Langlois*, Cout. Dig. 388.

The respondent, who was an advocate argued his appeal in person. Motion to tax counsel fee was refused.

Costs paid pursuant to judgment below—how recovered when judgment reversed.

Lewin v. *Howe*, 14 Can. S.C.R. 722.

The defendants having succeeded in the court below and

S. 53. Costs. How recovered.

in the Supreme Court, their costs after taxation were paid by the plaintiffs. Subsequently these judgments were reversed by the Judicial Committee of the Privy Council. Upon an application to the Supreme Court to have the judgment of the Privy Council made a judgment of the Supreme Court the plaintiffs applied to have the order of the Supreme Court direct the repayment of the costs so paid with interest. The application being referred to Strong, J., a clause was inserted in the judgment of the Supreme Court by which the defendants were ordered to refund the said costs, but without interest. Supreme Court Records.

Duggan v. *The London and Canadian Loan and Agency Co. et al.*, 23rd March, 1893.

A judgment of the Supreme Court of Canada allowing an appeal with costs (20 Can. S.C.R. 481), was carried, in further appeal, by the respondents to Her Majesty's Privy Council, where the decision was reversed ((1893), A.C. 506; 63 L.J. 14). The respondents had, however, in the meantime paid the costs under the order of the Supreme Court.

On motion in the Supreme Court of Canada, on behalf of the said respondents, it was held that they were entitled to an order directing the re-payment to them of the costs so paid, the amount of such costs to be settled upon an inquiry before the Registrar.

(Motion granted with costs.)

Costs—where point not raised in the pleading.

City of Montreal v. *McGee*, 30 Can. S.C.R. 582.

In an action for bodily injuries where the extinction of the right of action by prescription was not pleaded or raised in the courts below and upon an appeal the prescription was judicially noticed and the action dismissed, the appeal was allowed without costs.

Sandon Water Works Co. v. *White*, 35 Can. S.C.R. 309.

In this case the plaintiffs in their reply set up a failure of defendants to comply with certain conditions precedent, but did not set up another condition precedent upon which

S. 53. Costs. Pleading defective.

the judgment appealed from proceeded, though it was not referred to at the trial. *Held*, that the plaintiffs need not have replied as they did, but having done so without setting up the condition especially relied upon in appeal, thereby possibly misleading the defendants, they were properly punished by the court below by being deprived of their costs of appeal.

Costs—jurisprudence generally.

Fisher v. *Anderson*, Cout. Dig. 384; 4 Can. S.C.R. 406.

In a case submitted for the construction of a will, upon allowing an appeal it was ordered that the costs should be paid by the respondents, who were executors and trustees out of the general residue of the estate of the deceased, but if the residue should have been distributed then that costs should be contributed by the persons who should have received portions of the residue ratably according to the amounts respectively received by them.

The Ætna Life Insurance Co. v. *Brodie*, 5 Can. S.C.R. 1.

Appellants not having tendered with their plea costs up to and inclusive of its production, ordered to pay the respondent the costs incurred in the court of first instance.

Brunet v. *Pilon*, 5 Can. S.C.R. 356.

A motion to quash an appeal on the ground that it should not have been brought as a substantive appeal, but as a cross-appeal, was dismissed. But the respondent having succeeded in having the judgment of the court below varied (reversed on one point and affirmed on another), was allowed costs as of a cross-appeal taken under rule 61.

The Queen v. *Starrs*, 17 Can. S.C.R. 118.

Where a claim against the Government was referred to arbitration, the Crown not insisting on its strict legal rights and the claimants thereby put to great expense, the Crown was deprived of costs in all the courts.

Bell v. *Wright*, Cout. Dig. 1331; 24 Can. S.C.R. 656.

In a suit for construction of a will and administration

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of testator's estate, where the land of the estate had been sold and the proceeds paid into court, J.J.B., a beneficiary under the will and entitled to a share in said fund, was ordered personally to pay certain costs to other beneficiaries. *Held*, reversing the decision of the Court of Appeal, that the solicitor of J.J.B. had a lien on the fund in court for his costs as between solicitor and client in priority to the parties who had been allowed costs against J.J.B. personally. *Held*, also, that the referee before whom the administration proceedings were pending had no authority to make an order depriving the solicitor of his lien, not having been so directed by the administration order and there being no general order permitting such an interference with the solicitor's *primâ facie* right to the fund.

Dreschel et al. v. *Auer Incandescent Light Mfg. Co.*, 28 Can. S.C.R. 268.

On a motion to quash an appeal where the respondents filed affidavits stating that the amount in controversy was less than the amount fixed by the statute as necessary to give jurisdiction to the appellate court, and affidavits were also filed by the appellants, shewing that the amount in controversy was sufficient to give jurisdiction under the statute, the motion to quash was dismissed, but the appellants were ordered to pay the costs, as the jurisdiction of the Court to hear the appeal did not appear until the filing of the appellants' affidavits in answer to the motion.

Gauthier v. *Jeannotte*, 14th June, 1898; 28 Can. S.C.R. 590.

The defendant had caused a defamatory statement to be printed in a newspaper, and on a separate fly-sheet, and circulated through the constituency, during a Parliamentary election, with a printed challenge to the plaintiff and others implicated in the charges made to justify their innocence by taking an action for damages in case they were not guilty, and offering at the same time to make a deposit to cover the costs of suit.

The Supreme Court of Canada, in affirming the judgment of the Court of Queen's Bench for Lower Canada

(which had reversed the judgment of the Superior Court in favour of the plaintiff, and dismissed the action without costs), refused to allow costs under the circumstances. Strong, C.J., dissented, being of opinion that the Superior Court judgment for $100 damages with costs as of an action for that amount should be restored.

Brigham v. *Banque Jacques Cartier*, 30 Can. S.C.R.429.

Where the appellant was an inspector of an insolvent estate and participated in arrangements intended to secure a fraudulent preference to a particular creditor, the appeal was allowed with costs, but the action against him was dismissed without costs and an order made that no costs should be allowed in any of the courts below.

Bell Telephone Co. v. *Chatham*, 31 Can. S.C.R. 61.

A person driving on a public highway who sustains injury to his person and property by the carriage coming in contact with a telephone pole lawfully placed there, cannot maintain an action for damages if it clearly appears that his horses were running away and that their violent uncontrollable speed was the proximate cause of the accident. In an action against the city corporation for damages in such a case the latter was ordered to pay the costs of the telephone company brought in as third party, it having been shewn that the company placed the pole where it was lawfully, and by authority of the corporation.

Millard v. *Darrow*, 31 Can. S.C.R. 196.

In an action for the price of land under an agreement for sale, or in the alternative for possession, defendant filed a counterclaim for specific performance and paid into court the amount of the purchase money and interest, demanding therewith a deed with covenants of warranty of title. Plaintiff proceeded with his action and recovered judgment at the trial for the amount claimed and costs, including costs on the counterclaim; the decree directing him to give the deed demanded by the defendant as soon as the costs were paid. The verdict was affirmed by the court *en banc*. *Held*, reversing the judgment appealed from (33 N.S. Rep. 334), that as defendant had succeeded

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on his counterclaim he should not have been ordered to pay the costs before receiving his deed and the decree was varied by a direction that he was entitled to his deed at once with costs of appeal to the court below *en banc*, and to the Supreme Court of Canada against plaintiff. Parties to pay their own costs in court of first instance. *Held*, per Gwynne, J. Defendant should have all costs subsequent to the payment into court.

Challoner v. *Lobo*, 32 Can. S.C.R. 505.

The judgment appealed from (1 Ont. L.R. 156, 262) reversed the trial court judgment (32 O.R. 247), and held that the "last revised assessment roll" governing the status of petitioners in proceedings under the Drainage Act, was the roll in force at the time the petition was adopted by the municipal council and referred to the engineer for report, and not the roll in force at the time that the by-law was finally passed. The contractor had been made party in the Court of Appeal for Ontario and appeared at the hearing, but did not himself appeal. The judgment appealed from held that the effect of allowing the appeal did not give him any costs on the appeal. The Supreme Court affirmed the judgment appealed from.

Montreal v. *C.P.R.*, 33 Can. S.C.R. 396.

Where the contentions of neither party were fully adopted, the appeal was allowed without costs in the Supreme Court of Canada.

Crease v. *Fleischman*, 34 Can. S.C.R. 279.

In this case the Court said: "The appeal is dismissed, but under the special circumstances of the case, and as the respondents opposed the motion to rectify, and occasioned unnecessary costs, it is dismissed without costs in this Court and in the court appealed from."

AMENDMENTS.

54. At any time during the pendency of an appeal before the Court, the Court may, upon the application of any of the parties, or without any such application, make

all such amendments as are necessary for the purpose of determining the appeal, or the real question of controversy between the parties, as disclosed by the pleadings, evidence or proceedings. R.S., c. 135, s. 63. S. 54. Amendments.

55. Any such amendment may be made, whether the necessity for the same is or is not occasioned by the defect, error, act, default or neglect of the party applying to amend. R.S., c. 135, s. 64.

56. Every amendment shall be made upon such terms as to payment of costs, postponing the hearing or otherwise as to the court seems just. R.S., c. 135, s. 65.

Swim v. *Sheriff*, 1881.

The defendant having seized under a writ of replevin issued out of the Supreme Court of New Brunswick a quantity of logs, the plaintiff brought an action for trespass. The defendant neglected to include in his pleas to the declaration justification under the writ.

Held, per Ritchie, C.J., and Fournier, J., that if the evidence could not be given under the pleadings, the Court could allow the record to be amended by adding such a plea.

Per Fournier, J., that if such amendment became necessary, the defendant should pay the costs.

Per Henry, J., that no effort having been made in the court below to add such a plea, it was too late and contrary to precedent and justice now to admit it.

Piché v. *City of Quebec*, 1885.

The plaintiff, a commercial traveller, was in a store in Quebec writing down an order for his firm, and had a small sample of his goods in his hand, when he was arrested by a policeman. A by-law of the City of Quebec prohibited the selling of goods by samples by transient traders without having paid a license fee of $60. After his arrest the plaintiff paid the license fee and brought the action for illegal arrest. The corporation justified under the by-laws and municipal regulations.

S. 56. Amendments.

Held, per Strong and Fournier, JJ. The evidence fell short of establishing the allegation of the defendant's plea that the plaintiff was actually engaged in selling, there being no proof of any actual sale, but did shew that he was openly pursuing the occupation of a transient merchant or trader, or employee of a transient merchant or trader, without license, and the Court would permit of an amendment of the pleadings, which would adapt the allegations of the parties to the case as disclosed by the evidence.

Baker v. *La Societé de Construction Métropolitaine*, 22 Can. S.C.R. 364.

In their declaration the appellants alleged that the respondents had been in possession of the property since 9th May, 1876, and after the *enquête* they moved the court to amend the declaration by substituting for the 9th May, 1876, the words "1st Dec., 1886." The motion was refused by the Superior Court, which held that the admission amounted to a judicial avowal from which they could not recede, and the Court of Queen's Bench affirmed this decision.

On appeal to the Supreme Court it was *Held*, reversing the judgment of the court below, Fournier, J., dissenting, that the motion should have been allowed by the Superior Court so as to make the allegation of possession conform with the facts as disclosed by the evidence. Article 1245 C.C.

Porter v. *Hale*, 23 Can. S.C.R. 265.

At the hearing of a suit by P. to enforce performance of an agreement by the devisee of land under a will to convey it to P. he claimed to be entitled to a decree, in the event of the case made by his bill failing, on the ground that the said will was not registered according to the registry laws of New Brunswick, and was therefore void as against him an intending purchaser, and C. had an interest in the land he had agreed to sell to him as an heir-at-law of the estate.

Held, that on a bill claiming title under the will, P. could not have relief based on the proposition that the same will was void against him, and no amendment could be permitted to make a case not only at variance with, but

antagonistic to that set out in the bill, especially as such amendment was not asked for until the hearing. S. 56. Amendments.

Ferrier v. *Trépannier*, 24 Can. S.C.R. 86.

Where parties are before the Court *quâ* executors, and the same parties should also be summoned *quâ* trustees, an amendment to that effect is sufficient, and a new writ of summons is not necessary.

Price v. *Fraser*, 31 Can. S.C.R. 505.

Between the hearing of a case and the rendering of the judgment in the trial court, the defendant died. His solicitor by inadvertence inscribed the case for revision in the name of the deceased defendant. The plaintiffs allowed a term of the Court of Review to pass without noticing the irregularity of the inscription, but, when the case was ripe for hearing on the merits, gave notice of motion to reject the inscription. The executors of the deceased defendant then made a motion for permission to amend the inscription by substituting their names *es qualité*. The Court of Review allowed the plaintiffs' motion as to costs only, permitted the amendment and subsequently reversed the trial court judgment on the merits. The Court of King's Bench (appeal side) reversed the judgment of the Court of Review on the ground that it had no jurisdiction to allow the amendment and hear the case on the merits, and that consequently all the orders and judgments given were nullities. *Held*, reversing the judgment appealed from (Q.R. 10 K.B. 511), the Chief Justice and Taschereau, J., dissenting, that the Court of Review had jurisdiction to allow the amendment and that, as there had been no abuse of discretion and no parties prejudiced, the Court of King's Bench should not have interfered.

City of Montreal v. *Hogan*, 31 Can. S.C.R. 1.

The Court said:—

"The contention was put forward by the appellants at the hearing of this appeal that as by the deed of ownership of the property in question filed at the trial by the respondent as his title thereto, the sale thereof appears to have been made not to him alone, but to him and one Beau-

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fort jointly, he, the respondent, could not alone bring this action as he has done. To meet this objection the respondent thereupon tendered a deed of assignment by Beaufort to him of all his rights in the property. We could not, however, allow the production of this document, as it has been the constant jurisprudence of this Court not to receive here any new evidence whatever. *Exchange Bank* v. *Gilman*, 17 Can. S.C.R. 108. But the appellants cannot now avail themselves of an objection of this nature that was not taken at the trial, where, upon the necessary amendment of the declaration, the evidence to meet such objection could have been brought. They, by their pleas, acknowledge the respondent's title to the property by offering to return it to him. And for them at this stage of the case to turn round and ask, for the first time, the dismissal of his action on the ground that he has not proved his title is what cannot be allowed.

Hill v. *Hill*, 33 Can. S.C.R. 13.

A petition in revocation of a judgment homologating a report failed to attack specifically an earlier judgment. A motion to amend the petition so as to include the earlier judgment was refused in the court below, but was granted by the Supreme Court in the exercise of its discretion under these sections.

Burland v. *City of Montreal*, 33 Can. S.C.R. 373.

In this case the plaintiff claimed to recover the value of certain lands illegally retained by the defendant. The evidence shewed that the only matter in dispute was the value of the land in question, but the court below dismissed plaintiff's action on the ground that the proper remedy was either an action *en bornage* or *au petitoire*, but the Supreme Court having power to amend the pleadings so as to determine the real question in controversy by section 63 (now section 54), remitted the record to the court below to ascertain by expertise or otherwise to determine the extent of the lands taken, and ordered defendants to return the same to the plaintiff in the same condition as it was before possession was taken, and ordered that all necessary amendments of the pleadings should be treated as having been made.

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Porter v. *Pelton*, 33 Can. S.C.R. 449.

In this case the Court said:—

"The appellants applied at the opening of the argument to add three alternative claims. We are of opinion that all proper amendments should be made where the Court is satisfied that such amendments are necessary to do justice and the nature of the demand is not changed, and that neither party can be prejudiced. Such amendments must be dealt with in each case in the sound exercise of a judicial discretion. We cannot in this case interfere with the exercise of a discretion in the court below refusing the same application.

Massawippi Valley Rly. Co. v. *Reed*, 33 Can. S.C.R. 457.

This action was brought *au petitoire* for a declaration of plaintiff's title to certain lands. It was shewn that the plaintiff company had under the provisions of their Act, leased the railway and all its appurtenances to another railway company, which held and operated the railway at the time of the institution of the action. The trial judge held that the plaintiffs having parted with the interest, had no right of action. *Held*, affirming in this respect the Court of Appeal below, that a right of action subsisted in the plaintiffs, and if necessary the plaintiffs should have the right of adding the other railway company as co-plaintiff.

Dorion v. *Crowley*, Cass. Dig., 2nd ed., 709.

In an appeal from Quebec, where it was sought to add a party as co-respondent on the ground that he had obtained from the respondents a notarial assignment of all their interest in the suit, made prior to the hearing of the case by the Court of Appeal of the province, the Supreme Court held that the application to add the assignee should have been made at the earliest oportunity to the court below, and was not one the Supreme Court should be called upon to decide. Cass. Prac. 78.

Caldwell v. *Stadacona F. & L. Ins. Co.*, 11 Can. S.C.R. 212.

Where a party has been improperly joined as co-plain-

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tiff or co-defendant, the Supreme Court will order him to be struck out of the record. Cass. Prac. 78.

Long v. *Hancock* (not reported).

Where a party was, by the judgment of the court, made liable for the costs of the appeal, although he had in fact not been a party to such appeal, nor interfered in the appeal by depositing a factum, or appearing by counsel at the argument, the judgment was amended by the Court. Cass. Prac. 78.

Dumoulin v. *Langtry*, 13 Can. S.C.R. 258.

Where parties, other than those on the record have an interest entitling them to prosecute an appeal in the name of the plaintiff on the record, the Supreme Court will permit them to do so, on such terms as may seem just. Cass. Prac. 78.

Hogaboom v. *Receiver-General*, December, 1897.

Where a party was not in the case as originated, but received notice of appeal, and was represented by counsel at the hearing, he was allowed to tax his costs of the appeal. Cass Prac. 78.

Grant v. *The Queen*, 20 Can. S.C.R. 297.

In this case the action was instituted against the Government of Quebec, but when the case came up for hearing on the appeal to the Supreme Court the Court ordered that the name of "Her Majesty the Queen" be substituted for that of the "Province of Quebec."

Syndicat Lyonnais du Klondyke v. *McGrade*, 36 Can. S.C.R. 251.

In an action to set aside a conveyance as made in fraud of creditors, the defendant desiring to meet the action by setting up that there was no debt due and consequently that no such fraud could exist, must allege these objections in his pleadings. In the present case the defendant, having failed to plead such defence, was allowed to amend on terms, the Chief Justice dissenting.

Rule 4, *infra*, provides that the Court or a judge may order a case to be remitted to the court below in order that

it may be made more complete by the addition thereto of further matter. S. 56. Amendments.

For decisions under this rule, *vide* page 391, *infra*.

INTEREST.

57. If on appeal against any judgment, the Court affirms such judgment, interest shall be allowed by the Court for such time as execution has been delayed by the appeal. R.S., c. 135, s. 66.

Trust and Loan v. *Ruttan*, 5th February, 1878.

An application to vary judgment by inserting direction that interest be allowed for the period during which the appeal has been pending, must be on notice.

Clark v. *Scottish Imperial Insurance Company*, 19th February, 1880.

Motion for allowance of interest on verdict from date thereof in appeal from N.B. *Held*, that it be allowed on principal sum from last day of next term after verdict.

McQueen v. *The Phœnix Mutual Fire Insurance Co.*, 9th April, 1880.

Counsel for appellant moves for interest for time judgment has been stayed, pursuant to section 34 Supreme and Exchequer Courts Act. Question to full Court by Fournier, J. *Held*, a question the Court should dispose of on its own motion.

The Queen v. *MacLean et al.*, 12th May, 1885.

M. & Co. brought an action by petition of right against the Dominion Government, for damages for an alleged breach of contract whereby the suppliants contracted for the Parliamentary and Departmental printing for a certain specified period. The alleged breach consisted in the Government giving a portion of the said printing to other parties, the suppliants claiming that, by the terms of the contract, they were entitled to the whole of it. The Crown demurred to the petition, and as to the departmental printing, the demurrer was overruled (8 Can. S.C.R. 210). The

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petition subsequently came on for hearing in the Exchequer Court, and a reference was made to the Registrar and Queen's Printer to ascertain and report as to the profit lost to the suppliants by not being allowed to do the departmental printing. The referees found a certain sum as the profit lost to suppliants, stating in their report, that the suppliants claimed interest on the amount, but that the referees were of opinion they had no power, under the order of reference to consider the question of interest.

No exception was taken to the report of the referees, and the suppliants moved in the Exchequer Court for judgment for the amount found by the referees with interest, as the damages to which they were entitled under their petition of right. Mr. Justice Henry, before whom the motion was made, gave judgment for the amount found by the referees with interest thereon at 6 per cent., such interest to be computed on the aggregate of the sums which, according to said report, the suppliants up to the 31st day of December, in each year during the currency of the said contract, would have received as profit.

On appeal to the Supreme Court of Canada from that part of the judgment allowing interest. *Held*, Henry, J., dissenting, that the suppliants were not entitled to interest on the amount found by the referees for loss of profits.

Appeal allowed with costs.

St. Louis v. *The Queen*, 25 Can. S.C.R. 665. Cass. Prac. 87.

Interest was allowed against the Crown, but the question of the suppliant's right to it was not argued.

Toronto Rly. Co. v. *The Queen*, Oct., 1897. Cass. Prac. 87.

In a case before the Exchequer Court for return of duties improperly imposed, judgment was given against the claimants. This was afterwards affirmed by the Supreme Court, but reversed by the Privy Council, and judgment ordered to be entered for the suppliant for the amount claimed and costs. On the case coming again before the Exchequer Court judgment was entered for the principal sum only, interest being refused, and an appeal was taken

to the Supreme Court for the interest In the meantime the Crown presented a petition to the Judicial Committee of the Privy Council, praying for a declaration that the claimants were not entitled to interest under their Lordships' judgment. The petition was dismissed, their Lordships stating that interest having been claimed, and the question not having been argued in any of the courts, it should be allowed. The Crown thereupon consented, under section 52 of the Act, to the judgment of the Exchequer Court being reversed on the appeal to the Supreme Court. S. 57. Interest.

The Queen v. *Henderson*, 28 Can. S.C.R. 425.

An action instituted in the Exchequer Court. *Held*, where a claim against the Crown arises in the Province of Quebec and there is no contract in writing, interest may be recovered against the Crown according to the law in that province, and section 33 of the Exchequer Court Act does not apply.

Queen v. *Armour*, 31 Can. S.C.R. 499.

The Supreme Court dismissed an appeal by the Crown from the judgment of the Exchequer Court which awarded the suppliant $14,158 as compensation for lands expropriated with interest and costs. In settling the minutes of judgment of the Supreme Court, the Registrar by the direction of the Chief Justice, inserted a provision that the suppliant was entitled to be paid by the Crown interest on the compensation money awarded by the judgment of the Exchequer Court from the date of that judgment at the rate of six per centum per annum.

Other cases.

Wilkins v. *Geddes*, 3 Can. S.C.R. 203.

Under 31 V. c. 12 and 37 V. c. 13, the Minister of Public Works of the Dominion of Canada appropriated to the use of the Dominion certain lands in Yarmouth county, known as "Bunker's Island." In accordance with said Acts, on the 2nd April, A.D. 1875, he paid into the hands of W., prothonotary at Halifax, the sum of $6,180 as compensation and interest, as provided by those Acts to

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be thereafter appropriated among the owners of said island. This sum was paid at several times, by order of the Supreme Court of Nova Scotia, to one A., as owner, to one G., as mortgagee, and to others entitled, less ten dollars. As the money had remained in the hands of W., the prothonotary of the court, for some time, H., attorney for G., applied to the Supreme Court for an order of the Court calling upon W., the prothonotary, to pay over the interest upon G.'s proportion of the moneys, which interest (H. was informed) had been received by the prothonotary from the bank where he had placed the amount on deposit. W. resisted the application on the ground that he was not answerable to the proprietor of the principal, or to the Court, for interest, but did not deny that interest had been received by him. A rule *nisi* was granted by the Court and made absolute, ordering the prothonotary to pay whatever rate of interest he received on the amount.

Held, 1. That the prothonotary was not entitled to any interest which the amount deposited earned while under the control of the Court. That, in ordering the prothonotary to pay over the interest received by him, the Court was simply exercising the summary jurisdiction which each of the superior courts has over all its immediate officers. (Fournier and Henry, JJ., dissenting.)

2. That the order appealed from, being a decision on an application by a third party to the Court, was appealable under the 11th section of 38 V. c. 11. (Fournier, J., dissenting, and Taschereau, J., doubting.)

Leak v. *City of Toronto*, 30 Can. S.C.R. 321.

If in the construction of a public work land of a private owner is injuriously affected and the compensation therefor is determined by arbitration, interest cannot be allowed by the arbitrator on the amount of damages awarded. Judgment appealed from (26 Ont. App. R. 351) affirmed.

Sinclair v. *Preston*, 31 Can. S.C.R. 408.

To entitle a creditor to interest under 3 & 4 Wm. IV. c. 42, s. 28 (Imp), the written instrument under which it is claimed must shew by its terms that there was a debt certain payable at a certain time. It is not sufficient that the

same may be made certain by some process of calculation or some act to be performed in the future. S. 57. Interest.

Dunn v. *The King*, 12th Nov., 1901. Cout. Dig. 728.

The petition of right was to recover unpaid interest on duties exacted by the Government of New Brunswick for export duties for taking lumber cut under licenses from the Dominion of Canada, on lands in dispute between the provinces and eventually found to belong to Canada. The interest was claimed as both provinces and Dominion had paid interest and otherwise admitted liability therefor. The Crown claimed that it paid as a matter of grace and without liability by statute or express contract and that the interest could not be recovered by suit. The Supreme Court held that there was no liability of the Crown for interest, there having been no statutory liability nor express contract therefor, and that none arose on account of payments of interest from time to time or on the account stated as claimed.

CERTIFICATE OF JUDGMENT.

58. The judgment of the Court in appeal shall be certified by the Registrar of the court to the proper officer of the court of original jurisdiction, who shall thereupon make all proper and necessary entries thereof; and all subsequent proceedings may be taken thereupon as if the judgment had been given or pronounced in the said last mentioned court. R.S., c. 135, s. 67.

Dawson v. *McDonald*, Cass. Dig. 683.

The judgment of the Supreme Court must, under section 46 (now 58), Supreme and Exchequer Court Act, be entered and sent to the court below before defendant can have recourse to a proceeding by *requête civile*. A *requête civile* does not stay execution as a matter of course. The defendant would have to apply to the Superior Court or a judge thereof for an order. A judge in chambers should not grant an order staying execution of a judgment, especially when defendant has had ample time to apply to the full Court. Per Taschereau, J.

S. 58. Judgment enforcing by court below.

Ex parte Jones, Cout. Dig. 1124.

Under the provisions of R.S. c. 135, s. 67, a judgment of the Supreme Court of Canada, certified to the proper officer of the Court of original jurisdiction, becomes a judgment of the inferior court for all intents and purposes, and it is not necessary to obtain special leave to issue execution in order to levy the costs of the party awarded costs on the appeal to the Supreme Court of Canada.

Durocher v. *Durocher*, 27 Can. S.C.R. 634.

When judgment on a case in appeal has been rendered by the Supreme Court and certified to the proper officer of the court of original jurisdiction, the Supreme Court has no jurisdiction to entertain a petition (*requête civile*) for revocation of its judgment.

JUDGMENT FINAL AND CONCLUSIVE.

59. The judgment of the Court shall, in all cases, be final and conclusive, and no appeal shall be brought from any judgment or order of the Court to any court of appeal established by the Parliament of Great Britain and Ireland, by which appeals or petitions to His Majesty in Council may be ordered to be heard, saving any right which His Majesty may be graciously pleased to exercise by virtue of his royal prerogative. R.S., c. 135, s. 71.

Leave to appeal.

Kelly v. *Sullivan*, 21st January, 1877.
Moore v. *Connecticut Mutual Ins. Co.*, 9th April, 1880.
Queen Ins. Co. v. *Parsons*, 21st June, 1880.

The Court has no jurisdiction either to refuse or grant an application for leave to appeal to the Privy Council.

Nasmith v. *Manning*, 4th March, 1881.

Notice of intention to make such an application should not be put on the motion paper.

Appeals to the Judicial Committee of the Privy Council from the Supreme Court of Canada lie only by special

leave of the Privy Council. The Judicial Committee will not entertain the application for leave to appeal until the final judgment of the Supreme Court has been drawn up and entered. (*Pion* v. *North Shore Rly. Co.*, Cass. Prac. 88.)

S. 59. Privy Council. No appeal except by leave.

Petition—what to contain.

Canada Central Rly. Co. v. *Murray*, 8 Can. S.C.R. 313.

To an action on the common counts brought by T. M. and W. M. against the C.C.R. Co. to recover money claimed to be due for fencing along the line of the railway, the C.C.R. Co. pleaded never indebted and payment. The contract was signed on behalf of the C.C.R. Co. by one F., who controlled nine-tenths of the stock, and the C.C.R. Co. denied that F. had any power to contract on their behalf. A general verdict was found for T. M. and W. M. for $12,218.00. The Supreme Court held that it was properly left to the jury to decide whether the work performed of which the C.C.R. Co. received the benefit was contracted for by the company through the instrumentality of F. or whether they adopted and ratified the contract, and that the verdict could not be set aside on the ground of being against the weight of evidence.

Ritchie, C.J., and Taschereau, J., dissenting, held that there was no evidence that F. had any authority to bind the Company.

The C.C.R. Co. then applied for leave to appeal to the Privy Council (8 A.C. 574), and in refusing leave Lord Watson said:—

"Now the questions raised appear to their Lordships to involve no issue except an issue of fact: that the judges below have differed upon a question of fact with regard to an ordinary contract of employment does not seem to be any reason for permitting an appeal having regard to the terms of the statute which now regulates these appeals."

"Their Lordships are also desirous in this case to lay down the rule that they will in future expect parties who are petitioning for leave to bring an appeal before this Board to state succinctly, but fully, in their petition, the grounds upon which they make that demand. They cer-

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tainly expect that parties will confine themselves in future to the petition, and will not wander into extraneous matter, such as the record and proceedings, over which this Board, until an appeal is permitted and the papers are sent to England by the proper authorities, have no control, and which they cannot accept on an *ex parte* statement, which an application of this kind is.

"Their Lordships will humbly report to Her Majesty that this petition ought to be dismissed."

Procedure.

The first step usually taken in an application for leave to appeal to the Judicial Committee is the filing of a praecipe or requisition with the Registrar for a certified copy of the case, factums, judgment and reasons of the judges. These documents are delivered out to the solicitor for the appellant upon payment of the fees provided by the Supreme Court Rules, *infra*, p. 446. The solicitor thereupon prepares the petition for presentation to the Judicial Committee, and the affidavit supporting the same. The Judicial Committee has granted special leave to appeal from the Supreme Court where the only material filed on the application was the petition and a copy of the judgment with an affidavit of the appellant's solicitor verifying the facts alleged.

For forms *vide* Privy Council Appeals, Preston, p. 21, *et seq.*

As to what the petition should contain and the circumstances under which leave to appeal will be granted or refused, *vide* Safford & Wheeler's Privy Council Practice, p. 730.

Time.

There is no limit with respect to the time within which the King in Council will grant special leave to appeal from the judgment of the Supreme Court of Canada, but the practice is to make the application for special leave with reasonable promptitude after the judgment of the Supreme Court has been rendered.

King's order.

If leave is granted the King's order directs the Registrar of the Supreme Court "to transmit to the Registrar of the Privy Council without delay the authenticated copies under the seal of the said Supreme Court of the record, pleadings, proceedings and evidence proper to be laid before His Majesty on the hearing of the appeal, upon payment by the petitioner of the usual fees for the same."

Printing.

The Privy Council Rules regulating appeals provide that the appellant or his agent should make an application for the printing of the transcript record within six calendar months from the arrival of the transcript and the registration thereof in all matters brought by appeal from His Majesty's colonies and plantations east of the Cape of Good Hope, or from the Territories of the East India Company and within the space of three months in all matters brought by appeal from any other part of His Majesty's dominions abroad, and that in default of the appellant or his agent taking effectual steps for the prosecution of the appeal within such time or times respectively, the appeal shall stand dismissed without further order.

As the papers furnished the solicitor by the Registrar of the Supreme Court for the purpose of the application for special leave are identical with those which he is directed to forward by the King's order in the event of leave to appeal being granted, in recent years in the petition for leave it has been customary to ask that the papers certified by the Registrar of the Supreme Court, used on the application, be accepted as the record in the appeal by the Registrar of the Privy Council. In such case the King's order contains the following provision: "And it is hereby further ordered that the authenticated copy under the seal of the said Supreme Court of the record produced upon the hearing of the said petition be accepted as the record in the said appeal." *Chappelle* v. *The King*, March 12th, 1903.

Under the Privy Council Rules, the appellant may print the record before it is transmitted to England, but in

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doing so must comply strictly with the rules of the Judicial Committee regulating the size of type, etc., etc. *Vide* Privy Council Appeals, Preston, p. 15; Safford & Wheeler's Privy Council Practice, pp. 1033-1040.

When the printing is done in Canada the appellant is required to leave with the Registrar of the Supreme Court two copies of the printed case for the purpose of having the same certified by the Registrar and the seal of the Supreme Court affixed thereto, and fifty other copies are required to be deposited with the Registrar, and the necessary expense of transmission paid for the purpose of being forwarded to the Registrar of the Privy Council.

Where the King's order contains no provision dispensing with the forwarding of the transcript record, and the intention is to have the printing done in England, the solicitor for the appellant should file with the Registrar of the Supreme Court a requisition to have the transcript record in the case made up and despatched.

By order in council of the Judicial Committee of the Privy Council dated 20th March, 1905, *infra*, p. 548, it is provided that where leave to appeal to the Privy Council is granted, and the respondent's agents have received copies of the order granting leave as well as a notice from the Registrar of the court below of the despatch of the transcript record to the Registrar of the Privy Council, and provided that this appears upon the record or the accompanying certificate of the Registrar of the court below, the respondents will be bound to enter an appearance within three months from the filing of the petition of appeal, or in default the appeal may be set down *ex parte*. The object of this new practice is to render unnecessary the tedious procedure of appearance orders. This practice was followed in *Barrett* v. *Syndicat Lyonais du Klondike*, January, 1906.

Appeals in forma pauperis.

Leave to appeal in *forma pauperis* may be granted by the Judicial Committee. *Vide* Safford & Wheeler, Privy Council Practice, p. 752.

In *Dominion Cartridge Co.* v. *McArthur*, the King's

order 11th August, 1902, directed the Registrar of the Supreme Court to transmit the transcript record to the Registrar of the Privy Council in the language above set out, but without the words "upon payment by the petitioner of the usual fees for the same." In this case the Registrar was instructed by the Chief Justice, Sir Henry Strong, to forward the transcript record without the usual stamps being affixed thereto, and without the payment of any fee.

Special leave—when granted.

Clergue v. *Murray* (1903), A.C. 521.

Held—"According to section 71 of Revised Statutes of Canada, 1886, c. 135, there is no appeal from any judgment or order of the Supreme Court of Canada except by special leave of His Majesty in Council. Where a suitor, having his choice whether to appeal to the Supreme Court or to His Majesty in Council, elects the former remedy, it is not the practice to give him special leave except in a very strong case. (*Prince* v. *Gagnon* (1882), 2 App. Cas. 103, followed)."

C. P. R. v. *Blain* (1904), A.C. 453.

Special leave to appeal from a decree of the Supreme Court of Canada will not be granted to a petitioner who has elected to appeal to that Court and not to His Majesty direct, unless a question of law is raised of sufficient importance to justify it. *Ex parte Clergue* (1903), A.C. 521, followed.

Ewing v. *Dominion Bank* (1904), A.C. 806.

Petition for special leave to appeal from the Supreme Court of Canada dismissed where the petitioners were appellants to that Court and no important question of law was raised.

Staying execution.

McDougall v. *Montreal Street Rly. Co.*, Q.R. 24 S.C. 509.

The Superior Court cannot, on the mere affirmation of

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a party that he intends to apply to His Majesty's Privy Council for leave to appeal from a final judgment of the Supreme Court of Canada, suspend the execution of said judgment.

Adams & Burns v. *Bank of Montreal*, Cout. Dig. 593.

A judge in Chambers of the Supreme Court of Canada will not entertain an application to stay proceedings pending an appeal from the judgment of the Court to the Judicial Committee of the Privy Council.

Criminal appeals.

The judgment of the Supreme Court is final in criminal appeals. The provisions of the Criminal Code take away any further appeal to the Judicial Committee of the Privy Council.

Vide p. 531, *infra*.

Election cases.

In the exercise of its authority to create "additional courts" the Parliament of Canada, in 1874, by 37 V. c. 10 (R.S. (1906), c. 7), created courts for the trial of controverted elections. No appeal lies from these courts to His Majesty in Council. *Théberge* v. *Landry*, 2 A.C. 102; *Valin* v. *Langlois*, 5 A.C. 115.

Section 69 of the Controverted Elections Act, *infra*, p. 516, provides that the judgment of the Supreme Court of Canada in election cases shall be final.

In the Glengarry election case, *Kennedy* v. *Purcell*, 59 L.T. 279, *infra*, p. 516, the Judicial Committee in refusing leave to appeal said that there was no substantial distinction between the statute which was the subject of decision in *Théberge* v. *Landry* and in *Valin* v. *Langlois*, and the case in question, and held, without giving any decision on the abstract question of the existence of the Royal prerogative to grant leave to appeal, that if it did exist it ought not to be exercised in that case.

Admiralty cases.

The Exchequer Court of Canada is a Colonial Court of Admiralty, and by 54-55 V. c. 29, being an Act to pro-

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vide for the exercise of Admiralty jurisdiction within Canada in accordance with the "Colonial Courts of Admiralty Act, 1890," provision is made in section 14 for an appeal from a local judge in Admiralty direct to the Supreme Court of Canada.

The Colonial Courts of Admiralty Act (Imp.), 53-54 V. c. 27, s. 6, sub-s. 1, provides as follows: "The appeal from the judgment of any court in a British possession in the exercise of the jurisdiction conferred by this Act either where there is as of right no local appeal or after a decision on local appeal, lies to His Majesty the King in Council."

Section 7, sub-s. 1, in part provides as follows:

"Rules of Court for regulating the procedure and practice (including fees and costs) in a court in a British possession in the exercise of the jurisdiction conferred by this Act, whether original or appellate, may be made by the same authority and in the same manner as rules touching the practice, procedure, fees, and costs in the said Court in the exercise of its ordinary civil jurisdiction respectively are made."

The general rules and orders regulating the practice and procedure in Admiralty cases in the Exchequer Court of Canada contain no provisions regulating the procedure to be adopted on appeals to His Majesty in Council, but rule No. 228 provides that "in all cases not provided for by these rules the practice for the time being in force in respect to Admiralty proceedings in the High Court of Justice in England, shall be followed."

As to this Safford & Wheeler say in their Privy Council Practice, at p. 916: "Inasmuch as no one of the rules of the High Court of Justice applies to appeals to the Privy Council and the Order in Council does not provide any substitute for Rules 150 to 155 of the rules of 1883, as to the proceedings to be taken in the court appealed from on appeals to the King in Council, no such rules appear at present to exist."

On the 21st October, 1905, in the case of the *Steamship Cape Breton* v. *Richelieu & Ontario Navigation Co.*, Idington, J., in chambers, upon the application of the appellants, made an order under the English Vice-Admiralty Rule

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150, fixing the bail to be given on an appeal in that case from the Supreme Court to His Majesty in Council; and on the 30th March, 1906, in the case of the Ship Albano, appellant, and the Allan Line Steamship Co., respondent, the Court made a similar order fixing the bail to be given on an appeal from its judgment. In neither case was the question discussed whether the English Admiralty rules were in force, but as this precedent may be followed in future cases, it has been thought desirable to include here the rules in question. *Vide* Safford & Wheeler's Privy Council Practice, p. 908.

"150. A party desiring to appeal shall within one month from the date of the decree or order appealed from, file a notice of appeal and give bail in such sum not exceeding £300, as the judge may order, to answer the costs of the appeal. A form of notice is to be found in Appendix No. 51.

"151. Notwithstanding the filing of the notice of appeal, the judge may at any time before the service of the inhibition proceed to carry the decree or order appealed from into effect, provided that the party in whose favour it has been made gives bail to abide the event of the appeal, and to answer the costs thereof in such sum as the judge may order.

"152. An appellant desiring to prosecute his appeal is to cause the Registrar to be served with an inhibition and citation, and a monition for process, or is to take such other steps as may be required by the practice of the appellate court.

"153. On service of the inhibition and citation all proceedings in the action will be stayed.

"154. On service of the monition for process the Registrar shall forthwith prepare the process at the expense of the party ordering the same.

"155. The process which shall consist of a copy of all the proceedings in the action shall be signed by the Registrar, and sealed with the seal of the Court, and transmitted by the Registrar to the Registrar of the appellate court."

Section 6 above of the Colonial Courts of Admiralty Act (Imp.), 53-54 V. c. 27, would appear to give a right

of appeal *de plano* from the Supreme Court of Canada to His Majesty in Council in appeals taken to the Supreme Court from a judgment of the local judge in Admiralty or from the Exchequer Court sitting in appeal from the local judge in Admiralty.

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Judgments of Judicial Committee—how enforced.

Lewin v. *Howe*, 14 Can. S.C.R. 722.

When a judgment of the Supreme Court of Canada has been reversed by the Privy Council the proper manner of enforcing the judgment of the Privy Council is to obtain an order making it a judgment of the Supreme Court of Canada, and then have a certificate of the judgment of the Supreme Court forwarded to the court below. If the judgment of the Supreme Court is affirmed by the Privy Council, it is not necessary to take out an order in the Supreme Court.

The application to make an order of the Judicial Committee an order of the Supreme Court should be made in Chambers.

As to enforcing the order of the Privy Council with respect to costs, *vide* p. 235, *supra*.

For provisions relating to appeals from provincial courts direct to the Privy Council, *vide* p. 47, *supra*.

Concurrent appeals—Supreme Court and Privy Council.

McGreevy v. *McDougall*, Cout. Dig. 74.

At the hearing of the appeal it appeared that the respondent had taken an appeal from the same judgment to Her Majesty's Privy Council, and that the respondent's said appeal was then pending. The Court, in consequence, stopped the arguments of counsel and ordered that the hearing of the appeal to the Supreme Court of Canada should stand over until after the adjudication of the said appeal to the Privy Council.

Eddy v. *Eddy*, Cout. Dig. 130.

Where the respondent has taken an appeal, from the same judgment as is complained of in the appeal to the Supreme Court of Canada, to the Judicial Committee of

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Her Majesty's Privy Council, the hearing of the appeal to the Supreme Court will be stayed until the Privy Council appeal has ben decided, upon the respondent undertaking to proceed with diligence in the appeal so taken by him. In the case in question the costs were ordered to be costs in the cause.

Bank of Montreal v. *Demers*, 29 Can. S.C.R. 435.

Held (following *Eddy* v. *Eddy*, Cout. Dig. 130), that where one party to the appeal in the court below has launched an appeal to the Privy Council, the other party to the appeal should not inscribe an appeal from the same judgment to the Supreme Court while the other appeal is pending, and if he does his proceedings in the Supreme Court will be stayed with costs.

For Privy Council rules, *vide* p. 537, *infra*.

60. Important questions of law or fact touching—

"(*a.*) the interpretation of *The British North America Acts*, 1867 *to* 1886; or

"(*b.*) the constitutionality or interpretation of any Dominion or provincial legislation; or

"(*c.*) the appellate jurisdiction as to educational matters, by *The British North America Act*, 1867, or by any other Act or law vested in the Governor in Council; or

"(*d.*) the powers of the Parliament of Canada or of the legislatures of the provinces, or of the respective governments thereof, whether or not the particular power in question has been or is proposed to be executed; or

"(*e.*) any other matter, whether or not in the opinion of the court *ejusdem generis* with the foregoing enumerations, with reference to which the Governor in Council sees fit to submit any such question;—

"'May be referred by the Governor in Council to the Supreme Court for hearing and consideration, and any question touching any of the matters aforesaid, so referred

by the Governor in Council, shall be conclusively deemed to be an important question.' S. 60. References by Governor in Council.

"2. When any such reference is made to the Court it shall be the duty of the Court to hear and consider it, and to answer each question so referred; and the Court shall certify to the Governor in Council, for his information, its opinion upon each such question, with the reasons for each such answer; and such opinion shall be pronounced in like manner as in the case of a judgment upon an appeal to the said Court; and any judge who differs from the opinion of the majority shall in like manner certify his opinion and his reasons."

3. In case any such question relates to the constitutional validity of any Act which has heretofore been or shall hereafter be passed by the legislature of any province, or of any provision in any such Act, or in case, for any reason, the government of any province has any special interest in any such question, the attorney-general of such province, shall be notified of the hearing, in order that he may be heard if he thinks fit.

4. The Court shall have power to direct that any person interested, or, where there is a class of persons interested, any one or more persons as representatives of such class, shall be notified of the hearing upon any reference under this section, and such persons shall be entitled to be heard thereon.

5. The Court may, in its discretion, request any counsel to argue the case as to any interest which is affected and as to which counsel does not appear, and the reasonable expenses thereby occasioned may be paid by the Minister of Finance out of any moneys appropriated by Parliament for expenses of litigation.

6. The opinion of the Court upon any such reference,

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although advisory only, shall, for all purposes of appeal to His Majesty in Council, be treated as a final judgment of the said Court between parties. 54-55 V. c. 25, s. 4;—6 E. VII. c. 50.

By 6 Ed. VII. c. 50, the sub-sections 1 and 2 of section 37 of R.S.C. 1886, c. 135, as amended by section 4 of chapter 25, 54-55 V., were repealed and the above sections 1 and 2 substituted therefor. The original sub-sections read as follows:—

"60. Important questions of law or fact touching provincial legislation, or the appellate jurisdiction as to educational matters vested in the Governor in Council by the *British North America Act, 1867*, or by any other Act or law, or touching the constitutionality of any legislation of the Parliament of Canada, or touching any other matter with reference to which he sees fit to exercise this power, may be referred by the Governor in Council, to the Supreme Court for hearing or consideration; and the Court shall thereupon hear and consider the same.

2. The Court shall certify to the Governor in Council, for his information, its opinion on questions so referred, with the reasons therefor, which shall be given in like manner as in the case of a judgment upon an appeal to the said court; and any judge who differs from the opinion of the majority shall, in like manner, certify his opinion and his reasons."

It was stated in Parliament when the amendment was under discussion that its object was to compel the Supreme Court to answer questions with respect to hypothetical or intended legislation and to meet the objections stated by the Supreme Court in pronouncing judgment in the reference *re* Sunday legislation, 35 Can. S.C.R. 581, *infra*, page 266.

The following observations have been made with respect to the matters which are proper to be submitted under this section as it originally stood and as to the binding effect of any decision given thereunder.

S. 60. References by Governor in Council.

Attorney-General for Ontario v. *Attorney-General for the Dominion, Brewers Case* (1896), A.C. p. 348:—

"Their Lordships will now answer briefly, in their order, the other questions submitted by the Governor-General of Canada. So far as they can ascertain from the record, these differ from the question which has already been answered in this respect, that they relate to matters which may possibly become litigious in the future, but have not as yet given rise to any real and present controversy. Their Lordships must further observe that these questions, being in their nature academic rather than judicial, are better fitted for the consideration of the officers of the Crown than of a court of law. The replies to be given to them will necessarily depend upon the circumstances in which they may arise for decision; and these circumstances are in this case left to speculation: It must, therefore, be understood that the answers which follow are not meant to have, and cannot have, the weight of a judicial determination, except in so far as their Lordships may have occasion to refer to the opinions which they have already expressed in discussing the seventh question."

Attorney-General of Ontario v. *Hamilton Street Rly.*, (1903), A.C. 524:—

"With regard to the remaining questions, which it has been suggested should be reserved for further argument, their Lordships are of opinion that it would be inexpedient and contrary to the established practice of this Board to attempt to give any judicial opinion upon those questions. They are questions proper to be considered in concrete cases only; and opinions expressed upon the operation of the sections referred to, and the extent to which they are applicable, would be worthless for many reasons. They would be worthless as being speculative opinions on hypothetical questions. It would be contrary to principle, inconvenient, and inexpedient that opinions should be given upon such questions at all. When they arise, they must arise in concrete cases, involving private rights; and it would be extremely unwise for any judicial tribunal to attempt beforehand to exhaust all possible cases and facts which

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might occur to qualify, cut down and override the operation of particular words when the concrete case is not before it."

In re Sunday Legislation, 35 Can. S.C.R. 581, the majority of the Court said, p. 591:—

"We are of the opinion that the questions submitted to us as to whether certain supposed or hypothetical legislation which the legislature of one of the provinces might in the future enact would be within the powers of such legislature, are not within the purview of the section. Questions as to the constitutionality of existing legislation are clearly within the meaning of that 37th section (now section 60), and the general words 'touching any other matter' must be considered as within the rule *ejusdem generis* and may well refer to orders in council by the Governor-General or Lieutenant-Governors, as the case may be, passed pursuant to the Dominion or provincial legislation the constitutionality of which may be in question, or to departmental regulations authorized by statute. These orders in council cover a very large legislative area, and include regulations on the subjects of navigation, pilotage, fisheries, Crown lands, forests, mines and minerals. For the first time this question of jurisdiction has been raised by one of the interested parties, and for that reason we feel bound to express the foregoing views, from which Mr. Justice Sedgewick dissents.

"As, however, the practice of this Court heretofore has been to answer questions similar to those now submitted as to the power to legislate vested in the Dominion or the provinces and on appeals to the Judicial Committee of the Privy Council answers have been given by that Board on the assumption that the questions were warranted by the section to which we have referred, we will follow in this case, subject to the expression of the foregoing views, the practice of the courts on similar references and proceed to answer the questions as follows."

In the reference *Re Provincial Fisheries*, 26 Can. S.C.R. 444, which was a special case referred by the Governor-General in Council to the Supreme Court under the pro-

S. 60. References by Governor in Council.

visions of this section, Taschereau, J., made the following observations:—

"Our answers" (to the questions submitted) "are merely advisory and we have to say what is the law as heretofore judicially expounded, not what is the law according to our opinion. We determine nothing. We are mere advisers, and the answers we give bind no one, not even ourselves."

The following references have been made under this section, or the corresponding section of 38 V. c. 11:—

In re New Brunswick Penitentiary, April, 1880.

In re Canada Temperance Act of 1878, *and County of Perth*, Cass. Dig. 105.

In re Canada Temperance Act of 1878, *and County of Kent*, Cass. Dig. 106.

The Thrasher Case, Cass. Dig. 480.

The Manitoba Railway Crossings Case.

In re Statutes of Manitoba relating to Education, 22 Can. S.C.R. 577.

In re Provincial Jurisdiction to pass Prohibitory Liquor Laws, 24 Can. S.C.R. 170.

In re Provincial Fisheries, 26 Can. S.C.R. 444.

In re Criminal Code, Bigamy Sections, 27 Can. S.C.R. 461.

In re Representations in the House of Commons, Nova Scotia and New Brunswick, 33 Can. S.C.R. 475.

In re Representation in the House of Commons, Prince Edward Island, 33 Can. S.C.R. 594.

In re Sunday Legislation, 35 Can. S.C.R. 581.

Case and factums.

By General Order, No. 88, *infra*, p. 462, it is provided that:—

"Whenever a reference is made to the Court by the Governor in Council or by the Board of Railway Commissioners for Canada, the case shall only be inscribed by the Registrar upon the direction and order of the Court or a judge thereof, and factums shall thereafter be filed by all parties to the reference in the manner and form and within the time required in appeals to the Court."

S. 60. References by Governor in Council.

Counsel.

In the case of the *Manitoba School Act*, 22 Can. S.C.R. 577, the Court requested Mr. Christopher Robinson, Q.C., to argue the appeal on behalf of the province. In the *Prohibition case* in 24 Can. S.C.R. 170, it directed the Brewers and Distillers' Association of Ontario to be notified and counsel appeared for them at the hearing. Cass. Prac. 59.

61. The Court, or any two of the judges thereof, shall examine and report upon any private bill or petition for a private bill presented to the Senate or House of Commons, and referred to the Court under any rules or orders made by the Senate or House of Commons. R.S., c. 135, s. 38.

Only one bill has been referred to the Supreme Court under this section, namely, the Bill to Incorporate the Christian Brothers, 1876, Cass. Prac. 59.

HABEAS CORPUS.

62. Every judge of the Court shall except in matters arising out of any claim for extradition under any treaty, have concurrent jurisdiction with the courts or judges of the several provinces, to issue the writ of *habeas corpus ad subjiciendum*, for the purpose of an inquiry into the cause of commitment in any criminal case under any Act of the Parliament of Canada.

2. If the judge refuses the writ or remands the prisoner, an appeal shall lie to the Court. R.S., c. 135, s. 32.

63. In any *habeas corpus* matter before a judge of the Supreme Court, or on any appeal to the Supreme Court in any *habeas corpus* matter, the Court or judge shall have the same power to bail, discharge or commit the prisoner or person, or to direct him to be detained in custody or otherwise to deal with him as any court, judge or justice of

the peace having jurisdiction in any such matters in any province of Canada. R.S., c. 135, s. 33. S. 63. Habeas corpus.

64. On any appeal to the Court in any *habeas corpus* matter the Court may by writ or order direct that any prisoner or person on whose behalf such appeal is made shall be brought before the Court.

2. Unless the Court so direct it shall not be necessary for such prisoner or person to be present in court, but he shall remain in the charge or custody to which he was committed or had been remanded, or in which he was at the time of giving the notice of appeal, unless at liberty on bail, by order of a judge of the court which refused the application or of a judge of the Supreme Court. R.S., c. 135, s. 34.

65. An appeal to the Supreme Court in any *habeas corpus* matter shall be heard at an early day, whether in or out of the prescribed sessions of the Court. R.S., c. 135, s. 35.

The appellate jurisdiction of the Supreme Court in *habeas corpus* proceedings arising out of a criminal charge, is limited solely to a review of the decision of a judge of the Supreme Court, on whom, under section 62, is conferred concurrent jurisdiction with the courts or judges of the several provinces of Canada, except in extradition matters, and the Supreme Court has no power to hear an appeal from any decision made by a provincial court or a judge in any *habeas corpus* criminal proceeding.

It will be perceived that it is a judge of the Court only who has power to issue the writ, and that the Court itself has no original, but only an appellate jurisdiction.

In re Trepanier, 12 Can. S.C.R. 111. Per Ritchie, C.J.

If on the return to the writ of *habeas corpus* it appears that the prisoner is committed for trial on a criminal charge under a Dominion statute, the prisoner, by virtue of the *habeas corpus* jurisdiction of a judge of the Supreme Court, could be either bailed or remanded.

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Per Strong, J.:—"The only consideration which on the return to the writ of *habeas corpus* can be entered upon by the court or judge is the sufficiency of the commitment. If the officer returns to the writ a good commitment, whether it is in pursuance of a sentence of a common law court, that is a sentence following a conviction by a jury, or whether it is a commitment following a summary adjudication by a magistrate under a statutory jurisdiction, in either case that is conclusive. . . The officer who has the prisoner in custody has not the record, he cannot return the record. He can only return the warrant of commitment, and if that appears to be good, it must be conclusive so far as the writ of *habeas corpus* is concerned."

In re Boucher, Nov., 1879.

Held, (per Ritchie, C.J.) "as regards *habeas corpus* in criminal matters, the court has only a concurrent jurisdiction with the judges of the Superior Courts of the various provinces, and not an appellate jurisdiction, and there is no necessity for an appeal from the judgment of any judge or court, or any appellate court, because the prisoner can come direct to any judge of the Supreme Court individually, and upon that judge refusing the writ or remanding the prisoner, he could take his appeal from that judgment to the full Court."

In re Pierre Poitvin, August, 1881.

In a case of commitment by a coroner for murder, application was made to Strong, J., for a writ of *habeas corpus*.

Held, that under sec. 51 (now sec. 62), the writ is to be issued for the purpose of an inquiry into a commitment only "in any criminal case under any Act of the Parliament of Canada," and the Act of the Parliament of Canada (1869) does not create the offence of murder, but only defines the punishment which may be awarded for such offence. Writ refused.

In re Sproule, 12 Can. S.C.R. 140.

Held, the right to issue a writ of *habeas corpus* being limited by section 51 to "an enquiry into the cause of com-

mitment in any criminal case under any Act of the Parliament of Canada,'' such writ cannot be issued in a case of murder, which is a case at common law. (Fournier and Henry, JJ., dissenting.) S. 65. Habeas corpus.

An application to quash a writ of *habeas corpus* as improvidently issued may be entertained in the absence of the prisoner. (Henry, J., dissenting.)

After a conviction for a felony by a court having general jurisdiction over the offence charged, a writ of *habeas corpus* is an inappropriate remedy.

If the record of a superior court, produced on an application for a writ of *habeas corpus* contains the recital of facts requisite to confer jurisdiction it is conclusive and cannot be contradicted by extrinsic evidence. (Henry, J., dissenting.)

A return by the sheriff to the writ setting out such conviction and sentence and the affirmation thereof by the court of error is a good and sufficient return. If actually written by him or under his direction the return need not be signed by the sheriff. (Henry, J., dissenting.)

In re Trepanier, 12 Can. S.C.R. 111.

Application was made to the Chief Justice of the Supreme Court of Canada in Chambers on behalf of a person arrested on a warrant issued on a conviction by a magistrate, for a writ of *habeas corpus* and for a *certiorari* to bring up the proceedings before the magistrate, the application being based on the lack of evidence to warrant the conviction. The application was dismissed. On appeal to the full Court,

Held, Henry, J., dissenting, that the conviction having been regular, and made by a court in the unquestionable exercise of its authority and acting within its jurisdiction, the only objection being that the magistrate erred on the facts and that the evidence did not justify the conclusion at which he arrived as to the guilt of the prisoner, the Supreme Court could not go behind the conviction and inquire into the merits of the case by the use of a writ of *habeas corpus* and thus constitute itself a court of appeal from the magistrate's decision.

The only appellate power conferred on the court in

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criminal cases is by the 49th section of the Supreme & Exchequer Courts Act, and it could not have been the intention of the legislature, while limiting appeals in criminal cases of the highest importance, to impose on the court the duty of revisal in matters of fact of all the summary convictions before police or other magistrates throughout the Dominion.

Section 34 of the Supreme Court Amendment Act of 1876 does not in any case authorize the issue of a writ of *certiorari* to accompany a writ of *habeas corpus* granted by a judge of the Supreme Court in Chambers, and as the proceedings before the court on *habeas corpus* arising out of a criminal charge are only by way of appeal from the decision of such judge in Chambers, the said section does not authorize the Court to issue a writ of *certiorari* in such proceedings; to do so would be to assume appellate jurisdiction over the inferior court.

Semble, per Ritchie, C.J., that chapter 70 of the Revised Statutes of Ontario relating to *habeas corpus* does not apply to the Supreme Court of Canada.

Ex parte McDonald, 27 Can. S.C.R. 683.

The Court in delivering judgment said:—

"The petitioner has filed before me a copy of the warrant of commitment and also of the conviction and information filed before the stipendiary magistrate, and other papers, but I must say that I am not inclined to go into any inquiry behind the warrant of commitment.

"I am not disposed to go beyond what appears to me to be the plain words of the Supreme Court Act and the well settled jurisprudence of this Court: *Re Boucher*, 1879; *Re Poitvin*, 1881; *Re Trepanier*, 1885; *Re Sproule*, 1886.

"The first paragraph of section 32 of the Supreme and Exchequer Courts Act, provides as follows:—

"'Every judge of the Court shall have concurrent jurisdiction with the courts or judges of the several provinces, to issue writs of *habeas corpus ad subjiciendum* for the purpose of an inquiry into the cause of commitment in any criminal case under any Act of the Parliament of Canada.'

"I believe therefore that the jurisdiction of a judge of

the Supreme Court in matters of *habeas corpus* in any criminal case is limited to an inquiry into the cause of commitment, that is, as disclosed by the warrant of commitment, under any Act of the Parliament of Canada."

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Re Patrick White, 31 Can. S.C.R. 383.

An application for a writ of *habeas corpus* was referred by the judge to the Supreme Court of the province, and after hearing the application was refused. On an application subsequently made to a judge of the Supreme Court of Canada, in Chambers, *Held,* per Sedgewick, J.:—

"Section 32 of the Supreme and Exchequer Courts Act (now section 63) may give me all the power which the common and statute law gives to judges of superior courts. in matters of *habeas corpus,* but it does not constitute me a court of appeal with jurisdiction to void or reverse judgments of the Supreme Court of Nova Scotia. If I have in the premises equal and co-ordinate power with a judge of that court, my power most certainly does not extend further. The suggestion is almost impertinent, but were either of the two judges of the provincial court who until now have had no part in the matter, to grant the writ and, in spite of the judgment of the Supreme Court, and in vindication and assertion as well of his autonomy as of his possibly superior and conceivably infallible knowledge of law, to release the prisoner, his action, violating elementary principles as to legal authority and precedent, would be open to not undeserved censure. In the case supposed he would unhesitatingly and without question accept as law the judgment of his court. And what he should and would do, I must also do.

"Even if I thought the imprisonment illegal (which I do not), I would not, and under the circumstances above stated, I cannot interfere.

"The application is refused."

In re Vancini, 34 Can. S.C.R. 621.

The appellant Vancini was charged with the crime of theft before the police magistrate at Fredericton, N.B., and having elected to be tried summarily he pleaded guilty and was sentenced to imprisonment in the penitentiary.

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Application was made to a judge of the Supreme Court of New Brunswick for a writ of *habeas corpus* on the two main grounds: 1. That as by section 785 of the Criminal Code, as amended by 63 V. c. 46, a summary trial can only be had for an offence triable at a court of general sessions of the peace, such section is inoperative, there being no such court in New Brunswick. 2. That the Dominion Parliament cannot give jurisdiction to a provincial court to try criminal offences; the power to constitute a court of criminal jurisdiction being given only to the legislature.

The application for the writ was referred to the full Court in New Brunswick by which it was refused. A similar application was then made to Mr. Justice Killam of the Supreme Court of Canada, in Chambers, who also refused the writ. An appeal taken from this refusal to the full Court was dismissed.

In re William Smitheman, 35 Can. S.C.R. 189.

In this case an application was made to Killam, J., in Chambers for a writ of *habeas corpus* to inquire into the cause of imprisonment of one William Smitheman then in the penitentiary at Dorchester in the Province of New Brunswick, on a conviction by his Honour William B. Wallace, judge of the County Court Judges' Criminal Court, in and for the Metropolitan County of Halifax, District No. 1, in the Province of Nova Scotia, under the provisions of article 54 of the Criminal Code, 1892, for the speedy trial of indictable offences, and the following order was made:—

"It is ordered that a writ of *habeas corpus* issue directed to John A. Kirk, Esquire, Warden of Dorchester Penitentiary, at Dorchester, in the Province of New Brunswick, to have the body of William Smitheman before a judge in Chambers at the City of Ottawa, in the Dominion of Canada forthwith to undergo and receive all and singular such matters and things as the said judge shall then and there consider of concerning him in this behalf.

"And it is further ordered that a motion for the discharge of the said William Smitheman from custody under the said writ of *habeas corpus* be set down for hearing by a judge of this Court in Chambers at the Supreme Court

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Building in the City of Ottawa aforesaid, for the 14th day of June, A.D. 1904, at eleven o'clock in the forenoon.

"And it is also further ordered that the production of the body of the within named William Smitheman in pursuance of the said writ be dispensed with upon his solicitor signing upon said writ an endorsement dispensing with the production of the body of the said William Smitheman."

The motion for the discharge of the prisoner from custody came on for hearing before Davies, J., in Chambers, and was refused.

Upon appeal to the full Court (35 Can. S.C.R. 490), *Held*, "by the Penitentiary Act, R.S.C. c. 182, s. 42, the officer conveying a convict to a penitentiary is to deliver him over without any further warrant than a copy of the sentence taken from the minutes of the court before which the convict was tried and certified by a judge or by the clerk or acting clerk of such court. This was done in the present case and the copy furnished shewed a record in the form which satisfied the statute and which by virtue of the statute shewed the jurisdiction of the court."

Extradition.

In re Lazier, 29 Can. S.C.R. 630.

An application having been made to the Court to fix a day for hearing a motion to quash an appeal to the Supreme Court in an extradition matter, the Court refused to fix a day as there was no necessity for a motion to quash, the Court having no jurisdiction to hear an appeal in a case of proceedings upon a writ of *habeas corpus* arising out of a claim for extradition under a treaty.

CERTIORARI.

66. A writ of *certiorari* may, by order of the Court or a judge thereof, issue out of the Supreme Court to bring up any papers or other proceedings had or taken before any court, judge or justice of the peace, and which are considered necessary with a view to any inquiry, appeal or other proceeding had or to be had before the Court. R.S., c. 135, s. 36.

S. 66. Certiorari.

The judges of the Supreme Court have not the extensive common law jurisdiction of the provincial courts to superintend by *certiorari* the administration of the law by inferior courts.

Re Trepanier, 12 Can. S.C.R. 111, per Ritchie, C.J.

"*Certiorari* is the medium through which the Court of Queen's Bench exercises its jurisdiction over the summary proceedings of inferior courts, and always was unless expressly taken away; no writ of error lies upon a conviction, so that a *certiorari* is the only mode of bringing it into the Queen's Bench in order to revise it."

Per Strong, J.

"This section only authorizes the bringing up of proceedings and papers required before the Supreme Court sitting as an appellate court. The writ is not meant to accompany a writ of *habeas corpus* returnable before a single judge. If, therefore, on a return to a writ of *habeas corpus*, it appears that the prisoner is in custody after conviction, and the warrant of commitment is regular upon its face, this is a conclusive return to the writ, and a judge has no power to bring up, by writ of *certiorari*, something behind the warrant, namely, the conviction."

The decision *In re Trepanier* was followed by Mr. Justice Patterson, in *Re Arabin alias Ireda* on an application for a writ of *habeas corpus*. Cass. Prac. 55.

Sewell v. *British Columbia Towing Co.*, Cass. Prac. 55.

A writ of *certiorari* was moved for to bring up papers from the Supreme Court of British Columbia, the Chief Justice of that court having made an order staying execution on the judgment of the Supreme Court of Canada, certified to the court below in the usual way, on the ground that an appeal was being proceeded with to the Privy Council. Motion refused.

SPECIAL CASES REFERRED TO THE COURT.

67. When the legislature of any province of Canada has passed an Act agreeing and providing that the Supreme

S. 67. Jurisdiction. Constitutional cases.

Court of Canada shall have jurisdiction in any of the following cases, that is to say:—

(*a.*) Of suits, actions or proceedings in which the parties thereto by their pleading have raised the question of the validity of an Act of the Parliament of Canada when in the opinion of a judge of the court in which the same are pending such question is material;

(*b.*) Of suits, actions or proceedings in which the parties thereto by their pleadings have raised the question of the validity of an Act of the legislature of such province, when in the opinion of a judge of the court in which the same are pending such question is material;

the judge who has decided that such question is material shall at the request of the parties, and may without such request, if he thinks fit, in any suit, action or proceeding within the class or classes of cases in respect of which such Act so agreeing and providing has been passed, order the case to be removed to the Supreme Court for the decision of such question, whatever may be the value of the matter in dispute, and the case shall be removed accordingly.

2. The Supreme Court shall thereupon hear and determine the question so raised and shall remit the case with a copy of its judgment thereon to the court or judge whence it came to be then and there dealt with as to justice appertains.

3. There shall be no further appeal to the Supreme Court on any point decided by it in any such case, nor, unless the value of the matter in dispute exceeds five hundred dollars, on any other point in such case.

4. This section shall apply only to cases of a civil nature. R.S., c. 135, ss. 72, 73 and 74.

This section contains that portion of the Supreme and

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Exchequer Courts Act, section 72, which refers to the jurisdiction of the Supreme Court of Canada. The original section also gave jurisdiction to the Exchequer Court in certain cases, and these provisions are now contained in section 31 of the Exchequer Court Act, which reads as follows:—

"31. When the legislature of any province of Canada has passed an Act agreeing that the Exchequer Court shall have jurisdiction in cases of controversies.

"(*a.*) between the Dominion of Canada and such province;

(*b.*) between such province and any other province or provinces which have passed a like Act;

the Exchequer Court shall have jurisdiction to determine such controversies and an appeal shall lie from the Exchequer Court to the Supreme Court."

The legislatures of Ontario, Nova Scotia, New Brunswick, British Columbia and Manitoba have passed the necessary statutes to give jurisdiction to the Supreme and Exchequer Courts.

Only one case apparently has been brought to the Supreme Court under the original statute:—

Attorney-General of Ontario v. *Attorney-General of Canada,* 14 Can. S.C.R. 736.

This was an action instituted in the Exchequer Court of Canada in which the Attorney-General of Ontario was plaintiff and the Attorney-General of Canada defendant. The statement of claim recited that the legislature of Ontario had passed an Act intituled "An Act to amend the law respecting escheats and forfeitures," authorizing the Lieutenant-Governor in Council to dispose of lands, tenements, hereditaments and personal property; that the Government of the Dominion of Canada claimed that Her Majesty was entitled to such property for the benefit of the Government of the Dominion and not for the benefit of the province and accordingly disallowed the said Act; that subsequently the Court of Queen's Bench for the Province of Quebec in a case between the Attorney-General of Quebec and the Attorney-General of Canada, with refer-

S. 67. Jurisdiction. Constitutional cases.

ence to the estate of one Fraser, had held that his goods, moveable and immoveable, escheated for the benefit of the province and not of the Dominion; that in consequence of this decision it had been agreed between the Governments of Canada and Ontario that for the future, until there should be a judicial decision overruling the above case in the Province of Quebec, the Government of Canada should act upon the assumption that lands and personal property in any province escheated or forfeited belonged to the province; that, in 1877, the Province of Ontario had passed an Act to amend the law respecting escheats and forfeitures (40 V. c. 3); that the decision of the Court of Queen's Bench was subsequently overruled by the Supreme Court of Canada in a case of *Mercer* v. *Attorney-Genral*, 5 Can S.C.R. 538, but this decision was reversed by the Judicial Committee of the Privy Council so far as regarded lands escheated for want of heirs, but did not determine the law with respect to personal property; that the Dominion Government now claimed that although not entitled to land, it was entitled as against the province to personal estate escheated as aforesaid; and prayed a declaration that personal property of persons dying domiciled within Ontario intestate and leaving no next of kin or other person entitled thereto, belonged to the province or to Her Majesty in trust for the province, or that if all of such personal property did not so belong, that some other declaration might be made as to the respective rights to said property.

To this statement of claim the Attorney-General of Canada pleaded by a statement of defence claiming that the property in question escheated to Her Majesty in the right of the Dominion, and not of the province. No reply having been filed the pleadings were closed.

An order was made on notice by Mr. Justice Taschereau, sitting in Chambers as a judge of the Exchequer Court, appointing a day for hearing an application to fix the time and place of hearing. The application was made before Mr. Justice Gwynne, also sitting in Chambers as a judge of the Exchequer Court, when the summons was discharged on the ground that no proper case was presented for the decision of the Court.

S. 67. Jurisdiction. Constitutional cases.

An appeal was taken from the order in Chambers to the Exchequer Court, Sir W. J. Ritchie presiding, where the motion was dismissed on the ground that he was not prepared to interfere with the order of another judge of the same court.

From this order an appeal was taken to the Supreme Court of Canada, where it was held "affirming the decision appealed from, that the pleadings did not disclose any matter in controversy in reference to which the Court could be properly asked to adjudge, or which a judgment of the Court could affect."

JURISPRUDENCE GENERALLY.

Sections 35-67 above contain all the statutory provisions conferring appellate and original jurisdiction upon the Supreme Court. The following sections deal with procedure; and it has been thought desirable to insert at this point the decisions which deal with the jurisprudence of the Court and which could not appropriately be placed under any of the preceding sections.

WEIGHT TO BE ATTACHED TO FINDINGS OF FACT BELOW.

Concurrent findings.

The Court will not reverse concurrent findings of fact of two courts below unless clearly erroneous.

Bickford v. *Howard*, Cout. Dig. 96 (1882).

Appeal from two judgments of the Court of Appeal for Ontario, affirming judgments recovered in actions on contracts on trials by a judge without a jury. The verdicts had been sustained by the Queen's Bench and Common Pleas, respectively. The appeal was dismissed with costs. Per Gwynne, J.—When a judge has tried a case without a jury and found a verdict, which verdict has been affirmed by two courts, this Court, sitting in appeal, should not reverse the conclusion arrived at by the lower courts on the weight of evidence, unless convinced beyond all reasonable doubt that all the judges before whom the case came have clearly erred.

Black v. *Walker*, Cout. Dig. 96 (1886).

Jurisprudence. Concurrent findings below.

Per Taschereau, J.—Concurrent findings on a question of fact in two courts below ought not to be reversed on appeal except under very unusual circumstances. *Hays* v. *Gordon*, L.R. 4 P.C. 337; *Gray* v. *Turnbull*, L.R. 2 H.L. 53; *Bell* v. *City of Quebec*, 5 App. Cas. 94; *Smith* v. *Lawrence*, L.R. 5 P.C. 308, referred to.

Cassels v. *Burns*, 14 Can. S.C.R. 256.

Where a jury has made findings of fact and the verdict has been affirmed by the judgment appealed from, the Supreme Court of Canada will not disturb the decision.

White v. *Currie*, 22 C.L.J. 17. November 16th, 1885.

C., a member of the defendant's firm of solicitors was employed to prepare a mortgage for W., who gave instructions, partly verbal and partly written. Nearly six years after W. brought an action against the firm for neglecting to register the mortgage, and shortly before the trial asked to be allowed to add to his statement of claim an allegation of neglect to include a certain property in the mortgage, which he claimed had been included in the instructions. There was conflicting evidence at the trial as to the instructions, and judgment was given for the defendants, which judgment was sustained by the Divisional Court and by the Court of Appeal.

On appeal to the Supreme Court of Canada, *Held*, affirming the judgments of the courts below, that as the plaintiff had delayed so long in prosecuting his claim against the defendants, and the judge who heard the case had decided against him on the evidence, this Court would not interfere with that judgment affirmed by two courts.

Appeal dismissed with costs.

Warner v. *Murray*, 16 Can. S.C.R. 720.

M. having assigned his property to trustees for the benefit of his creditors his wife preferred a claim against the estate for money lent to M. and used in his business. The assignee refused to acknowledge the claim, contending

Jurisprudence. Concurrent findings below.

that it was not a loan but a gift to M. It was not disputed that the wife had money of her own and that M. had received it. The trial judge gave judgment against the assignee, holding that M. did not receive the money as a gift. This judgment was confirmed on appeal.

Held, confirming the judgment of the Court of Appeal for Ontario, that as the whole case was one of fact, namely, whether the money was given to M. as a loan by, or gift from, his wife, who in the present state of the law of Ontario, is in the same position, considered as a creditor of her husband, as a stranger, and as this fact was found on the hearing in favour of the wife and confirmed by the Court of Appeal, this, the second appellate court, would not interfere with such finding.

Titus v. *Colville*, 18 Can. S.C.R. 709.

Held, affirming the judgment of the Court of Appeal, that the question being purely one of fact which the trial judge was the person most competent to determine from seeing and hearing the witnesses, and it not being clear beyond all reasonable doubt that his decision was erroneous, but, on the contrary, the weight of evidence being in its favour, his judgment should not be interfered with on appeal.

Schwersenski v. *Vineberg*, 19 Can. S.C.R. 243.

S. brought an action to compel V. to render an account of the sum of $2,500, which S. alleged had been paid on the 6th of October, 1885, to be applied to S.'s first promissory notes maturing and in acknowledgment of which V.'s bookkeeper gave the following receipt: "Montreal, October 6th, 1885. Received from Mr. D. S. the sum of two thousand five hundred dollars to be applied to his first notes maturing. M. V., per F. L.," and which V. failed and neglected to apply. V. pleaded that he never got the $2,500 and that the receipt was given in error and by mistake by his clerk. After documentary and parol evidence had been given the Superior Court for Lower Canada whose judgment was affirmed by the Court of Queen's Bench, dismissed S.'s action. On appeal to the Supreme Court of Canada,

Held, that the finding of the two courts on the question of fact as whether the receipt had been given through error should not be interfered with. Jurisprudence. Concurrent findings below.

Bickford v. *Hawkins*, 19 Can. S.C.R. 362.

Held, Strong, J., dissenting, that the questions raised were entirely matters of fact, as to which the decision of the trial judge who saw and heard the witnesses, confirmed as it was by the Court of Appeal for Ontario should not be interfered with.

Bowker v. *Laumeister*, 20 Can. S.C.R. 175.

At the trial parol evidence was given to establish the alleged trust and its existence was found as a fact by the trial judge who made a decree ordering the property to be sold and the proceeds applied as, according to the contention of the plaintiff, and the evidence in proof thereof, had been agreed upon. The full Court (Supreme Court of British Columbia) affirmed this decree.

Held, that the fact of the existence of the trust having been found by the trial judge, and such finding having been affirmed by the full Court, it should not be disturbed on this further appeal.

Grand Trunk Rly. Co. v. *Weegar*, 23 Can. S.C.R. 422.

Held, that though the findings of the jury were not satisfactory upon the evidence, yet, where they had been upheld on a first appeal, a second appellate court could not interfere. Per King, J.—The findings of the jury have to be accepted by the appellate court.

Headford v. *McClary Mfg. Co.*, 24 Can. S.C.R. 291.

Held, per Strong, C.J., that although the case might properly have been left to the jury, the judgment of nonsuit, having been affirmed by two courts, should not be interfered with.

North British Ins. Co. v. *Tourville*, 25 Can. S.C.R. 177.

In this case an appeal was allowed against the concurrent findings of two courts on a question of fact on the

Jurisprudence. Concurrent findings below.

grounds: 1. That the case was not tried by a jury; 2. The judge who determined it in the first instance did not hear the witnesses. 3. The Court of Appeal expressed grave doubts in adopting the findings of the court of first instance. 4. The judgment of the Court of Appeal was not unanimous. 5. By the *considérants* of the judgment of the Superior Court it did not appear that the non-production by the respondents of the written documents bearing on the controversy was taken into consideration. 6. The Court of Appeal appeared to have given weight to a piece of evidence of undoubted illegality.

Snetsinger v. *Peterson*, 23rd May, 1894.

S. and P. were engaged in business together, under a written agreement, in the packing and selling of fruit, and a dispute having arisen as to the state of accounts between them, a third person was chosen to enable them to effect a settlement. S. claimed that the person so chosen was only to go over the accounts and make a statement, while P. contended that the whole matter was left to him as an arbitrator. This person, having gone over the accounts, made out a statement shewing $235 to be due to S., and some time afterwards he presented a second statement shewing the amount due to be $286. S. was given a cheque for the latter amount, which, he asserted, was taken only on account, and he afterwards brought an action for the winding-up of the partnership affairs.

Held, affirming the decision of the Court of Appeal for Ontario, that whether or not there was a submission to arbitration was a question of fact as to which the Supreme Court of Canada would not, on appeal, interfere with the finding of the trial judge that all matters were submitted, affirmed as it was, by a Divisional Court and the Court of Appeal.

Sénésac v. *Central Vermont Railway Co.*, 26 Can. S.C.R. 641.

In an action against a railway company for damages for loss of property by fire alleged to have been occasioned by sparks from an engine or hot-box of a passing train, in which the court appealed from held, affirming the

Court of Review, that there was no sufficient proof that the fire occurred through the fault or negligence of the company, and it was not shewn that such finding was clearly wrong or erroneous, the Supreme Court would not interfere with the finding. Jurisprudence. Concurrent findings below.

Charlebois v. *Surveyer*, 27 Can. S.C.R. 556.

In this case the trial judge dismissed plaintiff's action which was affirmed by the Court of Queen's Bench. The Supreme Court reversed both courts and directed judgment to be entered for the plaintiff for $500 damages and costs in all the courts.

George Matthews Co. v. *Bouchard*, 28 Can. S.C.R. 580.

In an action for damages in which the plaintiff recovered judgment at the trial which was upheld by the Court of Queen's Bench (the evidence was taken at *enquête* and the written depositions filed of record, but the witnesses were not heard in presence of the trial judge), *Held*, that although the evidence on which the court below based their findings of fact might appear weak and there might be room for the inference that the primary cause of the injuries might have been the plaintiff's own imprudence, the Supreme Court of Canada would not on appeal reverse such concurrent findings of fact.

Grand Trunk Rly. v. *Rainville*, 29 Can. S.C.R. 201.

Held, that where mere questions of fact were involved the jurisprudence of the Supreme Court, as of the Privy Council, is not to disturb the unanimous findings of two courts, especially so when they are findings of a jury, unless clearly wrong or erroneous (following *Sénésac* v. *The Central Vermont*, 26 Can. S.C.R. 641).

City of Montreal v. *Cadieux*, 29 Can. S.C.R. 616.

Held, that although there may be concurrent findings on questions of fact in both courts below, the Supreme Court will upon appeal interfere with their decisions when it clearly appears that a gross injustice has been occasioned to the appellant, and there is evidence sufficient to justify findings to the contrary.

Jurisprudence. Concurrent findings below.

Quebec Fire Ins. Co. v. *Bank of Toronto*, Cout. Dig. 101 (1900).

During the argument of counsel for respondent, he was stopped, the Chief Justice announcing that the majority of the Court considered that there should be no interference with the judgment appealed from, saying: "I am clearly of opinion that we should dismiss the appeal as it is upon questions of fact already passed upon by two courts below and, if we should reverse, it would be in the teeth of decided cases in this Court."

Home Life v. *Randall*, 30 Can. S.C.R. 97.

An action having been tried by a judge without a jury, *Held*, that the Court would not be precluded from entering into an examination of the evidence by the rule that a second Court of Appeal will not interfere with the concurrent findings of two preceding courts on a question of fact, a rule well established and often acted upon in the Supreme Court as well as in the Privy Council and in the United States, but in this case the Supreme Court reversed the court below on a question of evidence which was not taken into consideration by the court below.

Gareau v. *Montreal Street Rly. Co.*, 31 Can. S.C.R. 463.

In an action by the owner of adjoining property for damages caused by the vibrations of machinery in an electric powerhouse, the evidence was contradictory and the courts below gave effect to the testimony of scientific witnesses in preference to that of persons acquainted with the locality. *Held*, Taschereau, J., dissenting, that notwithstanding the concurrent findings of the courts below, as the witnesses were equally credible the evidence of those who spoke from personal knowledge of the facts ought to have been preferred to that of persons giving opinions based merely upon scientific observations.

Toronto Rly. Co. v. *Balfour*, 32 Can. S.C.R. 239.

Held, following *Lambkin* v. *South Eastern Rly. Co.*, 5 App. Cas. 352, that the question of negligence being one of fact for the jury, and the finding having been upheld in

the court appealed from, the highest appellate tribunal would not interfere.

Jurisprudence. Concurrent findings below.

D'Avignon v. *Jones*, 32 Can. S.C.R. 650.

Held, that the evidence being contradictory and the two courts below having unanimously found in favour of the respondent, the appeal should be dismissed.

Williams v. *Stephenson*, 33 Can. S.C.R. 232.

The evidence being insufficient to enable the trial judge to ascertain the damages claimed for breach of contract, he stated that he was obliged to guess at the sum awarded and his judgment was affirmed by the judgment appealed from. The Supreme Court of Canada was of opinion that no good result could be obtained by sending the case back for a new trial and therefore allowed the appeal and dismissed the action, thus reversing the concurrent findings of two courts below. Armour, J., however, was of opinion that the proper course was to order a new trial.

Belcher v. *McDonald*, 33 Can. S.C.R. 321.

The Supreme Court being of the opinion that the judgment of the trial judge affirmed in appeal was manifestly against the weight of evidence, reversed the court below. (Reversed in the Privy Council (1904), A.C. 429.)

Citizens Light & Power v. *St. Louis*, 34 Can. S.C.R. 495.

Held, "The controversy raised by the respondent upon the alleged non-fulfilment by the appellants of their contract relates merely to questions of fact upon which the two courts below have unanimously found against the respondent's contentions, a finding with which nothing in the case would justify us in interfering."

McNeil v. *Cullen*, 35 Can. S.C.R. 510.

Held, affirming the judgment appealed from (36 N.S. Rep. 482) that two courts having pronounced against the validity of the will such decision would not be reversed by a second court of appeal.

Jurisprudence. Concurrent findings below.

Hood v. *Eden*, 36 Can. S.C.R. 476.

Per Taschereau, C.J.—"The respondent has not failed to resort to the stock argument on appeals to this class of cases, that upon a question of fact he has the concurrent finding of three courts below in his favour. Now, in the first place, there are no controverted facts of any importance here. The case rests principally upon inferences of law and facts from admitted or uncontradicted facts. And, secondly, it must not be forgotten that, when the statute allows of an appeal on facts, even if concurred in by three courts, as here, it is on the assumption, as in all cases, that there may be error in all these judgments, and the respondent is not entitled to invoke as an argument in his favour the very judgment that the appellant complains of.

"It is our duty in every case to give the judgment that the Court of Appeal should, in our opinion, have given. The fact that two or three courts have passed upon a question of fact does not relieve us from the responsibility of judging of the evidence as we view it. If, in this case, we think that the local master came to a wrong conclusion, it is not simply because two successive appeals from his findings have failed that the appeal to us must also fail. When the statute gives an appeal to any court it never imposes the condition that the judgment must not be reversed. We have repeatedly had to reverse on questions of fact: *Russell* v. *Lefrancois*, 8 Can. S.C.R. 335; *The North British & Mercantile Ins. Co.* v. *Tourville*, 25 Can. S.C.R. 177; *Dempster* v. *Lewis*, 33 Can. S.C.R. 292, and the cases there cited; and as long as the right to appeal as to findings of fact exists, we have to continue to do so every time that we are convinced that there is error in the judgment complained of, whatever may be the number of courts or of judges that the respondent has previously succeeded in leading into error."

Weight to be attached to findings of jury.

Peters v. *Hamilton*, Cout. Dig. 976 (1880).

Held.—"Whether or not a memorandum of agreement, set up by the defendant as containing the only contract

between the parties was intended to settle the contract in whole or in part is a question for the jury. The onus of shewing that it contained all the terms of the contract is upon the party producing it. In such a case oral testimony is admissible on behalf of both parties. A verdict based upon the appreciation of the evidence in such a case ought not to be interfered with by an appellate court."

Jurisprudence generally. Findings of jury.

Fraser v. *Stephenson*, S.C. Cas. 214, 8th March, 1886.

An action was brought to recover the price and value of goods sold by the plaintiff to the defendant's brother, and on the trial the plaintiff gave evidence of an agreement with the defendant whereby the latter, as the plaintiff alleged, undertook to give notes at four months to retire notes at three months given by his brother, the purchaser of the goods. The plaintiff swore that this agreement was carried out for a time, but that the defendant finally refused to continue it any longer. The evidence shewed that the defendant always gave his notes to his brother who carried them to the plaintiff. The defendant, on the other hand, swore that he never made any such agreement, but only gave notes to his brother to help him in his business. The evidence of the plaintiff was entirely uncorroborated. A verdict was found for the plaintiff and the Supreme Court of New Brunswick refused a new trial.

Held, Ritchie, C.J., and Taschereau, J., dissenting, that the weight of evidence was not sufficiently in favour of the plaintiff to justify the verdict, and there must be a new trial.

Appeal allowed with costs and new trial granted.

Mail Printing Co. v. *Laflamme*, Cout. Dig. 979 (1889).

Damages were assessed by a jury at $6,000 for a newspaper libel and $4,000 additional on a further libel contained in a defamatory plea. *Held*, on appeal from the Court of Queen's Bench (M.L.R. 4 Q.B. 84) that the damages were excessive; that they should be reduced to a total of $6,000, and in the event of plaintiff's refusal to accept a reduced verdict for that amount a new trial should be allowed.

Jurisprudence generally. Findings of jury.

Phœnix Insurance Co. v. *McGhee*, 18 Can. S.C.R. 61.

Held, per Strong, J.—An appeal court exercises different functions in dealing with a case tried by a judge without a jury from those exercised in jury cases. In the former case the Court has the same jurisdiction over the facts as the trial judge, and can deal with them as it chooses. In the latter the court cannot be substitued for the jury to whom the parties have agreed to assign the facts for decision. Appeal allowed, rule for a new trial made absolute.

Royal Ins. Co. v. *Duffus*, 18 Can. S.C.R. 711.

On motion for new trial on grounds of excessive damages, etc., the verdict was sustained. The Supreme Court affirmed the decision, Gwynne, J., dissenting, although the amount of damages found was unsatisfactory.

York v. *Canada Atlantic Rly. Co.*, 2 Can. S.C.R. 167.

An order for a new trial was affirmed, on appeal, for grounds, amongst others, that the damages were excessive under the evidence.

Fraser v. *Drew*, 30 Can. S.C.R. 241.

Held, that when a case has been properly submitted to the jury and their findings upon the facts are such as might be the conclusions of reasonable men, a new trial will not be granted on the ground that the jury misapprehended or misunderstood the evidence, notwithstanding that the trial judge was dissatisfied with the verdict.

Dominion Cartridge Co. v. *McArthur*, 31 Can. S.C.R. 392.

Held, that it is the duty of the appellate court to set aside the verdict of a jury in an action for damages by an employee resulting from an explosion when there was no evidence as to the immediate cause of the explosion notwithstanding that the findings of a jury in favour of plaintiff have been affirmed by two courts below. Reversed in the Privy Council (1905), A.C. 72.

McKelvey v. *Le Roi Mining Co.*, 32 Can. S.C.R. 664.

An appellate court should not disregard the verdict of a jury which is supported by evidence.

Jackson v. *G. T. Rly.*, 32 Can. S.C.R. 245.

Jurisprudence generally. Findings of jury.

The Court of Appeal below being of opinion that the verdict of the jury was against the weight of evidence dismissed the action. The Supreme Court being of the same opinion dismissed the appeal with costs.

Dunsmuir v. *Lowenberg, Harris & Co.*, 34 Can. S.C.R. 228.

The contest in this case was with respect to an alleged collateral parol agreement. A judgment for the plaintiffs at the first trial was set aside by the full Court and a new trial ordered. A judgment at the second trial in favour of plaintiffs was affirmed by the full Court, but on appeal to the Supreme Court a new trial was ordered. A judgment at the third trial in favour of plaintiff was affirmed by the full Court, but on an appeal to the Supreme Court a new trial was again ordered.

Confederation Life v. *Borden*, 34 Can. S.C.R. 338.

In this case a judgment for the plaintiffs (appellants) was set aside by the full Court and a new trial ordered. Upon appeal to the Supreme Court the judgment of the court of first instance was restored, the majority of the court being of opinion that there was no error on the part of the judge or jury below; that every defence sought to be raised had been tried and disposed of; that to allow a new trial for the purpose of inquiring whether there are other defences would be against all precedent.

Held, that the judgment of the court below having proceeded upon the view that the findings of the jury were against the weight of evidence, this was not an exercise of discretion with which an appellate court will refuse to interfere.

Dartmouth Ferry Co. v. *Marks*, 34 Can. S.C.R. 366.

The plaintiffs (appellants) having failed in the full Court to have the judgment at the trial set aside owing to the court being evenly divided, an appeal to the Supreme Court was allowed and a new trial ordered on the ground that the findings of the jury were clearly contrary to the evidence.

Jurisprudence generally. Findings of jury.

Metropolitan Life v. *Montreal Coal & Towing Co.*, 35 Can. S.C.R. 266.

Unless the evidence so strongly predominates against the verdict as to lead to the conclusion that the jury has either wilfully disregarded the evidence or failed to understand or appreciate it, a new trial ought not to be granted.

Weight to be attached to findings of arbitrators and valuators.

The Queen v. *Murphy*, Cout. Dig. 96 (1886).

On 3rd February, 1882, the Minister of Railways and Canals requiring part of a lot for construction of the I. C. Rly. deposited in accordance with the Government Railway Act, 1881, a plan of the land, and gave notice under section 15 tendering compensation. Respondents refused the sum tendered, and the question of compensation was submitted by the Minister under the Act to the official arbitrators who, after hearing evidence of the claimants and the Crown, awarded the amount tendered and refused as full compensation for the land expropriated and all damages, and imposed the costs of arbitration upon the claimants. An appeal to the Exchequer Court was heard by Fournier, J., one witness on either side being examined, the award of the arbitrators was set aside. On further appeal to the Supreme Court, respondents gave notice of intention upon the hearing to contend that the decision should be varied and respondent allowed a larger sum as compensation and damages. The questions were entirely fact, and it was held, that the judgment of the court below should be affirmed and the appeal dismissed with costs.

Grand Trunk Rly. Co. of Canada v. *Coupal*, 28 Can. S.C.R. 531.

On an arbitration in a matter of the expropriation of land under the provisions of the Railway Act, the majority of the arbitrators appeared to have made their computation of the amount of the indemnity awarded to the owner of the land by taking an average of the different estimates

made on behalf of both parties according to the evidence before them. Jurisprudence generally.

Held, reversing the decision of the Court of Queen's Bench, and restoring the judgment of the Superior Court (Taschereau and Girouard, JJ., dissenting), that the award was properly set aside on the appeal to the Superior Court, as the arbitrators appeared to have proceeded upon a wrong principle in the estimation of the indemnity thereby awarded. Findings of arbitrators.

Allan v. *City of Montreal*, 23 Can. S.C.R. 390.
Lemoine v. *City of Montreal*, 23 Can. S.C.R. 390.

Held, in a matter of expropriation such as this the decision of arbitrators, men of more than ordinary business experience upon a question of value, should not be interfered with.

The King v. *Likely*, 32 Can. S.C.R. 47.

The Crown expropriated land of L. and had it appraised by valuators who assessed it at $11,400, which sum was tendered to L. who refused it and brought suit by petition of right for a larger sum as compensation. The Exchequer Court awarded him $17,000. On appeal by the Crown, *Held*, reversing the judgment appealed from, Girouard, J., dissenting, that the evidence given on the trial of the petition shewed that the sum assessed by the valuators was a very generous compensation to L. for the loss of his land and the increase by the judgment appealed from was not justified. The Court, while considering that a less sum than that fixed by the valuators should not be given in this case expressly stated that the same course would not necessarily be followed in future cases of the kind.

Jury—findings incomplete.

Sewell v. *B.C. Towing Co. and The Moodyville Sawmill Co.*, 9 Can. S.C.R. 527.

In a case where a towing company made a contract and afterwards engaged the assistance of another transportation company in carrying out the contract, the ship in tow was damaged through careless and improper navigation by the

Jurisprudence generally. Jury findings incomplete.

tugs of both companies employed about the work. *Held*, reversing the judgment appealed from that an action in which both companies were joined as defendants was maintainable in that form under the B.C. Judicature Act, that the case coming before the court below on motion for judgment under the order which governs the practice in such cases, and which is identical with the English Order 40, Rule 10, of the Orders of 1875, the court could give judgment finally determining all matters in dispute, although the jury may not have found on them all, but does not enable the court to dispose of a case contrary to the finding of the jury. In case the court considers particular findings to be against evidence, all that can be done is to order a new trial, either generally or partially under the powers conferred by the rule similar to the English Order 39, Rule 40; and that the Supreme Court of Canada giving the judgment that the court below ought to have given, was in this case in a position to give judgment upon the evidence at large, there being no findings by the jury interposing any obstacle to their doing so, and therefore a judgment should be entered against both defendants for damages and costs. (See the *Thrasher Case*, 1 B.C. Rep., p. 1, 153.)

Nixon v. *The Queen Ins. Co.*, 23 Can. S.C.R. 26.

The jury not having answered two questions submitted to them which the Court held could not truthfully have been answered in any other way than favourably to the defendants, the judgment of the court below was affirmed which allowed an appeal from the judgment at the trial upon the findings of the jury and instead of directing a new trial had dismissed the plaintiff's action with costs.

St. Stephens Bank v. *Bonness*, 24 Can. S.C.R. 710.

This was an action tried with a jury. The jury disagreed upon all the questions submitted to them but upon the second divided six yeas and one nay, which, under the practice in Nova Scotia was sufficient to warrant a judgment being entered. The trial judge was of opinion the verdict could not be sustained and directed judgment to be entered for defendant. On motion to the full Court for

a new trial, the court was equally divided and the verdict stood; upon appeal to the Supreme Court a new trial was ordered. Jurisprudence generally. Jury findings incomplete.

Cowans v. *Marshall,* 28 Can. S.C.R. 161.

In an action to recover damages for injuries alleged to have been caused by negligence, the plaintiff must allege and make affirmative proof of facts sufficient to shew the breach of a duty owed him by defendant and that the injuries thereby were occasioned; and when the jury failed to find defendant guilty of the particular act of negligence charged in the declaration as constituting the cause of the injuries, a verdict for the plaintiff cannot be sustained and a new trial should be granted.

Moore v. *Woodstock Woollen Mills Co.,* 29 Can. S.C.R. 627.

In this case the evidence as to user of a highway was conflicting and the jury found that there had been no public user of the way in question. The trial judge disregarded this finding and held that dedication was established by a deed of lease filed in evidence, and this decision was affirmed by the full Court. On appeal to the Supreme Court it was held that the company having entirely failed to get a finding from the jury in its favour upon the point of user had therefore failed in making out the case it set out to make, and that the judgment below should be reversed, and as all the facts were fully gone into it would best meet the justice of the case to direct that judgment should be entered for the defendants.

Rowan v. *Toronto Rly. Co.,* 29 Can. S.C.R. 717.

In an action for damages the Supreme Court reversed the judgment of the Court of Appeal in the construction it placed upon the findings of the jury, and as there was no evidence of negligence on the plaintiff's part, the Court held that, as it had before it all the material necessary for finally determining the questions in dispute, a new trial was not necessary, and the appeal was allowed and judgment for the respondents vacated and judgment directed to be entered for the appellant.

Jurisprudence generally. Jury findings incomplete.

Randall v. *Ahearn & Soper*, 34 Can. S.C.R. 698.

A jury having answered two questions submitted to them and neglected to answer the third, the trial judge treated this as a disagreement and discharged the jury. Both parties appealed to the Divisional Court where it was held that the trial judge was right and judgment could not be entered for either party. The Court of Appeal gave judgment for defendant and dismissed the action, stating in its reasons that A. was barred upon certain admissions of counsel during his argument before that court. On appeal to the Supreme Court counsel for appellant took exception to the statement as to his admissions contained in the judgment of the Court of Appeal, and the Supreme Court being of opinion that the court below had misconceived the admissions allowed the appeal and ordered a new trial.

Misdirection or non-direction.

Providence Washington Ins. Co. v. *Gerow*, 14 Can. S.C.R. 731.

A marine policy insured a ship for a voyage from Melbourne to Valparaiso for orders, thence to a loading port on the western coast of South America, and thence to a port of discharge in the United Kingdom. The ship went from Valparaiso to Lobos, an island from twenty-five to forty miles off the coast of South America and was afterwards lost. In an action on the policy, *Held*, that whether or not Lobos was a loading port on the western coast of South America within the policy was a question for the jury, and it not having been submitted to them a new trial was ordered for misdirection.

After judgment application was made to vary or reverse the judgment on affidavits shewing that the question was submitted and answered.

Held, that the application was too late, as the Court had to determine the appeal case transmitted, and the respondent had allowed the appeal to be argued and judgment rendered without taking any steps to have the case amended.

Hardman v. *Putnam*, S.C. Cas. 112.

Jurisprudence generally. Mis-direction or non-direction.

In an action for winding-up a partnership in the gold mining business the defence pleaded was that there never was a partnership formed between the plaintiff and the defendants, or, if there was, that it had been put an end to by a verbal agreement between the parties. The case was tried by a jury and the result depended on the credit to be attached to the respective witnesses on each side who gave evidence as to the agreement that had been entered into. No issue of fraud was raised by the defendants, but the trial judge, in charging the jury, made strong observations in respect to fraudulent concealment of facts from the plaintiff and submitted questions to the jury calling for findings in relation to such fraud. The plaintiff having obtained a verdict which was sustained by the Supreme Court of Nova Scotia,

Held, reversing the judgment of the court below, Gwynne, J., dissenting, that there should be a new trial.

Per Ritchie, C.J.—The Supreme Court, as an appellate court for the Dominion, should not approve of such strong observations being made by a judge as were made in this case, in effect charging upon the defendants fraud not set cut in the pleadings and not legitimately in issue in the cause.

Griffiths v. *Boscowitz*, S.C. Cas. 245.

W., a trader, being in financial difficulties assigned all his property to B., who undertook to arrange with W.'s creditors. W. subsequently assigned his property in trust for the benefit of his creditors and the assignee and some of the creditors brought an action to have the transfer to B. set aside. On the trial, after the evidence on both sides was concluded, plaintiff's counsel asked the judge to instruct the jury as to what constituted fraud under the Statute of Elizabeth, and he also urged that an account should be taken of the dealing between W. and B. The judge refused to define fraud to the jury as requested and the jury stated that they were unable to deal with the accounts. Judgment having been given for the defendants and affirmed by the full Court,

Jurisprudence generally. Mis-direction or non-direction.

Held, that the refusal of the judge to charge the jury as requested amounted to misdirection, and there should be a new trial; that the case could not be properly decided without taking the accounts; and that it could be more properly dealt with as an equity case.

Cowans v. *Marshall*, 28 Can. S.C.R. 161.

The judgment appealed from (Q.R. 6 Q.B. 534) affirmed the decision of the Court of Review at Montreal (Q.R. 10 S.C. 316), and a new trial was sought by defendants *inter alia* upon the ground that the judge charged the jury in such terms as to lead them away from a proper appreciation of the special issues of fact and to divert their attention only to the general question of negligence. In allowing the appeal the Supreme Court observed that the appellant's contention was well founded.

Green v. *Miller*, 31 Can. S.C.R. 177.

A plaintiff is entitled to an explicit direction stating the law on points directly affecting issues of which the burden of proof is upon him. A judge's charge in a suit for libel is not open to objection for want of an explicit reference to pre-existing unfriendliness between the parties as a proof of malice where the only evidence of unfriendliness consisted of hard things said of the defendant by the plaintiff. Judgment appealed from (32 N.S. Rep. 129) affirmed.

Spencer v. *Alaska Packer's Ass.*, 35 Can. S.C.R. 362.

Held, that upon a trial by jury the judge in directing the jury as to the law is bound to call their attention to the manner in which the law should be applied by them according to their findings as to the facts. Where the form of the charge was defective in this respect, and left the jury in a confused state of mind as to the questions in issue, a new trial was ordered.

Mader v. *Halifax Electric Tramway Co.*, 37 Can. S.C.R. 94.

Where on the trial of an action based on negligence questions are submitted to the jury they should be asked

specifically to find what was the negligence of the defendants which caused the injury; general findings of negligence will not support a verdict unless the same is shewn to be the direct cause of the injury.

Jurisprudence generally. Mis-direction or non-direction.

Where the trial judge has seen and heard the witnesses.

The Picton, 4 Can. S.C.R. 648.

Held, where a disputed fact involving nautical questions, is raised by an appeal from the judgment of the Maritime Court of Ontario, as in the case of a collision, the Supreme Court will not reverse the decree of the judge of the court below, merely upon a balance of testimony.

Bellechasse Election Case, 5 Can. S.C.R. 91.

Where an appeal is limited to a question of the jurisdiction of the court appealed from, the Supreme Court of Canada cannot decide upon the merits of the case, and where, in such a case, further adjudication is ordered, a second judgment therein deciding upon the merits is appealable under the Supreme Court Act. On appeal the findings of fact by the trial judge ought not to be reversed unless his conclusions appear, beyond a doubt, to be erroneous.

Ryan v. *Ryan*, 5 Can. S.C.R. 387, 406.

Where there was evidence which, in the opinion of the Supreme Court of Canada, established the creation of a new tenancy at will within ten years, the Court reversed the holding of the Court of Appeal for Ontario, which had reversed the findings of fact by the trial judge. Per Gwynne, J.—A court of appeal should not reverse the finding upon matters of fact of the judge who tried the cause and had the opportunity of observing the demeanour of the witnesses unless the evidence be of such a character as to convey to the mind of the judges sitting on the appellate tribunal the irresistible conviction that the findings are erroneous.

Gingras v. *Desilets*, Cout. Dig. 95 (1881).

In allowing the appeal with costs, *Levi* v. *Reed*, 6 Can. S.C.R. 482, was approved and the Supreme Court *Held*,

Jurisprudence generally. Witnesses heard in court.

Taschereau, J., dissenting, that in view of very serious injuries sustained by the plaintiff and of the misconduct of the defendant in abusing his position of a justice of the peace, $3,000 awarded by the trial judge was not so clearly excessive as to justify a reversal of his judgment. Taschereau, J., while holding that the amount to which the Court of Queen's Bench had reduced the damages ($600) was not sufficient, considered that, taking into consideration the position of the plaintiff and the nature of the injuries, $3,000 was excessive. Fournier, J., considered that the abuse of the defendant of his position of justice of the peace was an important element to be taken into consideration in fixing the amount of damages. Per Gwynne, J.—The sound rule to adopt is that in mere matters of fact, or in the estimation of damages not susceptible of precise calculation or not ascertainable by the application of any rule prescribing a measure of damages, the appeal court should sustain the judgment of the trial judge unless satisfied that his conclusions are clearly erroneous.

Montcalm Election Case, Magnan v. *Dugas,* 9 Can. S.C.R. 93.

Held, that the Supreme Court on appeal will not reverse on mere matters of fact the judgment of the judge who tries an election petition, unless the matter of the evidence is of such a nature as to convey an irresistible conviction that the judgment is not only wrong, but is erroneous, and that the evidence in support of the charge of bribing Mireau, as well as of the other charges of bribery and treating, was not such as would justify an appellate court in drawing the inference that the respondent intended to corrupt the voters.

Guilford v. *Anglo-French SS. Company,* 9 Can. S.C.R. 303.

This action was brought by G. against A. F. S. S. Co. to recover damages for an alleged breach of contract. The plaintiff was master of the SS. "George Shattuck," trading between Halifax and St. Pierre and other ports in the Dominion. She was owned by the defendant company, the

plaintiff being one of the largest shareholders of the company. Plaintiff's contract was that he was to supply the ship with men and provisions for the passengers and crew, and sail her as commander for $900 a month, afterwards increased to $950. The ship had been originally accustomed to remain at St. Pierre forty-eight hours, but the time was afterwards lengthened to sixty hours by the company, yet the plaintiff insisted on remaining only forty-eight hours, against the express directions of the company's agents at St. Pierre, and was otherwise disobedient to the agents, in consequence of which he was, on the 22nd May, without prior notice, dismissed from the service of the company. The case was tried before Sir William Young, C.J., without a jury, who, considering that the plaintiff was not a master in the ordinary sense, held that he had been wrongfully dismissed and found a verdict in his favour for $2,000. A rule *nisi* was made absolute by the full Court for a new trial.

Jurisprudence generally. Witnesses heard in court.

On appeal to the Supreme Court of Canada, it was *Held*, 1st. That even if the dismissal had been wrongful, the damages were excessive, and the case should go back for a new trial on this ground.

Grassett v. *Carter*, 10 Can. S.C.R. 105.

Held, where there is a direct conflict of testimony, the finding of the judge at the trial must be regarded as decisive, and should not be overturned in appeal by a court which has not had the advantage of seeing the witnesses and observing their demeanour while under examination.

Parker v. *Montreal City Passenger Rly. Co.*, Cout. Dig. 96 (1885).

The plaintiff who was thrown out of a waggon, sustaining injuries, brought action for negligence owing to improper construction and bad order of the company's track. Torrance, J., found that the track was in bad order, the switch three inches above the level of the road, contrary to law, and that this caused the accident without any fault on the part of the plaintiff, whose damages he assessed at $2,500. The Queen's Bench reversed this judgment, being of opinion that the rails, as well as the part of the road-

Jurisprudence generally. Witnesses heard in court.

way the company was bound to maintain, were lawful and sufficient; that the company was not at fault, and that the plaintiff had not exercised necessary caution and prudence and might by reason, caution and prudence have avoided the accident. *Held*, that as the questions to be decided were purely matters of fact, the judgment of the court of first instance should not have been disturbed. Strong, J., dissented on the ground that the judgment of the Court of Queen's Bench on the facts was correct.

(The Privy Council refused leave to appeal, as the findings of fact should not have been disturbed.)

Arpin v. *The Queen*, 14 Can. S.C.R. 736.

Where a judgment appealed from is founded wholly upon questions of fact the Supreme Court of Canada will not reverse it unless convinced beyond all reasonable doubt, that such judgment is clearly erroneous. The provisions of the Supreme and Exchequer Courts Act relating to appeals from the Province of Quebec apply to cases instituted under the Quebec Petition of Right Act. *McGreevy* v. *The Queen*, 14 Can. S.C.R. 735, followed.

Welland Election Case, German v. *Rothery*, 20 Can. S.C.R. 376.

On a charge that appellant had been guilty personally of a corrupt practice by promising to W. to endeavour to procure him a situation in order to induce him to vote, and that such promise was subsequently carried into effect, the trial judges held on the evidence that the charge had been proved. The promise was charged as having been made in Thorold on 28th February, 1891. It was proved that W. some time before the trial made a declaration upon which the charge was based, at the instance of the solicitor for petitioner, and had got for such declaration employment in Montreal from the C.P.R. Co. until the trial took place and W. swore that the promise had been made on 17th February. G. (appellant), although denying the charge, admitted in his examination that he intimated to W. that he would assist him, and there was evidence that after the election G. wrote to W. and did endeavour to procure him the situation, but the letters were not put in evidence,

having been destroyed by W. at the request of appellant. *Held,* affirming the judgment appealed from, that as the evidence of W. was in part corroborated by the evidence of appellant, the conclusion by the trial judges was not wrong, still less so entirely erroneous as to justify the Court as an appellate tribunal in reversing the decision of the court below on the questions of fact involved.

Jurisprudence generally. Witnesses heard in court.

Town of Levis v. *The Queen,* 21 Can. S.C.R. 31.

The Supreme Court will not interfere with the award of the Exchequer Court as to value of land expropriated for railway purposes where there is evidence to support the finding and it is not clearly erroneous.

North Perth Election Case, Campbell v. *Grieve,* 20 Can. S.C.R. 331.

G., a voter and supporter of the respondent, holding a free railway ticket to go to Listowel to vote and wanting two dollars for his expenses while away from home, asked for the loan of the money from W., a bartender and friend. W. not having the money at the time applied to S., an agent of the respondent, who was present in the room, for the money, telling him he wanted it to lend to G., to enable him to go to Listowel to vote. S., the agent, lent the money to W., who handed it over to G. W. returned the two dollars to S. the day before the trial. The judges at the election trial held that it was a *bonâ fide* loan by S. to W. On appeal to the Supreme Court of Canada,

Held, reversing the judgment of the court below, that as the decision of the trial judges depended on the inference drawn from the evidence their decision could be reviewed in appeal, and that the proper inference to be drawn from the undisputed facts in the present case was that the loan by S. to W. was a mere colourable transaction by S. to pay the travelling expenses of G. within the provisions of section 88 of the Dominion Elections Act and a corrupt practice sufficient to avoid the election under section 91 of the said Act.

SS. "Santanderino" v. *Vanvert et al.,* 23 Can. S.C.R. 145. 13th March, 1893.

In an action against the owners of the "Santanderino"

Jurisprudence generally. Witnesses heard in court.

for damages by collision with respondent's barque, the "Juno," through the breaking down of the steering apparatus, the local judge in Admiralty District for Nova Scotia, who was assisted on the trial by a nautical assessor, found that the steering gear was constructed on an approved patent, and was in good order when the "Santanderino" started on her voyage, but that the collision was due to want of prompt action by the master and officers when the wheel refused to work (3 Ex. C.R. 378).

On appeal to the Supreme Court of Canada, it was *Held*, Sedgewick and King, JJ., dissenting, that only a question of fact was involved, and though it was doubtful if the evidence was sufficient to warrant the finding, the decision was not so clearly wrong as to justify an appellate court in reversing it.

Merritt v. *Hepenstal*, 25 Can. S.C.R. 150.

If in a case tried without a jury evidence has been improperly admitted, a court of appeal may reject it and maintain the verdict if the remaining evidence warrants it.

Montreal Gas Co. v. *St. Laurent*,
City of St. Henri v. *St. Laurent*, 26 Can. S.C.R. 176.

Held, that the Supreme Court will not interfere with the amount of damages assessed by the judgment appealed from if there is evidence to support it.

Sénésac v. *Central Vermont Rly.*, 26 Can. S.C.R. 641.

Held, that the jurisprudence of the Court is not to disturb judgments appealed from upon mere questions of fact unless clearly wrong or erroneous.

Demers v. *Montreal Steam Laundry*, 27 Can. S.C.R. 537.

The plaintiff, appellant, had recovered judgment in the Superior Court against respondents for $500 which judgment was reversed by the Court of Queen's Bench, and the action dismissed. On appeal by plaintiff to the Supreme Court it was held that where a judgment upon facts having been rendered by a court of first instance has been reversed upon appeal, a higher court of appeal should

not interfere with the judgment of the court of appeal below unless clearly satisfied that it is erroneous.

Jurisprudence generally. Witnesses heard in court.

Lefeunteum v. *Beaudoin*, 28 Can. S.C.R. 89.

In the estimation of the value of evidence in ordinary cases, the testimony of a credible witness who swears positively to a fact should receive credit in preference to that of one who testifies to a negative.

The evidence of witnesses who are near relatives or whose interests are closely identified with those of one of the parties, ought not to prevail in favour of such party against the testimony of strangers who are disinterested witnesses.

Girouard, J., said: "We have already decided (*North British* v. *Tourville*, 25 Can. S.C.R. 177) that we are the judges of the facts, and that if the proof shews clearly that the court below has erred in its application of the facts the duty of the Court is to set aside the judgments below"; and in this case upon its appreciation of the facts the Suprem Court reversed both courts below with costs.

Paradis v. *Limoilou*, 30 Can. S.C.R. 405.

Held, that when there does not appear to have been manifest error in the findings of the court below, they will not be disturbed on appeal.

Crawford v. *Montreal*, 30 Can. S.C.R. 406.

Where there is direct contradiction between equally credible witnesses the evidence of those who speak from facts within their personal knowledge should be preferred to that of experts giving opinions based upon extra judicial statements and municipal reports.

Bell v. *Vipond*, Cout. Dig. 102 (1901).

On the merits in this case the controversy rested upon the fact whether or not a ship had been acquired by some of the partners in a commercial firm for the purposes of the firm's business or merely as a private venture. The Court of Queen's Bench had reversed the trial court judgment, and held that it belonged to the firm. As it was not

Jurisprudence generally. Witnesses heard in court.

made clear that there was error in the judgment appealed from the Supreme Court of Canada dismissed the appeal with costs.

Granby v. *Menard*, 31 Can. S.C.R. 14.

The trial judge tried the case without a jury and heard the evidence of the witnesses. *Held*, that under such circumstances when the trial judge expressly says that he believes certain witnesses and discredits others, an appellate court should not interfere with his judgment.

The Queen v. *Armour*, 31 Can. S.C.R. 499.

The trial judge having come to a conclusion on the question of damages in an expropriation proceeding where a great amount of evidence on both sides was adduced, the Supreme Court being unable to say that it was demonstrated in the clearest way by reference to the evidence that there was error in the judgment appealed from, dismissed the appeal.

Hamelin v. *Bannerman*, 31 Can. S.C.R. 534.

An objection as to arbitration and award being a condition precedent to an action for damages which had been waived or abandoned in the Court of Queen's Bench cannot be invoked on an appeal to the Supreme Court. On a cross-appeal the Supreme Court refused to interfere with the amount awarded for damages in the court below upon its appreciation of contradictory evidence.

Schr. Reliance v. *Conwell*, 31 Can. S.C.R. 653.

In an action claiming compensation for loss of the fishing schooner "Carrie E. Sayward" by being run into and sunk while at anchor by the "Reliance," the decision mainly depended on whether or not the lights on the lost schooner were burning as the admiralty rules required at the time of the accident. The local judge gave judgment against the "Reliance." *Held*, that though the evidence given was contradictory, it was amply sufficient to justify the said judgment which should not therefore be disturbed on appeal. *Santanderino* v. *Vanvert*, 23 Can. S.C.R. 145,

and *The Village of Granby* v. *Ménard,* 31 Can. S.C.R. 14, followed. Jurisprudence generally.

Dempster v. *Lewis,* 33 Can. S.C.R. 292. Witnesses heard in court.

Although the trial judge in his judgment distinctly said that he gave credit to the evidence of the defendant, yet the Court of Appeal reversed the trial judge and the Supreme Court affirmed this judgment. Girouard, J., dissenting, held that the case was governed by *Granby* v. *Ménard,* 31 Can. S.C.R. 14.

Massawippi Valley Rly. Co. v. *Reed,* 33 Can. S.C.R. 457.

On questions of law, the judgment appealed from was reversed, Davies, J., *dubitanté,* but the findings on conflicting testimony, in respect of damages, by the trial judge were not disturbed on the appeal.

Where the trial judge has not seen or heard the witnesses.

Russell v. *Lefrancois,* 8 Can. S.C.R. 335.

It is the duty of an appellate court to review the conclusion arrived at by courts whose judgments are appealed from upon the question of fact when such judgments do not turn upon the credibility of any of the witnesses, but upon the proper inference to be drawn from all the evidence in the case. In this case the trial judge did not personally hear all the witnesses, their evidence being given at *enquête.*

Malzard v. *Hart,* 27 Can. S.C.R. 510.

Held, that where the witnesses have not been heard in the presence of the judge, but their depositions were taken before a commissioner, a court of appeal may deal with the evidence more fully than if the trial judge had heard it or there had been a finding of fact by a jury, and may reverse the finding of the trial court if such evidence warrants it.

New trial generally.

Domville v. *Cameron,* Cout. Dig. 122 (1880).

Appeal from a judgment of the Supreme Court of New

Jurisprudence generally. New trials.

Brunswick, making absolute a rule to set aside a verdict for the defendants, and for a new trial, on the several grounds of improper reception of evidence, misdirection, and because the verdict was against the weight of evidence. *Held*, that the court below having proceeded as well on the ground that the verdict was against the preponderance of the evidence as on the law, the appeal came within section 22 of the Supreme Court Act, and would not lie. Appeal quashed for want of jurisdiction, but without costs, the appeal having been heard *ex parte*, the respondent not appearing.

Jones v. *De Wolff*, Cout. Dig. 995 (1884).

Where the rule had been taken out for a new trial only, the Supreme Court refused to make an order for nonsuit or that verdict for the defendant should be entered, but merely affirmed the rule.

C. P. R. v. *Lawson*, Cout. Dig. 74 (1885).

A rule was discharged so far as it asked a nonsuit, but was made absolute for a new trial. *Held*, on an appeal by defendant that although the plaintiff was entitled to recover, yet, as he had not appealed from the order for a new trial, the rule should be affirmed and the appeal dismissed with costs.

Halifax Street Railway Co. v. *Joyce*, 17 Can. S.C.R. 709.

Section 24 (*d*) of the Supreme Court Act, R.S.C. c. 135, allowing an appeal "from the judgment on a motion for a new trial upon the ground that the judge has not ruled according to law," is applicable to jury cases only. Gwynne, J., *dubitante*.

Scott v. *The Bank of New Brunswick*, 21 Can. S.C.R. 30.

Appeal from a decision of the Supreme Court of New Brunswick setting aside a verdict for the plaintiff and ordering a new trial.

The action was brought to recover from the Bank of New Brunswick the amount of a special deposit by the plaintiff, and the defence was that such amount had been

already paid to an agent of the plaintiff who had endorsed plaintiff's name upon and given up the deposit receipt. As against this defence it was contended that no such authority was given to the agent and that plaintiff's name had been forged on the receipt. The jury found the facts in favour of this contention, and plaintiff obtained a verdict which was set aside by the full Court and a new trial ordered. Plaintiff sought to appeal. Jurisprudence generally. New trials.

The Court *Held*, that a new trial having been ordered to try certain questions of fact in the case, such order should not be interfered with by an appellate court.

C.P.R. v. *Cobban*, 22 Can. S.C.R. 132.

This action was brought on for trial before Mr. Justice Street and a jury. The only question left to the jury was that of negligence upon which they failed to agree, the learned judge stating that if there were any other questions to be decided he would decide them himself. There was a general understanding before the jury returned their verdict that other questions in the case would be argued before the trial judge at a subsequent time. During the trial counsel for the defendants made a motion for a nonsuit which was informally dismissed. No further argument took place before the trial judge and the defendants moved before the Divisional Court by way of appeal from Mr. Justice Street's decision refusing a nonsuit, and for an order that the action be dismissed on the grounds principally that there was no evidence of negligence and that the relief pleaded was of itself a complete bar to the action. Before the hearing of the appeal the pleadings were amended by an order made in Chambers. The Divisional Court ordered the action dismissed upon the sole ground that there was no evidence of negligence to go to the jury. Upon appeal to the Court of Appeal it was held that the Divisional Court went too far in disposing of the case as they did before the issues had been passed upon and considered by the trial judge or the jury.

Upon appeal to the Supreme Court, *Held*, that the case had never been tried and that the issues of fact had never been passed upon either by the jury or the judge and that the appeal should be dismissed.

Jurisprudence generally. New trials.

Held, further, that the judgment appealed from was not a final judgment and it was questionable whether an appeal lay to the Supreme Court on the facts of the case from the judgment of the Court of Appeal.

Hesse v. *Saint John Railway,* 30 Can. S.C.R. 218.

In this case plaintiff recovered a verdict for $25,000 damages and appealed to the Supreme Court from an order of the Supreme Court of New Brunswick granting a new trial. This Court dismissed the appeal, but limited the new trial to the assessment of damages, the finding as to liability of defendants not to be interfered with.

Green v. *Miller,* 33 Can. S.C.R. 193.

Held, that as the defendant had asked for a new trial only in the court below the Supreme Court could not under the Nova Scotia Act order judgment to be entered for him in the action, but could only direct that a new trial be had between the parties.

Point not taken in court below.

Gray v. *Richford,* 2 Can. S.C.R. 431.

An appellate court cannot refuse to entertain a question as to the effect of a deed given in evidence, on the ground that it was not raised at the trial nor in term. *Oakes* v. *Turquand,* L.R. 2 E. & I. App. 325, referred to by Strong, J. Judgment appealed from (I Ont. App. R. 112) reversed.

Montreal Loan & Mortgage Co. v. *Fauteux,* 3 Can. S.C.R. 411.

Lionais v. *Molsons Bank,* 10 Can. S.C.R. 526.

Documents which have not been proved nor produced at the trial cannot be relied on or made part of the case in appeal.

The South-West Boom Co. v. *McMillan,* 3 Can. S.C.R. 700.

D. McM., the respondent, sued S. W. B. Co., the appellants, to recover damages alleged to have been sustained

by reason of the obstruction of the River Miramichi by appellant's booms. The pleas were not guilty, and leave and license. On the trial counsel proposed to add a plea, that the wrong complained of was occasioned by extraordinary freshet. The counsel for the respondent objected on the ground that such plea might have been demurred to. The learned judge refused the application, because he intended to admit the evidence under the plea of not guilty. On appeal, counsel for the appellants contended that the obstruction complained of was justified under the statute 17 V. c. 10 (N.B.), incorporating the South-West Boom Company.

Jurisprudence generally. Point not taken below.

Held, that the appellants, not having put in a plea of justification under the statute, or applied to the Supreme Court of New Brunswick *in banco* for leave to amend their pleas, could not rely on that ground before this Court to reverse the decision of the court below

Western Counties Rly. Co. v. *Windsor & Annapolis Rly. Co.*, 6th February, 1879.

A point raised at the hearing not in factum, and counsel for respondent therefore objects that he is not prepared to argue it. The Court adjourns hearing for a week.

Fuller v. *Ames*, Cout. Dig. 119 (1880).

Technical objection not taken in the court below, cannot be allowed to prevail in appeal, following the rule of the Privy Council. Per Taschereau, J.

Dorion v. *Crowley*. 17th May, 1886.

Held, that although the objection that the right of action has been prescribed is taken for the first time on the argument in appeal, the Court is bound to entertain it and give effect to it if properly raised.

Appeal allowed but without costs in any of the courts.

L'Union St. Joseph de Montreal v. *Lapierre*, 4 Can. S.C.R. 164.

L. was expelled from membership in L'U. St. J., an incorporated benefit society, for being in default to pay six

Jurisprudence generally. Point not taken below.

months' contributions. Article 20 of the society's by-laws, section 5, provides that "When a member shall have neglected during six months to pay his contributions, or the entire amount of his entrance fee, the society may erase his name from the list of members, and he shall then no longer form part of the society; for that purpose, at every general and regular meeting, it is the duty of the collector-treasurers to make known the names of those who are indebted in six months' contributions, or in a balance of their entrance fees, and then any one may move that such members be struck off from the list of members of the society." L. brought a suit under the shape of a petition, praying that writ of mandamus should issue, enjoining the company to re-instate him in his rights and privileges as a member of the society: 1. On the ground that he had not been put *en demeure* in any way; and that no statement or notice had been given him of the amount of his indebtedness. 2. On the ground that many other members of the society were in arrears for similar periods, and that it was not competent for the society to make any distinction amongst those in arrear. 3. On the ground that no motion was made at any regular meeting.

The Court of Queen's Bench for L. C. (appeal side) held that L. should have had "prior notice" of the proceedings to be taken with a view to his expulsion.

Held, on appeal, that as L. did not raise by his pleadings the want of "prior notice," or make it a part of his case in the court below, he could not do so in appeal.

Per Taschereau and Gwynne, JJ.—A member of that society, who admits that he is in arrear for six months' contributions, is not entitled to "prior notice" before he can be expelled for non-payment of dues.

Oakes v. *The City of Halifax*, 4 Can. S.C.R. 640.

Held, reversing the judgment of the Supreme Court of Nova Scotia, that in Nova Scotia, where the rule *nisi* to set aside an award specifies certain grounds of objection, and no new grounds are added by way of amendment in the court below, no other ground of objection to the award can be raised on appeal.

McGreevy v. *McCarron*, 18th June, 1883.

Jurisprudence generally. Point not taken below.

An action for $37,000 which the respondents claimed were due them for balance on a sum of $103,213.96, amount of work performed under contract between appellant and respondents, and extra work agreed to between respondents and appellants.

On appeal to the Supreme Court of Canada from the Court of Queen's Bench for Lower Canada, *Held*, Taschereau, J., delivering the judgment of the Court, 1. The contention on the part of the respondents that the *faits et articles* submitted to the appellant should be taken *pro confessis*, because the answers thereto were not direct, categorical and precise (art. 229 C.C.P.), was not open to the respondents, as they had failed to make a motion to that effect in the court of first instance. The case of *McGreevy* v. *Paillé*, 5 Leg. News 95, confirmed by Supreme Court, was not in point as a motion had been regularly made and granted in the Superior Court. Nor has *Douglas* v. *Ritchie*, 18 L.C. Jur. 274, any application. There the defendant made default and had not answered the *faits et articles* at all. Here the defendant had answered, and if plaintiffs desired to have the answers set aside, it must be by motion.

Woodworth v. *Dickie*, 14 Can. S.C.R. 734.

In an action on a bail bond the defence was that it had been altered after execution, and that it was not in the form required by the statute.

Held, affirming the judgment of the Supreme Court of Nova Scotia (19 N.S. Rep. 96), that the defendant having refused to call the attesting witness to the bond, who was their counsel in the case, the defence as to the alteration, alleged to be in the attestation clause, could not succeed.

Held, also, that the objection as to the form of the bond being merely technical and unmeritorious, could not be taken for the first time before this Court.

Exchange Bank of Canada v. *Gilman*, 17 Can. S.C.R. 108.

The Exchange Bank of Canada, in an action instituted

Jurisprudence generally. Point not taken below.

by them against G., filed a withdrawal of a part of their demand in open court reserving their right to institute a subsequent action for the amount so withdrawn. The Court acted on this *retraxit*, and gave judgment for the balance. This judgment was not appealed from. In a subsequent action for the amount so reserved,

Held, reversing the judgment of the court below, Fournier, J., dissenting, that the provisions of article 451, C.C.P. are applicable to a withdrawal made outside, and without the interference of, the Court and cannot affect the validity of a withdrawal made in open court and with its permission.

2. That it was too late in the second action to question the validity of the *retraxit* upon which the Court had in the first action acted and rendered a judgment which was final and conclusive.

A document not proved at the trial but relied on in the Court of Queen's Bench for the first time cannot be relied on or made a part of the case in appeal. *Montreal L. & M. Co.* v. *Fauteux*, 3 Can. S.C.R. 411, and *Lionais* v. *Molsons Bank*, 10 Can. S.C.R. 526, followed.

Venner v. *Sun Life Ins. Co.*, 17 Can. S.C.R. 394.

It is too late to raise an objection for the first time on the argument before the Supreme Court that the legal representatives of the assured were not made parties to an action on a policy of life insurance.

The Canadian Pacific Railway Co. v. *Robinson*, 19 Can. S.C.R. 292.

The husband of respondent was injured while engaged in his duties as appellants' employee, and the injury resulted in his death about fifteen months afterwards. No indemnity having been claimed during the life-time of the husband, the widow, acting for herself as well as in the capacity of executrix for her minor child, brought an action for compensation within one year after his death.

Held, reversing the judgment of the Superior Court, and the Court of Queen's Bench for Lower Canada (appeal side) (Fournier, J., dissenting), 1. That the respondent's right of action under article 1056, C.C., depends not only

upon the character of the act from which death ensued, but upon the condition of the decedent's claim at the time of his death, and if the claim was in such a shape that he could not then have enforced it, had death not ensued, the article of the code does not give a right of action, and creates no liability whatever on the person inflicting the injury. Jurisprudence generally. Point not taken below.

2. That as it appeared on the record that the plaintiff had no right of action, the Court would grant the defendant's motion for judgment *non obstante veredicto*. Article 433, C.P.C.

3. That at the time of the death of the respondent's husband all right of action was prescribed under article 2262, C.C., and that this prescription is one to which the tribunals are bound to give effect although not pleaded. Articles 2267 and 2188, C.C.

(The judgment in this case was reversed by the Judicial Committee of the Privy Council.—See [1892] A.C. 481.) Cf. *The Queen* v. *Grenier*, 30 Can. S.C.R. 42.

Mylius v. *Jackson*, 23 Can. S.C.R. 485.

An objection to the insufficiency of a traverse in a pleading will not be entertained when taken for the first time on appeal, the issue having been tried on the assumption that the traverse was sufficient.

Gorman v. *Dixon*, 26 Can. S.C.R. 87.

In this case as a matter of strict pleading the plaintiff should have raised by a replication an answer to one of the defendant's pleas, but evidence was given as if such replication was on the record. An objection having been taken in the Supreme Court founded upon this question of pleading, the Court held that an appellate court would not give effect to a merely technical ground of appeal against the merits and when there had been no surprise or disadvantage to the appellant.

Sherbrooke Street Rly. Co. v. *Kerr*, Cout. Dig. 994 (1899).

The action was for damages from injuries to a motorman through a collision of his car with a special car

Jurisprudence generally. Point not taken below.

returning to the car barns at unusual speed on the wrong track. A verdict was entered for the plaintiff on the findings of the jury, and on appeal to the Court of Review defendant objected (1) that plaintiff had not denied charge in the statement of defence that the accident had been caused by his fault; (2) that there was misdirection by the trial judge telling the jury that the plaintiff could succeed even if he had himself been negligent if they thought such negligence had not caused the accident; (3) that it had not been alleged that the car which came in collision with that of the plaintiff had no right to be in the place where it was at the time; (4) that since the trial, defendant had discovered that plaintiff had stated his age at 47 years instead of 45 years; and (5) that the verdict was against the weight of evidence. Langelier, J., in delivering the judgment appealed from, *Held*, amongst other things, that objection to the pleadings came too late, after the necessary proof had been made and an amendment permitted. The Supreme Court affirmed the judgment appealed from for the reasons stated by Mr. Justice Langelier.

The Queen v. *Poirier*, 30 Can. S.C.R. 36.

Where issues have been joined in a suit and judgment rendered upon pleadings admitting and relying upon a written instrument, an objection to the validity of the instrument taken for the first time on an appeal to the Supreme Court comes too late and cannot be entertained.

Sandon Water Works v. *White*, 30 Can. S.C.R. 309.

In this case the plaintiffs, in their reply, set up a failure of defendants to comply with certain conditions precedent, but did not set up another condition precedent upon which the judgment appealed from proceeded, though it was not referred to at the trial. *Held*, that the plaintiffs need not have replied as they did, but having done so without setting up the condition specially relied upon in appeal, thereby possibly misleading the defendants, they were properly punished by the court below by being deprived of their costs in appeal.

City of Montreal v. *Belanger*, 30 Can. S.C.R. 574.

Jurisprudence generally. Point not taken below.

Where an assessment roll covering a valuation of over half a million dollars has been, after contestation, duly confirmed, a ratepayer cannot be permitted to raise the objection, upon an application to quash the roll, that his property was assessed for a comparatively trivial amount over its proper value, when he had failed to urge that objection before the Board of Revisors.

City of Montreal v. *McGee*, 30 Can. S.C.R. 582.

In an action for bodily injuries where the extinction of the right of action by prescription was not pleaded or raised in the courts below and upon an appeal the prescription was judicially noticed and the action dismissed, the appeal was allowed without costs.

City of Montreal v. *Hogan*, 31 Can. S.C.R. 1.

On hearing of appeal objection was taken for the first time to the sufficiency of plaintiff's title, whereupon he tendered a supplementary deed to him of the lands in question. *Held*, following *Exchange Bank of Canada* v. *Gilman*, 17 Can. S.C.R. 108, that the Court must refuse to receive the document as fresh evidence cannot be admitted upon appeal. *Held*, also, that defendant could not raise the question as to the sufficiency of the plaintiff's title, for the first time on appeal. The allegations and conclusions of the declaration were deficient and the Court under section 63 of the Supreme & Exchequer Courts Act, ordered all necessary amendments to be made thereto for the purpose of determining the real controversy between the parties as disclosed by the pleadings and evidence. *Piché* v. *City of Quebec*, Cass. Dig. (2 ed.) 497; *Gorman* v. *Dixon*, 26 Can. S.C.R. 87, followed. (Under the special circumstances of the case and improper actions of the defendant, the plaintiff was awarded costs in all the courts. The judgment appealed from (Q.R. 8 Q.B. 534) was varied.)

Hamelin v. *Bannerman*, 31 Can. S.C.R. 534.

In the Supreme Court the defendant orally contended that an arbitration was a condition precedent to the

Jurisprudence generally. Point not taken below.

respondent's action. No such objection having been taken in the court below nor in the appellant's factum in the Supreme Court, *Held*, that this objection could not now be raised.

McKelvey v. *LeRoi Mfg. Co.*, 32 Can. S.C.R. 664.

Questions of law appearing upon the record, but not raised in the courts below may be relied upon for the first time in an appeal to the Supreme Court where no evidence in rebuttal could have been brought to effect them had they been taken at the trial.

Hosking v. *LeRoi No.* 2 (*Limited*), Cout. Dig. 1129 (1903).

On the hearing of the appeal, counsel for appellant suggested a question for argument which was pertinent to the issues, but had not been taken in the factum nor raised in the courts below. He was permitted to argue the question on the understanding that both parties would be permitted to file supplementary factums on the points raised after the hearing closed. Counsel for respondent made no objections to arguing the new points on the terms settled.

Chambly Manfacturing Co. v. *Willet*, 34 Can. S.C.R. 502.

The defendant (appellant) acquiesced in the judgment at trial in favour of plaintiff by the construction of certain works. On appeal by the defendants to the Court of King's Bench this ground against the appeal was not taken by the respondent by exception in accordance with article 1220 of the Code of Procedure. *Held*, that it was too late for the respondent to raise that point in appeal to the Supreme Court and a motion to quash was dismissed.

Gervais v. *McCarthy*, 35 Can. S.C.R. 14.

Held, that the prohibition of parol testimony in certain cases by the Civil Code of Quebec is not a rule of public order which must be judicially noticed and where such evidence has been improperly admitted at the trial without objection, the adverse party cannot take objection to the irregularity on appeal.

Miller v. *Robertson*, 35 Can. S.C.R. 80.

Jurisprudence generally. Point not taken below.

Upon a bill in equity claiming an injunction to restrain sale of lands the question of title was referred to the common law side, and resulted in a judgment for the plaintiff. From this judgment in ejectment an appeal was taken to the Supreme Court of the province where the judgment was sustained. The judge in equity then made a final decree in equity declaring plaintiff owner of the land, whereupon the defendant applied to the Supreme Court for leave to appeal *per saltum* from the judgment in equity which was granted on the ground that the full Court below had already decided the matter in question in the common law action. The respondent contended that by the judgment in ejectment the question of title was *res judicata*, the appellant not having appealed from that judgment, and that the judge in equity was bound to make the decree he did and follow the judgment of the full Court. The Supreme Court reversed the judge in equity and dismissed the bill of complaint, holding that no relief could be had in equity on the facts of this case, but without costs as the defendant had not by demurrer or otherwise raised that answer to the plaintiff's bill.

Res judicata—chose jugée.

Leger v. *Fournier*, 14 Can. S.C.R. 314.

Held, affirming the judgment of the court below, where the right of redemption stipulated by the seller entitled him to take back the property sold within three months from the day the purchaser should have finished a completed house in course of construction on the property sold, it was the duty of the purchaser to notify the vendor of the completion of the house, and in default of such notice, the right of redemption might be exercised after the expiration of the three months.

There was no *chose jugée* between the parties by the dismissal of a prior action on the ground that the time to exercise the right of redemption had not arrived, and the conditions stipulated had not been complied with.

Jurisprudence generally.

Muir v. *Carter*, 16 Can. S.C.R. 473.
Holmes v. *Carter*, 16 Can. S.C.R. 473.

Res judicata —chose jugée.

A final judgment setting aside an intervention to a seizure of the dividends of bank shares founded upon an allegation that such dividends formed part of a substitution is not a *res judicata* as to the corpus of said shares nor as to the dividends of other shares claimed under a different title.

Fonseca v. *Attorney-General of Canada*, 17 Can. S.C.R. 612.

Per Gwynne, J.—There is no sound reason why the Government of the Dominion should not be bound by the judgment of a court of justice in a suit to which the Attorney-General, as representing the Government, was a party defendant, equally as any individual would be, if the relief prayed by the information is sought in the same interest and upon the same grounds as were adjudicated upon by the judgment in the former suit.

Farwell v. *The Queen*, 22 Can. S.C.R. 553.

In proceedings on an information of intrusion exhibited by the Attorney-General of Canada against the appellant, it had been adjudged that the appellant, who claimed title under a grant from the Crown under the Great Seal of British Columbia, should deliver up possession of certain lands situate within the railway belt in that province. *The Queen* v. *Farwell*, 14 Can. S.C.R. 392.

The appellant having registered his grant and taken steps to procure an indefeasible title from the Registrar of Titles of British Columbia, thus preventing grantees of the Crown from obtaining a registered title, another information was exhibited by the Attorney-General to direct the appellant to execute to the Crown in right of Canada a surrender or conveyance of the said lands.

Held, that the proceedings on the information of intrusion did not preclude the Crown from the further remedy claimed.

Davies v. *McMillan*, S.C. Cas. 306.

K. was a trader, and in insolvent circumstances when

he sold the whole of his stock in trade to D. At the time of this sale D. was aware that two of D.'s creditors had recovered judgments against him. The sheriff afterwards seized the goods so sold, under executions issued upon judgments subsequently obtained, and upon an interpleader issue tried in the County Court the jury found that K. had sold the goods with intent to prefer the creditors who held the prior judgments, but that D. had purchased in good faith and without knowing of such intention on the part of the vendor. Judgment was thereupon entered against D. in the County Court, and the judgment was affirmed by the Supreme Court of British Columbia *en banc*.

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In an action afterwards brought by D. against the sheriff for trespass in seizing the goods he obtained a verdict, which was, however, set aside by the court *en banc*, a majority of the judges holding that the County Court judgment was a complete bar to the action.

On appeal to the Supreme Court of Canada,

Held, reversing the judgment of the Supreme Court of British Columbia, that as the evidence shewed that the goods had been purchased in good faith by D. for his own benefit, the sale was not void under the statute respecting fraudulent preferences; that the County Court judgment, being a decision of an inferior tribunal of limited jurisdiction, could not operate as a bar in respect of a cause of action in the Supreme Court, beyond the jurisdiction of the County Court, and further, that even if such judgment could be set up as a bar, it ought to have been specially pleaded by way of estoppel, by a plea setting up in detail all the facts necessary to constitute the estoppel, and that from the evidence in the case it appeared that no such estoppel could have been established. Taschereau, J., dissented.

Stuart v. *Mott*, 23 Can. S.C.R. 384.

S. brought a suit for performance of an alleged verbal agreement by M. to give him one-eighth of an interest of his, M.'s interest in a gold mine, but failed to recover as the court held the alleged agreement to be within the Statute of Frauds. On the hearing M. denied the agreement as alleged, but admitted that he had agreed to give S.

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one-eighth of his interest in the proceeds of the mine when sald, and it having been afterwards sold S. brought another action for payment of such share of the proceeds.

Held, reversing the decision of the Supreme Court of Nova Scotia, Fournier and Taschereau, JJ., dissenting, that S. was not estopped by the first judgment against him from bringing another action.

Held, also, that the contract for a share of the proceeds was not one for sale of an interest in land within the Statute of Frauds.

Grant v. *Maclaren*, 23 Can. S.C.R. 310.

A Court of Probate has no jurisdiction over accounts of trustees under a will, and the passing of accounts containing items relating to the duties of both executors and trustees is not, so far as the latter are concerned, binding on any other court, and a Court of Equity, in a suit to remove the executors and trustees, may investigate such accounts again and disallow charges of the trustees which were passed by the Probate Court.

Law v. *Hansen*, 25 Can. S.C.R. 69.

A judgment of a foreign court having the force of *res judicata* in the foreign country has the like force in Canada.

Unless prevented by rules of pleading a foreign judgment can be made available to bar a domestic action begun before such judgment was obtained. *The Delta*, 1 P.D. 393, distinguished.

The combined effect of Orders 24 and 70, Rule 2, and section 12, sub-section 7 of chapter 104 R.S.N.S. (5 ser.), will permit this to be done in Nova Scotia.

Mercier et vir. v. *Barrette*, 25 Can. S.C.R. 94.

In an action *en bornage* between M. and B. a surveyor was appointed by the Superior Court to settle the line of division between the lands of the respective parties, and his report, indicating the position of the boundary line, was homologated, and the court directed that boundaries should be placed at certain points on said line. M. appealed from that judgment to the Court of Review claiming that the

report gave B. more land than he claimed and that the line should follow the direction of a fence between the properties that had existed for over thirty years. The Court of Review gave effect to this contention and ordered the boundaries to be placed according to it, in which judgment both parties acquiesced and another surveyor was appointed to execute it. He reported that he had placed the boundaries as directed by the Court of Review, but that his measurements shewed that the line indicated was not in the line of the old fence and his report was rejected by the Superior Court. The Court of Review, however, held that the report of the first surveyor, having been homologated by the court, was final as to the location of the fence and that the judgment had been properly executed. The Court of Queen's Bench reversed this judgment, set aside the last report and ordered the surveyor to place the boundaries in the true line of the old fence.

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Held, reversing the decision of the Court of Queen's Bench, that the judgment of the Court of Review in which the parties acquiesced was *chose jugée* between them not only that the division line between the properties must be located on the line of the old fence, but that such line was one starting at the point indicated in the plan and report of the first surveyor. The Court of Review was right, therefore, in holding that the surveyor executing the judgment could do nothing else than start his line at the said point.

Ross et al. v. *The Queen*, 25 Can. S.C.R. 564.

The Intercolonial Railway Act provides that no contractor for construction of any part of the road should be paid except on the certificate of the engineer, approved by the Commissioners, that the work was completed to his satisfaction. Before the suppliant's work in this case was completed the engineer resigned, and another was appointed to investigate and report on the unsettled claims. His report recommended that a certain sum should be paid to the contractors.

Held, per Taschereau, Sedgewick and King, JJ., that as the court in *McGreevy* v. *The Queen*, 18 Can. S.C.R. 371, had, under precisely the same state of facts, held that

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the contractor could not recover that decision should be followed, and the judgment of the Exchequer Court dismissing the petition of right affirmed.

Held, per Gwynne, J., that independently of *McGreevy* v. *The Queen*, the contractor could not recover for want of the final certificate.

Held, per Strong, C.J., that as in *McGreevy* v. *The Queen*, a majority of the judges were not in accord on any proposition of law on which the decision depended, it was not an authority binding on the Court, and on the merits the contractors were entitled to judgment.

Sleeth v. *Hurlbert*, 25 Can. S.C.R. 620.

A search warrant issued under the Canada Temperance Act, is good if it follows the prescribed form, and if it has been issued by competent authority and is valid on its face it will afford justification to the officer executing it in either criminal or civil proceedings, notwithstanding that it may be bad in fact and may have been quashed or set aside. Taschereau, J., dissenting.

The statutory form does not require the premises to be searched to be described by metes and bounds or otherwise.

A judgment on *certiorari* quashing the warrant would not estop the defendant from justifying under it in proceedings to replevy the goods seized where he was not a party to the proceedings to set the warrant aside, and such judgment was a judgment *inter partes* only. Taschereau, J., dissenting.

Clarke v. *Phinney*, 25 Can. S.C.R. 633.

An executrix obtained from the Probate Court a license to sell real estate of a deceased testator for the payment of his debts. Judgment creditors of the devisees moved to set aside the license, but failed on their motion and again in appeal. The lands were sold under the license and the executrix paid part of the price to the judgment creditors, and they received the same knowing the moneys to have been proceeds of the sale of the lands. Afterwards the judgment creditors, still claiming the license to be null, issued execution against the lands, and the purchaser

brought an action to have it declared that the judgment was not a charge thereon.

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Held, that the judgment upon the motion to set aside the license was conclusive against the judgment creditors and they were precluded thereby from taking collateral proceedings to charge the lands affected, upon grounds invoked or which might have been invoked upon the motion.

Held, further, that the judgment creditors, by receiving payment out of the proceeds of the sale, had elected to treat the license as having been regularly issued, and were estopped from attacking its validity in answer to the action.

Cooper et al. v. *Molsons Bank*, 26 Can. S.C.R. 611.

Under the Judicature Act, estoppel by *res judicata* cannot be relied on as a defence to an action unless specially pleaded.

Stevenson v. *City of Montreal, and White, Mis-en-cause*, 27 Can. S.C.R. 593.

Prior to the proceedings which gave rise to the action, the City of Montreal determined to widen Stanley Street between Sherbrooke and St. Catherine Streets, and passed a by-law to provide for the expropriation of sufficient land, back of the original line of the street, to carry out the intended widening. In the assessment roll prepared to meet the cost of this widening, a rate was set upon all property on the street, not only between St. Catherine and Sherbrooke Streets, but northward to the extreme northerly limit of Stanley Street on the confines of Mount Royal Park. W. attacked this assessment roll, claiming that his property, on the upper part of Stanley Street, should not be assessed for the widening in question as the said upper part of Stanley Street was a private way. The Superior Court gave judgment in favour of W.'s contentions, and quashed the assessment roll. Further expropriations to carry out the proposed widening between St. Catherine and Sherbrooke Streets, were then proceeded with, and assessment rolls prepared by which the whole cost of these expropriations was thrown upon the proprietors between St. Catherine and Sherbrooke Streets, no part being rated against W. or other proprietors on the upper part of Stan-

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ley Street. Objections were thereupon filed to set aside these assessment rolls on the ground that the assessments were augmented by improperly releasing the property on the upper part of Stanley Street from any portion of the assessment, and W. was called into the case to defend his interests. The Superior Court *Held,* 1st. That the former judgment in the action between W. and the City of Montreal was *res judicata* and that the upper portion of Stanley Street was a private way and therefore exempt from assessment; and 2nd. Even if that point had not been settled by the former judgment, that the petitioners had failed to prove that the street was not a private way. This judgment was affirmed by the Court of Queen's Bench (Q.R. 6 Q.B. 107), and upon further appeal, the Supreme Court of Canada affirmed the decision of the Court of Queen's Bench and dismissed the appeal with costs.

Delorme v. *Cusson,* 28 Can. S.C.R. 66.

Where, as the result of a mutual error respecting the division line, a proprietor had in good faith, and with the knowledge and consent of the owner of the adjoining lot, erected valuable buildings upon his own property, and it afterwards appeared that his walls encroached slightly upon his neighbour's land, he cannot be compelled to demolish the walls which extend beyond the true boundary or be evicted from the strip of land they occupy, but should be allowed to retain it upon payment of a reasonable idemnity.

In an action for revendication under such circumstances the judgment previously rendered in an action *en bornage* between the same parties cannot be set up as *res judicata* against the defendant's claim to be allowed to retain the ground encroached upon by paying reasonable indemnity, as the objects and causes of the two actions were different.

Hyde v. *Lindsay,* 29 Can. S.C.R. 505.

A merchant in Ottawa, Ontario, purchased the assets of an insolvent trader in Hull, Quebec, but refused to accept delivery of the same. The curator of the estate brought an action in the Superior Court of Quebec to compel him to do

so and obtained judgment, whereupon he accepted delivery and paid the purchase money. The curator subsequently brought action in Ontario for special damages alleged to have been incurred in the care and preservation of the assets from the time of the purchase until the delivery. *Held*, that these special damages most of which could not be ascertained until after the purchase was completed, could not have been included in the action brought in the Quebec courts and the right to recover them was not *res judicata* by the judgment in that action.

Jurisprudence generally. Res judicata —chose jugée.

Carroll v. *Erie Co. Natural Gas and Fuel Co.*, 29 Can. S.C.R. 591.

In an action relating to the construction of a deed the plaintiff claimed the benefit of a reservation contained in a prior agreement, but judgment was given against him on the ground that the agreement was superseded by the deed. He then brought an action to reform the deed by inserting the reservation therein. *Held*, that the subject matter of the second action was not *res judicata* by the previous judgment. In an action for rectification of a contract the plaintiff may be awarded damages.

Jones v. *City of St. John*, 31 Can. S.C.R. 320.

J. having been assessed in 1896 on personal property as a resident of St. John, N.B., appealed without success to the appeals committee of the common council, and then applied to the Supreme Court of New Brunswick for a writ of *certiorari* to quash the assessment, which was refused. An execution having been threatened he then paid the taxes under protest. The matter was thus left in abeyance. In 1897 he was again assessed under the same circumstances, and took the same course with the exception that he appealed to the Supreme Court of Canada from the judgment refusing a *certiorari*, and the Court held the assessment void and ordered the writ to issue for quashing. (See 30 Can. S.C.R. 122.) J. then brought an action for repayment of the amount paid for the assessment of 1896. *Held*, affirming the judgment of the Supreme Court of New Brunswick, that the judgment refusing a *certiorari* to

Jurisprudence generally. Res judicata —chose jugée.

quash the assessment in 1896 was *res judicata* against J. and he could not recover the amount so paid.

Citizens Light & Power Co. v. *Town of St. Louis*, 34 Can. S.C.R. 495.

Held, where there is a confession of judgment as to part of a claim a judgment entered thereon is *res judicata* that the contract was not *ultra vires* and such a defence cannot be set up to an action for a further sum claimed to be due under the contract.

Prevost v. *Prevost*, 35 Can. S.C.R. 193.

Where a person who might have an eventual interest in substituted lands has not been called to the family council nor made a party in the Superior Court on proceedings for authority to sell the lands, the order authorising the sale is, as to him, *res inter alios acta*, does not prejudice his rights and, therefore, he cannot maintain an appeal therefrom.

Fontaine v. *Payette*, 36 Can. S.C.R. 613.

In proceedings for the sale of lands under execution, the appellants filed an opposition to secure a charge thereon and under the provisions of article 726 of the Code of Civil Procedure, a judge of the Superior Court ordered that the opposants should, within a time limited, furnish security that the lands, if sold subject to the charge, should realize sufficient to satisfy the claim of the execution creditor. On failure to give security as required the opposition was dismissed, and on appeal to the Supreme Court of Canada, the judgment dismissing the opposition was affirmed (35 Can. S.C.R. 1). Subsequently the proceedings in execution were continued and, on the eve of the date advertised for the sale by the sheriff, the opposants filed another opposition to secure the same charge, offered to furnish the necessary security, and obtained an order staying the sale. The judgment appealed from maintained a subsequent order made under article 651, C.P.Q., which revoked the order staying the sale and dismissed the opposition.

Held, that the judgment dismissing the opposition on

default to furnish the required security was *chose jugée* against the appellants and deprived them of any right to give such security or take further proceedings to secure their alleged charge upon the lands under seizure.

Jurisprudence generally. Res judicata —chose jugée.

Per Taschereau, C.J.—In a case like the present an appeal to the Supreme Court of Canada would be quashed, on motion by the respondent, as being taken in bad faith.

Per Girouard, J.—As the order by the judge of first instance was made in the exercise of judicial discretion the Supreme Court of Canada, under section 27 of the Act, was deprived of jurisdiction to entertain the appeal.

Vide Dawson v. *Macdonald, supra,* p. 35; *Miller* v. *Robertson, supra,* p. 319; *Exchange Bank* v. *Gilman, supra,* p. 313; *Shaw* v. *St. Louis, supra,* p. 12; *Ontario & Quebec* v. *Marcheterre, supra,* p. 13; *Desaulniers* v. *Payette, supra,* p. 43; *Baptist* v. *Baptist, supra,* p. 14.

Damages assessed once for all.

City of Montreal v. *McGee,* 30 Can. S.C.R. 582.

Held, that the reservation of recourse for future damages in a judgment upon an action for tort is not an adjudication which can preserve the right of action beyond the time limited by the provisions of the Civil Code.

Semble, where, in an action of this nature there is but one cause of action past and future damages must be assessed once for all.

Gareau v. *Montreal Street Rly.,* 31 Can. S.C.R. 463.

The plaintiff's action was brought to recover damages to buildings resulting from vibration caused by the working of the defendants' machinery. The action was dismissed in the court below. This was reversed by the Supreme Court which fixed a sum to cover damages past, present and future. If not accepted by the plaintiff, a new trial as to amount of damages claimed by the writ (which did not include future damages) was ordered.

Anctil v. *Quebec,* 33 Can. S.C.R. 347.

Held, that it was illegal for a plaintiff to reserve in

Jurisprudence generally. Judicial notice by court.

his action a right to bring a subsequent action for other damages, as the damages must be assessed once for all.

Judicial notice by court.

L'Association St. Jean Baptiste v. *Brault,* 30 Can. S.C.R. 598.

Held, that if the contract in question is unlawful its illegality cannot be waived or condoned by conduct on the part of the party against whom it is asserted and it is the duty of the Court *ex mero motu* to notice the nullity at any stage of the case.

City of Montreal v. *McGee,* 30 Can. S.C.R. 582.

Held, that the prescription of actions for personal injuries established by article 2262 of the Civil Code is not waived by failure of the defendant to plead the limitation, but the Court must take judicial notice of such prescription as absolutely extinguishing the right of action.

McFarran v. *Montreal Park & Island Rly.,* 30 Can. S.C.R. 410.

When it appears upon the face of the writ of summons and statement of claim that the plaintiff has no right of action, it is not necessary that objection should be taken by *exception à la forme.* Absolute want of legal right of action may be invoked by a defendant at any stage of a suit.

Acquiescence in judgment.

Ball v. *McCaffrey,* 20 Can. S.C.R. 319.

The constitutionality of the statute of the Province of Quebec having been raised by the defendant's plea, thereupon the Attorney-General intervened and the judgment of the Superior Court having maintained the plaintiff's action and the Attorney-General's intervention, the defendant appealed to the Court of Queen's Bench, but afterwards abandoned his appeal from the judgment on the intervention. On appeal to the Supreme Court from the Court of Queen's Bench on the principal action the defendant

claimed he had the right to have the judgment of the Superior Court on the intervention reviewed. *Held*, that the latter judgment could not be reviewed.

Jurisprudence generally. Acquiescence.

Société Canadienne Française de Construction de Montréal v. *Daveluy*, 20 Can. S.C.R. 449.

By a judgment of the Court of Queen's Bench defendant was ordered to deliver up a number of its shares upon payment of a certain sum. Before the time for appealing expired the attorney *ad litem* for defendant delivered the shares to plaintiff's attorney and stated he would not appeal if the society were paid the amount directed to be paid. An appeal was subsequently taken before the plaintiff's attorney complied with the terms of the offer. On motion to quash the appeal on the ground of acquiescence in the judgment, *Held*, that the appeal would lie. Per Taschereau, J.—An attorney *ad litem* has no authority to bind his client not to appeal by an agreement with the opposing attorney that no appeal would be taken.

In re Ferguson, Turner v. *Bennett, Turner* v. *Carson*, 28 Can. S.C.R. 38.

The judgment appealed from gave certain costs to appellant which were taxed and paid to him out of moneys in court to the credit of the cause. A motion to quash was made on the ground that by accepting these costs the appellant had acquiesced in the judgment appealed from by taking a benefit thereunder. *Held*, that the reception of the costs in question was in no way inconsistent with the appeal against the construction the judgment had placed upon the will in dispute.

Schlomann v. *Dowker*, 30 Can. S.C.R. 323.

Defendants filed judicial abandonments as ordered by the judgments appealed from, declaring, however, in the deeds, that exception was taken thereto, and that they intended to appeal, but made the abandonment to avoid *capias*, etc. *Held*, per Strong, C.J., and Taschereau and Girouard, JJ., that appellants had acquiesced in the judgments, executed the order against them and left matters in

Jurisprudence generally. Acquiescence.

a position where it was impossible to obtain relief. Gwynne, J., concurred on the understanding that there should not be *res judicata* in respect to an alleged partnership. Sedgewick, J., assented doubtfully, as he did not feel satisfied that the abandonment had not been made under stress.

Amending statutes—effect on pending litigation.

Taylor v. *The Queen*, 1 Can. S.C.R. 65.

It was held that no appeal would lie from the judgment signed, entered or pronounced prior to January 11th, 1876, the day on which the Act constituting the Court came into force.

Hurtubise v. *Desmarteau*, 19 Can. S.C.R. 562.

It was held that the amendment 54-55 V. c. 25, s. 3, did not apply to a case in which the judgment of the Court of Review was delivered on the day the Act came into force.

Hyde v. *Lindsay*, 29 Can. S.C.R. 99.

The Act 60 & 61 V. c. 34, which restricts the right of appeal to the Supreme Court in cases from Ontario as therein specified, does not apply to a case in which the action was pending when the Act came into force, although the judgment directly appealed from may not have been pronounced until afterwards.

Cowan v. *Evans, Mitchell* v. *Trenholme, Mills* v. *Limoges*, 22 Can. S.C.R. 331.

The statute 54 & 55 V. c. 25, s. 3, which provides that "whenever the right to appeal is dependent upon the amount in dispute such amount shall be understood to be that demanded and not that recovered, if they are different," does not apply to cases in which the Superior Court has rendered judgment or to cases argued and standing for judgment (*en délibéré*) before that court, when the Act came into force. *Williams* v. *Irvine*, 22 Can. S.C.R. 108, followed.

Vide Couture v. *Bouchard, infra*, p. 334.

Williams v. *Irvine*, 22 Can. S.C.R. 108.

By section 3, chapter 25 of 54 & 55 V. an appeal is

given to the Supreme Court of Canada from the judgment of the Superior Court in review (P.Q.), "where and so long as no appeal lies from the judgment of that court, when it confirms the judgment rendered in the court appealed from, which by the law of the Province of Quebec, is appealable to the Judicial Committee of the Privy Council."

Jurisprudence generally. Amending statutes.

The judgment in this case was delivered by the Superior Court on the 17th November, 1891, and was affirmed unanimously by the Superior Court in review on the 29th July, 1892, which latter judgment was by the law of the Province of Quebec appealable to the Judicial Committee. The statute 54 & 55 V. c. 25, was passed on the 30th September, 1891, but the plaintiff's action had been instituted on the 22nd November, 1890, and was standing for judgment before the Superior Court in the month of June, 1891, prior to the passing of 54 & 55 V. c. 25. On an appeal from the judgment of the Superior Court in review to the Supreme Court of Canada, the respondent moved to quash the appeal for want of jurisdiction,

Held, per Strong, C.J., and Fournier and Sedgewick, JJ., that the right of appeal given by 54 & 55 V. c. 25 does not extend to cases standing for judgment in the Superior Court prior to the passing of the said Act. *Couture* v. *Bouchard*, 21 Can. S.C.R. 281, followed. Taschereau and Gwynne, JJ., dissenting.

Fournier, J.—That the statute is not applicable to cases already instituted or pending before the Courts, no special words to that effect being used.

Judgment en délibéré—Time does not run.

McCrae v. *White*, 9 Ont. P.R. 288. Nov. 24th, 1882.

Judgment was delivered by the Court of Appeal on the 24th March. On the same day application was made for leave to appeal to the Supreme Court, as the case was one in which, by reason of the O.J. Act there is no appeal without leave. Leave to appeal was not granted till 1st May, and the bond was filed on the 22nd May.

Counsel for appellant applied for the allowance of the bond.

Jurisprudence generally. Judgment en délibéré.

Counsel contra objected that the bond had not been filed and allowed within thirty days from the judgment, as required by the Supreme Court Act.

Patterson, J.—After consultation with Burton, J., the delay being the act of the court, the time for filing the bond must count from the granting of leave to appeal, as no delay took place in applying for such leave.

Couture v. *Bouchard*, 21 Can. S.C.R. 281.

In an action brought by the respondent against the appellant for $2,006 which was argued and taken *en délibéré* by the Superior Court for Lower Canada, sitting in review on the 30th September, 1891, the day on which the Act 54-55 V. c. 25, s. 3, giving a right to appeal from the Superior Court in review to the Supreme Court of Canada was sanctioned, the judgment was rendered a month later in favour of the respondents. On appeal to the Supreme Court of Canada,

Held, per Strong, Fournier and Taschereau, JJ., that the respondent's right could not be prejudiced by the delay of the court in rendering judgment which should be treated as having been given on the 30th September, when the case was taken *en délibéré*, and therefore the case was not appealable. *Hurtubise* v. *Desmarteau*, 19 Can. S.C.R. 562, followed.

St. James Election, Brunet v. *Bergeron*, 33 Can. S.C.R. 137.

The Controverted Elections Act, R.S. c. 9, s. 32 (1886), provides that "the trial of every election petition shall be commenced within six months from the time when such petition has been presented." And by section 33 "the court or judge may, notwithstanding anything in the next preceding section, from time to time enlarge the time for the commencement of the trial."

In this case the petition was presented on the 22nd February. On the 27th February preliminary objections were filed which were dismissed on the 24th April. An appeal was taken from this judgment to the Supreme Court on the 2nd May, and the judgment of the Supreme Court was not given until the 10th October. The six months within

which the trial was required to commence by section 32 expired on the 22nd August. Jurisprudence generally.

The petitioner obtained an order postponing the trial until the 30th juridical day after the judgment of the Supreme Court should be pronounced. The judgment of the Supreme Court having been pronounced on the 10th October, the 30th juridical day it was admitted, would be the 17th November. On the 14th November the respondent in the election proceedings moved to have the judgment fixing the trial for the 17th November set aside and the petition declared lapsed, which was refused, and a further order was made directing the trial of the petition for the 4th December. Judgment en délibéré.

The point for the decision of the Supreme Court was to determine whether or not the election court had jurisdiction to try the petition on that date. *Held*, that on the 10th October when the Supreme Court rendered its judgment on the appeal from the judgment upon the preliminary objections, only three months and nine days could be counted out of the six months from the date of the filing of the petition, leaving two months and twenty-one days to complete the six months, and as the trial began on the 4th December it was within that period.

Held, that a case may be ten, twelve or more months before the Supreme Court, and it was impossible to give to section 32 of the Act the strict construction that the respondent in the election proceedings contended for.

Attorney-General v. *Scott*, 34 Can. S.C.R. 282.

Held, that the appellants could not be prejudiced by the delay of the judge in deciding upon an application until after the expiration of the 60 days allowed for bringing an appeal and that the judgment approving of the security and granting leave to appeal must be treated as having been given on the day that the case was taken *en délibéré* following *Couture* v. *Bouchard*, 21 Can. S.C.R. 281.

Court may assume jurisdiction when of opinion to dismiss appeal.

Schroeder v. *Rooney*, Cass. Dig. 403.

On appeal to the Supreme Court of Canada, *Held*, that

Jurisprudence generally. Court may assume jurisdiction.

it was doubtful if an appeal would lie to the Supreme Court of Canada in such a case, but if it would, the order of Wilson, C.J., affirmed by the judgment of the Divisional Court, should not be interfered with.

Quebec, Montmorency & Charlevoix Rly. Co. v. *Mathieu,* 19 Can. S.C.R. 426.

Appeal from judgment affirming an award for $1,974.75 damages on expropriation of lands, with interest from date of award and costs. On hearing the appeal, Strong and Taschereau, JJ., doubted the Court's jurisdiction, but concurred in the decision of the Court dismissing the appeal on the merits, assuming, without deciding, that there was jurisdiction to entertain it. Per Taschereau, J.—The Court will not, on appeal, interfere with concurrent findings of fact in the courts below, fully supported by evidence.

The Great Eastern Railway Company v. *Lambe,* 21 Can. S.C.R. 431.

On appeal to the Supreme Court the respondent moved to quash the appeal on the ground that the amount of the original judgment was the only matter in controversy and was insufficient in amount to give jurisdiction to the Court. The Court without deciding the question of jurisdiction heard the appeal on the merits, and dismissed the same with costs.

St. Joachim v. *Pointe Claire Turnpike Road Co.,* 24 Can. S.C.R. 486.

In pronouncing judgment the Court said: "An objection to our jurisdiction to entertain this appeal was taken *in limine* by the respondent. But as we are of opinion that we should dismiss the appeal we assume jurisdiction, without determining the question raised thereupon, as we have often done in such cases, and as the Privy Council has done in many instances, amongst others in *Braid* v. *The Great Western Rly. Co.,* 1 Moo. P.C. N.S. 101.

Bain v. *Anderson,* 28 Can. S.C.R. 481.

Where the jurisdiction of the Supreme Court is doubt-

ful the Court may assume jurisdiction if it has decided to dismiss the appeal on the merits.

Jurisprudence generally. Court may assume jurisdiction.

Bastien v. *Filiatrault*, 31 Can. S.C.R. 129.

In this case after hearing counsel for the parties the Court reserved judgment, and on a subsequent day, dismissed the appeal on the merits with costs for the reasons given in the courts below, and without determining a question as to the jurisdiction of the Court to entertain the appeal raised by the respondent upon a motion to quash.

Amount involved trifling.

McDonald v. *Gilbert*, 16 Can. S.C.R. 700.

The Court said it could not refuse to hear an appeal in which such a trifling sum as $20 was involved, yet the bringing of such appeals was highly objectionable and to be in every way discouraged.

Gorman v. *Dixon*, 26 Can. S.C.R. 87.

This was an appeal from Prince Edward Island, where the amount involved was $160. In giving judgment the Chief Justice said: "It is to be hoped that some statutory amendment of the law may in the future prevent appeals to this Court in cases of such very minor importance as the present, in which the amount in controversy is so greatly disproportioned to the expenses of the appeal here."

Kent v. *Ellis*, 31 Can. S.C.R. 113.

In pronouncing judgment in this case the Chief Justice said: "The Maritime Provinces enjoy the costly privilege of bringing appeals to this Court upon paltry amounts. That such appeals should be possible is a blot upon the administration of justice. I hope the Bar of the Maritime Provinces will assist in obtaining the necessary legislation to put an end to that state of things."

Joinder of causes of action.

Meloche v. *Deguire*, 34 Can. S.C.R. 24.

Held, that there was nothing objectionable in the plain-

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tiff in the same action making a claim *en partage* as well as *au petitoire*.

Reference to debates in Parliament.

Gosselin v. *The King*, 33 Can. S.C.R. 255.

Held, that it was not proper to refer to debates in Parliament for the purpose of construing a statute, although this rule has been relaxed with respect to the B.N.A. Act. The report of the codifiers of the Civil Code of Lower Canada are often referred to in the Quebec courts, in the Supreme Court and in the Privy Council.

PROCEDURE.

68. Proceedings in appeals shall, when not otherwise provided for by this Act, or by the Act providing for the appeal, or by the general rules and orders of the Supreme Court, be as nearly as possible in conformity with the present practice of the Judicial Committee of His Majesty's Privy Council. R.S., c. 135, s. 39.

For practice of the Judicial Committee, *vide* Preston on Privy Council Appeals, and Safford & Wheeler, Privy Council Practice.

Vide also notes to s. 59, *supra*.

Following the practice of the Privy Council, in *Foran* v. *Handley*, 1892, the Registrar vacated an order dismissing an appeal, and granted a further extension for filing the case, where satisfactory reason for the delay was shewn.

69. Except as otherwise provided, every appeal shall be brought within sixty days from the signing or entry or pronouncing of the judgment appealed from. 50-51 V., c. 16, s. 57.

Appeals otherwise provided for are:—

Criminal appeals. Criminal Code, s. 1024, *infra*, p. 531.

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Exchequer Court appeals. Exchequer Court Act, s. 82, infra p. 479.

Election appeals. Controverted Elections Act, s. 65, *infra*, p. 510.

Appeals under the Winding-up Act. Winding-up Act, s. 104, *infra*, p. 525.

In the Province of Quebec, time always runs from the pronouncing of the judgment.

In other appeals "the date from which time begins to run is always the date of the pronouncing of the judgment unless an application is made to the court appealed from to review some decision made by the Registrar on the settlement of the minutes, or some substantial question affecting the rights of the parties has not been clearly disposed of by the judgment as pronounced, and the determination of this has delayed the settlement of the minutes." *County of Elgin* v. *Robert*, 36 Can. S.C.R. 27.

In this judgment all the earlier decisions of the court are reviewed, namely: *O'Sullivan* v. *Harty*, 13 Can. S.C.R. 431; *Walmsley* v. *Griffith*, 13 Can. S.C.R. 434; *Martley* v. *Carson*, 13 Can. S.C.R. 439; *Martin* v. *Sampson*, 26 Can. S.C.R. 707.

This section applies to appeals from the judgment of the Court of Appeal for Ontario under s. 48(*e*), *supra*. *Canadian Mutual* v. *Lee*, 34 Can. S.C.R. 224.

The provisions of this section also apply to appeals *per saltum*. *Barrett* v. *Syndicat Lyonnais du Klondyke*, 33 Can. S.C.R. 667. A judge of the court appealed from in such cases has no power to extend the time for bringing the appeal, nor has a judge of the Supreme Court such power. *Barrett* v. *Syndicat Lyonnais du Klondyke*, 33 Can. S.C.R. 667.

Roblee v. *Rankin*, 11 Can. S.C.R. 137.

The plaintiff's demurrer to the defendant's plea was allowed by the full Court of Nova Scotia on the 5th February, 1883. On the 19th March, plaintiff obtained a rule

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absolute authorizing the prothonotary to compute debt and damages for which final judgment might be entered. No rule for judgment on the demurrer or other rule, except the rule to compute, was taken out by the respondent, nor was any judgment signed until the 2nd day of May, 1883. An application to quash the appeal for want of jurisdiction, made on the ground that time for appeal should run from the date of the judgment on the demurrer and that the present appeal was too late, was dismissed.

Robertson v. *Wigle*, 15 Can. S.C.R. 214.

Where a judgment of the Maritime Court was handed to the Registrar by the judge and not pronounced in open court, it was held by the Supreme Court that the time for giving notice of appeal would run from the date of the entry of the judgment and not from the date of delivery to the Registrar.

The delay prescribed by this section is not suspended during the vacations of the court. *News Printing Co.* v. *McRae*, 26 Can. S.C.R. 695.

When the last of the 60 days falls on a Sunday or statutory holiday, the security must be allowed not later than the next earlier juridical day. There is no express decision of the Supreme Court on this point, but it was so held by the Court of Appeal for Ontario in the case of *Goyeau* v. *Great Western Rly. Co.* (1879), Can. Law Journal, Vol. 15, p. 107, where the decision is thus reported:—

"Burton, J., after conferring with the other judges, held the last of the 30 days limited by sec. 25 of the Supreme Court Act for the allowance of the appeal being a Sunday did not give the plaintiff the following day to procure his appeal to be allowed, and is not a special circumstance warranting an order enlarging the time for such allowance under section 26 of the Act."

Habeas corpus.

In re Smart, 16 Can. S.C.R. 396.

Held, that this section applies to habeas corpus appeals not arising out of a criminal charge.

Judgment en délibéré pronounced after the 60 days had expired.

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Attorney-General v. *Scott*, 34 Can. S.C.R. 282.

Held, that the defendants could not be prejudiced by the delay of the judge in deciding upon an application until after the expiration of the 60 days allowed for bringing an appeal.

Vide McCrae v. *White*, *supra*, p. 333; *Couture* v. *Bouchard*, *supra*, p. 334; *St. James Election Case*, *supra*, p. 334.

An order allowing the security for an appeal to the Supreme Court is one way of bringing the appeal within the provisions of this section, and the order may be made by a judge of the court below or of the Supreme Court. The Registrar has all the powers of a judge of the Supreme Court in such matters. *Fraser* v. *Abbott*, Cass. Dig. 695; *Taylor* v. *Queen*, 1 Can. S.C.R. 65; *Walmsley* v. *Griffith*, 13 Can. S.C.R. 434; *Vaughan* v. *Richardson*, 17 Can. S.C.R. 703; *News Printing Co.* v. *McRae*, 26 Can. S.C.R. 695.

When the judge of the court below has made an order allowing the security, he is *functus officio*, and the appeal is then subject to the jurisdiction of the Supreme Court. Orders made in the cause by the court below after the allowance of the security will be disregarded by the Supreme Court: *Lakin* v. *Nuttall*, 3 Can. S.C.R. 691; *Walmsley* v. *Griffith*, Cass. Dig. 697; *Starrs* v. *Cosgrave Brewing and Malting Co.*, Cass. Dig. 697.

Ontario and Quebec Rly. Co. v. *Marcheterre*, 17 Can. S.C.R. 141.

An appellant may apply to a judge of the Supreme Court to settle the case and approve security on appeal, notwithstanding that he may have already applied to a judge of the court below who has refused the application.

70. No appeal upon a special case, or from the judgment upon a motion to enter a verdict or non-suit upon a point reserved at the trial, or from the judgment upon a

S. 70. Notice of appeal.

motion for a new trial, shall be allowed, unless notice thereof is given in writing to the opposite party, or his attorney of record, within twenty days after the decision complained of or within such further time as the court appealed from, or a judge thereof, allows. R.S., c. 135, s. 41.

This section is a reproduction of R.S., c. 135, s. 41, with the following alterations made by the Commissioners for the Revision of the Statutes:—

The word "of" in the second line in the old section has been changed to "or." The former reading was clearly a clerical error.

In line 4, the words in the old section "upon the ground that the judge has not ruled according to law" have been eliminated to conform to the amendment made to 24(d) of the Supreme and Exchequer Courts Act, now 38(b), by 54-55 V. c. 25, s. 2.

The notice in this section required to be given within 20 days of the decision complained of must be 20 clear days, that is, exclusive of the day on which the decision was rendered and the day on which the notice is served.

The other cases in which a notice of appeal has to be given are:—

(*a.*) Criminal Appeals, to the Attorney General of the Province within 15 days after the affirmance of the conviction, or such further time as the Supreme Court or a judge thereof allows. Criminal Code, sec. 1024, *infra*, p. 531.

(*b.*) Exchequer Appeals, including Admiralty cases, Notice of setting down the appeal must be given within 10 days. Exchequer Court Act, sec. 82, *infra*, p. 479.

If the appeal is by the Crown, a notice takes the place of a deposit under the Act. Exchequer Court Act, s. 85, *infra*, p. 486.

(*c.*) Election Appeals. Notice of setting down the appeal for hearing must be given within three days. Controverted Elections Act, s. 67, *infra*, p. 512.

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The notice is not an initiation of the appeal, and cannot be set aside before the security has been given. *Smith* v. *Smith*, 11 Ont. P.R. 6. And see as to effect of notice, *Reg.* v. *McGanley*, 22 Ont. P.R. 259; *Ex parte Saffrey*, 5 Ch. D. 365, Cass. Prac. 62.

It will be noticed that the section neither gives to the Supreme Court or a judge thereof power to extend the time for giving notice of appeal under this section.

Vaughan v. *Richardson*, 17 Can. S.C.R. 703.

In this case the solicitors for the defendants did not obtain authority from the defendants to appeal from the judgment below in time to give notice of appeal within 20 days from the pronouncing of the judgment. The application to the judge below was not for an extension of time to give the notice, but for leave to appeal, and the order was limited to such leave. The plaintiffs moved to quash the appeal for want of jurisdiction, owing to the notice of appeal not having been given. *Held*, that the giving of the notice was a condition precedent to the Supreme Court's jurisdiction; that the time for giving the notice might have been extended by the court below after the 20 days had expired, and no notice having been given, the appeal must be quashed for want of jurisdiction.

Rollands v. *Canada Southern Rly. Co.*, 13 Ont. P.R. 93.

The defendants appealed to the Court of Appeal from an order of a Divisional Court discharging an order *nisi* to enter judgment for the defendants or for a new trial, on the ground, among others, that the trial judge should have withdrawn the case from the jury, or should have directed them otherwise than he did. The Court of Appeal dismissed the defendants' appeal, and the defendants sought to appeal from such dismissal to the Supreme Court of Canada.

Held, that the judgment of the Court of Appeal came within s. 24(*d*) of the Supreme and Exchequer Courts Act, R.S.C. c. 135, as "a judgment upon a motion for a new trial upon the ground that the judge has not ruled according to law"; and that the proposed appeal was governed by the

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necessity for the notice of appeal within twenty days prescribed by s. 41 of the Act.

The judgment of the Court of Appeal was delivered on the 5th of March, 1889. On the 16th March the solicitors for the defendants wrote to their clients suggesting an appeal, but they received no instructions until the 2nd April, and took no step until the 3rd April. No explanation was offered of the delay or neglect except the production of a telegram to the solicitors from an officer of the defendants giving instructions to appeal, and suggesting that the matter has been overlooked by another officer.

The judges in the Divisional Court and Court of Appeal were unanimous in deciding against the defendants.

Held, that under these circumstances the time for giving the required notice should not be extended.

Draper v. *Radenhurst*, 14 Ont. P.R. 376. Cass. Prac., 2nd ed., 62.

The "special case" mentioned in section 41 has no reference to the case prepared, under Cons. Rule 413, for an appeal to the Court of Appeal for Ontario. Therefore, the latter court overruled an objection to a bond for security for costs of an appeal to the Supreme Court on the ground that notice should have been given under said section, it being contended that every appeal from that court is on a "special case."

Smyth v. *McDougall*, 1 Can. S.C.R. 114.

Held, that when a case has, by consent of parties, been turned into a special case, and the judge's minutes of the evidence taken at the trial agreed to be considered as part of the said special case, the court has no power to add anything thereto, except with the like consent, and has no power to order any further evidence to be taken.

71. Notwithstanding anything herein contained the court proposed to be appealed from, or any judge thereof, may, under special circumstances, allow an appeal, although the same is not brought within the time hereinbefore prescribed in that behalf;

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2. In such case, the court or judge shall impose such terms as to security or otherwise as seems proper under the circumstances;

3. The provisions of this section shall not apply to any appeal in the case of an election petition. R.S., c. 135, s. 42.

Vaughan v. *Richardson*, 17 Can. S.C.R. 703.

Held, per Strong, J., that the words "allow an appeal" in section 42, now section 71, simply mean the settlement of the case and the approval of the security.

Held, per Ritchie, C.J., and Strong, J., that the judge having power to extend the time for bringing the appeal may do so even after the time within which the appeal should be brought has expired.

Allowance of appeal.

The use of the expression "allow an appeal" in this section has given rise to a misapprehension with respect to the power of a judge of the court below, and applications under this section in the Province of Quebec frequently ask the judge below to grant leave to appeal, as if the appeal could only be taken by leave, whereas the right to appeal depends solely upon the case being one in which an appeal lies under the sections of the statute conferring an appellate jurisdiction upon the Supreme Court. The judge below has, therefore, no jurisdiction to grant leave, nor is leave necessary. All that this section does is to authorize a judge of the court below to allow the security which the appellant offers, and to extend the time for the giving of the security where the appeal has not been brought within the 60 days prescribed by section 69, *supra*. Although there are expressions in some of the earlier decisions of the court which might warrant the conclusion that a judge of the court below might extend the time in which the appeal should be brought, and the Registrar of the Supreme Court in Chambers in the same case allow the security, it is now definitely determined by the decision in *Barrett* v. *Syndicat Lyonnais du Klondyke*, 33 Can. S.C.R. 667, *supra*, p. 339,

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that this cannot be done, and that the only jurisdiction the judge below has to extend the time for bringing the appeal is in a case where it is proposed to have the security allowed in the court below. The Registrar can only allow the security where the application is made within the 60 days provided by section 69, *supra*, and where the period so limited has expired a judge of the court below alone has power to allow the security.

The Court of Appeal for Ontario has held that no appeal lies to that court from a judgment of a judge of that court extending the time for appealing. *Neill* v. *Travellers' Ins. Co.*, 9 Ont. App. R. 54; *Re Central Bank of Canada*, 17 Ont. P.R. 395 (Cass. Prac. 63).

Wherever power is given to a legal authority to grant or refuse leave to appeal, the decision of that legal authority is final and conclusive. *Ex parte Stevenson*, 3 Times L. R. 486 (Cass. Prac. 63).

There would seem to be no power in either court to extend the time for bringing an appeal under "The Dominion Controverted Elections Act" (Cass. Prac. 63).

As to what are "special circumstances" within the meaning of this section, *vide Ex parte Gilchrist*, 17 Q.B.D. 528; *Bradley* v. *Baylis*, 8 Q.B.D. 195. See *Langdon* v. *Robertson*, 12 Ont. P.R. 139, approving of *Sievewright* v. *Leys*, 9 Ont. P.R. 200; *Re Gabourie, Casey* v. *Gabourie*, 12 Ont. P.R. 252; *Platt* v. *Grand Trunk Rly. Co.*, 12 Ont. P.R. 380.

No uniform rule can be deduced from the cases, but if any rule can be laid down it seems to be that to do justice in the particular case is above all other considerations, as was said in *Re Gabourie, supra.* In *Re Manchester Economic Building Society*, 24 Ch. D. 488, in which application for special leave to appeal was made after the expiration of the time fixed, Brett, M.R., says, at p. 497: "I know of no rule other than this, that the court has power to give the special leave, and, exercising its judicial discretion, is bound to give the special leave, if jurisdiction requires that that leave should be given" (Cass. Prac. 64).

Oppenheimer v. *Brackman*, 32 Can. S.C.R. 699.

A judge of the Supreme Court of British Columbia,

whether or not he sits as a member of the court constituted to hear the appeal, is "a judge of the court proposed to be appealed from" within the meaning of this section, and has the power to allow an appeal. S. 71. 60 days' limit extended.

Order allowing appeal—what to contain.

Bank of Montreal v. *Demers*, 29 S.C.R. 435.

Held, the Supreme Court will not inquire into the facts and circumstances which moved the judge of the court below to extend the time for bringing an appeal to the Supreme Court under this section.

72. No writ shall be required or issued for bringing any appeal in any case to or into the court, but it shall be sufficient that the party desiring so to appeal shall, within the time herein limited in the case, have given the security required and obtained the allowance of the appeal.

2. Whenever error in law is alleged, the proceedings in the Supreme Court shall be in the form of an appeal. R.S., c. 135, s. 43.

Allowance of the appeal.

Vide notes to section 71, *supra*.

The proceedings subsequent to the allowance of the security are governed by the Supreme Court Rules, when not provided for by the Act itself. The following résumé, adapted from the introduction to Cassels' Practice, 1888, sets out in a concise form the proceedings which have to be taken before an appeal is ripe for hearing: —

Having given the required notice of appeal, or intention to appeal, the next point which arises for consideration is as to security. The approving of the security is a mode of allowing the appeal, and when given the appeal has been brought and is then within the jurisdiction of the Supreme Court. Now section 69 of the Act provides that every appeal (certain exceptions being provided for) "shall be brought within sixty days from the signing or entry or pro-

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nouncing of the judgment appealed from." Does the time run from the signing or entry or pronouncing of the judgment? (See notes to section 69 for the cases decided on this point.) The application to have security approved may, under section 69, be made either in the court below or in the Supreme Court, and there are certain cases in which special leave to appeal must be obtained from the Supreme Court or a judge thereof—for instance, appeals under the Winding-up Act, and certain appeals from the Exchequer Court. If the sixty days be too short a time to perfect the security an application must be made under section 71 of the Act based upon the "special circumstances" required by that section. It should be borne in mind that such an application must be made to the "court appealed from or a judge thereof." Having elected in which court to make the application for approval of the security, the bond should be prepared and steps taken, according to the usual practice of the court to be applied to, to have the bond approved. In the Supreme Court four days' clear notice should be given to the opposite party of the intention to apply, and the necessary instructions sent to the Ottawa agent, who should be regularly appointed pursuant to the requirements of rule 16. The appointment of an agent at the earliest moment is an important step in the appeal. It is entirely irregular to communicate with the Registrar of the Court as to any proceeding in appeal. All applications not strictly applications which should be made to the full Court are now made to the Registrar sitting as a Judge in Chambers under the provisions of rule 83. There are but two exceptions in such rule.

After the security has been approved of, the appellant has one month within which to settle and print the case. No special rules have been made by the Supreme Court as to the practice to be adopted on settling the case. The statute (section 73) provides that it shall be stated by the parties, or, in the event of difference, be settled by the court appealed from or a judge thereof. The appellant's solicitor can send to the solicitor for the respondent a draft of the case, and the respondent's solicitor can return it within a reasonable time with such suggestions or alterations as he

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may think advisable, and the draft can be sent from one to the other until finally signed as agreed upon, or until a difference arises which can be settled only by an application to a judge. Or an agreement can be signed by the solicitors as to what documents, specifying them clearly, the case shall contain. Unnecessary material should be carefully omitted. As to what should be inserted see section 73 of the Act and notes. Upon the appellant's solicitor will then fall the duty of printing the case. The rules of the court regulating the form and style of the case should be closely followed. It may happen that the length of the case, or other circumstances, makes it evident that with reasonable diligence it will not be possible to overtake the printing within the month after security has been allowed. The solicitor for the appellant, to avoid an application on the part of the respondent to dismiss the appeal for want of prosecution, should then apply in the Supreme Court, in Chambers, for further time, giving the usual four clear days' notice of the application to his opponent and filing an affidavit in the Supreme Court in support of his application. When printed, a copy of the case should be submitted to the proper officer of the court below, who, upon being satisfied that it is the case stated by the parties, or settled by the judge, and paid the usual fees, should certify and transmit it to the Registrar of the Supreme Court, with a certified copy of the bond given as security and certified copies of exhibits. (See rule 10.) It may be less expensive and more advantageous to the satisfactory argument of the appeal to obtain from the Supreme Court, in Chambers, an order for the transmission of the original exhibits. The case should be filed in the office of the Registrar of the Supreme Court twenty clear days before the first day of the session at which it is to be brought on for hearing. At least fifteen days before the first day of the session notice of hearing must be served. (See rules 11-15.)

Each party has in the meantime prepared and printed a correct but complete statement of the facts of the case and the reasons and authorities upon which he intends to rely. This document is called a factum. The factums of both parties should be deposited with the Registrar at least

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fifteen days before the first day of the session. (Rule 23.) As to what the factum should contain and how it should be printed, see rules 24 and 25. The appeal must be inscribed by the appellant for hearing; that is, a request must be filed with the Registrar to place it on the list of appeals for hearing, at least fourteen days before the first day of the session at which the appeal is to be heard. (Rule 31.) The inscription cannot be made unless the appellant's factum has been deposited. If the respondent has failed to deposit his factum within the time limited by the rule in that behalf, the appellant inscribes *ex parte*. The appeal is then placed on the proper list by the Registrar, and will be called by the court when reached.

73. The appeal shall be upon a case to be stated by the parties, or, in the event of difference, to be settled by the court appealed from, or a judge thereof; and the case shall set forth the judgment objected to and so much of the pleadings, evidence, affidavits and documents as is necessary to raise the question for the decision of the Court. R.S., c. 135, s. 44.

The case.

Vide rules 1, 2, 3, 4, 5, 6, 7, 8 and 9 *infra*, and notes thereto, and note to section 72, *supra*.

Reasons for judgment.

Attorney General v. *City of Montreal*, 13 Can. S.C.R. 352.

Per Ritchie, C.J.—The printed case filed should contain the reasons for judgments of courts below.

Mayhew v. *Stone*, 26 Can. S.C.R. 58.

Per Taschereau, J.—Where a court had pronounced judgment in a cause before it, and after proceedings in appeal had been instituted certain of the judges filed documents with the prothonotary purporting to be additions to their respective opinions in the case, such documents were

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improperly allowed to form part of the case on appeal and could not be considered by the appellate court.

Canadian Fire Ins. Co. v. *Robinson.* 9th Oct., 1901.

When the appeal was called for hearing, counsel for the appellant applied for leave to file, as part of the case on appeal, the notes of reasons for a dissenting judgment in the court below, which had not been delivered in time for printing as part of the record. A certificate by the clerk of appeals was annexed to a printed copy of the notes, stating that they were a correct copy, and that, owing to the judge's absence from Canada, they had been unable to obtain the notes from him at an earlier date. The application was opposed by counsel for the respondents. The court allowed the notes to be filed, and it was stated, by His Lordship the Chief Justice, that the court was always disposed to permit the filing of notes of the reasons for judgment of judges in the court below when they could be obtained.

Formal judgment.

Bank of British North America v. *Walker.* 24th Dec., 1881.

An original case, purporting to be an appeal from a judgment of the Supreme Court of British Columbia overruling the demurrers of the defendants to certain counts of the declaration, contained no formal order or judgment of the court overruling demurrers. Upon application of the agent for appellants' solicitors, the agent of the respondents' solicitors consenting, it was ordered that the Registrar be at liberty to file the case as received without the formal order, and that the appellants might attach within six weeks from that date the said formal order to the case and copies.

Per Ritchie, C.J., in Chambers.

Wright v. *Synod of Huron,* Cout. Dig. 1101.

During the hearing of the appeal, the attention of appellant's counsel was called to the fact that the case was

S. 73. Case. Formal judgments.

defective on account of the omission from the record of the decree of the Court of Chancery. The argument was allowed to proceed on counsel undertaking to have the decree added to the case before judgment should be rendered.

Wallace v. *Souther,* Cout. Dig. 1102.

A case cannot be filed unless it contains the formal judgment of the court appealed from. The appeal may, by consent, be placed at the foot of the roll to permit the adding of the rule of the court below. Improper reflections upon the conduct of the judges in the court below will be ordered to be struck out of the factum, and subject the solicitor to the censure of the court and loss of his costs.

Town of St. Stephen v. *County of Charlotte.* Cout. Dig. 1104. 8th Nov., 1894.

The Supreme Court of Canada will not hear an appeal when the judgment appealed from does not appear in the case filed.

St. Stephen v. *Charlotte,* Cout. Dig. 1104.

Before the hearing, attention was drawn to the fact that the formal judgment or order of the court below was not in the printed "case." Upon counsel undertaking to have it taken out, printed and added to the "case," the court consented to hear the appeal, but the Chief Justice intimated that in future no appeal would be heard if the "case" did not contain the formal judgment of the court below.

Reid v. *Ramsay,* Cout. Dig. 1101.

A case cannot be filed or appeal entertained where it does not appear by the printed record that judgment has been formally entered.

Kearney v. *Kean,* Cout. Dig. 1101.

An incomplete case cannot be received by the Registrar, but where such a case was filed, the hearing of appeal was allowed to stand over till the case was perfected by the addition of the formal judgment of the court below.

Case generally.

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Exchange Bank of Canada v. *Gilman*, 17 Can. S.C.R. 108.

The case in appeal should not contain matter that was not before the trial court.

Carrier v. *Bender*, Cout. Dig. 1101.

Per Gwynne, J., in Chambers.—No application should be made with respect to the contents of the "case," or to dispense with printing any part of it, until it has been settled by agreement between the parties, or by a judge of the court below, pursuant to the statute.

Barnard v. *Riendeau*, 11th March, 1901.

The court drew attention to the impropriety of printing parts of the case on appeal in italics merely for the purpose of emphasizing particular phrases or paragraphs. Such a practice may be permitted in factums, but never in the printed case.

May v. *McArthur*, 3rd April, 1884.

Certain portions of the case had been italicized in the printing. The prothonotary certified that the printed case was the case agreed upon and settled by the parties. No affidavit was produced to contradict this certificate or to shew that the italics had been improperly used.

Objection to case overruled.

The case is to be printed so as to procure a certain degree of uniformity and all that is required is a substantial compliance with rule 8.

Ritchie, C.J., in Chambers.

Rex v. *Love*. 14th Nov., 1901. Cout. Dig. 1105.

On 21st May, 1901, a motion for a rule was refused, and on 14th November following, the case being inscribed for hearing on an appeal from a judgment refusing mandamus to compel a magistrate to commit a person accused of forgery for trial after the accused had been tried summarily and discharged by him. As no printed case or factums were

S. 74. Case. Transmission.

filed, the court refused to hear the appeal and ordered that it should be struck off the roll.

74. The clerk or other proper officer of the court appealed from shall, upon payment to him of the proper fees and the expenses of transmission, transmit the case forthwith after such allowance to the Registrar, and further proceedings shall thereupon be had according to the practice of the Supreme Court. R.S., c. 135, s. 45.

Neither the statute nor the rules expressly provide that the case which is to be certified to the Registrar of the Supreme Court by the Registrar or clerk of the court appealed from shall be a printed case, and in recent years the practice has obtained of receiving the certified case from the clerk of the Territorial Court of the Yukon Territory typewritten, and the agents for the solicitors have had the printing done in Ottawa.

SECURITY AND STAYING EXECUTION.

75. No appeal shall be allowed until the appellant has given proper security, to the extent of five hundred dollars, to the satisfaction of the court from whose judgment he is about to appeal, or a judge thereof, or to the satisfaction of the Supreme Court, or a judge thereof, that he will effectually prosecute his appeal and pay such costs and damages as may be awarded against him by the Supreme Court.

2. This section shall not apply to appeals by or on behalf of the Crown or in election cases, in cases in the Exchequer Court, in criminal cases, or in proceedings for or upon a writ of *habeas corpus*. R.S., c. 135, s. 46. 50-51 V., c. 16, s. 57.

The provisions of this section must be strictly complied with.

Holsten v. *Cockburn*, 1904.

In this case the appellants, on consent of the respond-

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ents, had a bond for $250 allowed by a judge of the court below as security for their appeal to the Supreme Court. On the case reaching the Registrar he referred the matter to the Chief Justice to determine whether or not such a bond was a sufficient compliance with section 46, now section 75. The bond was disallowed, the Chief Justice in his judgment saying:—

"Though it would seem that as a general rule the giving of security is an enactment in favour of the adverse party, and that consequently the adverse party may waive it expressly or impliedly, yet, under the Supreme Court Act, that is not so. Under sections 40, 43 and 46 (now sections 69, 72 and 75 respectively), the case is taken out of the jurisdiction of the Provincial Court only by the approval of the security. It is only by that Act that the Supreme Court acquires jurisdiction. That is why rule 6 requires that the case contain a certificate that the security has been given. *Fraser* v. *Abbott*, Cass. Dig. 695; *In re Cahan*, 21 Can. S.C.R. 100. *Whitman* v. *The Union Bank*, 16 Can. S.C.R. 410, might be read as opposed to that view. But the statute is, to my mind, clear, and the clerk of the Provincial Court has no authority whatever, as a general rule, to certify a case (rule 1) when no security has been given. Our Registrar should, therefore, refuse to receive such a case. The security, of course, must be as required by the statute."

Subsequently, a case was certified to the Registrar from the Court of Appeal for Ontario in which the Grand Trunk Rly. Co. were appellants, and the security allowed by a judge of the Court of Appeal was the undertaking of the appellants' solicitor. On the strength of the decision in *Holsten* v. *Cockburn*, the Registrar refused to receive the case until the security required by the statute had been given.

In re Cahan, 21 Can. S.C.R. 100.

An appeal was sought from the refusal of the Supreme Court of Nova Scotia to admit the appellant as an attorney of the court. There being no person interested in opposing the application or the appeal, no security for costs was given. *Held*, that the court had no jurisdiction to hear the

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appeal. Except in cases specially provided for, no appeal can be heard by this court unless security for costs has been given as provided for by this section 135.

Order allowing security required.

McDonald v. *Abbott*, 3 Can. S.C.R. 278.

The following certificate was filed with the printed case, as complying with rule 6 of the Supreme Court Rules: "We, the undersigned, joint prothonotary for the Superior Court of Lower Canada, now the Province of Quebec, do hereby certify that the said defendant has deposited in our office, on the twentieth day of November last, the sum of five hundred dollars, as security in appeal in this case, before the Supreme Court, according to section thirty-first of the Supreme Court Act, passed in the thirty-eighth year of Her Majesty, chapter second. Montreal, 17th January, 1878, Hubert, Honey & Gendron, P.S.C." *Held*, on motion to quash appeal, that the deposit of the sum of $500 in the hands of the prothonotary of the court below, made by appellant, without a certificate that it was made to the satisfaction of the court appealed from, or any of its judges, was nugatory and ineffectual as security for the costs of appeal.

Proper obligees not named in bond.

Scammell v. *James*, 16 Can. S.C.R. 593.

S. brought an action against J. and issued a writ of capias. Bail was given, and special bail entered in due course, but the bail-piece was not filed, nor judgment entered against J. for some months after. On application to a judge in Chambers, an order was made for the discharge of the bail on account of delay in entering up judgment, and the full Court refused to set aside such an order. An appeal was brought to the Supreme Court of Canada, intituled in the suit against J. from the judgment of the full Court, and the bond for security for costs was given to J. *Held*, that as the bail, the only parties really interested in the appeal, were not before the Court, and were

not entitled to the benefit of the bond, the appeal must be quashed for want of proper security. S. 75. Security.

Objections to security—how taken.

Whitman v. *Union Bank of Halifax*, 16 Can. S.C.R. 410.

If objection is made to the form of a bond for security for costs on appeal to the Supreme Court, it should be by application in Chambers to dismiss, and if not so made the objection will be held to be waived.

Appeals in forma pauperis.

Fraser v. *Abbott*, Cout. Dig. 111.

Held, the Supreme Court or a judge thereof has no power to allow an appeal in *forma pauperis* or to dispense with the giving of the security required by the statute.

Dominion Cartridge Co. v. *Cairns*, Cass. Prac. 68.

Sedgewick, J., refused an application for a certified copy of the record without payment of the court fees, on the ground of the applicant's poverty.

No power to increase security.

Archer v. *Severn*, 12 Ont. P.R. 472.

The Court of Appeal has no discretion to increase the amount of security on appeal to the Supreme Court of Canada fixed by R.S.C. c. 135, s. 46, at $500, because of the number of respondents.

Bonsack Machine Co. v. *Falk*, Cout. Dig. 46. (Q.R. 9 Q.B. 355.)

Upon application to file a bond of security for costs of an appeal to the Supreme Court of Canada, several respondents who had appeared separately in the Superior Court and in the Court of Appeal, urged that they were respectively entitled to separate security bonds for each of four appellants, *i.e.*, four bonds of $500 each. *Held*, per Hall, J., that leave to appeal should be granted on the furn-

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ishing of a single bond for $500. *Archer* v. *Severn*, 12 Ont. P.R. 472, followed.

Form of bond.

The form of bond set out on page 220 of Cassels' Supreme Court Practice, 2nd edition, is incorrect. The words in the 4th line, "jointly bound," should have been "firmly bound"; and the word "by" at the end of the 6th line should have been "binds."

Jamieson v. *London and Canadian L. and A. Co.*, 18 Ont. P.R. 413.

A bond filed as security for costs of an appeal to the Supreme Court of Canada stated that the sureties were jointly and severally held and "jointly" bound, instead of "firmly" bound, and "we bind ourselves and each of us by himself," instead of "binds himself." *Held*, that it must be disallowed for uncertainty as to whether it could be properly construed as a joint and several bond.

Young v. *Tucker*, 18 Ont. P.R. 449.

A bond filed as security for costs of an appeal to the Supreme Court of Canada was disallowed on the ground of substantial error in the form—"by" instead of "binds" in the operative part. *Jamieson* v. *London and Canadian L. and A. Co.*, 18 P.R. 413, followed.

Davidson v. *Fraser*, 17 Ont. P.R. 246.

The condition in a bond filed upon an appeal to the Supreme Court of Canada was to "pay such costs and damages as shall be awarded *in case the judgment shall be affirmed.*" *Held*, that this was not in substance the same as the statutory condition to "pay such costs and damages as may be awarded against the appellant by the Supreme Court"; and the italicised words words added a condition not required by the Supreme Court Act, and by which the respondents ought not to be hampered.

Robinson v. *Harris*, 14 Ont. P.R. 373.

In an appeal to the Supreme Court of Canada,

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although it is not necessary that the appellant should be a party to the appeal bond, if he is made a party, and does not execute the bond, the respondent is entitled to have it disallowed. In an appeal bond, where the object was not only to secure payment of the costs which might be awarded by the Supreme Court of Canada under section 46 of R. S.C. c. 135, but also under section 47(e) to procure a stay of execution of the judgment appealed from as to the costs thereby awarded against the appellant, the condition was "shall effectually prosecute the said appeal and pay such costs and damages as may be awarded against the appellant by the Supreme Court of Canada, and shall pay the amount by the said-mentioned judgment directed to be paid, either as a debt or for damages or costs," etc. *Held*, that this did not cover the costs awarded against the appellant by the judgment appealed from.

Molsons Bank v. *Cooper*, 17 Ont. P.R. 153.

The condition of a bond filed by the defendants as security for the costs of an appeal to the Supreme Court of Canada, was that if the defendants "shall effectually prosecute their said appeal and pay such costs and damages as may be awarded against them by the Supreme Court of Canada, then their obligation shall be void; otherwise to remain in full force and effect." *Held*, that the bond was not irregular. (2) The affidavit of execution of such a bond need not be intituled in the cause. (3) A surety in such a bond, when justifying in the sum sworn to "over and above what will pay all my just debts," need not add "and every other sum for which I am now bail."

Officer of the court may be surety.

Wilkins v. *Maclean*, 7 C.L.T. Occ. N. 5.

It is not a valid objection to a surety to a bond for security for costs to the Supreme Court of Canada that he is an officer of the court appealed from.

Application of section generally.

The application to have the bond as security allowed

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should be made in Chambers, and on notice, and be accompanied by a copy of the bond.

McNab v. *Wagler*, February 22nd, 1884.

Motion on behalf of defendant for approval of security and allowance of appeal.

Held, that a similar application having been made to Gwynne, J., in Chambers, and refused, and the application being in any event one which should be made in Chambers, the application could not be entertained.

Ontario and Quebec Rly. Co. v. *Marcheterre*, 17 Can. S.C.R. 141.

Although an application to allow the security has been refused by a judge of the court below, the appellant may make a similar application to a judge of the Supreme Court.

London and Canadian Loan and Agency Co. v. *Morris*, Cass. Prac. 68.

As a municipality has the ordinary right of suing and being sued, it can, as incident to such right, properly join in a bond for security under this section given in a suit in which it was a party. Per Taylor, C.J., 1 West. L.T. 215.

Bank of Hamilton v. *Halstead*, Cass. Prac. 69.

The bond should not provide for security for anything but the costs of the appeal, as required by section 46. Thus, where the condition of the bond was that appellants should "effectually prosecute their said appeal and pay such costs and damages as may be awarded against them by the Supreme Court of Canada, and shall pay the amounts by said judgments respectively directed to be paid, either as a debt or for damages or costs or the part thereof as to which the said judgments may be affirmed if they or either of them be affirmed only as to part, and all damages awarded against the said Bank of Hamilton on such appeal," the Registrar refused to approve of it.

Bazinet v. *Gadomy*, 1892. Cass. Prac. 69.

A bond, conditioned to pay costs "in case the appeal

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should be dismissed," was refused. No such condition is attached to the security by section 46 (now 75), and a respondent is not obliged to accept it.

In Laine v. *Beland*, 1896.

A bond was refused for a similar defect.

Milson v. *Carter*, 69 L.T. 735. Cass. Prac. 69.

When the order of the provincial court granting leave to appeal made no provision as to costs in case of dismissal for want of prosecution ("effectually prosecute his appeal") the Judicial Committee of the Privy Council held that the said court had power to correct the omission in its order.

McManamy v. *City of Sherbrooke*, 13 Legal News 290. Cass. Prac. 70.

When an appeal from the Court of Queen's Bench for Lower Canada has been regularly allowed, and the case is before the Supreme Court, the Superior Court has no power to suspend by injunction, proceedings on the appeal.

Wheeler v. *Black*, M.L.R. 2 Q.B. 159. Cass. Prac. 70.

Held, that personal security is sufficient, and that the sureties need not justify on real estate.

Where it is desired to include in the same bond security for the costs of the appeal to the Supreme Court and also security to stay execution under the next section, the application to allow the bond should be made in the court below.

Although no express provision is made therefor, in the statute or rules, the practice obtains in the Supreme Court of allowing *viva voce* examination of sureties on an application for the approval of the bond; both parties will be permitted to file affidavits in respect to the sufficiency of any security offered.

The tariff of fees provides that where security is given by a deposit of money there shall be paid in stamps one per cent. on the amount of the deposit and $2.00 on the order.

When the security is allowed an order is made in the form set out page 467, *infra*.

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The Interpretation Act, R.S., c. 1, s. 34, s.-s. (27), reads as follows: "'Sureties' means sufficient sureties, and the expression 'security' means sufficient security, and wherever these words are used one person shall be sufficient therefor, unless otherwise expressly ordered."

Winding-up Act cases.

Where leave to appeal has been granted under the provisions of the Winding-up Act, security for costs must be given in accordance with this section.

As to security in Election Appeals, *vide* p. 491, *infra*.
As to security in Exchequer Appeals, *vide* p. 479, *infra*.

76. Upon the perfecting of such security, execution shall be stayed in the original cause: Provided that,—

(*a.*) if the judgment appealed from directs an assignment or delivery of documents or personal property, the execution of the judgment shall not be stayed, until the things directed to be assigned or delivered have been brought into court, or placed in the custody of such officer or receiver as the court appoints, nor until security has been given to the satisfaction of the court appealed from, or of a judge thereof, in such sum as the court or judge directs, that the appellant will obey the order or judgment of the Supreme Court;

(*b.*) if the judgment appealed from directs the execution of a conveyance or any other instrument, the execution on the judgment shall not be stayed, until the instrument has been executed and deposited with the proper officer of the court appealed from, to abide the order or judgment of the Supreme Court;

(*c.*) if the judgment appealed from directs the sale or delivery of possession of real property, chattels real or immoveables, the execution of the judgment shall not be stayed, until security has been entered into to the satisfac-

S. 76. Stay of execution.

tion of the court appealed from, or a judge thereof, and in such amount as the said last mentioned court or judge directs, that during the possession of the property by the appellant he will not commit, or suffer to be committed, any waste on the property, and that if the judgment is affirmed, he will pay the value of the use and occupation of the property from the time the appeal is brought until delivery of possession thereof, and also, if the judgment is for the sale of property and the payment of a deficiency arising upon the sale, that the appellant will pay the deficiency;

(*d.*) if the judgment appealed from directs the payment of money, either as a debt or for damages or costs, execution thereof shall not be stayed, until the appellant has given security to the satisfaction of the court appealed from, or of a judge thereof, that if the judgment or any part thereof is affirmed, the appellant will pay the amount thereby directed to be paid, or the part thereof as to which the judgment is affirmed, if it is affirmed only as to part, and all damages awarded against the appellant on such appeal.

2. If the court appealed from is a Court of Appeal and the assignment or conveyance, document, instrument, property or thing, as aforesaid, has been deposited in the custody of the proper officer of the court in which the cause originated, the consent of the party desiring to appeal to the Supreme Court, that it shall so remain to abide the judgment of the Supreme Court, shall be binding on him and shall be deemed a compliance with the requirements in that behalf of this section;

3. In any case in which execution may be stayed on the giving of security under this section, such security may be given by the same instrument whereby the security pre-

S. 76. Stay of execution.

scribed in the next preceding section is given. R.S., c. 135, s. 47.

Dawson v. *Macdonald*, 15th January, 1884.

While the proceedings were going on on the opposition of the 30th December, 1880, another writ of execution was issued in the original cause to collect the costs awarded to respondents by the Supreme Court of Canada on the 10th June, 1880. To this writ the appellant Dawson filed a second opposition on the 18th January, 1881. This opposition was dismissed by the Superior Court, and the judgment of that court was confirmed by the Court of Queen's Bench. The latter court refused an appeal from the judgment on this second opposition, on the ground that the amount in dispute was not sufficient to authorize an appeal.

Dawson thereupon moved before the Supreme Court of Canada for an order to suspend the proceedings under the execution to which the opposition of the 18th January, 1881, was filed, and for leave to appeal from the judgment on said opposition.

Held, that there was no ground for staying the execution. The court had properly dismissed the appeal on the case presented, and that was a final decision in itself, and it was no ground for staying the execution that there were other proceedings in the court below which might possibly shew that the defendant should have succeeded in the original action.

Motion refused with costs.

Dawson v. *Macdonald*, Cout. Dig. 1135.

The judgment of the Supreme Court must be entered and sent to the court below before defendant can have recourse to a proceeding by *requête civile*. A *requête civile* does not stay execution as a matter of course. The defendant would have to apply to the Superior Court or a judge thereof for an order. A judge in Chambers should not grant an order staying execution of a judgment, especially when defendant has had ample time to apply to the full Court. (Per Taschereau, J.)

S. 76. Stay of execution.

Agricultural Ins. Co. of Watertown, N.Y. v. *Sargent*, 16 P.R. 397.

The plaintiffs appealed to the Court of Appeal from a judgment of the High Court dismissing their action with costs, and gave the security for the costs of appeal required by section 71 of the Judicature Act, by paying $400 into court, and also gave the security required by rule 804(4) in order to stay the execution of the judgment below for taxed costs, by paying $322.14 into court. Their appeal was dismissed with costs. Desiring to appeal to the Supreme Court of Canada, they paid $500 more into court, and this was allowed by a judge of the Court of Appeal as security for the costs of the further appeal. *Held*, that execution was stayed upon the judgments of the High Court and Court of Appeal until the decision of the Supreme Court. *Semble*, that payment out of the moneys in court to the defendant of his costs of the High Court and Court of Appeal, upon the undertaking of his solicitors to repay in the event of the further appeal succeeding, could not properly be ordered. *Kelly* v. *Imperial Loan Co.*, 10 P.R. 499, commented on.

Veilleux v. *Price & Ordway*, Cout. Dig. 108. 5th May, 1903.

Application for completion of security bond on appeal from a judgment condemning V. to pay O. $37,500, and dismissing the intervention of P., who claimed half the money. It appeared that there was $30,400 deposited in the Quebec Bank to the credit of V., and his application was that this sum should be paid into court and that he should be required to give security only for the balance, instead of being obliged to give security for the whole sum in order to stay execution. The court held that it had no jurisdiction to make the order, and dismissed the application with costs.

77. When the security has been perfected and allowed, any judge of the court appealed from may issue his fiat to the sheriff, to whom any execution on the judgment has issued, to stay the execution, and the execution shall be

S. 77. Stay of execution.

thereby stayed, whether a levy has been made under it or not.

2. If the court appealed from is a court of appeal, and execution has been already stayed in the case, such stay of execution shall continue without any new fiat, until the decision of the appeal by the Supreme Court.

3. Unless a judge of the court appealed from otherwise orders no poundage shall be allowed against the appellant, upon any judgment appealed from, on which any execution is issued before the judge's fiat to stay the execution is obtained. R.S., c. 135, s. 48.

78. If, at the time of the receipt by the sheriff of the fiat, or of a copy thereof, the money has been made or received by him, but not paid over to the party who issued the execution, the party appealing may demand back from the sheriff the amount made or received under the execution, or so much thereof as is in his hands not paid over, and in default of payment by the sheriff, upon such demand, the party appealing may recover the same from him in an action for money had and received, or by means of an order or rule of the court appealed from. R.S., c. 135, s. 49.

79. If the judgment appealed from directs the delivery of perishable property, the court appealed from, or a judge thereof, may order the property to be sold and the proceeds to be paid into court, to abide the judgment of the Supreme Court. R.S., c. 135, s. 50.

For decisions under the corresponding sections of the Judicature Act of Ontario, *vide* Holmested & Langton. The Judicature Act, 1905, edition, Rule 827, p. 1064.

DISCONTINUANCE OF PROCEEDINGS.

80. An appellant may discontinue his proceedings by giving to the respondent a notice entitled in the Supreme

Court and in the cause, and signed by the appellant, his attorney or solicitor, stating that he discontinues such proceedings. S. 80. Discontinuance.

2. Upon such notice being given, the respondent shall be at once entitled to the costs of and occasioned by the proceedings in appeal; and may, in the court of original jurisdiction, either sign judgment for such costs or obtain an order from such court, or a judge thereof, for their payment, and may take all further proceedings in that court as if no appeal had been brought. R.S., c. 135, s. 51.

The practice followed in case of discontinuing proceedings is to file the notice of discontinuance in the office of the Registrar and obtain an appointment to tax costs.

CONSENT TO REVERSAL OF JUDGMENT.

81. A respondent may consent to the reversal of the judgment appealed against, by giving to the appellant a notice entitled in the Supreme Court and in the cause, and signed by the respondent, his attorney or solicitor, stating that he consents to the reversal of the judgment; and thereupon the Court, or any judge thereof, shall pronounce judgment of reversal as of course. S.R., c. 135, s. 52.

Confederation Life Ass. v. *Wood*, May, 1902.

A condition in a policy of life insurance provided that if any premium, or note given therefor, was not paid when due, the policy should be void. A note given, payable with interest, in payment of a premium provided that if it were not paid at maturity the policy should forthwith become void. On the maturity of the note, it was partly paid and an extension was granted and on a part payment being again made, a further extension was granted. The last extension was overdue, and the balance on the note was unpaid at the death of the assured. A receipt by the company, given at the time of taking the note, was for the amount of the premium, but at the bottom of the face

S. 81. Reversal of judgment.

of the receipt were these words: "Paid by note in terms thereof." While the note was running the policy was assigned for value, with the assent of the company to the plaintiff, to whom the receipt was delivered by the assured.

The plaintiff filed a bill in equity as assignee of the policy, but his action was dismissed by Barker, J., the judge in Equity. On appeal to the Supreme Court of New Brunswick it was held by a majority of three to two, that defendant was estopped by the receipt and by the extensions of time for payment to the assured from setting up against the plaintiff that the policy was void for non-payment of the premium. On a further appeal to the Supreme Court of Canada a consent was filed by counsel for the respondent that the appeal should be allowed, each party to pay his own costs in the Supreme Court and in the court below, and the Supreme Court ordered judgment to be entered pursuant to the said consent.

DISMISSAL FOR DELAY.

82. If an appellant unduly delays to prosecute his appeal, or fails to bring the appeal on to be heard at the first session of the Supreme Court, after the appeal is ripe for hearing, the respondent may, on notice to the appellant, move the Supreme Court, or a judge thereof in chambers, for the dismissal of the appeal.

2. Such order shall thereupon be made as the said Court or judge deems just. R.S., c. 135, s. 53.

Rule 5 gives an appellant 30 days in which to file his case, and this time may be extended under Rules 42 and 70. The appeal may be dismissed if there has been unreasonable delay by the appellant, and where the judge in chambers has exercised his discretion and dismissed the appeal, the Supreme Court will not interfere.

Whitfield v. *The Merchants Bank*, 4th March, 1885.

The case was filed on the 22nd October, 1885, the respondent's factums on the 18th November, 1884. The

S. 82. Dismissal for delay.

last day for filing factums in appeals to be heard the following session was the 30th of January, 1885, and for inscribing, the 2nd February following. The appeal not being inscribed, the respondent's counsel gave notice of motion on the 9th February to dismiss appeal for want of prosecution. On the 14th the motion was heard. Appellant's agent stated that on the 2nd February he had made a search in the Registrar's office for the respondent's factum, and had been informed it had not been filed. He was therefore under the impression the respondent could not take advantage of the delay of the appellant.

Held, that the undue delay in filing appellant's factum and inscribing appeal had not been satisfactorily accounted for, and the appeal should be dismissed. Per Fournier, J., in chambers, 16th February, 1885.

An application was made to the Court to rescind or vary the order of Fournier, J., and to allow the appellant to file his factum and inscribe appeal. Affidavits were filed, but merely to the effect: 1. That appellant's counsel thought that while the respondent was in default with regard to his factum, it could not be considered that there was any undue delay in the prosecution by appellant of his appeal; and 2. That the appeal was *bona fide* and serious.

Held, that the Court would not interfere with the order of the judge in chambers.

Martin v. *Roy*, Jan. 1879.

A motion to dismiss appeal was referred by the Court to the Chief Justice in chambers.

City of Winnipeg v. *Wright*, 13 Can. S.C.R. 441.

A party seeking an appeal obtained an extension of time for filing his case but failed to take advantage of the indulgence so granted, whereupon, on the application of the respondent, the appeal was dismissed by the judge in chambers. On motion to rescind the order dismissing the appeal,

Held, Strong and Gwynne, JJ., dissenting that under the circumstances of the case the Court would not interfere by rescinding the judge's order and restoring the appeal.

S. 82. Dismissal for delay.

In election appeals it was formerly considered that motions to dismiss for want of prosecution must be made to the Court; *North York Election Case,* Cass. Dig., p. 682, No. 71; but in the *Halton Election Case,* 19 Can. S.C. R. 557, the Court referred such a motion to a judge in chambers, and since then the Registrar has heard them. *Chicoutimi and Saguenay Election Case,* Cass. Dig., p. 682, No. 72. Cass. Prac. p. 75.

Rule 44 provides as follows:

"Unless the appeal is brought on for hearing by the appellant within one year next after the security shall have been allowed, it shall be held to have been abandoned without any order to dismiss being required, unless the Court or a judge thereof shall otherwise order."

DEATH OF PARTIES.

83. In the event of the death of one of several appellants, pending the appeal to the Supreme Court, a suggestion may be filed of his death, and the proceedings may, thereupon, be continued at the suit of and against the surviving appellant, as if he were the sole appellant. R.S., c. 135, s. 54.

84. In the event of the death of a sole appellant, or of all the appellants, the legal representative of the sole appellant, or of the last surviving appellant, may, by leave of the Court or a judge, file a suggestion of the death, and that he is such legal representative, and the proceedings may thereupon be continued at the suit of and against such legal representative as the appellant.

2. If no such suggestion is made, the respondent may proceed to an affirmance of the judgment, according to the practice of the Court, or take such other proceedings as he is entitled to. R.S., c. 135, s. 55.

85. In the event of the death of one of several respondents, a suggestion may be filed of such death, and the pro-

ceedings may be continued against the surviving respondent. R.S., c. 135, s. 56. S. 85. Death of parties.

86. Any suggestion of the death of one of several appellants or of a sole appellant or of all the appellants or of one of several respondents, if untrue, may on motion be set aside by the Court or a judge. R.S., c. 135, ss. 54, 55 and 56.

87. In the event of the death of a sole respondent, or of all the respondents, the appellant may proceed, upon giving one month's notice of the appeal and of his intention to continue the same, to the representative of the deceased party, or if no such notice can be given, then upon such notice to the parties interested as a judge of the Supreme Court directs. R.S., c. 135, s. 57.

88. In the event of the death of a sole plaintiff or defendant before the judgment of the court in which an action or an appeal is pending is delivered, and if such judgment is against the deceased party, his legal representatives, on entering a suggestion of the death, shall be entitled to proceed with and prosecute an appeal in the Supreme Court, in the same manner as if they were the original parties to the suit. 52 V., c. 37, s. 3.

89. In the event of the death of a sole plaintiff or sole defendant before the judgment of the court in which an action or an appeal is pending is delivered, and if such judgment is in favour of such deceased party, the other party, upon entering a suggestion of the death shall be entitled to prosecute an appeal to the Supreme Court against the legal representatives of such deceased party, provided that the time limited for appealing shall not run until such legal representatives are appointed. 52 V., c. 37, s. 4.

S. 89. Death of parties.

The above provisions applicable in the case of death of parties must be supplemented by Rule 36, which provides as follows:

"In any case not already provided for by the Act, in which it becomes essential to make an additional party to the appeal, either as appellant or respondent, and whether such proceeding becomes necessary in consequence of the death or insolvency of any original party, or from any other cause, such additional party may be added to the appeal by filing a suggestion as nearly as may be in the form provided for by section 43 (now 84) of the Act."

Judgment *nunc pro tunc.*

Merchants Bank v. *Smith,* 23rd May, 1884. Cass. Dig. 688.

The respondent, the assignee of an insolvent estate, having died between the day of hearing of the appeal and the day of rendering judgment, on motion of counsel for appellant the Court orders the judgment in appeal to be entered *nunc pro tunc* as of the date of hearing.

Merchants Bank of Canada v. *Keefer,* 12th January, 1885. Cass. Dig. 688.

On motion of appellant's counsel, judgment is directed to be entered *nunc pro tunc* as of the day of argument, one of the parties having died in the interval.

Ontario and Quebec Rly. Co. v. *Philbrick,* 26th May, 1886. Cass. Dig. 688.

On motion of counsel for respondent, supported by affidavit shewing that one of the parties had died between the date of hearing and the date upon which judgment delivered, the Court directs judgment to be entered *nunc pro tunc* as of the day of hearing.

Muirhead v. *Sheriff,* 14 Can. S.C.R. 735.

In this case the plaintiff brought an action against the original defendant upon a contract of indemnity. After verdict and before entry of judgment the defendant died. Upon application of his executors leave was given them to

S. 89. Death of parties.

file a suggestion of the death of the defendant in the proper office, and by another order leave was given the plaintiff to sign judgment *nunc pro tunc* as of the date of the death of the defendant. Upon an appeal by the defendants to the Supreme Court a motion to quash was made by plaintiff on the ground that the judgment had not been revived against the executors and that the order granting leave to file a suggestion was a nullity. The motion was dismissed and appeal heard on the merits.

Lord Campbell's Act.

White v. *Parker*, 16 Can. S.C.R. 699.

In an action for negligence the plaintiff was nonsuited and on motion to the full Court the nonsuit was set aside and a new trial ordered. Between verdict and judgment the plaintiff died and a suggestion of his death was entered on the record. An appeal to the Supreme Court was quashed on the ground that under Lord Campbell's Act, or its equivalent in New Brunswick, an entirely new cause of action arose on the death of P. and that the original action was entirely gone and could not be revived.

ENTRY OF CAUSES.

90. The appeals set down for hearing shall be entered by the Registrar on a list divided into three parts, and numbered and headed as follows: "Number one, Maritime Province Cases;" "Number two, Quebec Cases;" "Number three, Ontario Cases;" and the Registrar shall enter all appeals from the Provinces of Nova Scotia, New Brunswick and Prince Edward Island on part numbered one and all appeals from the Province of Quebec on part numbered two, and all appeals from the Provinces of Ontario, Manitoba, British Columbia, Alberta, Saskatchewan and the Yukon Territory, on part numbered three, in the order in which they are respectively received; and such appeals shall be heard and disposed of in the order in

S. 90. Entry of causes.

which they are so entered, unless otherwise ordered by the Court.

2. The Court may by order direct in what order the cases in part number one and part number three shall be entered: Provided that at the October sittings of the Court the appeals entered on part number two shall be first heard, then those entered on part number three, and finally those entered on part number one. R.S., c. 135, s. 58;—50-51 V., c. 16, s. 57—52 V., c. 37, s. 5;—54-55 V., c. 25, s. 5.

Pursuant to this section, cases from the most distant provinces are placed at the head of the list of the part to which they belong, thus, in the Maritime appeals, the order which usually obtains is, 1st, Prince Edward Island appeals; 2nd, Nova Scotia appeals; and 3rd, New Brunswick appeals.

In part 3 the order is, 1st, Yukon appeals; 2nd, British Columbia appeals; 3rd, Alberta appeals; 4th, Saskatchewan appeals; 5th, Manitoba appeals; and 6th, Ontario appeals.

Election appeals are usually placed in a special list ahead of all the appeals, and the same practice has been followed in appeals from the Board of Railway Commissioners.

Where special circumstances make it desirable, the Court will place any case in such a position in the part to which it belongs, as proves most suitable, and Election appeals, with consent of both parties, have been set down among the appeals from the province in which the case arose.

The Court has frequently refused to remove a case from the part to which it belongs and place it in another part.

EVIDENCE.

91. All persons authorized to administer affidavits to be used in any of the superior courts of any province, may

administer oaths, affidavits and affirmations in such province to be used in the Supreme Court. R.S., c. 135, s. 91. S. 91. Evidence. Affidavits.

92. The Governor in Council may, by commission, from time to time, empower such persons as he thinks necessary, within or out of Canada, to administer oaths, and take and receive affidavits, declarations and affirmations in or concerning any proceeding had or to be had in the Supreme Court.

2. Every such oath, affidavit, declaration or affirmation so taken or made shall be as valid and of the like effect, to all intents, as if it had been administered, taken, sworn, made or affirmed before the Court or before any judge or competent officer thereof in Canada.

3. Every commissioner so empowered shall be styled "a commissioner for administering oaths in the Supreme Court of Canada." R.S., c. 135, s. 92.

93. Any oath, affidavit, affirmation or declaration, administered, sworn, affirmed or made out of Canada, before any commissioner authorized to take affidavits to be used in His Majesty's High Court of Justice in England, or before any notary public, and certified under his hand and official seal, or before the mayor or chief magistrate of any city, borough or town corporate in Great Britian or Ireland, or in any colony or possession of His Majesty, out of Canada, or in any foreign country, and certified under the common seal of such city, borough or town corporate, or before a judge of any court of supreme jurisdiction in any colony or possession of His Majesty or dependency of the Crown out of Canada, or before any consul, vice consul, acting consul, pro-consul or consular agent of His Majesty exercising his functions in any foreign place, and certified under his official seal, concerning any proceeding had or to be had in the Supreme Court,

S. 93. Evidence. Effect of affidavits.

shall be as valid and of like effect, to all intents, as if it had been administered, sworn, affirmed or made before a commissioner appointed under this Act. R.S., c. 135, s. 93.

94. Every document purporting to have affixed, imprinted or subscribed thereon or thereto, the signature of any commissioner appointed under this Act, or the signature of any person authorized to take affidavits to be used in any of the superior courts of any province, or the signature of any such commissioner authorized to receive affidavits to be used in His Majesty's High Court of Justice in England, or the signature and official seal of any such notary public, or the signature of any such mayor or chief magistrate, and the common seal of the corporation, or the signature of any such judge, and the seal of the court of the signature and official seal of any such consul, vice-consul, acting consul, pro-consul or consular agent, in testimony of any oath, affidavit, affirmation or declaration, having been administered, sworn, affirmed or made by or before him, shall be admitted in evidence without proof of any such signature or seal being the signature or signature and seal of the person whose signature or signature and seal the same purport to be, or of the official character of such person. R.S., c. 135, s. 94.

95. No informality in the heading or other formal requisites of any affidavit, declaration or affirmation, made or taken before any person under any provision of this or any other Act, shall be an objection to its reception in evidence in the Supreme Court, if the court or judge before whom it is tendered thinks proper to receive it; and if the same is actually sworn to, declared or affirmed by the person making the same before any person duly authorized thereto, and is received in evidence, no such informality shall be set up to defeat an indictment for perjury. R.S., c. 135, s. 95.

S. 96. Evidence. Interrogatories.

96. If any party to any proceeding had or to be had in the Supreme Court is desirous of having therein the evidence of any person, whether a party or not, or whether resident within or out of Canada, the Court or any judge thereof, if in its or his opinion it is, owing to the absence, age or infirmity, or the distance of the residence of such person from the place of trial, or the expense of taking his evidence otherwise, or for any other reason, convenient so to do, may, upon the application of such party, order the examination of any such person upon oath, by interrogatories or otherwise, before the Registrar of the Court, or any commissioner for taking affidavits in the Court, or any other person or persons to be named in such order, or may order the issue of a commission under the seal of the Court for such examination; and may, by the same or any subsequent order, give all such directions touching the time, place and manner of such examination, the attendance of the witnesses and the production of papers thereat, and all matters connected therewith, as appears reasonable. R.S., c. 135, s. 96.

97. Every person authorized to take the examination of any witness, in pursuance of any of the provisions of this Act, shall take such examination upon the oath of the witness, or upon affirmation, in any case in which affirmation instead of oath is allowed by law. R.S., c. 135, s. 97.

98. The Supreme Court, or a judge thereof, may, if it is considered for the ends of justice expedient so to do, order the further examination, before either the Court or a judge thereof, or other person, of any witness; and if the party on whose behalf the evidence is tendered neglects or refuses to obtain such further examination, the Court or judge, in its or his discretion, may decline to act on the evidence. R.S., c. 135, s. 98.

S. 99. Evidence. Notice of examination.

99. Such notice of the time and place of examination as is prescribed in the order, shall be given to the adverse party. R.S., c. 135, s. 99.

100. When any order is made for the examination of a witness, and a copy of the order, together with a notice of the time and place of attendance, signed by the person or one of the persons to take the examination, has been duly served on the witness within Canada, and he has been tendered his legal fees for attendance and travel, his refusal or neglect to attend for examination or to answer any proper question put to him on examination, or to produce any paper which he has been notified to produce, shall be deemed a contempt of court and may be punished by the same process as other contempts of court; Provided that he shall not be compelled to produce any paper which he would not be compelled to produce, or to answer any question which he would not be bound to answer in court. R.S., c. 135, s. 100.

101. If the parties in any case pending in either of the said courts consent, in writing, that a witness may be examined within or out of Canada by interrogatories or otherwise such consent and the proceedings had thereunder shall be as valid in all respects as if an order had been made and the proceedings had thereunder. R.S., c. 135, s. 101.

102. All examinations taken in Canada, in pursuance of any of the provisions of this Act, shall be returned to the Court; and the depositions, certified under the hands of the person or one of the persons taking the same, may, without further proof, be used in evidence, saving all just exceptions. R.S., c. 135, s. 102.

103. All examinations taken out of Canada, in pursuance of any of the provisions of this Act, shall be proved by affi-

davit of the due taking of such examinations, sworn before some commissioner or other person authorized under this or any other Act to take such affidavit, at the place where such examination has been taken, and shall be returned to the Court; and the depositions so returned, together with such affidavit, and the order or commission, closed under the hand and seal of the person or one of the persons authorized to take the examination, may, without further proof, be used in evidence, saving all just exceptions. R.S., c. 135, s. 103.

S. 103. Evidence. Examinations out of Canada.

104. When any examination has been returned, any party may give notice of such return, and no objection to the examination being read shall have effect, unless taken within the time and in the manner prescribed by general order. R.S., c. 135, s. 104.

GENERAL PROVISIONS.

105. The process of the Court shall run throughout Canada, and shall be tested in the name of the Chief Justice, or in case of a vacancy in the office of chief justice, in the name of the senior puisné judge of the Court, and shall be directed to the sheriff of any county or other judicial division into which any province is divided.

2. The sheriffs of the said respective counties or divisions shall be deemed and taken to be *ex officio* officers of the Supreme Court, and shall perform the duties and functions of sheriffs in connection with the Court.

3. In any case where the sheriff is disqualified, such process shall be directed to any of the coroners of the county or district. R.S., c. 135, s. 105;—50-51 V., c. 16, s. 57.

106. Every commissioner for administering oaths in the Supreme Court, who resides within Canada, may take and receive acknowledgments or recognizances of bail, and all

S. 106. Commissioners for taking affidavits.

other recognizances in the Supreme Court. R.S., c. 135, s. 106;—51-51 V., c. 16, s. 57.

107. An order in the Supreme Court for payment of money, whether for costs or otherwise, may be enforced by such writs of execution as the Court prescribes. 50-51 V., c. 16, s. 57.

For procedure under this section, see General Order, No. 85, *infra*, p. 453.

108. No attachment as for contempt shall issue in the Supreme Court for the non-payment of money only. 50-51 V., c. 16, s. 57.

109. The judges of the Supreme Court, or any five of them, may, from time to time, make general rules and orders:—

(*a*) for regulating the procedure of and in the Supreme Court, and the bringing of cases before it from courts appealed from or otherwise, and for the effectual execution and working of this Act, and the attainment of the intention and objects thereof;

(*b*) for empowering the Registrar to do any such thing and transact any such business as is specified in such rules or orders, and to exercise any authority and jurisdiction in respect of the same as is now or may be hereafter done, transacted or exercised by a judge of the Court sitting in chambers in virtue of any statute or custom or by the practice of the Court;

(*c*) for fixing the fees and costs to be taxed and allowed to, and received and taken by, and the rights and duties of the officers of the Court;

(*d*) for awarding and regulating costs in such Court in favour of and against the Crown, as well as the subject;

(*e*) with respect to matters coming within the jurisdiction of the Court, in regard to references to the Court by

the Governor in Council, and in particular with respect to investigations of questions of fact involved in any such reference.

S. 109. Powers of judges to make rules and orders.

2. Such rules and orders may extend to any matter of procedure or otherwise not provided for by this Act, but for which it is found necessary to provide, in order to ensure the proper working of this Act and the better attainment of the objects thereof.

3. All such rules which are not inconsistent with the express provisions of this Act shall have force and effect as if herein enacted.

4. Copies of all such rules and orders shall be laid before both Houses of Parliament at the session next after the making thereof. 50-51 V., c. 16, s. 57;—54-55 V., c. 25, s. 4.

Pursuant to the powers conferred by this section, the Court passed General Order 83, *infra*, p. 451, conferring upon the Registrar all the authority and jurisdiction of a judge in chambers, except in matters of *habeas corpus* and *certiorari*.

It is questionable whether the powers conferred upon the Registrar of a judge in chambers apply to any case in which jurisdiction is conferred upon a judge of the Supreme Court by some statute other than the Supreme Court Act, *e.g.*, the Winding-up Act, the Railway Act. Jurisdiction has been exercised under the Winding-up Act, but more recently, the Registrar, having doubts as to his jurisdiction, has in all such cases had the applications made to a judge of the Supreme Court in chambers.

110. Any moneys or costs awarded to the Crown shall be paid to the Minister of Finance, and he shall pay out of any unappropriated moneys forming part of the Consolidated Revenue Fund of Canada, any moneys or costs awarded to any person against the Crown. 50-51 V., c. 16, s. 57.

S. 111. Fees payable in stamps.

111. All fees payable to the Registrar under the provisions of this Act shall be paid by means of stamps, which shall be issued for that purpose by the Minister of Inland Revenue, who shall regulate the sale thereof;

2. The proceeds of the sale of such stamps shall be paid into the Consolidated Revenue Fund of Canada. R.S., c. 135, s. 111.

SUPREME COURT RULES.

On the 7th of February, 1876, pursuant to the provisions of the Statute, the judges of the Supreme Court adopted the first 77 of the rules following, and by General Orders from time to time thereafter certain amendments were made thereto, and the Orders were numbered as if they were additional rules, the first General Order being number 78.

The rules following are printed as they stand to-day amended by the different General Orders.

TABLE OF RULES.

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RULE 22. Changing attorney or solicitor.
23. Factums to be deposited with Registrar.
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35. How orders to be signed and dated.
36. Adding parties by suggestion.
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41. Affidavits in support of motion.
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45. Rules applicable to exchequer appeals.
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47. Case in criminal appeals and *habeas corpus*.
48. When case to be filed.
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50. Preceding rules not applicable in election cases.
51. Printing record in election appeals. (Repealed.)
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53. Factum in election appeals.
54. When to be deposited.
55. Order dispensing with printing of record of factum in election appeals.
56. Fees to be paid Registrar.

RULE 57. Costs.
58. Court or judge may order payment of fixed sum for costs.
59. How payment of costs may be enforced. (Repealed.)
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61. Cross appeals.
62. Notice to be given.
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64. Translation of factum.
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66. Payment of money into court.
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70. Extending or abridging time.
71. Registrar to keep necessary books.
72. Computation of time.
73. Adjournment if no quorum.
74. Christmas vacation.
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76. Interpretation.
77. Interpretation.
ORDER 78. Amending Rule 52. (Repealed.)
79. Provision for Acting Registrar in absence of Registrar. (Lapsed.)
80. Amending rules 11, 14, 15, 23, 31, 62, and 63.
81. Amending schedule D (Tariff of Fees).
82. Provision for allowance to agents.
83. Jurisdiction of Registrar in chambers.
84. Substituting new schedule of fees payable to Registrar.
85. Writs, and practice regulating.
86. Repealing Rules 51 and 52 and substituting other provisions in election appeals.
87. Provision for Acting Registrar in absence or illness of Registrar. (Lapsed.)
88. 1. Amending Rule 15 so as to provide for service of notice of appeal in certain cases upon the Attorney General of Canada.

Rules and Orders.

ORDER 88. 2. Amending Rule 75 so as to provide that Long and Christmas vacations shall not be reckoned in the computation of time.

3 & 4. Providing for procedure in reference by the Governor in Council and Board of Railway Commissioners.

5. Providing that Rules 1 to 44 inclusive should be applicable to appeals from the Board of Railway Commissioners.

RULE 1.

Filing case.

The first proceeding in appeal in this court shall be the filing in the office of the Registrar of a case pursuant to section 29 of the Act (now 73) certified under the seal of the court appealed from.

Notwithstanding the provisions of this Rule, the Supreme Court has jurisdiction in matters arising prior to the settlement of the case, in the following cases: Applications for leave to appeal under s. 37 ss.(*c*); Applications for leave to appeal per saltum under s. 42; Applications for leave to appeal under ss. 48 and 49; applications to allow security under s. 75; and motions to dismiss under s. 82.

For form of certificate *vide infra*, p. 468.

General Order No. 88 provides as follows:

"3. Whenever a reference is made to the Court by the Governor in Council or by the Board of Railway Commissioners for Canada, the case shall only be inscribed by the Registrar upon the direction and order of the Court or a judge thereof, and factums shall thereafter be filed by all parties to the reference in the manner and form and within the time required in appeals to the Court.

4. Whenever an appeal is taken from any decision of the Board of Railway Commissioners for Canada pursuant to the provisions of the Railway Act, the appeal shall be upon a case to be stated by the parties, or in the event of

difference, to be settled by the said Board or the chairman thereof, and the case shall set forth the decision objected to and so much of the affidavits, evidence and documents as are necessary to raise the question for the decision of the Court. R. 1.

All the rules of the Supreme Court from 1 to 44 both inclusive, shall be applicable to appeals from the said Board of Railway Commissioners for Canada, except in so far as the Railway Act otherwise provides."

RULE 2.

Case to contain reasons for judgment.

The case in addition to the proceedings mentioned in the said section 29 (now s. 73) shall invariably contain a transcript of all the opinions or reasons for their judgment delivered by the judges of the court or courts below, or an affidavit that such reasons cannot be procured, with a statement of the efforts made to procure the same.

The opinions of the judges must appear in the printed case although they have been issued in the regular reports of the court appealed from. The Registrar will not receive a case in which the reasons are not printed if they were obtainable in time to be included when the case was settled. The affidavit referred to in this Rule should be printed in the case. In the Province of Quebec the practice obtains of accepting a certificate from the Clerk of Appeals that he has applied to the judges for their reasons and that the only ones received were those printed in the case.

It will be observed that the affidavit and certificate are required to cover not only the reasons for judgment of the court appealed from, but also of the court of first instance and any intermediate Court of Appeal.

Reasons for judgment prepared after an appeal is launched and with a view to the appeal, should not form part of the printed case.

R. 2.

Mayhew v. *Stone*, 26 Can. S.C.R. 58. Per Taschereau, J.

Where a court has pronounced judgment in a case before it and after proceedings in appeal had been instituted certain judges filed documents with the prothonotary purporting to be additions to their respective opinions in the case, *Held*, that such documents were improperly allowed to form part of the case in appeal and could not be considered by the appellate court.

Confederation Life Association v. *O'Donnell*, 10 Can. S.C.R. 93.

On the hearing application on behalf of the appellant was made to have an affidavit added to the case filed. Per Ritchie, C.J.—"The case has been settled and you cannot now amend it by adding what would be equivalent to new evidence."

Attorney General v. *City of Montreal*, 13 Can. S.C.R. 359.

The printed case filed should contain the reasons for judgments of courts below. Per Ritchie, C.J.

Exchange Bank of Canada v. *Gilman*, 17 Can. S.C.R. 108.

The case in appeal should not contain matter that was not before the trial Court.

Reid v. *Ramsay*, Cout. Dig. 1101.

A case cannot be filed or appeal entertained where it does not appear by the printed record that judgment has been formally entered.

Kearney v. *Kean*, Cout. Dig. 1101.

An incomplete case cannot be received by the Registrar, but where such a case was filed, the hearing of appeal was allowed to stand over till the case was perfected by the addition of the formal judgment of the court below.

Carrier v. *Bender*, Cout. Dig. 1101.

Per Gwynne, J., in chambers. No application should be made with respect to the contents of the "case" or to

dispense with printing any part of it, until it has been settled by agreement between the parties, or by a judge of the court below, pursuant to the statute. R. 2.

Bank of B.N.A. v. *Walker*, Cout. Dig. 1101.

Per Ritchie, C.J., in chambers. In a British Columbia appeal from a judgment over-ruling demurrers an original case did not contain the formal order or judgment of the court. Upon application, the agent of the respondents' solicitors consenting, it was ordered that the Registrar be at liberty to file the case as received without the formal order, and that the appellants might attach the formal order to the case and copies within six weeks from that date.

Wright v. *Synod of Huron*, Cout. Dig. 1101.

During the hearing of the appeal, the attention of appellant's counsel was called to the fact that the case was defective on account of the omission from the record of the decree of the Court of Chancery. The argument was allowed to proceed on counsel undertaking to have the decree added to the case before judgment should be rendered.

Wallace v. *Souther*, Cout. Dig. 1102.

A case cannot be filed unless it contains the formal judgment of the court appealed from. The appeal may, by consent, be placed at the foot of the roll to permit the adding of the rule of the court below.

Town of St. Stephen v. *County of Charlotte*, 8th Nov., 1894, Cout. Dig. 1104.

The Supreme Court of Canada will not hear an appeal when the judgment appealed from does not appear in the case filed.

(Note.—Before the hearing, attention was drawn to the fact that the formal judgment or order of the court below was not in the printed "case." Upon counsel undertaking to have it taken out, printed and added to the "case," the court consented to hear the appeal, but the Chief Justice intimated that, in future, no appeal would

R. 2. be heard if the "case" did not contain the formal judgment of the court below.)

Canadian Fire Ins. Co. v. *Robinson,* 9th Oct. 1901, Cout. Dig. 1105.

When the appeal was called for hearing counsel for the appellant applied for leave to file, as part of the case on appeal, the notes of reasons for a dissenting judgment in the court below which had not been delivered in time for printing as part of the record. A certificate by the clerk of appeals was annexed to a printed copy of the notes stating that they were a correct copy and that, owing to the judge's absence from Canada, they had been unable to obtain the notes from him at an earlier date. The application was opposed by counsel for the respondents. The Court allowed the notes to be filed, and it was stated by His Lordship the Chief Justice, that the Court was always disposed to permit the filing of notes of the reasons for judgment of judges in the court below when they could be obtained.

Printing unnecessary matter.

L'Heureux v. *Lamarche,* 12 Can. S.C.R., at p. 465.

Cost of printing unnecessary and useless matter in case not allowed on taxation.

RULE 3.

Case to contain copy of any order enlarging time.

The case shall also contain a copy of any order which may have been made by the court below or any judge thereof enlarging the time for appealing.

This rule is necessary because by section 69 the Supreme Court only has jurisdiction where the appeal is brought within 60 days, unless the time has been extended under section 71 by the court below or some judge thereof.

RULE 4. R. 4.

Case may be remitted to court below.

Although the case in appeal has been settled by the court below, a party dissatisfied by the omission of what he considers necessary material, may apply to a judge in chambers of the Supreme Court to have the case remitted for correction.

Parker v. *Montreal City Passenger Rly. Co.*, Cout. Dig. 1101.

Per Fournier, J., in chambers. Where it appeared that certain papers which a judge of the court below had directed should form part of the case had been incorrectly printed, especially the factum of the respondent in said court, which had been translated and in which interpolations had been made, the Registrar was directed to remit the case to the court below to be corrected.

In a proper case the Court itself will, at the hearing, direct the appeal to be remitted to the trial Court for the purpose of completing the record, but it is too late to make such an application after the appeal has been argued and stands for judgment.

Providence Washington Ins. Co. v. *Gerow*, 14 Can. S.C. R. 731.

The Supreme Court in determining an appeal is bound by the case as transmitted as forming the material upon which the hearing was based; steps to amend should be taken before the decision on the appeal, and an application to amend the case after a judgment by the Supreme Court ordering a new trial comes too late.

Ætna Ins. Co. v. *Brodie*, Cass. Dig. (2nd ed.) 673.

Respondent (plaintiff) moved the full Court to have the case amended by adding his evidence when examined as a witness on behalf of appellant (defendant). For appellant it was contended that under Art. 251 of the Code of Civil Procedure the evidence could not be consid-

R. 4. ered, a declaration having been filed excluding it from the record. *Held*, that the application should have been made in chambers, and not to the Court, and that, in any event, the evidence could not properly be made part of the case.

McCall v. *Wolff*, Cass. Dig. (2nd ed.) 673.

A judge of the court below having certified that the examination of one D. was made part of the case quantum valeat, *Held*, that the case must be remitted to the court below to be settled in accordance with the statute and practice of the Court. It should appear clearly, whether the examination did or did not form a part of the case.

Davidson v. *Tremblay*, 10th May, 1895, Cout. Dig. 1104.

The respondent had recovered damages for the death of his son, alleged to have been caused by the appellant's fault, and in the course of the argument of an appeal to the Supreme Court of Canada, the attention of the Court was directed to the absence of proof of record as to the relationship between the deceased and the plaintiff, and it was contended on behalf of the appellant that he had no *locus standi*. The hearing was enlarged for a day and upon the re-assembling of the Court, application was made on behalf of the respondent to have the cause remitted to the trial court for the purpose of completing the record so as to include the judgments on motions in the courts below to reject the evidence put in on that point. The Court, after hearing counsel for both parties, ordered that the case should be remitted to the trial court for the purpose of receiving evidence as to the relationship of the plaintiff and the identity of the deceased, and no other evidence, but as a condition precedent to such indulgence, that the plaintiff should pay to the defendants, appellants, the costs incurred by them in the Court of Queen's Bench, appeal side, and in the Superior Court for Lower Canada, such costs to be paid within a time limited, and in default, the appeal to stand allowed, and the action to be dismissed with costs to the defendants in all the courts without further order, said costs to be taxed at the diligence of said respondents, the record being retained in the Supreme

Court office for the time mentioned, when, if it appeared that the costs had been taxed and paid, then that the record should be remitted to the trial court for the purposes above mentioned. Gwynne, J., dissented and King, J., while concurring as to remitting the record, did not feel disposed to make the plaintiff pay the costs of the Court of Queen's Bench. R. 4.

Confederation Life v. *O'Donnell*, 10 S.C.R. 92.

An application at the hearing to amend the case by adding thereto an affidavit, was refused. A similar application to file a power of attorney referred to in a will which was the subject matter in dispute in the action was refused.

City of Montreal v. *Hogan*, 31 Can. S.C.R. 1.

On the hearing of the appeal objection was taken for the first time to the sufficiency of plaintiff's title, whereupon he tendered a supplementary deed to him of the lands in question. *Held*, following *Exchange Bank of Canada* v. *Gilman*, 17 Can. S.C.R. 108, that the Court must refuse to receive the document as fresh evidence cannot be admitted upon an appeal.

Mineral Products Co. v. *Continental Trust Co.*, May, 1906.

In this case a lease which was not put in evidence at the trial, was referred to in a mortgage which formed part of the documentary evidence in the case. The Court thought the lease should be before it for the purpose of properly determining the issues in question on the appeal. Counsel for the respondent consented, to avoid the case being sent back for a new trial, that the Court should treat the lease as part of the record.

RULE 5.

Motion to dismiss for delay.

If the appellant does not file his case in appeal with the Registrar within one month after the security required by the Act shall be allowed, he shall be considered as not duly

R. 5. prosecuting his appeal, and the respondent may move to dismiss the appeal pursuant to section 41 of the Act (now s. 82).

In appeals from the Yukon Territory, it has been held that instead of a printed case the Rule will be sufficiently complied with if a written or typewritten case is certified to the Registrar of the Supreme Court by the clerk of the court appealed from.

Section 82 of the Act provides as follows:

"82. If an appellant unduly delays to prosecute his appeal, or fails to bring the appeal on to be heard at the first session of the Supreme Court, after the appeal is ripe for hearing, the respondent may, on notice to the appellant, move the Supreme Court, or a judge thereof in chambers, for the dismissal of the appeal.

"2. Such order shall thereupon be made as the said Court or judge deems just."

Vide notes to this section at p. 368, *supra.*

The immediate consequence of failing to file the case with the Registrar of the Supreme Court within the month after security has been allowed, is that the appellant lays himself open to a motion to dismiss for want of prosecution. If, therefore, the appellant sees that it will be impossible to print his case within the time given by the rule, and has been unable to obtain or unwilling to ask the consent of the respondent to any extension of time, he must apply before the expiry of the month, if possible, to the Registrar of the Supreme Court in chambers, for further delay. The application should be on the usual four clear days' notice and be supported by affidavit, setting forth the reasons for making it. See Rules 39, 40, 41 and 42. Cass. Prac., 2nd ed., p. 132.

The Registrar in chambers has power to extend the time limited by this rule. *Vide* Rules 42 and 70, *infra,* pp. 427 and 440.

Motions to dismiss appeals ought not to be brought before the Court, but in the first instance should be made to a judge in chambers. *Martin* v. *Roy,* Cass. Dig. 2nd ed.,

682; *Halton Election Case,* 19 Can. S.C.R. 557; *Chicoutimi & Saguenay Election Case,* May, 1892, Cout. Dig. 1111. R. 5.

The Court has refused to interfere with the discretion exercised by a judge in chambers.

Whitfield v. *Merchants Bank of Canada,* Cout. Dig. 1110.

Case filed 22nd Oct., 1884; respondent's factum, 18th Nov., 1884. Last day for filing factums, 30th Jan., and for inscribing, 2nd Feb., 1885. Appeal not being inscribed, respondent gave notice of motion on 9th Feb. to dismiss appeal for want of prosecution; on 14th motion heard. Appellant's agent stated that on 2nd Feb. he had seached for the respondent's factum and had been informed it had not been filed; and claimed respondent could not take advantage of the delay of appellant. *Held,* per Fournier, J., in chambers, 16th Feb., 1885, that the undue delay in filing appellant's factum and inscribing appeal had not been satisfactorily accounted for, and the appeal should be dismissed. On application to the Court to rescind or vary the order of Fournier, J., and to allow the appellant to file his factum and inscribe appeal, affidavits were filed to the effect: 1. That appellant's counsel thought that while respondent was in default with regard to his factum, it could not be considered there was any undue delay in prosecution of appeal; and 2. That appeal was *bonâ fide* and serious. *Held,* that the Court would not interfere with the order of the judge in chambers.

City of Winnipeg v. *Wright,* 13 Can. S.C.R. 441.

In this case 30 days after security was allowed appellant obtained from a judge in chambers an extension of time for filing case. No case having been filed within the extended time, a judge in chambers dismissed the appeal, for want of prosecution. A motion to the full Court to rescind the order in chambers offering as excuse the length of the case and pressure of work in the printing office, and offering to go down to hearing at the then present session of the Court, was refused, a majority of the Court finding

R. 5. no ground for interfering with the reasonable exercise of his discretion by the judge in chambers.

In Election appeals it was formerly held that a motion to dismiss should be made to the Court, but now such motions are made in chambers. *Vide* notes to s. 82, *supra* p. 370.

Coté v. *Stadacona Assurance Co.*, 4th May, 1881. Cass. Dig., 2nd ed., 683.

Motion for leave to inscribe case which had not been put on inscription list because factum of appellant not filed in time. The appellant had been directed to bring appeal on for hearing at the session then being held, otherwise appeal to stand dismissed. Counsel stated that delay in filing factum had occurred because both parties had consented to delay being accorded for so doing. Counsel for respondent consented.

Held, that the rule requiring factums to be deposited within a limited time had been passed for the convenience of the court and judges and could not be waived by consent of parties, but under the peculiar circumstances, and in view of the consequences of refusing the motion, liberty to inscribe might be given.

In a proper case, an order directing an appeal to stand dismissed if the case is not filed within a certain time, may be vacated and further time to file allowed. *Vide Foran* v. *Handley*, *supra*, p. 000.

Mayor, etc., of Montreal v. *Hall*, 17th Nov., 1883. Cass. *Handley*, *supra*, p. 338.

Counsel for respondents, who have given notice of cross appeal, moves for leave to proceed with cross appeal, notwithstanding original case not filed until that day by appellants, and the appeal has not been inscribed.

Counsel for appellants also moves to have principal appeal heard, the delay in inscribing and in filing factums having been an oversight.

Held, that if the cross appellant desired to proceed with

his cross appeal he should have himself filed the original case. Both principal appeal and cross appeal to stand over. R. 5.

Herbert v. *Donovan*, Cout. Dig. 1103.

Motion on behalf of respondent to dismiss appeal for want of prosecution. The judgment of the Court of Appeal was pronounced 30th June, 1885. On 3rd July following appellant put in his bond for security for costs, which was allowed, but being under the impression that the time of vacation did not count, he took no steps to further prosecute his appeal. Notice of motion to dismiss was given 17th September, 1885, and was shortly afterwards heard before Henry, J., in chambers, who held, that under the circumstances, the time for filing the case should be extended to 10th October, then instant. Motion dismissed without costs.

RULE 6.

Certificate of security given.

The case shall be accompanied by a certificate under the seal of the court below, stating that the appellant has given proper security to the satisfaction of the court whose judgment is appealed from, or of a judge thereof, and setting forth the nature of the security to the amount of five hundred dollars, as required by the thirty-first section of the said Act (now s. 75), and a copy of any bond or other instrument by which security may have been given shall be annexed to the certificate.

In practice a copy of the bond by which security may have been given, is generally printed in the case, but this is unnecessary. A copy certified under the seal of the court below may be forwarded with the case.

The section of the Act relating to the giving of security is R.S., c. 139, s. 75. See notes to said section *supra*, p. 354, Cass. Prac., 2nd ed., p. 134.

R. 7.

RULE 7.

Case to be printed and twenty-five copies deposited with Registrar.

The case shall be printed by the party appellant, and twenty-five printed copies thereof shall be deposited with the Registrar for the use of the judges and officers of the Court.

The case as settled between the parties, or by the judge of the court below, is to be printed, but there have been many appeals in which a portion of the printing has been dispensed with, such as pamphlets or other printed documents, books of account, statements, etc.; sometimes evidence which has been printed for use in the court below, although not in the form required by the rules of the Supreme Court, and only a few copies can be procured. The Registrar has invariably relaxed the requirements as to printing when doing so would save large expense, and not cause any serious inconvenience.

But no application should be made to dispense with any part of the printing until the case has been settled; *Carrier* v. *Bender*, Cout. Dig. 1101; and such an application should be made to the Registrar of the Supreme Court and not to a judge of the court below.

In some cases an order has been made by the Registrar of the Supreme Court allowing less than twenty-five copies of the case to be deposited, but this will only be done when the circumstances are exceptional. Cass. Prac., 2nd. ed., p. 134.

The rules are defective in not providing that the appellant shall furnish the respondent with a copy of the case, and except as a matter of courtesy or upon an application to the Registrar, the respondent is not in a position to obtain a copy of the case for the preparation of his factum or to be used on the argument. Without such copy it is impossible to properly refer to the page of the printed case where evidence is to be found to which counsel preparing the factum desires to call attention. If the Registrar has

the full 25 copies of the case filed with him, he is able to supply counsel with copies if asked for. R. 7.

As to what the case shall contain, *vide* s. 73, *supra*, p. 350.

Rex v. *Love*, Cout. Dig. 1105.

On 21st May, 1901, a motion for a rule was refused and on 14th November following, the case being inscribed for hearing on an appeal from a judgment refusing mandamus to compel a magistrate to commit a person accused of forgery for trial after the accused had been tried summarily and discharged by him. As no printed case or factums were filed, the court refused to hear the appeal and ordered that it should be struck off the roll.

RULE 8.

Form of case.

The case shall be in demy quarto form. It shall be printed on paper of good quality, and on one side of the paper only, and the type shall be small pica leaded, and the size of the case shall be eleven inches by eight and one-half inches, and every tenth line shall be numbered in the margin. An index to the pleadings, depositions, and other principal matters shall be added.

Directions as to form of case will be found inside the front cover of each number of the Supreme Court Reports. Cass. Prac., 2nd ed., p. 135.

Use of italics.

May v. *McArthur*, Cout. Dig. p. 1101.

Certain portions of the case had been italicized in the printing. The prothonotary certified that the printed case was the case agreed upon and settled by the parties. No affidavit was produced to contradict this certificate or to shew that the italics had been improperly used. Objection to case over-ruled. The case is to be printed so as to procure a certain degree of uniformity and all that is required

R. 8. is a substantial compliance with Rul 8. Ritchie, C.J., in chambers.

Barnard v. *Riendeau*, Cout. Dig. 1105.

The Court drew attention to the impropriety of printing parts of the case on appeal in italics merely for the purpose of emphasizing particular phrases or paragraphs. Such a practice may be permitted in factums, but never in the printed case.

RULE 9.

Case not to be filed unless rules complied with.

The Registrar shall not file the case without the leave of the Court or a judge, if the foregoing order has not been complied with, nor if it shall appear that the press has not been properly corrected, and no costs shall be taxed for any case not prepared in accordance with this order.

For the purpose of making notes it is more convenient to have the book with the printed pages to the left.

It is the duty of the appellant to avoid unnecessary expense, and the costs of any printed material not properly required, or of printing done in an unnecessary expensive style, will be disallowed on taxation.

The printing should average from forty to forty-seven lines to the page, and not be uselessly leaded or paragraphed. The price paid should be a reasonable price, and the affidavit of disbursements, in addition to stating that the printing charges have been paid, should state that such charges are usual and reasonable in the locality in which the work has been done.

The index should be sufficient to enable any document to be easily found. It is objectionable to refer to an exhibit under its letter merely, without identifying it more fully. As a rule it is more convenient to have the index at the beginning of the case. Cass. Prac., 2nd ed., p. 135.

RULE 10. R. 10.

Certified copies of original documents and exhibits to be deposited with Registrar.

Together with the case, certified copies of all original documents and exhibits used in evidence in the court of first instance, are to be deposited with the Registrar, unless their production shall be dispensed with by order of a judge of this court; but the court or a judge may order that all or any of the originals shall be transmitted by the officer having the custody thereof to the Registrar of this court, in which case the appellant shall pay the postage for such transmission.

Exhibits which have a bearing upon the question at issue in the appeal should form part of the case and be printed. It is not the practice to require certified copies of original documents and exhibits to be deposited with the Registrar, but where a party to an appeal considers that the original exhibits ought to be before the court, an application to that end should be made to the Registrar on notice, and in proper case an order will be made directing the clerk of the court below to forward such originals to the Supreme Court.

Vide also *Robb* v. *Stafford, addenda et corrigenda.*

RULE 11.

Notice of hearing of appeal.

After the filing of the case, a notice of the hearing of the appeal shall be given by the appellant for the next following session of the Court as fixed by the Act, or as specially convened for hearing appeals according to the provisions thereof, if sufficient time shall intervene for that purpose, and if between the filing of the case and the first day of the next ensuing session there shall not be sufficient time to enable the appellant to serve the notice as herein-

R. 11. after prescribed, then such notice of hearing shall be given for the session following the then next ensuing session.

Rule 13 regulates the form of the notice of hearing.

By Rule 14, as amended by Rule 80, the notice of hearing shall be served at least fifteen days before the first day of the session at which the appeal is to be heard. Rule 15, as amended by Rule 80, provides for the manner of service.

By Rule 49 special provision is made for notice of hearing in criminal appeals and appeals in matters of *habeas corpus*, the time varying in the different provinces. Cass. Prac., 2nd ed., p. 136.

Rule 15, provides as follows: "Where the validity of a Statute of the Parliament of Canada is brought in question in any appeal to the Supreme Court, notice of hearing, stating the matter of jurisdiction raised, shall be served on the Attorney General of Canada."

The Court has refused to hear an appeal until such notice had been given.

The same rule would probably be held to apply to appeals where the validity of a statute of the Legislature of any province is in question, in which case a notice of hearing should be served upon the Attorney General of the province.

RULE 12.

Special notice convening court, form of.

The notice convening the Court under section 14 of the Act (now 33 and 34) for the purpose of hearing election or criminal appeals, or appeals in matters of *habeas corpus*, or for other purposes, shall, pursuant to the directions of the chief justice or senior puisne judge, as the case may be, be published by the Registrar in the Canada Gazette, and shall be inserted therein for such time before the day appointed for such special session as the said chief justice or senior puisné judge may direct, and

may be in the form given in Schedule A to these rules appended. R. 12.

RULE 13.

Form of notice of hearing.

The notice of hearing may be in the form given in Schedule B. to these rules appended.

Kearney v. *Kean*, 31st January, 1879.
Domville v. *Cameron*, 30th October, 1879. Cass. Dig., 2nd ed., 684.

When an appeal is heard *ex parte*, the Court requires an affidavit proving service of notice of hearing.

RULE 14.

When to be served.

The notice of hearing shall be served at least 15 days before the first day of the session at which the appeal is to be heard.

This does not apply to Election appeals (Rule 50) or to Criminal or *habeas corpus* appeals (Rule 49). In Exchequer appeals the notice of hearing must be given within 10 days after the appeal is set down. *Vide* s. 82 Exchequer Court Act, *infra*, p. 479.

RULE 15.

How notice of hearing to be served.

Such notice shall be served on the attorney or solicitor who shall have represented the respondent in the court below, at his usual place of business, or on the booked agent, or at the elected domicil of such attorney or solicitor at the City of Ottawa, and if such attorney or solici-

R. 15. tor shall have no booked agent or elected domicil at the City of Ottawa, the notice may be served by affixing the same in some conspicuous place in the office of the Registrar, and mailing on the same day a copy thereof prepaid to the address of such attorney or solicitor.

2. Where the validity of a Statute of the Parliament of Canada is brought in question in any appeal to the Supreme Court, notice of hearing, stating the matter of jurisdiction raised, shall be served on the Attorney General of Canada.

Sub-section 2 has been added to this rule by general order 88.

Where the respondent appears in person, *vide* Rules 20 and 21, *infra*, p. 407.

RULE 16.

"The agent's book."

There shall be kept in the office of the Registrar of this Court a book to be called "The Agent's Book," in which all advocates, solicitors, attorneys and proctors practising in the said Supreme Court may enter the name of an agent (such agent being himself a person entitled to practise in the said Court) at the said City of Ottawa, or elect a domicil at the said city.

Wallace v. *Burkner*, May 2nd, 1883. Cass. Dig., 2nd ed., 669.

Conducting business with the Registrar's office by correspondence is an irregular practice. A solicitor should appoint an agent as required by the Supreme and Exchequer Court rules.

A written authority should be filed with the Registrar authorizing either him or a solicitor to enter the name of

the agent in the agent's book, when the principal does not enter the name himself. Per Ritchie, C. J., in chambers. R. 16.

The authority must be in writing and filed in the Registrar's office. No special form is required. The following is sufficient:

"I hereby authorize you to enter your name as my agent in the 'agent's book' of the Supreme Court of Canada, and to act as such agent in all appeals to that Court in which I may be concerned (or in the following appeal, viz., ——), dated, etc."

The authority may be revoked by a subsequent one and a new entry in the book.

By General Order 82, it is ordered that an allowance shall be taxed by the Registrar to the duly entered agent in any appeal, in the discretion of the Registrar to $20.

The practice obtains of allowing in an ordinary case $20 to the appellant's agent and $15 to the respondent's agent, unless the appeal has been inscribed more than once, in which case both agents are entitled to the fee of $20. Where the solicitors for the appellant or respondent practise in the City of Ottawa, the practice obtains of allowing half fees in such case.

Any neglect to appoint an agent, or any neglect by an agent when appointed, may seriously prejudice the rights of the parties. An agent should keep a general supervision over the procedure in an appeal, see that the appeal is duly entered and the fee paid on entering it, attend to the depositing of the factum and the inscribing of the appeal, keep his principal advised with reference to all interlocutory applications, be present in court to hear judgment and notify his principal of the result, take out and serve on the agent of the other party an appointment to tax costs and settle the minutes of the judgment, and attend the taxation and settlement. Sometimes questions arise on the settlement of the minutes requiring a thorough acquaintance on the part of the agent with the nature of the appeal and the judgment. It is not very satisfactory to find after a judgment has been entered that an important provision has been omitted necessitating an application to the full Court at a considerable expense. Cass. Prac., 2nd ed., p. 139.

R. 17.

RULE 17.

Suggestion by respondent who appears in person.

In case any respondent who may have been represented by attorney or solicitor in the court below, shall desire to appear in person in the appeal, he shall immediately after the allowance by the court appealed from, or a judge thereof, of the security required by the Act, file with the Registrar a suggestion in the form following:

"*A.* v. *B.*

"I, A. B., intend to appear in person in this appeal.

(Signed) A. B."

Charlevoix Election Case (*Valin* v. *Langlois*), 10th June, 1880. Cass. Dig., 2nd ed., p. 677.

Costs—Counsel fee—Respondent arguing appeal in person.

Counsel for respondent moves for order to review taxation and to have counsel fee allowed to respondent, an advocate, who argued appeal in person. Refused, Fournier and Henry, JJ., dissenting.

RULE 18.

If no suggestion filed.

If no suggestion shall be filed, and until an order shall have been obtained as hereinafter provided for a change of solicitor or attorney, the solicitor or attorney who appeared for any party respondent in the court below shall be deemed to be his solicitor or attorney in the appeal to this Court.

RULE 19.

Suggestion by respondent who elects to appear by attorney.

When a respondent has appeared in person in the court below he may elect to appear by attorney or solicitor in the

appeal, in which case the attorney or solicitor shall file a suggestion to that effect in the office of the Registrar, and thereafter the notice of hearing and all other papers are to be served on such attorney or solicitor as hereinbefore provided. R. 19.

RULE 20.

Election of domicil by respondent who appears in person.

A respondent who appears in person may, by a suggestion filed in the Registrar's office, elect some domicil or place at the City of Ottawa, at which all notices and papers may be served upon him, in which case service at such place of the notice of hearing and all other notices and papers shall be deemed good service on the respondent.

RULE 21.

Service when respondent appears in person without electing domicil.

In case the respondent, who shall have appeared in person in the court appealed from, or who shall have filed a suggestion to Rule 17, shall not, before service, have elected a domicil at the City of Ottawa, the notice of hearing may be served by affixing the same in some conspicuous place in the office of the Registrar.

Rules 17, 18, 19, 20 and 21, all refer only to a respondent, and provide for the manner in which he may appear in an appeal. No provision has been made for the filing of a suggestion by an appellant who wishes to appear in person, nor for his electing to appear by solicitor in the Supreme Court when he has appeared in person in the court below, nor for election of domicil by an appellant who wishes to appear in person. But an appellant can prosecute an appeal in person, or by the solicitor who

R. 21. appeared for him in the cause below, or he may instruct some other solicitor to prosecute the appeal—and the rule as to entering an agent would of course apply to any solicitor so acting for the appellant. Besides, Rule 40 which regulates the mode of serving notices of motion is applicable as well to an appellant as a respondent, and from this rule it may be inferred that an appellant appearing in person may elect a domicil in the City of Ottawa. Cass. Prac., 2nd ed., p. 141.

RULE 22.

Changing attorney or solicitor.

Any party to an appeal may on an *ex parte* application to the Registrar obtain an order to change his attorney or solicitor, and after service of such order on the opposite party, all services of notices and other papers are to be made on the new attorney or solicitor.

One attorney's name only should appear on record. In an application to change the name of solicitor, it was shewn that Messrs. A. and B. appeared on the case as solicitors, and that A. had died. It was desired to have the name of B. alone inserted as solicitor. Application refused by the Chief Justice of the Supreme Court as unnecessary; *Gilmour & Rankin* v. *Bull*, 1 Kerr. N.B. 94, referred to. *The Exchange Bank* v. *Springer*, 24th February, 1887. Cass. Prac., 2nd ed., p. 141.

FACTUMS.

RULE 23.

Factums to be deposited with Registrar.

At least fifteen days before the first day of the session at which the appeal is to be heard, the parties appellant and respondent shall each deposit with the Registrar, for

the use of the court and its officers, twenty-five copies of his factum or points for argument in appeal. R. 23.

RULE 24.

Contents of factum.

The factum or points for argument in appeal shall contain a concise statement of the facts, and of the points of law intended to be relied on, and of the arguments and authorities to be urged and cited at the hearing, arranged under the appropriate heads.

Vernon v. *Oliver*, 11 Can. S.C.R. 156.

The plaintiff's factum containing reflections on the conduct of the judges of the court below, was ordered to be taken off the files as scandalous and impertinent.

Coleman v. *Miller*, 23 February, 1882, Cass. Dig., 2nd ed., 683.

Objections to a factum as containing unnecessary matter may be urged at the hearing.

Wallace v. *Souther*, Cout. Dig. 1102.

Improper reflections upon the conduct of the judges in the court below will be ordered to be struck out of the factum and subject the solicitor to the censure of the court or loss of his costs.

Fairman v. *City of Montreal*, 13th Mch., 1901, Cout. Dig. 1105.

The Court drew attention to the uselessness of translations of the notes of reasons for judgment in the courts below which were stated to be quite irregular. The judgments and reasons for judgment as printed in the case are the proper material to be read by the Court on an appeal.

The translations of factums and the judgments of opinions of the judges of the courts below may be ordered by any Supreme Court judge under Supreme Court Rules 64 and 65, when deemed necessary.

R. 24. *Filing factum.*

Dawson v. *McDonald,* 13th December, 1879, Cass. Dig., 2nd ed., 683.

Motion to dismiss appeal refused, but appellant requiring further indulgence to file factum ordered to pay costs of motion.

Other cases.

O'Brien v. *The Queen,* 10th June, 1878, Cass. Dig., 2nd ed., 686.

Motion to have appeal heard at the then present session, notwithstanding case and factum of appellant not filed 30 days before first day of session, and factum not yet filed on behalf of the Crown. Counsel for Crown consenting. Refused.

Lawless v. *Sullivan,* Cout. Dig. 1118.

By consent of both parties an appeal may be submitted on factums and reporter's notes of a former argument before the Court.

Charleviox Election Case, Valin v. *Langlois,* 7th June, 1879, Cass. Dig., 2nd ed., 684.

Court refuses to allow appeal to be submitted on the factums, but decides it must be orally argued.

McKenzie v. *Kittridge,* 18th June, 1879. Cass. Dig., 2nd ed., 684.

Where a re-hearing became necessary owing to a change in the personnel of the Court, the judge who had not heard the appeal consenting, and counsel for all parties desiring it, the Court assented to the appeal being submitted on the factums.

Muirhead v. *Sheriff,* 2nd June, 1886, Cass. Dig., 2nd ed., 684.

On application of counsel for appellants, counsel for respondent assenting, the Court consented to have appeal submitted on factums without oral argument.

Hall Mines v. *Moore, infra*, p. 422. R. 24.

It was remarked by the Chief Justice with respect to this case that had an application been made on behalf of the appellant to have the appeal heard upon the factums, the Court would not have dismissed the appeal.

Parker v. *Montreal City Passenger Rly. Co.*, Cout Dig. 1102.

When an appeal inscribed for hearing *ex parte* was called, counsel for respondents asked leave to be heard and to be allowed to deposit factum. Counsel for appellant consented. The application was granted.

Western Counties Rly. Co. v. *Windsor & Annapolis Rly. Co.*, 6th Feb. 1879, Cass. Dig., 2nd ed., 683.

A point is raised at the hearing not in factum, and counsel for respondent therefore objects that he is not prepared to argue it. The Court adjourns hearing for a week.

Levis Election Case, Belleau v. *Dussault*, Cout. Dig. 1119.

When the appeal was called for hearing, counsel for the appellant appeared, no one appearing on behalf of the respondent. It appeared that the appellant's factum had not been filed until the morning of the day on which the appeal was so called, instead of three clear days before the first day of the session, as required by Rule 54. The Court refused to hear the appellant *ex parte* as the case was thus irregularly inscribed.

Lord v. *Davidson*, Cout. Dig. 1102.

When an appeal inscribed for hearing *ex parte* was called, counsel for respondent asked leave to be heard, although his factum had not been deposited within the time provided by the rules. Counsel for appellant consented. *Held*, that the rules respecting factums must be strictly complied with and the Registrar should not receive factums tendered after the time fixed in the rule. Counsel for respondent was heard, but this case was not to be considered a precedent.

R. 24. *Whitfield* v. *Merchants Bank of Canada*, Cout. Dig. 1103.

The rules respecting factums must be strictly complied with, and the Registrar should not receive factums tendered after the delay specified in the rule. Default by the respondent to file a factum does not justify a similar default on the part of the appellant or relieve him from the consequences of a motion to dismiss under S.C. Rule 26.

RULE 25.

How to be printed.

The factum or points for argument in appeal shall be printed in the same form and manner as hereinbefore provided for with regard to the case in appeal, and shall not be received by the Registrar unless the requirements hereinbefore contained, as regards the case, are all complied with.

RULE 26.

Motion by respondent to dismiss appeal on ground of delay in filing factum.

If the appellant does not deposit his factum or points for argument in appeal within the time limited by Order 23, the respondent shall be at liberty to move to dismiss the appeal on the ground of undue delay, as provided for by section 41 of the Act (now s. 82).

RULE 27.

Appellant may inscribe ex parte if factum not filed.

If the respondent fails to deposit his factum or points for argument in appeal within the said prescribed period, the appellant may set down or inscribe the cause for hearing *ex parte*. See Rule 31.

RULE 28.

Setting aside inscription ex parte.

Such setting down or inscription *ex parte* may be set aside or discharged upon an application to a judge in chambers sufficiently supported by affidavit.

RULE 29.

Registrar to seal up factums first deposited.

The factum or points for argument in appeal first deposited with the Registrar shall be kept by him under seal, and shall in no case be communicated to the opposite party until the latter shall himself bring in and deposit his own factum or points.

RULE 30.

Interchange of factums.

So soon as both parties shall have deposited their said factum or points for argument in appeal, each party shall, at the request of the other, deliver to him three copies of his said factum or points.

The factum should be as complete as possible, but the Court has never refused leave to counsel to hand in for the use of the judges a printed list of authorities cited at the hearing not already mentioned in the factum. An additional argumentative factum is never, or very rarely, received, and would not be accepted by the Registrar for distribution among the judges without special leave of the Court. The additional list of authorities should be printed and copies sent to the Registrar as soon as possible after the argument of the appeal. The factum should not contain irrelevant matter, or reproduce documents already printed in the case, when a reference to them will answer the purpose. Cass. Prac., 2nd ed., 143.

R. 30. *Criminal appeals; habeas corpus appeals.*

No factums required. Rule 47, *infra*, p. 429.

Election appeals.

Factum must be printed as in ordinary appeals. Rule 53, *infra*, p. 431.

An order may be made dispensing with the factum. Rule 55, *infra*, p. 432.

Exchequer appeals.

A factum is required as in other appeals. Rule 45, *infra*, p. 429.

References by the Governor in Council.

Factums are required. General Order No. 88.

References by the Board of Railway Commissioners.

Factums are required. General Order No. 88.

Appeals from the Board of Railway Commissioners.

Factums are required. General Order No. 88.

RULE 31.

Registrar to inscribe appeals for hearing.

Appeals shall be set down or inscribed for hearing in a book to be kept for that purpose by the Registrar at least fourteen days before the first day of the session of the Court fixed for the hearing of the appeal. But no appeal shall be so inscribed which shall not have been filed twenty clear days before said first day of said session, without the leave of the Court or a judge.

By section 32 of the Act the regular sessions always begin on a Tuesday. The case, therefore, should be filed not later than the third Tuesday preceding the opening of

the session (20 clear days). The factums, under Rule 23, should be deposited not later than the third Saturday preceding the opening of the session, and the appeal should be inscribed on the third Monday preceding—that is the Monday following the last day for depositing the factums. If the respondent has failed to deposit his factum the appeal must be inscribed for hearing *ex parte*. This inscription *ex parte* can only be vacated on application supported by affidavit accounting for the delay. A mere consent on the part of the appellant or his solicitor would not be sufficient. See Rules 27 and 28 (Cass. Prac., 2nd ed., 145). R. 31.

The respondent cannot inscribe the appeal even though the appellant make default in inscribing. His remedy is by motion to dismiss for want of prosecution. See section 82 of the Supreme Court Act, and notes thereon, (Cass. Prac., 2nd ed., 146).

There are special rules relating to the inscription of election appeals, exchequer appeals, criminal appeals, and appeals in matters of *habeas corpus*. Cass. Prac., 2nd ed., 146.

Election appeal.

The only rules of the Supreme Court directly affecting the inscription are the one requiring a fee of $10 to be paid on entering every appeal, and the rules relating to the printing of the record and the depositing of factums (53, 54 and 86). *North Ontario Election Case*, 3 Can. S.C.R. 374.

If the fee be paid in time to enable the record to be printed and the factums to be deposited within the time specified, the appeal will be immediately inscribed by the Registrar for the ensuing session.

As to exchequer appeals *vide* notes to section 82 of the Exchequer Court Act, *infra*, p. 479.

As to criminal appeals and appeals in matters of ***habeas corpus***. These may be set down for hearing as soon as the certified written case, mentioned in Rule 47, has been received by the Registrar, provided the time limit specified in Rule 48 does not interfere. In that event an applica-

R. 31. tion may be made to a judge, or to the Court if in session, for special leave to inscribe. Cass. Prac., 2nd ed., 147.

Election appeals take precedence on the inscription list. On special application criminal and *habeas corpus* appeals have been given an early hearing during the session. Exchequer appeals are placed in the several lists according to the respective provinces in which the cases were tried. Cass. Prac., 2nd ed., 147.

Ex parte inscription.

Kearney v. *Kean; Domville* v. *Cameron,* Cout. Dig. 1118.

On an appeal being heard *ex parte,* the Court requires an affidavit proving service of notice of inscription for hearing.

Appeal perfected after day for inscription.

Bank of Toronto v. *Les Curé, etc., de La Ste. Vierge,* Cout. Dig. 1119.

In an appeal perfected after the day for inscribing, an application was made by counsel for appellant, counsel for respondent consenting, to have appeal heard at the session of the court then proceeding. *Held,* that the appeal must come on in the regular way the following session, there being no circumstances shewn to induce the Court to interfere to expedite the hearing.

Grip Printing & Pub. Co. v. *Butterfield,* Cout. Dig. 1120.

Counsel for appellant moves for leave to inscribe appeal for hearing, though the case had been filed after the time limited for inscribing, all parties being desirous of having appeal heard and consenting. Motion refused.

Striking an appeal from the list.

Parker v. *Montreal City Passenger Rly. Co.,* Cout. Dig. 1120.

A motion to strike an appeal off the list of appeals inscribed for hearing must be on notice.

RULE 32.

R. 32.

Counsel at hearing.

No more than two counsel on each side shall be heard on any appeal, and but one counsel shall be heard in reply.

In some cases the Court has relaxed this rule and heard more than two counsel.

Coleman v. *Miller*, Cout. Dig. 1106.

The Court heard a third counsel for appellants, notwithstanding the Rule 32, as the laws of two provinces were in question, and there was a cross-appeal. It was stated that the practice permitted under the special circumstances should not be considered a precedent.

Russell v. *Lefrancois*, Cout. Dig. 1106.

When one counsel from Quebec and one from Ontario had been heard for respondent, a third counsel (from Quebec) was heard on French authorities applicable.

Jones v. *Fraser*, Cout. Dig. 1107.

On special application, third counsel was heard, intricate questions of law having to be argued there being a cross-appeal and counsel stating that the Court of Queen's Bench for Lower Canada had also relaxed its rule which forbids the hearing of more than two counsel on each side. The Court stated that the fact of there being a cross-appeal was not of itself sufficient ground to cause the Court to depart from its rule.

Counsel—Right to begin.

The "Thrasher" Case, Cout. Dig. 1118.

Inasmuch as all statutes should *primâ facie* be considered within the jurisdiction of the Legislature passing them, any one attacking a statute should begin. Therefore counsel for Dominion Government was first heard.

In re "Liquor License Act, 1883," Cout. Dig. 1106.

Where a question of legislative jurisdiction is raised, the party attacking the validity of an Act should begin.

R. 32. In the case in question, counsel for the provinces were first heard. Only one counsel was heard in reply for all the provinces.

In re "Canada Temperance Act, 1878" (County of Perth), Cout. Dig. 1106. 28th Oct., 1884.

Question whether the Canada Temperance Act, 1878, section 6, had been complied with, and whether proclamation should issue under section 7. (See "Canada Temperance Act, 1878," 3.)

The Court directs the parties seeking to sustain the affirmative, and wishing to shew that the proclamation should issue, to begin.

In re Representation in the House of Commons, 33 Can. S.C.R. 475.

A reference was made by the Governor General in Council to the Supreme Court as follows:

"In determining the number of representatives in the House of Commons to which Nova Scotia and New Brunswick are respectively entitled after each decennial census, should the words 'aggregate population of Canada,' in sub-section 4 of section 51 of the British North America Act, 1867, be construed as meaning the population of the four original provinces of Canada or as meaning the whole population of Canada including that of provinces which have been admitted to the Confederation subsequent to the passage of the British North America Act?"

The provinces of New Brunswick and Nova Scotia attacked the construction placed upon sub-section 4 of section 51 of the B.N.A. Act, and the Attorney Generals of the other provinces of Canada were notified of the hearing and counsel for the Province of Ontario and the Province of Quebec were heard on the argument. Counsel for the provinces were first heard.

In re Representation in the House of Commons, 33 Can. S.C.R. 594, was a similar reference relating solely to the Province of Prince Edward Island. Counsel for Prince Edward Island were first heard.

In this case also the Court heard three counsel for the province.

Foreign counsel. R. 32.

Halifax City Rly. Co. v. *The Queen*, Cout. Dig. 1118.

Counsel residing in the State of New York wishing to be heard on behalf of appellants in an appeal pending before the Supreme Court of Canada was refused.

But in *The Ship "Calvin Austin"* v. *Lovitt*, 35 Can. S.C.R. 616, a member of the Massachusetts Bar was heard on behalf of the appellants. *Vide supra*, p. 61.

Illness of counsel.

Consumers' Cordage Co. v. *Connolly*, 11th Oct., 1900. Cout. Dig. 1120.

On the calling of the case in the order as inscribed on the roll for hearing, it was shewn that leading counsel for the appellant had been taken suddenly ill and was unable to be present in court. The hearing was consequently postponed till a subsequent day during the session, in accordance with the usual practice of the court in such cases.

Adamson v. *Adamson; Quebec Ins. Co.* v. *Eaton*, Cout. Dig. 1107.

Motion to postpone hearing till the following session on the ground of unexpected illness of counsel retained. Granted.

Counsel leading.

No rule has been laid down as to whether senior or junior counsel shall first address the court. In cases from the Province of Quebec it is the practice for the junior counsel first to address the court.

Motions.

As a rule only one counsel on each side is heard on the argument of a motion.

Other cases.

Provident Savings & Assurance Society v. *Mowat*, 11th Oct., 1901. Cout. Dig. 1107.

An application was made on behalf of respondent to

R. 32. have an appeal postponed to a lower position on the list of cases inscribed for hearing, a consent in writing signed by the solicitors for both parties was filed and it was shewn that respondent's counsel was seriously ill and unable to attend at the time when the hearing on the appeal would be likely to come on in its position upon the roll. It was accordingly directed by the Chief Justice that the case should be placed in a lower position upon the roll than that in which it had been inscribed.

Wallace v. *Burkner*, Cout. Dig. 1106.

Conducting business with the Registrar's office by correspondence is an irregular practice. A solicitor should appoint an agent as required by the Supreme and Exchequer Court rules.

Halifax City Rly. Co. v. *The Queen*, Cout. Dig. 1106.

The appellants do not appear by counsel at the hearing, but Mr. O'B. appears and states that he is the president and proprietor of the railway company, appellants, and wishes to be heard on their behalf. Refused. Appeal ordered to stand over till next session.

RULE 33.

Postponement of hearing.

The Court may in its discretion postpone the hearing until any future day during the same session, or at any following session.

The power of altering the order of hearing appeals is reserved to the Court by section 90 of the Supreme Court Act. This applies only to changing the order of the list for the session at the time being held. The above rule goes further and provides for the postponement of an appeal to any following session. If both parties consent to the postponement of the hearing of an appeal on the list, counsel can either notify the Court when the appeal is called, or inform the Registrar in writing of their wish to with-

draw the appeal, and the Registrar will inform the Court when the appeal is called. As a rule when an appeal is merely withdrawn it should be re-inscribed for hearing by the appellant on the usual *praecipe* filed with the Registrar. When the Court directs an appeal to stand for hearing at a subsequent session, no re-inscription is required, as the Registrar will place the appeal on the list, in accordance with the direction of the Court. Cass. Prac., 2nd ed, 148. R. 33.

If the case does not contain the formal judgment of the court below, or the reasons of the judges of the court below, or affidavit required by Rule 2, that such reasons could not be procured, or a proper index, or is in any other respect imperfect, the Court may direct the postponement of the hearing. *Kearney* v. *Kean*, Cout. Dig. 1101; *Lewin* v. *Howe*, 14 Can. S.C.R. 722; or place it at the foot of the list to permit missing matter to be added. *Wallace* v. *Souther*, Cout. Dig. 1102.

If it appears that the respondent has taken an appeal to the Privy Council from the same judgment, the Court will postpone the hearing until such appeal is decided. *McGreevy* v. *McDougall*, Cout. Dig. 74; *Eddy* v. *Eddy*, Cout. Dig. 130; *Bank of Montreal* v. *Demers*, Cout. Dig. 131.

RULE 34.

Default by parties in attending hearing.

Appeals shall be heard in the order in which they have been set down, and if either party neglect to appear at the proper day to support or resist the appeal, the Court may hear the other party, and may give judgment without the intervention of the party so neglecting to appear, or may postpone the hearing upon such terms as to payment of costs or otherwise as the Court shall direct.

If neither party be represented when the appeal is called for hearing, it will be struck out of the list. If the

R. 34. appellant be not represented and counsel for respondent asks for the dismissal of the appeal, it will be dismissed with costs. *Burnham* v. *Watson; Scott* v. *Queen; Western Ass. Co.* v. *Scanlan*, Cout. Dig. 1111. If respondent's counsel instead of asking for dismissal of the appeal, asks for the postponement of the hearing to the following session, the request will usually be granted.

In *Titus* v. *Colville*, 18 Can. S.C.R. 709, the Court reinstated an appeal dismissed for non-appearance of counsel for appellant, but refused to do so in *Foran* v. *Handley*, 24 Can. S.C.R. 706.

Hall Mines v. *Moore*, Cout. Dig. 123.

The appeal had been regularly inscribed on the roll for hearing at the May sittings of the Supreme Court of Canada, and on the 18th May, 1898, the case being called in the order in which it appeared upon the roll, no person appeared on behalf of the appellant. Counsel appeared for the respondent and asked that the appeal should be dismissed for want of prosecution. The Court referred to the fact that the case had been called in its proper place on the roll on the previous day and allowed to stand over because counsel were not present on the part of the appellant, and the appeal was dismissed with costs. On 20th May, 1898, application by motion was made on behalf of the appellant to have the appeal reinstated and restored to its place on the roll for hearing on such terms as the Court might deem appropriate, the ground stated for requesting such indulgence being that counsel for the appellant were under a misapprehension as to the time when the hearing was to take place. The motion was opposed by counsel for the respondent, who objected that proper notice of the motion had not been given as required by the rules of practice. The Court refused to hear the motion or to make an order staying the issue of the certificate of the judgment already rendered dismissing the appeal, but, under the circumstances, the motion was dismissed without costs.

It was subsequently remarked by the Chief Justice with respect to this case that had an application been made on behalf of the appellant to have the appeal disposed of upon the factums, the Court would not have dismissed the appeal.

RULE 35. R. 35.

How orders to be signed and dated.

All orders of this Court in cases of appeal shall bear date on the day of the judgment or decision being pronounced, and shall be signed by the Registrar.

This rule refers to orders of the Court. An order made by a judge in chambers is signed by the judge. And orders made by the Registrar sitting as a judge in chambers are signed by the Registrar. Rule 83. Cass. Prac., 2nd ed., 149.

When one of the parties has died between the hearing and pronouncing of judgment, the Court, on application, may direct its order to be dated and entered *nunc pro tunc*, as of the day of hearing. *Merchants Bank* v. *Smith*, Cout. Dig. 1130; *Ontario & Quebec Rly. Co.* v. *Philbrick*, Cout. Dig. 1131.

Even after the final judgment has been signed and entered and transmitted to the court below, the Supreme Court has power to amend such judgment, and will do so if it is clear that by oversight or mistake an error has occurred. *Vide* notes to section 2, *supra*, p. 1.

Mutual Fire Ins. Co. v. *Frey*, 5 Can. S.C.R. 82. Cout. Dig. 1121.

By memorandum at the end of the reported case (5 Can. S.C.R. 90), it appears that a dispute having arisen as to whether the court had held the action prematurely brought, on a reference, the Court intimated that such had, in fact, been the opinion of the court, although it did not appear as one of the reasons for the judgment delivered.

Settling minutes of judgment.

The rules make no special provision as to the practice to be observed in settling minutes of judgment, and as in the Province of Quebec the minutes are settled by the Court without the intervention of the solicitors, practitioners from that province are often of the impression that the

R. 35. minutes will be settled, signed and entered by the Registrar as a matter of course after the judgment has been pronounced. This is not the case. The practice is for the solicitor or agent for the successful party to draft minutes of judgment and serve the same upon the solicitor for the opposite party along with a copy of his bill of costs, and at the same time endorse the copies with a notice of the day and time when the minutes will be settled and the costs taxed by the Registrar, an appointment having been first obtained for this purpose. The solicitors thereupon attend before the Registrar and after hearing them the minutes are settled and the costs taxed. Any party dissatisfied with the minutes as settled may move the Court to have them varied, and in such case the Registrar will ordinarily delay the entering of the judgment until the motion has been heard. Upon the settlement of the minutes it has occasionally been found that the judgment of the Court has not dealt with all the matters in issue, or conditions have arisen after the delivery of the judgment which have made it necessary to provide in the formal judgment for matters not specifically covered by the judgment as pronounced in Court or by the reasons for judgment. In some instances the Court has, upon a motion to vary the minutes as settled by the Registrar, amended or varied its judgment as originally pronounced. *Vide Chambly* v. *Willet*, 34 Can. S.C.R. 502, *supra*, p. 5.

Bickford v. *Grand Junction Rly. Co.*, Cout. Dig. 1122.

A motion to vary minutes was referred to Strong, J., in chambers, to be subsequently heard *pro formâ* before the Court.

Consumers' Cordage Co. v. *Connolly*, Cout. Dig. 1165.

A motion was made before the Court to vary the minutes as settled by the Registrar by reciting special features as to the proceedings (see 31 Can. S.C.R. 246-247), for the purposes of a proposed appeal to the Privy Council. The Chief Justice took no part, but the remainder of the Court (Taschereau, Gwynne, Sedgewick and Girouard, JJ.), were of the opinion that the applicant should take nothing by his motion and refused to interfere with the minutes

as settled, stating, however, that the Registrar should grant a certificate to the applicant shewing the nature of the proceedings had for the purpose of being used upon the appeal to the Privy Council. R. 35.

Note.—The Privy Council granted a new trial on terms, otherwise the Supreme Court order to be set aside and the judgment of the Court of Review to stand.

RULE 36.

Adding parties by suggestion.

In any case not already provided for by the Act, in which it becomes essential to make an additional party to the appeal, either as appellant or respondent, and whether such proceeding becomes necessary in consequence of the death or insolvency of any original party, or from any other cause, such additional party may be added to the appeal by filing a suggestion as nearly as may be in the form provided for by section 43 (now 84) of the Act.

In *Guest* v. *Dick*, Oct., 1897, the executrix of a respondent who had died pending the appeal, was substituted for him, and a suggestion allowed to be filed by appellant.

And where the appellant had made an assignment in insolvency after the appeal had been taken, his assignee was added as an appellant, the sureties to the bond for security for costs filing a consent and an undertaking to be bound by the bond, notwithstanding the change of parties. *Ostrom* v. *Sills*, March, 1898, 28 Can. S.C.R. 485. Cass. Prac., 2nd ed., 150.

Vide also provisions of the Supreme Court Act, *supra* p. 370.

RULE 37.

Suggestion may be set aside.

The suggestion referred to in the next preceding rule may be set aside, on motion by the Court or a judge thereof.

R. 38.

RULE 38.

Determining questions of fact arising on motion.

Upon any such motion, the Court or a judge thereof may, in their or his discretion, direct evidence to be taken before a proper officer for that purpose, or may direct that the parties shall proceed in the proper court for that purpose to have any question tried and determined, and in such case all proceedings in appeal may be stayed until after the trial and determination of the said question.

RULE 39.

Motions.

All interlocutory applications in appeals shall be made by motion, supported by affidavit to be filed in the office of the Registrar before the notice of motion is served. The notice of motion shall be served at least four clear days before the time of hearing.

RULE 40.

Notice of motion, how served.

Such notice of motion may be served upon the solicitor or attorney of the opposite party by delivering a copy thereof to the booked agent, or at the elected domicile of such solicitor or attorney, to whom it is addressed, at the City of Ottawa. If the solicitor or attorney has no booked agent, or has elected no domicile at the City of Ottawa, or if a party to be served with notice of motion has not elected a domicile at the City of Ottawa, such notice may be served by affixing a copy thereof in some conspicuous place in the office of the Registrar of this Court.

RULE 41.

Affidavits in support of motion.

Service of a notice of motion shall be accompanied by copies of affidavits filed in support of the motion.

Rules 39, 40 and 41 are expressly declared not to apply to criminal appeals, *habeas corpus* appeals and election appeals. No express provision having been made for such cases, it has become the practice to apply these rules in all instances where motions are made to the Court.

Although under Rule 40 provision is made for affixing a copy of a notice of motion in the office of the Registrar where the solicitor for the opposite party has no booked agent in Ottawa, it is not the practice to dispose of motions notice of which has been so served unless some other steps have been taken to bring home to the solicitor or the party interested express notice that the application will be made.

RULE 42.

Giving further time.

Upon application supported by affidavit, and after notice to the opposite party, the Court or a judge thereof may give further reasonable time for filing the printed case, depositing the printed factum or points of either party, anl setting down or inscribing the appeal for hearing as required by the foregoing rules.

Orders will not be granted under this rule simply on consent of parties for their solicitors. Some good reason must be afforded for an extension of the time provided by Rules 5, 23 and 31.

Bickford v. *Lloyd; Canada Southern Rly. Co.* v. *Norvell*, Cout. Dig. 1115.

Under section 79 of the Supreme and Exchequer Courts Act (now section 109) and Rules 42 and 70 S.C., a judge of

R. 42. the Supreme Court in chambers has power to extend the time for printing and filing case. Per Ritchie, C.J., in chambers; per Fournier, J., in chambers.

Bank of B.N.A. v. *Walker*, Cout. Dig. 1115.

On 12th October, 1881, the agent for defendants' solicitor applied for three months' further time to file the case and factums, shewing by affidavit that the day the order had been made by a judge of the Supreme Court, allowing $500 to be paid into the Supreme Court of Canada as security for the costs of appeal, viz., 13th September, 1882, the $500 had been paid in; that the next day the papers had been mailed to the defendants' solicitor at Victoria, B.C., to enable him to prosecute his appeal; that a letter took about three weeks to reach Victoria from Ottawa; that he had on 7th October received a telegram (produced) from defendants' solicitor saying "Papers just received; get time extended," and that he verily believed unless three months' further time was granted to prepare and print case and factums and transmit them, grave injustice would be done. An order was thereupon made giving until 1st December then next to have case printed and filed with the Registrar of the Supreme Court of Canada. Per Ritchie, C.J., in chambers.

RULE 43.

Setting down motions.

Motions to be made before the Court are to be set down in a list or paper, and are to be called on each morning of the session before the hearing of appeals is proceeded with.

It is the duty of the solicitor desiring to present a motion to the Court to enter the same upon a special list prepared for the purpose kept in the office of the Registrar's clerk, the day before the motion is to be heard, so that copies may be made for the use of the Court before the motion is called. It is the practice of the Court to take up the motions in the order in which they appear upon the motion paper.

RULE 44. R. 44.

Appeal abandoned by delay.

Unless the appeal is brought on for hearing by the appellant within one year next after the security shall have been allowed, it shall be held to have been abandoned without any order to dismiss being required, unless the Court or a judge thereof shall otherwise order.

RULE 45.

Rules applicable to Exchequer appeals.

The foregoing rules shall be applicable to appeals from the Exchequer Court of Canada, except in so far as the Act has otherwise provided.

For the practice in connection with Exchequer Court appeals, *vide* notes to the Exchequer Court Act section 82, *infra*, p. 479.

RULE 46.

Rules not applicable to criminal appeals nor habeas corpus.

The foregoing rules shall not, except as hereinbefore provided, apply to criminal appeals nor to appeals in matters of *habeas corpus*.

RULE 47.

Case in criminal appeals and habeas corpus.

In the cases mentioned in the next preceding rule, no printed case shall be required, and no factum or points for argument in appeal need be deposited with the Registrar, but such appeals may be heard on a written case, certified under the seal of the court appealed from, and which case shall contain all judgments and opinions pronounced in the court below.

R. 48.

RULE 48.

When case to be filed.

In criminal appeals, and in appeals in cases of *habeas corpus*, and unless the Court or a judge shall otherwise order, the case must be filed as follows:

(1) In appeals from any of the provinces other than British Columbia, at least one month before the first day of the session at which it is set down to be heard.

(2) In appeals from British Columbia, at least two months before the said day.

RULE 49.

Notice of hearing in criminal appeals and in appeals in matters of habeas corpus.

In cases of criminal appeals and appeals in matters of *habeas corpus*, notice of hearing shall be served the respective times hereinafter fixed before the first day of the general or special session at which the same is appointed to be heard, that is to say:

(1) In appeals from Ontario and Quebec, two weeks.

(2) In appeals from Nova Scotia, New Brunswick and Prince Edward Island, three weeks.

(3) In appeals from Manitoba, one month.

(4) In appeals from British Columbia, six weeks.

As has been pointed out (Cass. Prac., 2nd ed., 155), these rules are not consistent with the provisions of section 65 of the Supreme Court Act or section — of the Criminal Code, which indicate it to be the intention of Parliament that these appeals should be heard as promptly as possible. Whenever it is considered desirable so to do, the appellant may have the delays shortened by applying in chambers under Rule 70.

RULE 50.

Preceding rules not applicable in election cases.

The following rules are not to apply to appeals in controverted election cases.

Although the preceding rules, except No. 12, are not to apply to election appeals, it is desirable that so far as they are applicable they should be adopted.

RULES 51 AND 52.

General Order No. 86 substitutes the following for Rules 51 and 52:

In controverted election appeals, the party appellant shall obtain from the Registrar, upon payment of the usual charges therefor, a certified copy of the record, or of so much thereof as a judge may direct to be printed, and shall have forty (40) copies of the said certified copy printed in the same form as hereinafter provided for the case in ordinary appeals, and immediately after the completion of the printing shall deliver to the Registrar thirty (30) of such printed copies, twenty-five (25) thereof for the use of the Court and its officers and five (5) thereof for the use of the respondent, and to be handed by the Registrar to the respondent or his solicitor or booked agent upon application made therefor.

For printing in election appeals the same fees shall be allowed on taxation as for printing the case in ordinary appeals.

RULE 53.

Factum in election appeals.

The factum or points for argument in appeal in controverted election appeals, shall be printed as hereinbefore provided in the case of ordinary appeals.

Vide Rules 24 and 25, *supra*, pp. 409 and 412.

R. 54.

RULE 54.

When to be deposited.

The points for argument in appeal or factum in controverted election cases shall be deposited with the Registrar at least three days before the first day of the session fixed for the hearing of the appeal, and are to be interchanged by the parties in manner hereinbefore provided with regard to the factum or points in ordinary appeals.

Vide Rules 25, 30 and 55.

RULE 55.

Order dispensing with printing of record or factum in election appeals.

In election appeals a judge in chambers may, upon the application of the appellant, make an order dispensing with the printing of the whole or any part of the record, any may also dispense with the delivery of any factum or points for argument in appeal. Such order may be obtained *ex parte* and the party obtaining it shall forthwith cause it to be served upon the adverse party.

The practice adopted in the Registrar's office in connection with election appeals is not to set down the appeal immediately upon its receipt from the clerk of the election court, but to first hear an application by the appellant upon notice to the respondent, to have a day fixed for the hearing which will permit of the printing being done, and where the appellant is desirous of having the printing of part of the record dispensed with, it is usual to deal with this matter along with the application to fix the day for hearing.

This rule only provides for an application by the appellant to dispense with printing a part of the record, but if he fails to make such an application, in a proper case he may be ordered to pay the costs of printing all the necessary matter. *Brassard* v. *Langevin*, 1 Can. S.C.R. 201.

RULE 56. R. 56.

Fees to be paid Registrar.

The fees mentioned in Schedule (C) to these orders shall be paid to the Registrar by stamps to be prepared for that purpose.

As to fees payable in *habeas corpus* and criminal appeals, *vide* notes to section 53, *supra*, p. 233.

Appeals in forma pauperis.

Fraser v. *Abbott*, 22nd February, 1878.
Fraser v. *Abbott*, 16th March, 1878, Cass. Dig. 695.

The Supreme Court, or a judge thereof, has no power to allow an appeal in *formâ pauperis*, or to dispense with the giving of the security required by the statute.

Approving of the security is a mode of allowing the appeal.

Section 24 of the S. & E.C. Act (now s. 68) does not give the Court power to allow appeals, because Her Majesty may be recommended to allow appeals by the Judicial Committee of the Privy Council, nor is it in the power of the judges of the Court to make rules or orders for the allowance of appeals. Nor does section 79 of the S. & E.C. Act (now s. 109) give the Court or a judge any power to grant or to make rules for granting the prayer of a petition to be allowed to have or prosecute an appeal in *formâ pauperis*.

Fournier, J., in chambers.
Richards, C.J., in chambers.

Dominion Cartridge Co. v. *McArthur*, 7th Oct., 1902, Cout. Dig. 1165.

On 7th October, 1902, present: Sir Henry Strong, C.J., and Taschereau, Sedgewick, Girouard, Davies and Mills, JJ. A motion was made for an order directing the Registrar of the Supreme Court of Canada to transmit the record to the Registrar of Her Majesty's Privy Council, on an appeal by the respondent, without the payment of the fees

R. 56. in stamps as required by the statute and rules of practice of the Court. After hearing counsel for the parties the motion was allowed and the order made as applied for, the Chief Justice stating that as this was an extraordinary case in which the Judicial Committee of the Privy Council had granted special leave to appeal in *formâ pauperis*, the ordinary rules could not apply.

RULE 57.

Costs.

Costs in appeal between party and party shall be taxed pursuant to the tariff of fees contained in Schedule (D) to these orders.

There is no provisions for the taxation of costs as between solicitor and client. *Vide Boak* v. *Merchants Marine Ins. Co., supra*, p. 235.

Increased counsel fee.

Except by consent, the Registrar will not, when taxing costs, hear any application for increased counsel fee, unless notice of such application has been given to the solicitor for the opposite party. Applications for increased counsel fee should be made to the Registrar in chambers, and not to the Court.

Beamish v. *Kaulbach*, 5th June, 1879.

An application for increased counsel fee is not one for the full Court, but should be made to a judge in chambers.

RULE 58.

Court or judge may order payment of fixed sum for costs.

The Court or a judge may direct a fixed sum for costs to be paid in lieu of directing the payment of costs to be taxed.

It is under this rule that costs are allowed on interlocutory applications.

RULE 59 (read as follows): R. 59.

"The payment of costs, if so ordered, may be enforced by process of execution in the same manner and by means of the same writs, and according to the same practice as may be in use from time to time in the Exchequer Court of Canada."

It has been repealed by General Order No. 85, *infra*, p. 453, which makes full supervision for the issue of writs out of the Supreme Court and the practice in relation thereto.

It is not the practice of the Court to issue a writ of execution to enforce payment of costs except under special circumstances.

RULE 60 (this rule read as follows):

"Contempts incurred by reason of non-compliance with any order of the Court other than an order for payment of money, may be punished in the same manner and by means of the same process and writs, and according to the same practice as may be in use from time to time in the Exchequer Court of Canada."

It has been repealed by General Order No. 85, *infra*, p. 453.

RULE 61.

Cross-appeals.

It shall not under any circumstances be necessary for a respondent to give notice of motion by way of cross-appeal, but if a respondent intends upon the hearing of an appeal to contend that the decision of the court below should be varied, he shall, within the time specified in the next rule, or such time as may be prescribed by the special order of a judge, give notice of such intention to any parties who may be affected by such contention. The omission to give such notice shall not in any way interfere with the power of the Court on the hearing of an appeal to treat the whole case as open, but may, in the discretion of the

R. 61. Court, be ground for an adjournment of the appeal, or for special order as to costs.

Mayor, etc., of Montreal v. *Hall,* 17th Nov., 1883, Cass. Dig., 2nd ed., 680.

Counsel for respondents, who has given notice of cross-appeal, moves for leave to proceed with cross-appeal, notwithstanding original case not filed until that day by appellants, and the appeal has not been inscribed.

Counsel for appellants also moves to have principal appeal heard, the delay in inscribing and in filing factums having been an oversight.

Held, that if the cross-appellant desired to proceed with his cross-appeal he should have himself filed the original case. Both principal appeal and cross-appeal ordered to stand over.

Canadian Pacific Rly. Co. v. *Lawson,* Cout. Dig. 74.

A rule was discharged so far as it asked a nonsuit, but was made absolute for a new trial. *Held,* on an appeal by defendant that although the plaintiff was entitled to recover, yet, as he had not appealed from the order for a new trial, the rule should be affirmed, and the appeal dismissed with costs.

Pilon v. *Brunet,* 5 Can. S.C.R. 319.

A motion to quash an appeal on the ground that it should not have been brought as a substantive appeal, but as a cross-appeal, was dismissed. But the respondent, although successful in getting the judgment varied, was allowed only the costs of a cross-appeal taken under Rule 61.

City of Montreal v. *Labelle,* 14 Can. S.C.R. 741.

A respondent whose verdict must be set aside on the ground that it was awarded by way of *solatium* cannot be given substantial damages where he has failed to give notice of his intention to ask appropriate relief by way of cross-appeal.

Stephens v. *Chaussé,* 15 Can. S.C.R. 379.

Plaintiff recovered $5,000 damages in an action for

negligence but the verdict was reduced to $3,000 on appeal to the Queen's Bench on the ground that the assessment made by the trial Court included vindictive damages for which the defendant was not liable. The Supreme Court was of opinion that the amount awarded by the Superior Court at the trial was not unreasonable and could not be said to include vindictive damages, but, as there was no cross-appeal by the plaintiff, the Court would not interfere to restore the original judgment. R. 61.

Bulmer v. *The Queen*, 23 Can. S.C.R. 488.

A cross-appeal will be disregarded by the Court when Rules 62 and 63 of the Supreme Court rules have not been complied with.

Town of Toronto Junction v. *Christie*, 25 Can. S.C.R. 551.

Under the Ontario Judicature Act, R.S.O. 1887, c. 44, ss. 47 and 48, the Court of Appeal has power to increase damages awarded to a respondent without a cross-appeal, and the Supreme Court has the like power under its Rule No. 61. Taschereau, J., dissented. Per Strong, C.J. Though the Court will not usually increase such damages without a cross-appeal, yet where the original proceedings were by arbitration under a statute providing that the Court, on appeal from the award, shall pronounce such judgment as the arbitrators should have given, the statute is sufficient notice to an appellant of what the Court may do, and a cross-appeal is not necessary.

RULE 62.

Notice to be given.

Subject to any special order which may be made, notice by a respondent under the last preceding rule shall be 15 days' notice.

RULE 63.

Factum in cross-appeals.

A respondent who gives a notice, pursuant to the two last preceding rules shall, before or within two days after

R. 63. he has served such notice deposit a printed factum or points for argument in appeal with the Registrar as hereinbefore provided as regards the principal appeal, and the parties upon whom such notice has been served shall within one week after service thereof upon them, deposit their printed factum, or points with the Registrar and such factum or points shall be interchanged between the parties as hereinbefore provided as to principal appeal.

RULE 64.

Translation of factum.

Any judge may require that the factum or points for argument in appeal of any party shall be translated into the language with which such judge is most familiar, and in that case the judge shall direct the Registrar to cause the same to be translated, and shall fix the number of copies of the translation to be printed, and the time within which the same shall be deposited with the Registrar, and the party depositing such factum shall thereupon cause the same forthwith to be printed at his own expense and such party shall not be deemed to have deposited his factum until the required number of the printed copies of the translation shall have been deposited with the Registrar.

RULE 65.

Translation of judgments and opinions of judges of court below.

Any judge may also require the Registrar to cause the judgments and opinions of the judges in the court below to be translated, and in that case the judge shall fix the number of copies of the translation to be printed and the time within which they shall be deposited with the Regis-

trar, and such translations shall thereupon be printed at the expense of the appellant. R. 65.

RULE 66.

Payment of money into court.

Any party directed by an order of the Court or a judge to pay money into Court must apply at the office of the Registrar for a direction so to do, which direction must be taken to the Ottawa branch or agency of the Bank of Montreal, and the money there paid to the credit of the cause or matter and after payment the receipt obtained from the bank must be filed at the Registrar's office.

Where it is desired to pay money into Court for the purpose of having security allowed on an appeal to the Supreme Court, or pursuant to any statute, the practice and forms in use at Osgoode Hall, Toronto, have been adopted by the Registrar, and it is the duty of the solicitor for the proposed appellant to apply to the Registrar's clerk who will issue to him a document consisting of three forms, the first of which is a requisition to be signed by the Registrar upon the bank to receive the deposit; the second document is an acknowledgment of the receipt by the bank of the money. This is returned to the Registrar by the bank. And the third document is an acknowledgment of the receipt of the money by the bank given to the depositor. The fees payable on the deposit in the form of stamps, pursuant to Rule 56, should be affixed to the receipt which will be returned to the Registrar by the bank, and not to the receipt delivered out to the depositor.

RULE 67.

Payment of money out of court.

If money is to be paid out of Court, an order of the Court or a judge must be obtained for that purpose, upon notice to the opposite party.

R. 68.

RULE 68.

How made.

Money ordered to be paid out of Court is to be so paid upon the cheque of the Registrar, countersigned by a judge.

RULE 69.

Formal objections.

No proceeding in the said Court shall be defeated by any formal objection.

Section 95, of the Act, provides that:

"No informality in the heading or other formal requisites of any affidavit, declaration or affirmation, made or taken before any person under any provision of this or any other Act, shall be an objection to its reception in evidence in the Supreme Court or the Exchequer Court if the Court or judge before whom it is tendered thinks proper to receive it; and if the same is actually sworn to, declared or affirmed by the person making the same before any person duly authorized thereto, and is received in evidence, no such informality shall be set up to defeat an indictment for perjury."

RULE 70.

Extending or abridging time.

In any appeals or other proceeding the Court or a judge may enlarge or abridge the time for doing any act, or taking any proceeding, upon such (if any) terms as the justice of the case may require.

This rule is substantially the same as English Order 64, Rule 7, and the Ontario Consolidated Rule No. 353, except that it does not contain the express provision that the application may be made after the expiration of the time appointed or allowed by the rules. The rule however has been construed as if this provision existed.

For decisions as to application of the rule *vide* notes to Holmested & Langton's Judicature Act, 1905, p. 558, and the Annual Practice, 1906, p. 867. R. 70.

RULE 71.

Registrar to keep necessary books.

The Registrar is to keep in his office all appropriate books for recording the proceedings in all suits and matters in the said Supreme Court.

RULE 72.

Computation of time.

In all cases in which any particular number of days not expressed to be clear days, is prescribed by the foregoing rules, the same shall be reckoned exclusively of the first day and inclusively of the last day, unless such last day shall happen to fall on a Sunday or a day appointed by the Governor General for a public fast or thanksgiving, or any other legal holiday or non-juridical day, as provided by the statutes of the Dominion of Canada.

This rule is substantially the same as the Ontario Consolidated Rules Nos. 344 and 345, and for decisions respecting the application of the rule *vide* Holmested & Langton's Judicature Act, 1905, p. 552.

Consolidated Rule of Practice 342 of the Supreme Court of Judicature for Ontario, expressly provides that "month" means "calendar month," where lunar months are not expressly mentioned. There is no corresponding provision in the Supreme Court rules, but in practice, the word "month" is similarly interpreted.

The Interpretation Act, Revised Statutes of Canada, 1906, c. 1, s. 34, sub-s. 11, defines "holiday" as follows:

"(11) 'Holiday' includes Sundays, New Year's Day, the Epiphany, Good Friday, the Ascension, All Saints'

R. 72. Day, Conception Day, Easter Monday, Ash Wednesday, Christmas Day, the birthday or the day fixed by proclamation for the celebration of the birthday of the reigning sovereign, Victoria Day, Dominion Day, the first Monday in September, designated Labour Day, and any day appointed by proclamation for a general fast or thanksgiving."

And s. 31, sub-s. h. of the same Act provides as follows:

"(h) If the time limited by any Act for any proceeding, or the doing of any thing under its provisions, expires or falls upon a holiday, the time so limited shall be extended to, and such thing may be done on the day next following which is not a holiday."

RULE 73.

Adjournment if no quorum.

If it happens at any time that the number of judges necessary to constitute a quorum for the transaction of the business to be brought before the Court is not present, the judge or judges then present may adjourn the sittings of the Court to the next or some other day, and so on from day to day until a quorum shall be present.

RULE 74.

Christmas vacation.

There shall be a vacation at Christmas, commencing on the 15th December and ending on the 10th of January.

RULE 75.

Long vacation.

The long vacation shall comprise the months of July and August.

2. The time of the long vacation or the Christmas vacation shall not be reckoned in the computation of the times

appointed or allowed by these rules for the doing of any act. R. 75.

Sub-section 2 of this rule was provided for by General Order No. 88 made on the 14th June, 1905. The effect of this amendment is to stay all proceedings provided for by the rules in appeals during long and Christmas vacations, but it is to be remembered that the rule does not affect any of the provisions of the Supreme Court Act, and that it is still necessary under section 69 to bring an appeal within 60 days from the signing, entry or pronouncing of the judgment appealed from, even if part or all of the 60 days falls within vacation; and similarly, the rule does not dispense with the provisions as to time contained in section 70 of the Act.

Chambers are not held in vacation, although in cases of urgency, applications will be heard by the Registrar or a judge of the Court. The Registrar's office however is open during vacation from eleven to twelve o'clock each juridical day.

RULE 76.

Interpretation.

In the preceding rules the term "a judge" means any judge of the said Supreme Court transacting business out of Court.

By virtue of General Order 83, the term would include the Registrar sitting in chambers for the transaction of business.

RULE 77.

Interpretation.

In the preceding rules, the following words have the several meanings hereby assigned to them over and above their several ordinary meanings, unless there be something in the subject or context repugnant to such construction, that is to say:

R. 77. (1) Words importing the singular number include the plural number, and words importing the plural number include the singular number.

(2) Words importing the masculine gender include females.

(3) The word "party" or "parties" includes a body politic or corporate, and also His Majesty the King and His Majesty's Attorney General.

(4) The word "affidavit" includes affirmation.

(1) The words "the Act" mean "The Supreme Court Act."

SCHEDULE A.

NOTICE CALLING SPECIAL SESSION.

Dominion of Canada.

The Supreme Court will hold a special session at the City of Ottawa on the day of , 19 for the purpose of hearing causes and disposing of such other business as may be brought before the Court (or for the purpose of hearing election appeals, criminal appeals, or appeals in cases of *habeas corpus*, or for the purpose of giving judgments only, as the case may be).

By order of the Chief Justice, or by order of Mr. Justice

(Signed)

Registrar.

Dated this day of , 19.

SCHEDULE B.

FORM OF NOTICE OF HEARING APPEAL.

In the Supreme Court
of Canada.

J. A., appellant, *v.* A. B., respondent. Take notice that this appeal will be heard at the next session of the Court, to be held at the City of Ottawa on the day of , 19

To , appellant's solicitor or attorney, or appellant in person.

Dated this day of , 19

SCHEDULE C.

TARIFF OF FEES TO BE PAID TO THE REGISTRAR OF THE SUPREME COURT OF CANADA.

[As substituted by General Order 84 for the original schedule.]

On entering every appeal	$ 10 00
On entering every judgment, decree or order in the nature of a final judgment.	10 00
On entering every other judgment, decree or order	2 00
On filing every document or paper	10
Every search	25
Every appointment	50
Every enlargement of any appointment, or on application in chambers	50

The foregoing items are not to apply to criminal appeals or appeals in matters of *habeas corpus* arising out of a criminal charge.

Sch. C. Tariff of fees.

On sealing every writ (besides filing)	$ 2 00
Amending every document, writ or other paper	50
Taxing every bill of costs (besides filing)	1 00
Every allocatur	1 00
Every fiat	50
Every reference, inquiry, examination or other special matter referred to the Registrar, for every meeting not exceeding one hour	1 00
Every additional hour or less	1 00
For every report made by the Registrar upon such reference, etc.	1 00
Upon payment of money into court, or deposited with the Registrar, every sum under $200.00. A percentage on money over $200.00 paid in at the rate of one per cent.	1 00
Receipt for money	25
Comparing, examining and certifying transcript record on appeal to the Privy Council	10 00
Comparing any other document, paper or proceeding with the original on file or deposit in the Registrar's office, per folio	2½
Every other certificate required from Registrar.	1 00
Copy of any document, paper or proceeding or any extract therefrom, per folio	10
Every affidavit, affirmation or oath administered by Registrar	25
Every commission or order for examination of witnesses	1 50

All fees payable to the Registrar are to be paid in stamps. See section 111, Supreme Court Act, and Rule 56.

See Rule 57 and notes.

SCHEDULE D.

Referred to in Rule 57 of the Supreme Court of Canada.

See Rule 57 and notes.

TARIFF OF FEES. Sch. D. Tariff of fees.

To be taxed between party and party in the Supreme Court of Canada:

On special case required by section 29 [now section 73] of the Act when prepared and agreed upon by the parties to the cause, including attendance on the judge to settle the same, if necessary, to each party	$ 25 00
By rule Easter Term, 1891, the Clerk of the Supreme Court of New Brunswick is entitled to a fee of 10 cents per fol., not to exceed $25 in all, on every paper in a case settled for appeal.	
Notice of appeal	4 00
On consent to appeal directly to the Supreme Court from the court of original jurisdiction.	3 00
See section 42 (*a*), *supra*, p. 152.	
Notice of giving security	2 00
Attendance on giving security	3 00
On motion to quash proceedings under section 37 [now section 50] according to the discretion of the Registrar to	25 00
Subject to be increased by order of the Court or of a judge	
Dec. 11th, 1905. The Chief Justice instructed the Registrar that the practice of the Court is to tax a fee of $50 on court motions. In a motion to vary minutes of judgment made this day this was adopted, and motion was dismissed with costs fixed at	50 00
On factums in the discretion of the Registrar to.	50 00
Subject to be increased by order of the Court or a judge	
It is only in exceptional cases that a fiat will be granted increasing the fee on factum. During the last ten years in not more than six cases has the Registrar increased the fee, and then only in appeals where the magnitude of	

Sch. D. Tariff of fees.

the amount involved or the importance of the issues raised justified the preparation of a factum greatly exceeding the average length.		
For engrossing for printer copy of case as settled, when such engrossed copy is necessarily and properly required, per folio of 100 words...	$	10
For correcting and superintending printing, per 100 words.		05
Amendment to the tariff by General Order 81.		
On dismissal of appeal if case be not proceeded with, in the discretion of the Registrar to..	25	00
Subject to be increased by order of the Court or a judge		
Suggestions under sections 42, 43 & 44 [now 83, 84 & 85] including copy and service	2	50
Notice of intention to continue proceedings under section 45 [now section 87].....	4	00
On depositing money under section 48 [now section 66 of the Dominion Controverted Elections Act] in controverted election cases	2	50
Notice of appeal in election cases limiting the appeal to special and defined questions under section 48 [now section 67 of the Dominion Controverted Elections Act]	6	00
Allowance to cover all fees to attorney and counsel for the hearing of the appeal, in the discretion of the Registrar to	200	00
Subject to be increased by order of the Court or a judge		
On printing factums, the same fees as in printing the case.		
Besides the Registrar's fees, reasonable charges for postages and disbursements necessarily incurred in proceedings in appeal will be taxed by the taxing officer.		
Allowance to the duly entered agent in any appeal, in the discretion of the Registrar, to ...	20	00

For forms of bills of costs, see *infra* Appendix of Forms.

GENERAL ORDER 78. G.O. 78.

Amendment to Rule 52.

Rule 52 was repealed by General Order No. 86, and this order was necessarily repealed with it although not mentioned in the General Order.

GENERAL ORDER 79.

This order provided for the late Mr. Duval, *précis* writer of the Court, acting as Registrar in the absence of Mr. Cassels, the Registrar.

GENERAL ORDER 80.

Amendments to certain rules.

It is ordered:

1. That Rule *eleven* be and the same is hereby amended by striking out the word "*immediately*" at the beginning of such rule.

2. That Rule *fourteen* be and the same is hereby amended by striking out the words "*one month*" therein contained, and by inserting in lieu thereof the words "*fifteen days.*"

3. That Rule *fifteen* be and the same is hereby amended by inserting after the words "*and mailing,*" where they occur in such rule, the words "*on the same day,*" and by striking out the words "*in sufficient time to reach him in due course of mail before the time required for service.*"

4. That Rule *twenty-three* be and the same is hereby amended by striking out the words "*one month*" at the beginning of said rule, and by inserting in lieu thereof the words "*fifteen days.*"

G.O. 80.

5. That Rule *thirty-one* be and the same is hereby amended by striking out the words "*one month,*" where they occur in said rule, and by inserting in lieu thereof the words "*fourteen days;*" and by adding at the end of said rule the words "*but no appeal shall be so inscribed which shall not have been filed twenty clear days before said first day of said session, without the leave of the Court or a judge.*"

6. That Rule *sixty-two* be and the same is hereby amended by striking out the words "*one month's*" and by inserting in lieu thereof the words "*fifteen days'.*"

7. That Rule *sixty-three* be and the same is hereby amended by striking out the words "*two weeks*" where they occur in said rule, and by inserting in lieu thereof the words "*one week.*"

GENERAL ORDER 81.

Amendments to tariff of fees.

It is hereby ordered that Schedule D. annexed to the rules of the Supreme Court of Canada be amended as follows:

Instead of the item: "Printed case, per folio of 100 words, including correcting, superintending printing and all necessary attendances, 30 cts.," the following allowances shall be taxed by the Registrar:

"For engrossing for printer, copy of cases as settled, when such engrossed copy is necessarily and properly required, per folio of 100 words, 10 cts.

"For correcting and superintending printing, per 100 words, 5 cts."

GENERAL ORDER 82.

Allowance to agents.

It is hereby ordered, that an allowance shall be taxed by

the Registrar to the duly entered agent in any appeal, in the discretion of the Registrar, to $20. G.O. 82. Allowance to agents.

See Rule 16 and notes for the duties of an agent.

GENERAL ORDER 83.

Jurisdiction of Registrar in chambers.

Whereas by "The Supreme and Exchequer Courts Act," section 109, as amended by chapter 16 of the Act passed in the 51st year of Her Majesty's reign intituled "An Act to amend 'The Supreme and Exchequer Courts Act,' and to make better provision for the trial of claims against the Crown," it is provided that the judges of the Supreme Court, or any five of them, may, from time to time, make general rules and orders for certain purposes therein mentioned, and among others for empowering the Registrar to do any such thing, and to transact any such business, and to exercise any such authority and jurisdiction in respect of the same, as by virtue of any statute or custom, or by the practice of the Court, was at the time of the last mentioned Act, or might be thereafter, done, transacted, or exercised by a judge of the court sitting in chambers, and as might be specified in such rule or order. It is therefore ordered:

1. That the Registrar of the Supreme Court of Canada be and he is hereby empowered and required to do any such thing, and to transact any such business, and to exercise any such authority and jurisdiction in respect of the same, as by virtue of any statute or custom, or by the practice of the Court, was at the time of the passing of the said last mentioned Act, and is now, or may be hereafter, done, transacted, or exercised by a judge of the said Court sitting in chambers, except in matters relating to:

(*a*) Granting writs of *habeas corpus* and adjudicating upon the return thereof.

(*b*) Granting writs of *certiorari*.

G.O. 83. Registrar. Jurisdiction in chambers.

2. In case any matter shall appear to the said Registrar to be proper for the decision of a judge, the Registrar may refer the same to a judge, and the judge may either dispose of the matter, or refer the same back to the Registrar with such directions as he may think fit.

3. Every order or decision made or given by the said Registrar sitting in chambers shall be as valid and binding on all parties concerned, as if the same had been made or given by a judge sitting in chambers.

4. All orders made by the Registrar sitting in chambers are to be signed by the Registrar.

5. Any person affected by any order or decision of the Registrar may appeal therefrom to a judge of the Supreme Court in chambers.

(*a*) Such appeal shall be by motion on notice setting forth the grounds of objection and served within four days after the decision complained of, and two clear days before the day fixed for hearing the same, or served within such other time as may be allowed by a judge of the said Court or the Registrar.

(*b*) The motion shall be made on the Monday appointed by the notice of motion, which shall be the first Monday after the expiry of the delays provided for by the foregoing sub-section, or so soon thereafter as the same can be heard by a judge, and shall be set down not later than the preceding Saturday in a book kept for that purpose in the Registrar's office.

6. For the transaction of business under these rules, the Registrar, unless absent from the city, or prevented by illness or other necessary cause, shall sit every juridical day, except during the vacations of the Court, at 11 a.m., or such other hour as he may specify from time to time by notice posted in his office.

October 17th, 1887.

GENERAL ORDER 84.

Tariff of fees to be paid Registrar.

It is hereby ordered that Schedule C, referred to in Rule 56, being the Tariff of Fees to be paid to the Registrar by stamps, be and the same is repealed, and the following substituted therefor:

Here follows Schedule C, as found on page 445, *supra*.

GENERAL ORDER 85.

Writs to be issued out of Supreme Court—Practice relating thereto—Tariff of fees to sheriffs.

Whereas by section 107 of the Supreme and Exchequer Courts Act, as substituted for the original section of such Act by Schedule A of chapter 16 of the Act passed in the fifty-first year of Her Majesty's reign, intituled:: "An Act to amend 'The Supreme and Exchequer Courts Act,' and to make better provision for the trial of claims against the Crown," it is provided that "an order in the Supreme Court for payment of money, whether for costs or otherwise, may be enforced by such writs of execution as the Court prescribes.

And whereas it is desirable to make rules prescribing the writs which shall be issued out of the said Court from time to time and regulating the practice in relation thereto:

It is therefore ordered:

1. A judgment or order for the payment of money against any party to an appeal other than the Crown may be enforced by writs of *fieri facias* against goods and *fieri facias* against land.

2. A judgment or order requiring any person to do any act other than the payment of money or to abstain from doing anything may be enforced by writ of attachment or by committal.

3. Writs of *fieri facias* against goods and lands shall be

G.O. 85. Writs of execution.

executed according to the exigency thereof, and may be in the following form:

CANADA.
Province of }

In the Supreme Court of Canada.

Between

A. B., (Plaintiff, *or as the case may be*) Appellant.

AND

C. D., (Defendant, *or as the case may be*) Respondent.

Edward, by the grace of God of the United Kingdom of Great Britain and Ireland King, Defender of the Faith:

To the Sheriff of , Greeting:

We command you that of the goods and chattels of C. D., in your bailiwick, you cause to be made the sum of and also interest thereon at the rate of six per centum per annum, from the day of [*day of judgment or order, or day on which money directed to be paid, or day from which interest is directed by the order to run, as the case may be*], which said sum of money and interest were lately before us in our Supreme Court of Canada, in a certain action [or certain actions, *as the case may be*], wherein A. B. is plaintiff and appellant, and C. D. and others are defendants and respondents [or in a certain matter there depending, intituled, "In the matter of E. F.," *as the case may be*], by a judgment [or order, *as the case may be*], of our said Court, bearing date the day of , adjudged [or ordered, *as the case may be*], to be paid by the said C. D. to A.B., together with certain costs in the said judgment [or order, *as the case may be*] mentioned, and which costs have been taxed and allowed, by the taxing officer of our Court, at the sum of , as appears by the certificate of the said taxing officer, dated the day of . And that of the goods and chattels of the said C. D. in your bailiwick, you further cause to be made the said sum of [costs], together with interest thereon at the rate of per centum

per annum, from the day of [*the date of the certificate of taxation. The writ must be so moulded as to follow the substance of the judgment or order*], and that you have that money and interest before us in our said Court immediately after the execution hereof, to be paid to the said A. B., in pursuance of the said judgment [or order, *as the case may be*], and in what manner you shall have executed this our writ, make appear to us in our said Court immediately after the execution thereof, and have there then this writ. G.O. 85. Writs of execution.

Witness the Honourable Charles Fitzpatrick, Chief Justice of our Supreme Court of Canada, at Ottawa, this day of in the year of our Lord, one thousand nine hundred and , and in the year of our reign.

4. Upon the return of the sheriff or other officer, as the case may be, of "lands or goods on hand for want of buyers" a writ of *venditioni exponas* may issue to compel the sale of the property seized. Such writ may be in the form following:

CANADA, Province of } In the Supreme Court of Canada.

Between

A. B., (Plaintiff, *or as the case may be*) Appellant.

AND

C. D., (Defendant, *or as the case may be*) Respondent.

Edward, etc. (*as in the writ of fieri facias*).

To the Sheriff of , Greeting:

Whereas by our writ we lately commanded you that the goods and chattels of C. D. [*here recite the fieri facias to the end*], and on the day of you returned to us, at our Supreme Court of Canada aforesaid, that by virtue of the said writ to you directed, you had taken goods and chattels of the said C. D., to the value of the money and interest aforesaid, which said goods and

G.O. 85. Writs of execution.

chattels remained on your hands unsold for the want of buyers. Therefore we being desirous that the said A. B. should be satisfied his money and interest aforesaid, command you that you expose for sale and sell, or cause to be sold, the goods and chattels of the said C. D., by you, in form aforesaid, taken, and every part thereof for the best price that can be gotten for the same, and have the money arising from such sale before us in our said Supreme Court of Canada immediately after the execution hereof, to be paid to the said A. B. and have there then this writ.

Witness, etc. (conclude as in writ of *fieri facias*).

5. In the mode of selling lands and goods and of advertising the same for sale, the sheriff or other officer is, except in so far as the exigency of the writ otherwise requires, or as is otherwise provided by these orders, to follow the laws of his province applicable to the execution of similar writs issuing from the highest court or courts of original jurisdiction therein.

6. A writ of attachment shall be executed according to the exigency thereof.

7. No writ of attachment shall be issued without the order of the Court or a judge. It may be in the form following:

Edward, etc. (*as in the writ of fieri facias*).

To the Sheriff of , *Greeting*:

We command you to attach so as to have him before us in our Supreme Court of Canada, there to answer to us, as well touching a contempt which he it is alleged hath committed against us, as also such other matters as shall be then and there laid to his charge, and further to perform and abide such order as our said Court shall make in this behalf, and hereof fail not, and bring this writ with you.

Witness, etc. (*as in the writ of fieri facias*).

8. In these rules the term "writ of execution" shall include writs of *fieri facias* against goods and against lands,

attachment and all subsequent writs that may issue for giving effect thereto. And the term "issuing execution against any party" shall mean the issuing of any such process against his person or property as shall be applicable to the case. G.O. 85. Writs of execution.

9. All writs shall be prepared in the office of the Attorney-General, or by the attorney or solicitor suing out the same, and the name and the address of the attorney or solicitor suing out the same, and if issued through an agent the name and residence of the agent also, shall be endorsed on such writ, and every such writ shall before the issuing thereof be sealed at the office of the Registrar and a *præcipe* therefor shall be left at the said office, and thereupon an entry of issuing such writ, together with the date of sealing and the name of the attorney or solicitor suing out the same, shall be made in a book to be kept in the Registrar's office for that purpose and all writs shall be tested of the day, month and year when issued. A *præcipe* for a writ may be in the following form:

CANADA
Province of In the Supreme Court of Canada.

Between

A. B., (Plaintiff, *or as the case may be*) Appellant.

AND

C. D., (Defendant, *or as the case may be*) Respondent.

Seal a writ of *fieri facias* directed to the sheriff of to levy of the goods and chattels of C. D. the sum of $ and interest thereon at the rate of per centum per annum, from the day of [and $ costs, *or as the case may be, according to* the writ required].

Judgment [or order] dated day of

[Taxing Master's certificate, dated].

[X. Y., Solicitor for *party on whose behalf writ is to issue.*]

10. No writ of execution shall be issued without the production to the officer by whom the same shall be issued of

G.O. 85. Writs of execution.

the judgment or order upon which the execution is to issue, or an office copy thereof shewing the date of entry. And the officer shall be satisfied that the proper time has elapsed to entitle the judgment creditor to execution.

11. In every case of execution the party entitled to execution may levy the interest, poundage fees and expenses of execution over and above the sum recovered.

12. Every writ of execution for the recovery of money shall be endorsed with a direction to the sheriff, or other officer to whom the writ is directed, to levy the money really due and payable and sought to be recovered under the judgment or order, stating the amount, and also to levy interest thereon if sought to be recovered, at the rate of six per cent. per annum, from the time when the judgment or order was entered up.

13. A writ of execution, if unexecuted, shall remain in force for one year only from its issue, unless renewed in the manner hereinafter provided; but such writ may, at any time before its expiration, by leave of the Court or a judge, be renewed by the party issuing it for one year from the date of such renewal, and so on from time to time during the continuance of the renewed writ, either by being marked in the margin with a memorandum signed by the Registrar or acting Registrar of the Court, stating the date of the day, month, and year of such renewal, or by such party giving a written notice of renewal to the sheriff, signed by the party or his attorney, and having the like memorandum; and a writ of execution so renewed shall have effect, and be entitled to priority according to the time of the original delivery thereof.

14. The production of a writ of execution, or of the notice renewing the same, purporting to be marked with the memorandum in the last preceding rule mentioned, shewing the same to have been renewed, shall be *primâ facie* evidence of its having been so renewed.

15. As between the original parties to a judgment or order, execution may issue at any time within six years from the recovery of the judgment or making of the order.

G.O. 85. Writs of execution.

16. Where six years have elapsed since the judgment or order, or any change has taken place by death or otherwise in the parties entitled or liable to execution, the party alleging himself to be entitled to execution may apply to the Court or a judge for leave to issue execution accordingly. And the Court or judge may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect. And the Court or judge may impose such terms as to costs or otherwise as shall seem just.

17. Any party against whom judgment has been given, or an order made, may apply to the Court or a judge for a stay of execution or other relief against such a judgment or order, and the Court or judge may give such relief and upon such terms as may be just.

18. Any writ may at any time be amended by order of the Court or judge upon such conditions and terms as to costs and otherwise as may be thought just, and any amendment of a writ may be declared by the order authorizing the same to have relation back to the date of its issue, or to any other date or time.

19. Sheriffs and coroners shall be entitled to the fees and poundage prescribed by the schedule following:

SCHEDULE.

Every warrant to execute any process directed to the sheriff, when given to a bailiff	$ 75
Service of process, each defendant (no fee for affidavit of services in such cases to be allowed unless service made or recognized by the sheriff)	1 50
Serving other papers beside mileage	75
For each *additional* party served	50
Receiving, filing, entering and endorsing all writs, notices or other papers, each	25
Return of all process and writs (except subpœna) notices or other papers	50
Every search, not being a party to a cause or his attorney	30

Sheriff's fees.

Certificate of result of such search, when required (a search for a writ against lands of a party, shall include sales under writ against same party and for the then last six months)	$1 00
Poundage on executions and on writs in the nature of executions where the sum made shall not exceed $1,000, six per cent.	
When the sum is over $1,000 and under $4,000, three per cent., when the sum is $4,000 and over, one and a half per cent., in addition to the poundage allowed up to $1,000, exclusive of mileage, for going to seize and sell; and except all disbursements necessarily incurred in the care and removal of the property.	
Schedule taken on execution or other process, including copy to defendant, not exceeding five folios	1 00
Each folio above five.....	10
Drawing advertisements when required by law to be published in the *Official Gazette* or other newspaper, or to be posted up in a court house or other place, and transmitting same in each suit	1 50
Every necessary notice of sale of goods, in each suit	75
Every notice of postponement of sale, in each suit	25
The sum actually disbursed for advertisements required by law to be inserted in the *Official Gazette* or other newspaper.	
Bringing up prisoner on attachment or *habeas corpus*, besides travelling expenses actually disbursed, per diem	6 00
Actual and necessary mileage from the court house to the place where service of any process, paper or proceeding is made, per mile.....	13
Removing or retaining property, reasonable and necessary disbursements and allowances to be made by the Registrar.	
Drawing bond to secure goods seized, if prepared by sheriff	1 50
Every letter written (including copy) required by party or his attorney respecting writs or process, when postage prepaid.	50

Drawing every affidavit when necessary and prepared by sheriff ..... $ 25 Sheriff's fees.

For services not hereinbefore provided for, the registrar may tax and allow such fees as in his discretion may be reasonable.

CORONERS.

The same fees shall be taxed and allowed to coroners for services rendered by them in the service, execution and return of process, as allowed to sheriffs for the same services as above specified.

20. Every order of a judge may be enforced in the same manner as an order of the Court to the same effect, and it shall in no case be necessary to make a judge's order a rule or order of the Court before enforcing the same.

21. No execution can issue on a judgment or order against the Crown for the payment of money. Where in any appeal there may be a judgment or order against the Crown directing the payment of money for costs, or otherwise, the Registrar may, on the application of the party entitled to the money, certify to the Minister of Finance, the tenor and purport of the judgment or order, and such certificate shall be by the Registrar sent to or left at the office of the Minister of Finance.

22. Rules 59 and 60 of the Supreme Court of Canada are hereby repealed.

Ottawa, October 18th, 1888.

GENERAL ORDER 86.

Rules 51 *and* 52 *are hereby repealed and the following substituted therefor*:

In Controverted Election Appeals the party appellant shall obtain from the Registrar, upon payment of the usual charges therefor, a certified copy of the record, or of so

G.O. 86. Election appeals. Printing.

much thereof as a judge may direct to be printed, and shall have forty (40) copies of the said certified copy printed in the same form as hereinbefore provided for the *case* in ordinary appeals, and immediately after the completion of the printing shall deliver to the Registrar thirty (30) of such printed copies, twenty-five (25) thereof for the use of the Court and its officers and five (5) thereof for the use of the respondent and to be handed by the Registrar to the respondent or his solicitor or booked agent upon application made therefor.

For printing in election appeals the same fees shall be allowed on taxation as for printing the *case* in ordinary appeals.

GENERAL ORDER 87.

This order provided for the duties of the late Registrar being performed, in his absence or incapacity through illness, by C. H. Masters, Reporter of the Court, and became of no effect on the Registrar's death.

GENERAL ORDER 88.

It is ordered that the following be added to the rules of the Court:

1. That Rule 15 as amended by Rule 80 be further amended by adding thereto, as sub-section 2, the following:

"Where the validity of a Statute of the Parliament of Canada is brought in question in any appeal to the Supreme Court, notice of hearing, stating the matter of jurisdiction raised, shall be served on the Attorney General of Canada."

2. The following rule shall be inserted after Rule 75:

"The time of the long vacation or the Christmas vacation shall not be reckoned in the computation of the times appointed or allowed by these rules for the doing of any act."

3. Whenever a reference is made to the Court by the Governor in Council or by the Board of Railway Commissioners for Canada, the case shall only be inscribed by the Registrar upon the direction and order of the Court or a Judge thereof, and factums shall thereafter be filed by all parties to the reference in the manner and form and within the time required in appeals to the Court. G.O. 88. Practice in special cases.

4. Whenever an appeal is taken from any decision of the Board of Railway Commissioners for Canada pursuant to the provisions of the Railway Act, the appeal shall be upon a case to be stated by the parties, or in the event of difference, to be settled by the said Board or the Chairman thereof, and the case shall set forth the decision objected to and so much of the affidavits, evidence and documents as are necessary to raise the question for the decision of the Court.

All the rules of the Supreme Court from 1 to 44 both inclusive, shall be applicable to appeals from the said Board of Railway Commissioners for Canada, except in so far as the Railway Act otherwise provides.

Signed. H. E. TASCHEREAU, C.J.
ROBT. SEDGEWICK, J.
D. GIROUARD.
L. H. DAVIES, J.
WALLACE NESBITT.
JOHN IDINGTON.

June 14, 1905.

FORMS.

1. Notice of Appeal.
2. Bond for Security for Costs.
3. Affidavit of Execution.
4. Affidavit of Justification.
5. Order for payment of money into Court as security for costs.
6. Certificate of Settlement of Case.

Forms.

7. Appointment of Agent.
8. Judgment allowing Appeal.
9. Judgment dismissing Appeal.
10. Order made in Chambers.
11. Appellant's Bill of Costs.
12. Respondent's Bill of Costs.
13. Affidavit of Disbursements.
14. Sheriff's Account.

1.—NOTICE OF APPEAL.

IN THE COURT OF APPEAL FOR ONTARIO.

(*or as the case may be, giving the style of the Court in which the judgment to be appealed from has been rendered.*)

Between

A. B., Plaintiff (appellant or respondent),

AND

C. D., Defendant (respondent or appellant).

(*or as the case may require.*)

Take notice, that A. B., the above named plaintiff, hereby appeals from the (judgment, decree, rule, order, or decision) pronounced (or pronounced and entered) in this cause (or matter) by this court (or by Mr. Justice ———) on the day of , 19 , whereby (*as the case may be.*)

The above form, altered to suit the circumstances of each particular case, would be applicable to most cases, but care should be taken to consider the wording of the section or rule requiring notice of appeal to be given and to vary the notice accordingly. For instance, in giving notice of intention to appeal, under section 84 of the Exchequer Court Act R.S., c. 140, from the decision of the Exchequer Court, the notice should state "that the Crown is dissatis-

fied with such decision, and intends to appeal against the same."

Form 1. Notice of appeal.

And notice of appeal must not be confounded with the notice of hearing required after an appeal is set down for hearing in the Supreme Court (*vide* Rules 13, 14 and 15); nor with the notice to be given in Exchequer appeals under section 82 of the Act; nor with the notice to be given in election appeals, under section 67 of the Dominion Controverted Elections Act R.S. c. 7. These notices are given after the appeal has been set down for hearing in the Supreme Court of Canada and should be entitled in that Court and the style of cause should be the style in that Court, and by them the appeal may be limited to any special and defined question or questions.

2.—BOND FOR SECURITY OF COSTS.

(To be given under section 75 of the Supreme Court Act.)

Know all men by these presents, that we A. B., of the of , in the county of , and Province of , C. D. of the same place , and E. F. of the same place , are jointly and severally held, and firmly bound unto G. H., in the penal sum of $500, for which payment well and truly to be made we bind ourselves and each of us binds himself, our and each of our heirs, executors and administrators firmly by these presents.

Dated this day of , A.D. 19 .

Whereas a certain action was brought in the Queen's Bench Division of the High Court of Justice for Ontario by the said A. B., plaintiff, against the said G. H., defendant. And whereas judgment was given in the said Court against the said A. B., who appealed from the said judgment to the Court of Appeal for Ontario. And whereas judgment was given in the said action in the said last mentioned Court on the day of , A.D., 19 . And whereas the said A.B. complains that in giving of

Form 2. Bond.

the last mentioned judgment in the said action upon the said appeal manifest error hath intervened, wherefore the said A. B. desires to appeal from the said judgment of the Court of Appeal for Ontario to the Supreme Court of Canada.

Now the condition of this obligation is such, that if the said A. B. shall effectually prosecute his said appeal and pay such costs and damages as may be awarded against him by the Supreme Court of Canada, then this obligation shall be void, otherwise to remain in full force and effect.

Signed sealed and delivered in presence of

A. B. (SEAL.)
C. D. (SEAL.)
E. F. (SEAL.)

If during the appeal, an appellant is added or substituted for the original appellant, either a new bond should be filed or an undertaking by the sureties to be bound by the bond, notwithstanding the change of parties.

3.—AFFIDAVIT OF EXECUTION.

Province of
County of
To Wit:

I, X. Y., of the of in the County of , and Province of , (*occupation*), make oath and say:

1. That I was personally present and did see the within instrument duly signed, sealed and executed by A. B., C. D. and E. F., three of the parties thereto.

2. That the said instrument was executed at

3. That I know the said parties.

4. That I am a subscribing witness to the said instrument.

Sworn before me at the of in the County of and Province of this day of A.D. 19

X. Y.

(Signed.)

A Commissioner, etc.

4.—AFFIDAVIT OF JUSTIFICATION BY SURETIES.

Form 4. Affidavit of justification.

I, C. D., of the of , in the County of , and Province of , make oath and say, That I am a resident inhabitant of the Province of , and am a freeholder in the of aforesaid, and that I am worth the sum of $1,000, over and above what will pay all my debts.

And I, E. F., of the of in the County of , and the Province of , make oath and say, That I am a resident inhabitant of the said Province of , and am a freeholder in the of aforesaid, and that I am worth the sum of $1,000, over and above what will pay all my debts.

(Signed.) C. D.
E. F.

The above named deponents, C. D. and E. F., were severally sworn before me in the of in the County of , and Province of , this day of , A.D. 19 .

(Signed.)

A Commissioner, etc.

The affidavit should be entitled in the court in which the security is given.

5.—ORDER FOR PAYMENT OF MONEY INTO COURT FOR SECURITY FOR COSTS.

IN THE SUPREME COURT OF CANADA.

On appeal from the Court of Appeal for Ontario (or as the case may be).

the day of , A.D. 19 .

The Registrar in Chambers (or The Honourable Mr. Justice in Chambers).

Form 5. Order. Payment into court.

Between

A. B., (defendant or plaintiff) Appellant;

AND

C. D., (plaintiff or defendant) Respondent.

Upon the application of the above named appellants, and upon hearing what was alleged by counsel for all parties, it is ordered that the sum of five hundred dollars paid into the Bank of Montreal as appears by deposit certificate No. , duly filed as security, that the appellants will effectually prosecute their appeal from the judgment of the Court of (as the case may be), dated the day of , A.D. 19 , and will pay such costs and damages as may be awarded against them by this Court, be and the same is hereby allowed as good and sufficient security.

(Signed.)

Registrar.

6.—CERTIFICATE OF SETTLEMENT OF CASE.

I, the undersigned Registrar (or Prothonotary, *or* clerk) of the (*name of court*) do hereby certify that the foregoing printed document from page to page , inclusive, is the case stated by the parties (*or* settled by the Honourable Mr. Justice , one of the judges of the said Court) pursuant to section 73 of the Supreme Court Act and the rules of the Supreme Court of Canada, in an appeal to the said Supreme Court of Canada, in a certain case pending in the said (*name of court*) between A. B., plaintiff (appellant) and C. D., defendant (respondent).

(*If a printed copy of the Bond given as security for costs forms part of the case, the certificate may continue as follows*:)

And I do further certify that the said A. B. has given proper security to the satisfaction of the said the Honourable Mr. Justice , as required by the 75th sec-

tion of the Supreme Court Act, such security being a bond to the amount of $500, a printed copy of which is to be found on pages of the said printed document hereto annexed. Form 6. Certificate of case.

In testimony whereof I have hereto subscribed my name and affixed the seal of the said (*name of court*) this (*date*).

Vide section 73 of the Supreme Court Act, and Rules 1, 2, 3, and 4. *Vide* also section 75 and Rule 6.

7.—APPOINTMENT OF AGENT.

Vide Rule 16.

I, , of the City of , in the Province of , practising as an attorney and solicitor in the Superior Courts of the said Province hereby authorize , of the City of Ottawa, Esquire, to enter his name as my agent, in the agents' book of the Supreme Court of Canada, and to act as such agent in all appeals to that Court in which I may be concerned as attorney or solicitor, (*or, if the authority is to be limited,* in the following appeal, viz.,) (*date*).

8.—JUDGMENT ALLOWING APPEAL.

In the Supreme Court of Canada.
day the day of , A.D., 19 .

Present:

THE HONOURABLE CHARLES FITZPATRICK, CHIEF JUSTICE.
" " MR. JUSTICE GIROUARD.
" " MR. JUSTICE DAVIES.
" " MR. JUSTICE IDINGTON.
" " MR. JUSTICE MACLENNAN.
" " MR. JUSTICE DUFF.

(*If any judge has been absent when judgment was rendered add* THE HONOURABLE MR. JUSTICE being

Form 8. Judgment allowing appeal.

absent, his judgment was announced by THE HONOURABLE THE CHIEF JUSTICE, *or* MR. JUSTICE , pursuant to the statute in that behalf).

Between

A. B., (plaintiff), Appellant;

AND

C. D., (defendant), Respondent.

The appeal of the above named appellant from the judgment of the court of King's Bench for the Province of Quebec (appeal side) (*or* of the Court of Appeal for Ontario, *or as the case may be*), pronounced in the above cause on the day of in the year of our Lord , reversing the judgment of the Superior Court for the Province of Quebec sitting in and for the District of , (*or* of the King's Bench Division of the High Court of Justice for Ontario, *or as the case may be*), rendered in the said cause on the day of in the year of our Lord , having come on to be heard before this Court* on the day of in the year of our Lord , in the presence of counsel as well for the appellant as the respondent, whereupon and upon hearing what was alleged by counsel aforesaid, this Court was pleased to direct that the said appeal should stand over for judgment, and the same coming on this day for judgment, this Court did order and adjudge** that the said appeal should be and the same was allowed, that the said judgment of the Court of King's Bench for the Province of Quebec (appeal side) (*or* of the said Court of Appeal for Ontario, *or as the case may be*) should be and the same was reversed and set aside, and that the said judgment of the Superior Court for the Province of Quebec sitting in and for the District of (*or* of the King's Bench Division of the High Court of Justice for Ontario, *or as the case may be*) should be and the same was restored.

And this Court did further order and adjudge that the said respondent should and do pay to the said appellant the costs incurred by the said appellant as well in the said Court of King's Bench for the Province of Quebec (ap-

peal side) (*or* in the said Court of Appeal for Ontario, *or as the case may be*) as in this Court. Form 8. Judgment allowing appeal.

*Note.—If a judge has died while the case stands *en délibéré* add the words "constituted as above with the addition of the Honourable Mr. Justice ————, since deceased.

9.—JUDGMENT DISMISSING APPEAL.

(Formal parts as in preceding down to** then proceed as follows:)

that the said judgment of the Court of King's Bench for the Province of Quebec (appeal side) (*or*, of the Court of Appeal for Ontario, *or as the case may be*) should be and the same was affirmed, and that the said appeal should be and the same was dismissed with costs to be paid by the said appellant to the said respondent.

10.—ORDER MADE IN CHAMBERS.

In the Supreme Court of Canada.

day the day of , 19 .

The Honourable Mr. Justice (*or* The Registrar) in Chambers.

Between

A. B., (plaintiff), Appellant;

AND

C. D., (defendant), Respondent.

Upon hearing , and upon reading the affidavit of filed the day of 19 (and).

It is ordered (*here insert the order made*), and that the costs of this application, which are hereby fixed at the sum of be paid by the said to the said

Form 11. Appellant's costs.

11.—BILL OF APPELLANT'S COSTS.

In the Supreme Court of Canada,

Between Appellant,

and

Respondent.

Bill of Appellant's Costs.	Fees.	Payments.
Notice of appeal	$ 4 00	
[In election appeals, when notice limits appeal	6.00]	
Notice of giving security	2 00	
Attendance on giving security and paid	3 00	
Fee on special case	25 00	
[Not taxable in election appeals.]		
Engrossing and superintending printing of special case, fos. at 15 cents per folio		
[Not taxable in election appeals.]		
Paid printer as per affidavit		
Paid clerk on transmission, etc., of original case, or record in an election appeal		
Paid forwarding copies of case		
Paid filing case with Registrar		$10 00
Engrossing and superintending printing of factum, fos. at 15 cents per folio		
Paid printer as per affidavit		
Fee on factum [in the discretion of Registrar to]		50 00
Paid, search and inscribing appeal		35
Allowance to cover fees to counsel and solicitor on hearing [in the discretion of the Registrar, to]	200 00	
Paid postages, telegrams, etc		
Allowance on account of agent's fees under Rule 82 [in the discretion of Registrar, to]		20 00

Bill of Appellant's Costs	Fees.	Payments.	Form 11. Appellant's costs.
Paid, search for particulars, to draft minutes		$ 25	
Paid entry of judgment		10 00	
Paid taxation and appointment		1 50	
Allocatur		1 00	
Paid filings [10 cents on each filing]			
Paid certified copy of judgment [$1.00, and 10 cents a folio.]			
Registrar's postage			
Total fees			
Total disbursements			
Taxed off			
Taxed at			

12.—BILL OF RESPONDENT'S COSTS.

In the Supreme Court of Canada,

Between Appellant,

and

Respondent.

Bill of Respondent's Costs.	Fees.	Payments.
Attendance on giving security [Not taxable in election appeals.]	$ 3 00	
Fee on special case [Not taxable in election appeals.]	25 00	
Engrossing and superintending printing of factum, fos. at 15 cents per folio		
Paid printer as per affidavit		
Fee on factum [in the discretion of Registrar, to]	50 00	
Allowance to cover fees to counsel and solicitor on hearing [in the discretion of Registrar, to]	200 00	
Paid postages, telegrams, etc.		

Form 12. Respondent's costs.

Bill of Respondent's Costs.	Fees.	Payments.
Allowance on account of Agent's fees under Rule 82 [in discretion of Registrar to]		$20 00
Paid search for particulars, to draft minutes		25
Paid entry of judgment		10 00
Paid taxation and appointment		1 50
Allocatur		1 00
Paid filings [10 cents on each filing]		
Paid certified copy of judgment [$1.00, and 10 cents for each folio.]		
Registrar's postage		
Total fees		
Total disbursements		
Taxed off		
Taxed at		

13.—AFFIDAVIT OF DISBURSEMENT.

In the Supreme Court of Canada,

Between Appellant,

and

Respondent.

I, of the of in the Province of (*occupation*) make oath and say:

1. That I am (*a member of the firm of, etc., or a clerk in the office of, etc.*), the attorneys or solicitors for the above named and as such have a personal knowledge of the facts hereinafter deposed to.

2. That on behalf of the said (*appellant or respondent*) I have paid of the of in said Province, printers, the sums following for the work mentioned, viz.:

Form 13. Affidavit of Disbursements.

DATE PAID.	PRINTING DONE.	AMOUNT PAID.
	("Case in Appeal." "Appellant's or Respondent's Factum.")	$

Total, $

amounting in all to the sum of dollars.

3. That in addition to the foregoing, I have paid the following sums in this appeal, viz.:

4. That with regard to the foregoing disbursements, I believe that the amount so paid for printing is fair and reasonable, and the usual and lowest price for which that class of work can be done in the said of and that the foregoing amounts further paid as aforesaid were reasonable and proper disbursements in this appeal.

Sworn before me at the of in the Province of this day of A.D. 19 } (Sgd.)

A Commissioner in the

Form 14. Sheriff's account.

14.—SHERIFF'S ACCOUNT.

IN THE SUPREME COURT OF CANADA.

SHERIFF'S ACCOUNT.

Under O. C. 7th June, 1883, and 49 Vict., c. 135, s. 15.

The Government of Canada,

To the Sheriff of the County of Carleton. DR.

Date 19		$	Cts.
Please forward this account to the Registrar Supreme Court of Canada, Ottawa.	To actual attendance in person or by deputy on the Supreme Court at its sittings from the..... day of .....to the..... day of ....days at $5.00 per day ....Constables at $1.50 each per day for each day necessarily and actually engaged in attendance during the sittings of the Court, in all..... ...days.....		
	NAMES OF CONSTABLES TO ATTEND. / NO. OF DAYS.		
	.... /		
	.... /		
	.... /		
	.... /		
	.... / ..... $		

I CERTIFY that the above account, amounting to..... is correct.

.....

Sheriff.

I CERTIFY that I have examined this account and believe it to be correct.

.....

Registrar.

.....

.....

APPENDIX

APPEALS UNDER SPECIAL ACTS

EXCHEQUER APPEALS

ELECTION APPEALS

APPEALS UNDER THE RAILWAY ACT

APPEALS UNDER THE WINDING-UP ACT

CRIMINAL APPEALS

PRIVY COUNCIL ORDERS

EXCHEQUER APPEALS

THE EXCHEQUER COURT ACT.

R.S., c. 140.

Appeals from the Exchequer Court of Canada are regulated by ss. 82, 83, 84, 85 and 86 of the Exchequer Court Act.

82. Any party to any action, suit, cause, matter or other judicial proceeding, in which the actual amount in controversy exceeds five hundred dollars, who is dissatisfied with any final judgment or with any judgment upon any demurrer given therein by the Exchequer Court, in virtue of any jurisdiction now or hereafter, in any manner, vested in such court, and who is desirous of appealing against such judgment, may, within thirty days from the day on which such judgment has been given, or within such further time as the judge of such court allows, deposit with the Registrar of the Supreme Court the sum of fifty dollars by way of security for costs.

2. The Registrar shall thereupon set the appeal down for hearing by the Supreme Court at the nearest convenient time according to the rules in that behalf of the Supreme Court; and the party appealing shall within ten days after the said appeal has been so set down as aforesaid or within such other time as the Court or a judge thereof shall allow, give to the parties affected by the appeal, or their respective attorneys or solicitors, by whom such parties were represented before the Exchequer Court, a notice in writing that the case has been so set down to be heard in appeal as aforesaid, and the said appeal shall thereupon be heard and determined by the Supreme Court.

3. In such notice the said party so appealing may, if

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he so desires, limit the subject of the appeal to any special defined question or questions.

4. 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 the damages or the amount of liability, 53 V., c. 35, s. 1, 2 Edw. VII., c. 8, s. 2, 6 Edw. VII., c. 11, s. 1.

"Any judgment upon any demurrer."

The Act 50-51 V. c. 16 (1887), which deliminated the Supreme Court from the Exchequer Court of Canada, provided by section 51 as follows:

"Any party to a suit in the Exchequer Court in which the actual amount in controversy exceeds $500, who is dissatisfied with the decision therein and desirous of appealing against the same, may within 30 days from the day on which such decision has been given or within such further time as the judge of such court allows, deposit with the Registrar of the Supreme Court the sum of $50 by way of security for costs.

In 1890, by 53 V., c. 35, s. 51, was amended, giving an appeal only from a final judgment. This remained the law until 1902, when by 2 Edw. VII., c. 8, s. 2, an appeal was given from any judgment upon a demurrer.

Toronto Type Foundry v. *Mergenthaler Linotype Co.*, 36 Can. S.C.R. 593.

In this case the judge of the Exchequer Court made an order postponing his decision upon certain issues raised by demurrer to the plaintiff's statement of claim until the trial of the action. An application was made before Maclennan, J., in chambers, for leave to appeal under 50-51 V., c. 16, s. 52, sub-s. 2 (now s. 83, *infra*). The judge held that the order in question was not a judgment upon a demurrer, and that the learned judge had expressed no final opinion on the issues raised by the demurrer, and that therefore no appeal would lie.

It will be perceived that sub-section 2 has been re-drafted

by the Commissioners for the revision of the statutes. As the section originally stood it was the duty of the Registrar to set the case down for the first day of the next session of the Court even when the deposit on the appeal was made as late as the day preceding the beginning of the session, and notwithstanding the fact that it was impossible to comply with the latter part of the section which gave the party appealing ten days after the deposit in which to give notice of the appeal being set down. In such case a strict compliance with the terms of the statute was impossible. The Commissioners accordingly have wisely, in redrafting the section, provided that the appeal shall be set down to be heard by the Court not for the first day of the next session, but for the nearest convenient time; and the time within which the notice of appeal is required to be given runs from the setting down of the appeal and not from the date of the deposit.

Extending time for bringing appeal.

Clark v. *The Queen*, 3 Can. Ex. R. 1.

The fact that a solicitor who has received instructions to appeal has fallen ill before carrying out such instructions, affords a sufficient ground for granting an extension of the time for bringing the appeal.

Also pressure of public business preventing a consultation between the Attorney-General and his solicitor was held to be a sufficient reason for granting an extension.

Held, also, that the order granting the extension may be made after the expiry of the 30 days within which the appeal is required to be brought.

McLean & Rogers v. *The Queen*, 4 Can. Ex. R. 257.

Where an application was made by the Crown for an extension of time within which to bring an appeal to the Supreme Court after the period prescribed had long expired and the material read in support of such application did not disclose any special grounds or reasons why an extension should be granted, the application was refused.

Exchequer appeals. Extending time.

Vaughan v. *Richardson*, 17 Can. S.C.R. 703.

Held, per Ritchie, C.J., and Strong, J., that the judge having power to extend the time for bringing the appeal under s. 70 of the Supreme Court Act, may do so even after the time within which the appeal should be brought has expired.

The Queen v. *Woodburn*, 29 Can. S.C.R. 112.

In this case, by a judgment of the Exchequer Court in April, 1896, which after making certain findings directed a reference. The report of the referee was confirmed in November, 1897. The Crown appealed from part of the judgment of November, 1897, and after the appeal had been set down by the Registrar of the Supreme Court, the Crown applied to the judge of the Exchequer Court to extend time for appealing from part of the judgment of 1896, which was granted. A motion to quash the appeal to the Supreme Court from the judgment of 1896 was dismissed, the Court holding that the Exchequer Court judge had jurisdiction to make the order enlarging the time for appealing from the judgment in question.

"The Registrar shall set the appeal down."

Berlinguet v. *The Queen*, 13 Can. S.C.R. 26.

In pronouncing the judgment in this case Strong, J., for the Court said:

"This is an application for a direction to the Registrar to set down for hearing an appeal from a judgment of the Exchequer Court on a petition of right. This petition of right was a Quebec case and the judgment on it was pronounced at Quebec where the case was heard before Mr. Justice Taschereau on the 17th October, 1877. It has never to this day been drawn up or entered . . . . On the 9th November, 1877, the deposit of $50, required by s. 68 (now 82) of the Supreme Court Act as security for costs, was made with the Registrar . . . . I am of opinion that the suppliant took every step it was obligatory on him to take to bring the appeal to a hearing. The deposit was made in due time . . . . This being so, the question

is whether the deposit for securing the costs having been made, as required by section 68 of the Act, and the Registrar not having entered the judgment and not having set down the appeal to be heard as required by section 68, the suppliant's appeal is now *ipso jure* out of court by the operation of Rule 44 of the Supreme Court rules. That rule provides that unless an appeal shall be brought on for hearing within one year after the security shall have been allowed, it shall be held to have been abandoned without any order to dismiss being required, unless the Court or a judge shall otherwise order. Exchequer appeals. Setting down appeals.

"According to the procedure prescribed by section 68 it was impossible for the suppliant to take any step in the cause until the Registrar had set the appeal down to be heard, as required by said section 68. The next step to be taken by the suppliant according to that section was one consequent on the setting down by the Registrar, and one which could not regularly be taken until the appeal had been set down; the words of the section, after providing for the deposit, being as follows:

"'And thereupon the Registrar shall set the suit down for hearing before the Supreme Court on the first day of the next session and the party appealing shall thereupon give to the party or parties affected by the appeal, or their respective attorneys, by whom such parties were represented in the Exchequer Court notice in writing that the case has been so set down to be heard in appeal as aforesaid.'

"Thus by the express words of the statute the notice was not to be given until after a certain step had been taken by the Court or its officer.

"In my opinion the suppliant is in strictness and of right entitled now to have this motion granted in order that he may proceed with his appeal; he is shewn to be in no default, and he is within the equity of the rule that the act of the Court can cause no prejudice.

"It is true he might have made this motion earlier, but I apprehend he is not to be prejudiced because he did not earlier invoke the aid of the Court to enforce that which it was the statutory duty of the officer of the Court

Exchequer appeals. Setting down appeals.

to do of his own motion, immediately on receiving the payment of the deposit without any further application from the appellant.

"The judgment in the Exchequer Court ought also at once to be entered on the judgment book in the Exchequer Court—of course this can and must be done *nunc pro tunc*.

"Rule 156 of the Exchequer Court is very explicit as to this. That rule says that every judgment shall be entered by the proper officer in the book to be kept for the purpose. This entry is the record of the judgment and the entering of it is to be the act of the court or officer and not of the parties.

"The entry is to be by the Registrar without waiting for any application from the parties, and if the party in whose favour the judgment is, requires an office copy it is to be delivered to him.

"I think the motion to set the appeal down to be heard at the next session of the Court should be granted, but without costs, as the point of practice involved in the motion is a new one."

By 6 Edw. VII., c. 11, s. 1, sub-s. 4 was added to the original section. The effect of this amendment will be to do away with the difficulty found in determining whether a judgment is final or interlocutory where the amount of damages or liability is the subject of a reference, a difficulty which will still subsist in such cases brought from any other court to the Supreme Court. *Vide* cases cited under *Final Judgment, supra*, p. 8.

As to the weight which will be attached by the Supreme Court to findings of fact by a judge of the Exchequer Court, *vide supra*, p. 299, under the head of "*Jurisprudence generally—where the trial judge has seen and heard the witnesses.*"

83. No appeal shall lie from any judgment of the Exchequer Court in any action, suit, cause, matter or other judicial proceeding, wherein the actual amount in controversy does not exceed the sum or value of five hundred

S. 83. Exchequer appeals. Leave.

dollars, unless such appeal is allowed by a judge of the Supreme Court, and such action, suit, cause, matter or other judicial proceeding,—

(*a.*) involves the question of the validity of an Act of the Parliament of Canada, or of the Legislature of any of the Provinces of Canada, or of an Ordinance or Act of any of the councils or legislative bodies of any of the Territories or districts of Canada; or—

(*b.*) relates to any fee of office, duty, rent, revenue or any sum of money payable to His Majesty, or to any title to lands, tenements or annual rents, or to any question affecting any patent of invention, copyright, trade-mark or industrial design, or to any matter or thing where rights in future might be bound. 50-51 V., c. 16, s. 52;—54-55 V., c. 26, s. 8.

Future rights.

It will be noted that the provision allowing an appeal where rights in future might be bound, is independent of the class of subjects which precede these words in this sub-section, and that the decisions under section 46(*b.*), *supra,* where it was held that the legal maxim *noscitur a sociis* was applicable, does not apply here.

83 (*a*) *and* (*b*).

With respect to the limitations placed upon appeals under $500, *vide* notes to section 46 (*a.*) and (*b.*), *supra.* pp. 169 and 170.

Leave to appeal.

For the facts which will be deemed sufficient for granting leave to appeal, *vide* notes to section 48(*e.*), *supra,* p. 220.

It has not been expressly decided whether an application for leave to appeal under this section can be made after the expiration of the 30 days from the delivery of the judgment of the Exchequer Court.

S. 83. Exchequer appeals. Leave.

Where it is impossible to apply for leave within the 30 days, it is advisable to obtain from the judge of the Exchequer Court an order extending the time for appealing, pursuant to the provisions of section 80, *supra*.

A special appeal on behalf of the Crown to the Supreme Court is given by the following section of the Exchequer Court Act:

84. Notwithstanding anything in this Act contained, an appeal shall lie on behalf of the Crown from any final judgment given by the Court in any action, suit, cause, matter or other judicial proceeding wherein the Crown is a party, in which the actual amount in controversy does not exceed five hundred dollars, if

(*a.*) such final judgment or the principle affirmed thereby affects or is likely to affect any case or class of cases then pending or likely to be instituted wherein the aggregate amount claimed or to be claimed exceeds or will probably exceed five hundred dollars; or

(*b.*) in the opinion of the Attorney-General of Canada, certified in writing, the principle affirmed by the decision is of general public importance; and

(*c.*) such appeal is allowed by a judge of the Supreme Court.

2. In case of such appeal being allowed by a judge of the Supreme Court, he may impose such terms as to costs and otherwise as he thinks the justice of the case requires. 2 Edw. VII., c. 8, s. 4.

The following sections of the Exchequer Court Act relate to appeals to the Supreme Court:

85. If the appeal is by or on behalf of the Crown no deposit shall be necessary, but the person acting for the Crown shall file with the Registrar of the Supreme Court a notice stating that the Crown is dissatisfied with such

decision, and intends to appeal against the same, and thereupon the like proceedings shall be had as if such notice were a deposit by way of security for costs. 50-51 V., c. 16, s. 53. Sec. 85. Exchequer appeals. Crown cases.

86. Every appeal from the Exchequer Court set down for hearing before the Supreme Court shall be entered by the Registrar on the list for the province in which the action, matter or proceeding the subject of the appeal, was tried or heard by the Exchequer Court; or if such action, matter or proceeding was partly heard or tried in one province and partly in another, then on such list as the Registrar thinks most convenient for the parties to the appeal. 54-55 V., c. 26, s. 9.

Jurisdiction.

In the matter of the *South Shore Rly. Co.* and the *Quebec Southern Rly. Co., Morgan* v. *Beique*, March 1st, 1906.

3 Edw. VII., c. 21, s. 1, confers jurisdiction upon the Exchequer Court in connection with the sale or foreclosure of railways, and by 4 & 5 Edw. VII., c. 158, after reciting that certain railways were in the hands of a receiver, and that it was desirable that they should be sold under the order of the Exchequer Court, it is provided that the Exchequer Court might order the sale of the railways and that they might be sold separately or together as in the opinion of the Exchequer Court would be for the best interests of the creditors, and that the sale should have the same effect as a sheriff's sale of immoveables under the laws of the Province of Quebec, and that the buyer should have, under such sale, clear title, free from all charges, hypothecs, privileges and incumbrances whatever.

The judge of the Exchequer Court having accepted a certain tender for the combined railways, although having separate tenders which together amounted to more than the tender accepted, parties who were creditors appealed from his order to the Supreme Court objecting to

Exchequer appeals. Jurisdiction.

the discretion exercised by him in accepting the tender in question. The respondents moved to quash on the ground that the Exchequer Court was *curia designata*, and that no appeal lay from the order of the Exchequer Court judge. The Supreme Court, without determining the motion to quash, gave judgment dismissing the appeals with costs.

Admiralty jurisdiction.

The Exchequer Court has Admiralty jurisdiction under the previsions of the Admiralty Act, R.S., c. 141, and an appeal lies to the Supreme Court in Admiralty cases from the judge of the Exchequer Court and from a local judge in admiralty.

The following are sections of the Admiralty Act:

3. The Exchequer Court is and shall be, within Canada, a Colonial Court of Admiralty, and as a Court of Admiralty shall, within Canada, have and exercise all the jurisdiction, powers and authority conferred by the *Colonial Court of Admiralty Act, 1890*, and by this Act. 54-55 V., c. 29, s. 3.

8. The Governor in Council may, from time to time, appoint any judge of a Superior or County Court, or any barrister of not less than seven years' standing, to be a local judge in Admiralty of the Exchequer Court in and for any Admiralty district.

(2) Every such local judge shall hold office during good behaviour, but shall be removable by the Governor General, on address of the Senate and House of Commons.

(3) Such judge shall be designated a local judge in Admiralty of the Exchequer Court. 54-55 V., c. 29, s. 6.

20. An appeal from any final judgment, decree or order of any local judge in Admiralty, may be made

(*a.*) to the Exchequer Court, or

(*b.*) subject to the provisions of the Exchequer Court Act regarding appeals, direct to the Supreme Court of Canada.

(2) On security for costs being first given, and subject to such provisions as are prescribed by general rules and

orders, an appeal, with the leave of the judge of the Exchequer Court or of any local judge, may be made to the Exchequer Court from any interlocutory decree or order of such local judge. Exchequer appeals. Jurisdiction. Admiralty.

Controversies between the Dominion and a province.

The Supreme Court has jurisdiction by way of appeal from the Exchequer Court, under the following section of the Exchequer Court Act:

32. When the Legislature of any province of Canada has passed an Act agreeing that the Exchequer Court shall have jurisdiction in cases of controversies.

(*a.*) between the Dominion of Canada and such province;

(*b.*) between such Province and any other Province or Provinces which have passed a like Act;

the Exchequer Court shall have jurisdiction to determine such controversies.

2. An appeal shall lie in each cases from the Exchequer Court to the Supreme Court. R.S., c. 135, s. 72.

Supreme Court Rule 45 reads as follows:

"The foregoing rules shall be applicable to appeals from the Exchequer Court of Canada, except in so far as the Act has otherwise provided."

ELECTION APPEALS

THE DOMINION CONTROVERTED ELECTIONS ACT, R.S., c. 7.

64. An appeal by any party to an election petition who is dissatisfied with the decision shall lie to the Supreme Court from,—

(*a.*) the judgment, rule order or decision on any preliminary objection to an election petition, the allowance of which objection has been final and conclusive and has put an end to such petition, or which objection if it had been allowed would have been final and conclusive and have put an end to such petition: Provided that, unless it is otherwise ordered an appeal in the last-mentioned case shall not operate as a stay of proceedings, nor shall it delay the trial of the petition; and

(*b.*) the judgment or decision on any question of law or of fact of the judges who have tried such petition. R.S., c. 9, s. 50.

Trial within six months.

Sections 39 and 40 of the Dominion Controverted Elections Act, R.S., c. 7, provide as follows:

39. The trial of every election petition shall be commenced within six months from the time when such petition has been presented, and shall be proceeded with from day to day until such trial is over; but if, at any time, it appears to the court, that the respondent's presence at the trial is necessary, such trial shall not be commenced during any session of Parliament if the respondent is a member; and in the computation of any time or delay allowed for any step or proceeding in respect of any such trial, or

Election appeals. Six months' limit.

for the commencement thereof as aforesaid, the time occupied by such session of Parliament shall not be included:

2. If, at the expiration of three months after such petition has been presented, the day for trial has not been fixed, any elector may, on application, be substituted for the petitioner on such terms as the court thinks just. R.S., c. 9, s. 32.

40. The Court may, notwithstanding anything in the next preceding section, from time to time enlarge the time for the commencement of the trial, if, on an application for that purpose supported by affidavit, it appears to such court that the requirements of justice render such enlargement necessary.

2. No trial of an election petition shall be commenced or proceeded with during any term of the court of which either of the trial judges who are to try the same is a member, and at which such judge is by law bound to sit. R.S., c. 9, s. 33.

Glengarry Election Case, Purcell v. *Kennedy*, 14 Can. S.C.R. 453.

Held, 1st. That the decision of a judge at the trial of an election petition overruling an objection taken by the respondent to the jurisdiction of the judge to go on with the trial on the ground that more than six months had elapsed since the date of the presentation of the petition is appealable to the Supreme Court of Canada under s. 50 (*b*), c. 9, R.S.C. (now s. 64). Gwynne, J., dissenting.

2nd. In computing the time within which the trial of an election petition shall be commenced the time of a session of parliament shall not be excluded unless the court or judge has ordered that the respondent's presence at the trial is necessary. Gwynne, J., dissenting.

3. The time within which the trial of an election petition must be commenced cannot be enlarged beyond the six months from the presentation of the petition, unless an order had been obtained on application made within said six months; an order granted on an application made after expiration of the said six months is an invalid order and

can give no jurisdiction to try the merits of the petition, which is then out of court. Ritchie, C.J., and Gwynne, J., dissenting. Election appeals. Six months' limit.

[An application made to the Judicial Committee for leave to appeal in this case was refused. See 59 L.J. 279; 4 Times L.R. 664.]

L'Assomption Election Case, Gauthier v. *Normandeau; Quebec County Election Case, O'Brien* v. *Caron,* 14 Can. S.C.R. 429.

An order in a controverted election case made by the court below or a judge thereof not sitting at the time for the trial of the petition, and granting or rejecting an application to dismiss the petition on the ground that the trial, had not been commenced within six months from the time of its presentation, is not an order from which an appeal will lie to the Supreme Court of Canada under section 50 of the Dominion Controverted Elections Act, R.S.C. c. 9 (now s. 64), Fournier and Henry, JJ., dissenting.

Re Joliette Election, Guilbault v. *Dessert,* 15 Can. S. C.R. 458.

Where the proceedings for the commencement of the trial have been stayed during a session of parliament by an order of a judge, and a day has been fixed for the trial within the statutory period of six months as so extended, on which day the petitioners proceeded, with their *enquête* and examined two witnesses after which the hearing was adjourned to a day beyond the statutory period as so extended to allow the petitioners to file another bill of particulars, those already filed being declared insufficient, *Held,* there was a sufficient commencement of the trial within the proper time and the future proceedings were valid under section 32 of the Controverted Elections Act, R.S.C., c. 9 (now s. 39).

Laprairie Election Case, Gibeault v. *Pelletier,* 20 Can. S.C.R. 185.

On the 23rd April, 1891, after the petition in this case was at issue, the petitioners moved to have the respondent

Election appeals. Six months' limit.

examined prior to the trial so that he might use the deposition upon the trial. The respondent moved to postpone such examination until after the session, on the ground that being attorney in his own case it would not "be possible for him to appear, answer the interrogatories and attend to the case in which his presence was necesssary before the closing of the session." This motion was supported by an affidavit of the respondent stating that it would be "absolutely necessary for him to be constantly in court to attend to the present election trial" and that it was not possible "for him to attend to the present case for which his presence is necessary before the closing of the session," and the court ordered the respondent not to appear until after the session of Parliament. Immediately after the session was over, on the 1st October, 1891, an application was made to fix a day for the trial, and it was fixed for the 10th of December, 1891, and the respondent was examined in the interval. On the 10th of December the respondent objected to the jurisdiction of the court on the ground that the trial had not commenced within six months following the filing of the petition and the objection was maintained.

Held, reversing the judgment appealed from, that the order was in effect an enlargement of the time for the commencement of the trial until after the session of Parliament and therefore, in the computation of time for the commencement of the trial the time occupied by the session of Parliament should not be included.

Pontiac Election Case, 20 Can. S.C.R. 626.

The facts of this case were as follows:

Petition presented on the 18th April, 1891.

Petition was presented to the court on October 6th that the time for the commencement of the trial should be enlarged until the 30th November.

Judgment on October 10th on the motion, provided that the delay for cemmencing the trial upon the petition is for the present postponed until the 4th day of November.

On the 19th October petitioner moved, notice of which was given on the 16th, that it is expedient that the 4th

November or such other date as to the court should seem fit, should be fixed for the trial, that it should take place at Shawville in the County of Pontiac, in Hodgins Hall. Election appeals. Six months' limit.

In answer to this petition, the respondent said, that the day ought not and could not be fixed, as the petition was filed and presented on the 18th April and the petitioner did not have a day fixed for commencement of the trial within six months from the filing and presentation of the election petition, and the said delay having expired without the trial having been so fixed, and without it having been so fixed to commence within said delay of six months, the petition was out of court; that the order of the 10th October extending the time for the commencement of the trial to the 4th November was *ultra vires*.

Upon this, on the 19th October the Superior Court judge made the order that the trial should commence on the 4th November at 10 o'clock and continue from day to day.

Upon appeal to the Supreme Court of Canada it was held that the orders made were valid.

Bagot Election Case, Dupont v. *Morin; Rouville Election Case, Bordeur* v. *Charbonneau*, 21 Can. S.C.R. 28.

Appeals from the judgments of the Superior Court for Lower Canada.

In these two cases the trials were commenced on the 22nd day of December, 1891, more than six months after the filing of the petition, and subject to the objection taken by the respondents that the court had no jurisdiction, more than six months having elapsed since the filing of the petition and no order made enlarging the time for the commencement of the trial; the respondents consented that their elections be voided by reason of corrupt acts committed by their agents without their knowledge.

On appeal to the Supreme Court upon the question of jurisdiction the petitioner's counsel signed and filed a consent to the reversal of the judgment appealed from without costs, admitting that the objection was well taken.

Upon the filing of an affidavit as to the facts stated in

Election appeals. Six months' limit.

the respondent's consent, the appeal was allowed and the election petition dismissed without costs.

Re Beauharnois Election, 32 Can. S.C.R. 111.

A judge of the Superior Court made an order providing that the election trial should proceed 30 days from the date of a judgment in an appeal then pending in the Supreme Court. The trial not having been proceeded with in the 30 days, if non-juridical days were counted, he subsequently, by order, held that such days should not be counted. On appeal from that order to the Supreme Court it was held that they were not orders appealable to the Supreme Court under the provisions of the Controverted Elections Act.

Held, also, that an order fixing a date for the trial of an election petition beyond the six months fixed by the Act had the effect to enlarge the time of trial although not so expressly stated.

Re Richelieu Election, 32 Can. S.C.R. 118.

Held, that an appeal does not lie to the Supreme Court from a judgment dismissing an election petition for want of prosecution within the six months prescribed by section 32 of the Controverted Elections Act (now s. 39).

St. James Election Case, 33 Can. S.C.R. 137.

Preliminary objections to an election petition filed on 22nd February, 1902, were dismissed by Loranger, J., on April 24th, and an appeal was taken to the Supreme Court of Canada. On 31st May, Mr. Justice Loranger ordered that the trial of the petition be adjourned to the thirtieth juridical day after the judgment of the Supreme Court was given, and the same was given dismissing the appeal on Oct. 10th, making Nov. 17th the day fixed for the trial under the order of 31st May. On Nov. 14th, a motion was made before Lavergne, J., on behalf of the member elect to have the petition declared lapsed for non-commencement of the trial within six months from the time it was filed. This was refused on 17th November, but the judge held that the trial could not proceed on that day as the order for adjournment had not fixed a certain time

and place, and on motion by the petitioner he ordered that it be commenced on Dec. 4th. The trial was begun on that day and resulted in the member elect being unseated and disqualified. On appeal from such judgment the objection to the jurisdiction of the trial judges was renewed. *Held*, that the effect of the order of May 31st was to fix Nov. 17th as the date of commencement of the trial; that the time between May 31st and Oct. 10th when the judgment of the Supreme Court on the preliminary objections was given, should not be counted as part of the six months within which the trial was to be begun, and that Dec. 4th on which it was begun was therefore within the said six months. Election appeals. Six months' limit.

Held, also, that if the order of 31st May could not be considered as fixing a day for the trial it operated as a stay of proceedings and the order of Mr. Justice Lavergne on Nov. 17th was proper. As to the disqualification of the member elect by the judgment appealed from the members of the Court were equally divided and the judgment stood affirmed.

Re Halifax Election, Hetherington v. *Roche*, Sup. Ct. 1906.

The facts of this case were as follows: In November, 1905, the time for beginning the trial of the election petition was extended for eight months and expired on the 14th July, 1906. On the 25th May, 1906, the Supreme Court of Nova Scotia ordered "that the time and place for the trial of the said petition be and the same is hereby fixed and appointed for the 17th day of July, A.D. 1906." On the 3rd July, the petitioner moved before the Hon. Mr. Justice Russell in Chambers for an order extending the time for commencing the trial for 30 days, alleging by his affidavit that the date fixed for the trial by the order of the 25th May was three days after the expiration of the time fixed by the order of November. Upon this material an order was made on the 6th July, "that the time for the commencement of the trial of the said petition be and the same is hereby enlarged and extended for 30 days from the date of this order." When the cause came on for hearing, objec-

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tion was taken to the jurisdiction of the trial judges on the ground that the order of the 25th May was void inasmuch as it fixed a day for the commencement of the trial beyond the last day within which the trial should commence under the order of November, and that the order of the 6th July was also void as it was only made as supplementary to the order of the 25th May, and fell with it. The trial judges held "that the time for the commencement of the trial of the petition herein has expired, and has not been validly enlarged and that there is no power, jurisdiction or authority in said judges to try said petition or to fix a date for the trial thereof, and that the said trial be not further proceeded with, and that the petition be dismissed for want of jurisdiction."

Held, by the Supreme Court that the case was governed by the *Beauharnois case, supra*, p. 496, and others, and that the order made by Mr. Justice Russell extending the time for 30 days was a valid extension, and allowing the appeal directed the trial to be proceeded with.

Preliminary objections.

Previous to 42 V., c. 39, s. 10 (1879), no express provision was made for an appeal to the Supreme Court from a judgment upon a preliminary objection.

In re Charlevoix Election Case, 2 Can. S.C.R. 319.

On the 21st April, 1877, an election petition was filed in the prothonotary's office of Murray Bay, district of Saguenay, against the respondent. The latter pleaded by preliminary objections that this election petition, notice of its presentation and copy of the receipt of the deposit had never been served upon him. Judgment was given maintaining the preliminary objections and dismissing the petition with costs. The petitioners, thereupon, appealed to the Supreme Court under 38 V., c. 11, s. 48.

Held, that the said judgment was not appealable, and that under that section an appeal will lie only from the decision of a judge who was tried the merits of an election petition. (Taschereau and Fournier, JJ., dissenting.)

Per Strong, J., (Richards, C.J., concurring,) that the

hearing of the preliminary objections and the trial of the merits of the election petition are distinct acts of procedure. Election appeals. Preliminary objections.

Status of petitioner—stare decisis.

Stanstead Election Case, Rider v. *Snow*, 20 Can. S.C.R. 12.

By preliminary objections to an election petition the respondent claimed the petition should be dismissed because the said petitioner had no right to vote at said election. On the day fixed for proof and hearing of the preliminary objections the petitioner adduced no proof and the respondent declared that he had no evidence and the preliminary objections were dismissed.

Held, per Sir W. J. Ritchie, C.J., and Taschereau and Patterson, JJ., that the *onus probandi* was upon the petitioner to establish his status, and that the appeal should be allowed and the election petition dismissed.

Per Strong, J., that the *onus probandi* was upon the petitioner, but in view of the established jurisprudence the appeal should be allowed without costs.

Fournier and Gwynne, JJ., *contra*, were of opinion that the *onus probandi* was on the respondent. *The Megantic Election Case* (8 Can. S.C.R. 169), discussed.

When the Supreme Court of Canada in a case in appeal is equally divided so that the decision appealed against stands unreversed the result of the case in the Supreme Court affects the actual parties to the litigation only and the Court, when a similar case is brought before it, is not bound by the result of the previous case.

Glengarry Election Case (*McLennan* v. *Chisholm*) 20 Can. S.C.R. 38.

The petition in this case simply stated that it was the petition of Angus Chisholm, of the township of Lochiel, in the county of Glengarry, without describing his occupation, and it was shewn by affidavit that there are two or three other persons of that name on the voters' list for that township.

Held, affirming the judgment of the court below, that

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the petition should not be dismissed for the want of a more particular description of the petitioner.

Bellechasse Election Case, Amyot v. *Labrecque*, 20 Can. S.C.R. 181.

The petition was served upon the appellant on the 12th of May, 1891, and on the 16th May the appellant filed preliminary objections, the first being as to the status of the petitioners. When the parties were heard upon the merits of the preliminary objections no evidence was given as to the status of the petitioners and the court dismisssed the objections. On appeal to the Supreme Court,

Held, reversing the judgment of the court below, Gwynne, J., dissenting, that the onus was on the petitioners to prove their status as voters. *The Stanstead Case*, 20 Can. S.C.R. 12, followed.

Prescott Election Case (*Proulx* v. *Fraser*), 20 Can. S. C.R. 196.

In this case the respondent, by preliminary objection, objected to the status of the petitioner, and the case being at issue copies of the voters' lists for said electoral district were filed but no other evidence offered, and the court set aside the preliminary objection "without prejudice to the right of the respondent if so advised to raise the same objection at the trial of the petition." No appeal was taken from this decision and the case went to trial, where the objection was renewed but was overruled by the trial judges who held that they had no right to entertain it, and on the merits they allowed the petition and voided the election. Thereupon the appellant appealed to the Supreme Court of Canada on the ground that the onus was on the respondents to prove their status, and that their status had not been proved.

Held, affirming the judgment of the court below, that the objection raising the question of the qualification of the petitioner was properly raised by preliminary objection and disposed of, and the judges at the trial had no jurisdiction to entertain such objection.

Richelieu Election Case, Paradis v. *Bruneau*, 21 Can. S.C.R. 168. Election appeals. Status.

Held, affirming the decision of Gill, J., that where the petitioner's status in an election petition is objected to by preliminary objection, such status should be established by the production of the voters' list actually used at the election, or a copy thereof certified by the clerk of the Crown in Chancery, R.S.C., c. 8, ss. 41, 58 & 56, R.S.C., s. 5, s. 32, and the production at the *enquête* of a copy certified by the revising officer of the list of voters upon which his name appears, but which has not been compared with the voters' list actually used at said election is insufficient proof. Gwynne and Patterson, JJ., dissenting.

Winnipeg Election Case; Macdonald Election Case, 27 Can. S.C.R. 201.

On the hearing of preliminary objections to an election petition to prove the status of the petitioner a list of voters was offered with a certificate of the Clerk of the Crown in Chancery, which, after stating that said list was a true copy of that finally revised for the district, proceeded as follows: "And is also a true copy of a list of voters which was used at said polling division at and in relation to an election of a member of the House of Commons of Canada for the said electoral district . . . which original list of voters was returned to me by the returning officer for said electoral district in the same plight and condition as it now appears, and said original list of voters is now on record in my office."

Held, that this was, in effect, a certificate that the list offered in evidence was a true copy of a paper returned to the Clerk of the Crown by the returning officer as the very list used by the deputy returning officer at the polling district in question, and that such list remained of record in possession of said clerk. It was then a sufficient certificate of the paper offered being a true copy of the list actually used at the election. *Richelieu Election Case* (21 Can. S.C.R. 168), followed.

Re Two Mountains Election, 31 Can. S.C.R. 437.

Held, that the status of the petitioner was sufficiently

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proved by the production of a list of voters bearing the imprint of King's printer, certified by the Clerk of the Crown in Chancery to be a copy of the voters' list used at the election and upon which the name of the petitioner appears.

Semble, that a jurat of the affidavit accompanying the petition subscribed by Grignon & Fortier, prothonotaries, was not objectionable.

Re Beauharnois Election, 31 Can. S.C.R. 447.

A preliminary objection having been taken to the status of the petitioner on the ground that he had been guilty of corrupt practices, the Supreme Court, approving of the judgment of the court below, that corrupt practices had not been proved, refrained from expressing an opinion upon the question argued, viz., whether under the Franchise Act or the Dominion Elections Act a person guilty of corrupt practices could vote, and consequently could not maintain a petition against the return.

Yukon Election Case, Grant v. *Thompson*, 37 Can. S. C.R. 495.

On the hearing of preliminary objections to an election petition the status of the petitioner may be established by oral evidence not objected to by the respondent.

Filing of petitions.

Vide Re Montmorency Election, 3 Can. S.C.R. 90. *Re West Huron Election*, 8 Can. S.C.R. 126. *Re Lisgar Election*, 20 Can. S.C.R. 1. *Re Vaudreuil Election*, 22 Can. S. C.R. 1. *Re Marquette Election*, 27 Can. S.C.R. 219. *Re West Assiniboia Election*, 27 Can. S.C.R. 215. *Re Nicolet Election*, 29 Can. S.C.R. 178. *Re Burrard Election*, 31 Can. S.C.R. 459. *Re Two Mountains Election*, 32 Can. S.C.R. 55.

Form of petition.

Re King's Election, 8 Can. S.C.R. 192. *Re Gloucester Election*, 8 Can. S.C.R. 204. *Re Lisgar Election*, 20 Can.

S.C.R. 1. *Re Lunenburg Election*, 27 Can. S.C.R. 226. *Re West Durham Election*, 31 Can. S.C.R. 314. *Re Two Mountains Election*, 31 Can. S.C.R. 437. Election appeals. Form of petition.

Service of petition:

Re Montmagny Election, 15 Can. S.C.R. 1. *Re King's Election*, 19 Can. S.C.R. 526. *Re Queen's and Prince Election*, 20 Can. S.C.R. 26. *Re Glengarry Election*, 20 Can. S.C.R. 38. *Re Shelburne Election*, 20 Can. S.C.R. 169. *Re Beauharnois Election*, 27 Can. S.C.R. 232. *Re Laval Election*, Cout. Dig. 529.

Deposit.

Re Argenteuil Election, 20 Can. S.C.R. 194. *Re Halton Election*, Cout. Dig. 516.

Practice and procedure generally.

Gloucester Election Case, 8 Can. S.C.R. 204.

A judgment of the Supreme Court of New Brunswick, setting aside an order of a judge rescinding a previous order made, authorising the withdrawal of the deposit money and removal of the petition off the files, is not a judgment on a preliminary objection within the meaning of the Act.

King's County (N.S.) Case, 8 Can. S.C.R. 192.

Nor a judgment of the Supreme Court of Nova Scotia, making absolute a rule to set aside an order extending the time for service of a petition.

Vaudreuil Election Case, 22 Can. S.C.R. 1.

Two election petitions were filed against the appellant, one by A. C., filed on the 4th April, 1892, and the other by A. V., the respondent, filed on the 6th April, 1892. The trial of the A. V. petition was by an order of a judge in chambers, dated the 22nd September, 1892, fixed for the 26th October, 1892. On the 24th October the appellant petitioned the judge in chambers to join the two petitions

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and have another date fixed for the trial of both petitions. This motion was referred to the trial judges, who, on the 26th October, before proceeding with the trial, dismissed the motion to have both petitions joined and proceeded to try the A. V. petition. Thereupon the appellant objected to the petition being tried then as no notice had been given that the A. C. petition had been fixed for trial, and, subject to such objection, filed an admission that sufficient bribery by the appellant's agent without his knowledge had been committed to avoid the election. The trial judges then delivered judgment setting aside the election.

On an appeal to the Supreme Court,

Held, 1st. That under s. 30 of c. 9, R.S.C. (now s. 37), the trial judge had a perfect right to try the A. V. petition separately.

2nd. That the ruling of the court below on the objection relied on in the present appeal, viz.: That the trial judges could not proceed with the petition in this case, because the two petitions filed had not been bracketed by the prothonotary as directed by s. 30 of c. 9, R.S.C., was not an appealable judgment or decision. Sedgewick, J., doubting.

West Assiniboia Election Case, 27 Can. S.C.R. 215.

The Supreme Court refused to entertain an appeal from the decision of a judge in chambers granting a motion to have preliminary objections to an election petition struck out for not being filed in time. Such decision was not one on preliminary objections within section 50 of the Controverted Election Act (now s. 64), and if it were, no judgment on the motion could put an end to the petition.

Marquette Election Case, 27 Can. S.C.R. 219.

The appeal given to the Supreme Court of Canada by the Controverted Elections Act R.S.C., c. 9, s. 50 (now s. 64), from a decision on preliminary objections to an election petition can only be taken in respect to objections filed under section 12 of the Act. No appeal lies from a judgment granting a motion to dismiss a petition on the ground that the affidavit of the petitioner was untrue.

Two Mountains Election Case, 32 Can. S.C.R. 55. Election appeals. Practice and procedure.

The record in the case of a controverted election was produced in the Supreme Court of Canada on appeal against the judgment on preliminary objections and, in re-transmission to the court below, the record was lost. Under the procedure in similar cases in the province where the petition was pending, a record was reconstructed in substitution of the lost record, and upon verification as to its correctness, the court below ordered the substituted record to be filed. Thereupon the respondent in the court below raised preliminary objections traversing the correctness of a clause in the substituted petition which was dismissed by the judgment appealed from. *Held,* that as the judgment appealed from was not one upon a question raised by preliminary objections, nor a judgment upon the merits at the trial, the Supreme Court of Canada had no jurisdiction to entertain the appeal, nor to revise the discretion of the court below in ordering the substituted record to be filed.

Re Halton Election, 19 Can. S.C.R. 557.

Parliament having been dissolved before the appeal came on for hearing in the Supreme Court. *Held,* that by the effect of the dissolution the petition dropped, and that the appellant, petitioner, was not entitled to have the record sent back to the court below with a view of being repaid his deposit, but it was proper that the Registrar should certify to the court below that the appeal to the Supreme Court had not been heard and that petition dropped by reason of the dissolution of Parliament so that the court below might be in a position to make an order disposing of the money in Court.

Halton Election Case, 19 Can. S.C.R. 557.

The petitioner subsequently moved the Supreme Court of Canada for an order directing the re-payment to him of the deposit in the court below, shewed that a similar application in the High Court of Justice for Ontario had been dismissed and that the order by Patterson, J., had not been appealed from. On 15th March, 1893, the Supreme

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Court ordered that a certificate should issue reciting the proceedings that had taken place and declaring that the petitioner was entitled to have his deposit returned.

Lisgar Election, Wood v. *Stewart*, 1904.

Before the appeal in this case came on for hearing, Parliament was dissolved, and an application was made by the appellant for an order allowing him to withdraw his deposit on the ground that the appeal had abated by reason of the dissolution of Parliament, and after argument the Court delivered judgment declaring that the petition had abated, and the petitioners were entitled to be paid the sum of $1,300 and accrued interest deposited with the clerk of the Court of King's Bench, Manitoba, for the costs of the petition and of the appeal.

Motion to dismiss for want of prosecution.

Re Lisgar Election, Wood v. *Stewart*, 1904.

In this case the judgment was pronounced upon the petition on the 30th day of October, 1902, and on the 7th November following, the petitioner deposited with the Clerk of the Election Court, the necessary security and fees in connection with an appeal to the Supreme Court of Canada. The record was not certified by the Clerk to the Registrar of the Supreme Court until the 9th day of January, 1904, and was only received by the Registrar on the 16th January, 1904, and consequently there elapsed between the day of the giving of the security and the certifying of the record a period of one year, two months and two days. The respondent moved before the Registrar in chambers to dismiss the appeal for want of prosecution, and the material filed consisted of an affidavit by the solicitor for the respondent that the Court stenographer had informed him that he had been instructed by the solicitor for the appellants not to proceed with the transcription of his notes of evidence, and that this was the cause of the delay in having the record certified by the election clerk. The solicitor for the appellants, on the contrary, denied that he had even given any such instructions and alleged

that he had always been anxious to have the appeal promptly proceeded with. The Registrar made a preliminary order directing the clerk of the Election Court and the stenographer to forward a certificate under their respective hands and seals accounting for delay, if any, in extending the notes of evidence taken at the trial of the election petition. These officers having satisfied the Registrar that the solicitors for the appellants were not responsible for the delay, the motion to dismiss was refused. In his reasons for judgment the Registrar said:

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'The appellant is required within eight days from the date of the decision to deposit with the clerk of the Court or other proper officer, the sum of $300 and a further sum of $10 as a fee for making up and transmitting the record to the Supreme Court. Having complied with this the appellant is under no responsibility for any delay which may arise in the office of the clerk of the Election Court. The latter may unnecessarily and unreasonably delay the transmission of the record. He may have trouble in getting the notes of evidence extended. He may be in doubt as to the material contained in the record. He may have to consult the trial judges with respect to this material. This does not concern the appellant. Neither need he be disturbed by fear that the clerk will fail to incorporate in the record material which the appellant deems essential because he will have an opportunity when the record has been received by the Registrar to apply to the Supreme Court and have any error or mistake corrected.

"In the next place it is to be remembered the public interests require that the right of a member to sit in Parliament should be finally determined at the earliest moment possible. This is abundantly clear from the strict provisions of the Controverted Elections Act which limit the time for each step in the cause. *Vide* sections 9, 10, 12, 13, 32, 43. These clearly manifest the intention of Parliament that election trials should be promptly disposed of. If further authority were required it can be found in the decisions of this Court. Mr. Justice Patterson in the *Halton Election Case,* 19 Can. S.C.R., p. 557, says: 'It is not material to attempt to apportion the responsibility for this

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waste of two years before reaching a decision so unlike the promptness which is aimed at by the law respecting controverted election.'

"It follows therefore that although an appellant will not be held responsible for delays made by the officer of the Court, yet if he unwarrantably interferes in the proceedings in the clerk's office causing an unreasonable and unnecessary delay he may become liable to have his appeal dismissed."

In election appeals it was formerly considered that motions to dismiss for want of prosecution must be made to the Court. *North York Election Case*, Cout. Dig. 1113; but in the *Halton Election Case*, 19 Can. S.C.R. 557, the Court referred such a motion to a judge in chambers, and since then the Registrar has heard them.

Chicoutimi & Saguenay Election Case, Cout. Dig. 1113.
Martin v. *Roy*, Cout. Dig. 1113.

Notice of trial.

Pontiac Election Case, 20 Can. S.C.R. 626.

An objection that the 15 days' notice of trial required by the rules of Court had not been complied with, is not an objection which can be invoked on an appeal to the Supreme Court where the appeal is taken from the judgment or decision on a question of law or of fact of the judge who tried the petition.

Speedy hearing of election appeals.

Charlevoix Election Case, Brassard v. *Langevin*, 2 Can. S.C.R. 319.

Per Strong, J.—"It may be truly said that there is no class of litigations in which judicial despatch is more desirable than that arising out of controverted elections. The interests of all concerned, those of the parties, the courts and the public, alike require reasonable promptitude of decision in such cases."

Re North Ontario Election Case, 3 Can. S.C.R. 374. Election appeals. Speedy hearing.

Per Taschereau, J.(405).—"Election cases affect public interests. That is why Parliament, instead of leaving to the parties the power of setting down their case for hearing as in ordinary cases, has ordered the Registrar to do so in election cases for the nearest convenient time after the transmission to him of the record. Parliament evidently intended that election appeals should not be delayed."

Re Pontiac Election Case, 20 Can. S.C.R. 626.

Per Gwynne, J.—"Speedy administration of justice was the object of the statute.

Findings of fact in court below.

Bellechasse Election, 5 Can. S.C.R. 91.

Held, that an Appellate Court in election cases ought not to reverse, on mere matters of fact, the findings of the judge who has tried the petition, unless the court is convinced beyond doubt that his conclusions are erroneous, and that the evidence in this case warranted the finding of the court below, that appellant had been guilty of personal bribery.

Berthier Election Case, Genereux v. *Cuthbert*, 9 Can. S.C.R. 102.

Held, as to three charges, that on the facts the judgment of the court below was not clearly wrong and should therefore not be reversed.

Montcalm Election Case, 9 Can. S.C.R. 93.

Held, that the Supreme Court will not reverse on mere matters of fact the judgment of the judge who tries an election petition unless the matter of the evidence is of such a nature as to convey an irresistible conviction that the judgment is not only wrong but is erroneous.

North Perth Election Case, 20 Can. S.C.R. 331.

Per Gwynne, J.—"In all cases of mere matters of facts the finding which depends upon the credibility of

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witnesses or upon the due balancing of contradictory evidence, the judgment of the learned judge who hears and sees the witnesses should, never, in my opinion, be reversed by an Appellate Court, and the more especially is this the case with judgments rendered upon these election petitions, the trial of which takes place before two judges whose concurrent opinion is necessary to the avoiding of the election; but where the question in issue depends upon the proper inference to be drawn from undisputed facts, the Appellate Court, equally with the trial court is bound to exercise its independent judgment.

For cases on the weight to be attached to findings of the trial judges, *vide* p. 299, *supra.*

Presentation of petition.

Yukon Election Case, Grant v. *Thompson,* 37 Can. S. C.R. 495.

A petition alleging "an undue election" or "undue return" of a candidate at an election for the House of Commons cannot be presented and served before the candidate has been declared elected by the returning officer. Girouard and Idington, JJ., dissenting.

65. The party so desiring to appeal shall, within eight days from the day on which the decision appealed from was given, deposit with the clerk of the court with whom the petition was lodged or with the proper officer for receiving moneys paid into court, at the place where the hearing of the preliminary objections, or where the trial of the petition took place, as the case may be, if in the Province of Quebec, and at the chief office of the court in which the petition was presented, if in any other province, in cases of appeal other than from a judgment, rule, order or decision on any preliminary objection, the sum of three hundred dollars, and in such last mentioned cases, the sum of one hundred dollars, as security for costs, and also a

further sum of ten dollars as a fee for making up and transmitting the record to the Supreme Court of Canada; and such deposit may be made in legal tender or in the bills of any chartered bank doing business in Canada. 54-55 V., c. 20, s. 12.

66. Upon such deposit being so made, the said clerk or other proper officer shall make up and transmit the record of the case to the Registrar of the Supreme Court of Canada, who shall set down the said appeal for hearing by the Supreme Court of Canada at the nearest convenient time and according to the rules of the Supreme Court of Canada in that behalf. R.S., c. 9, s. 51.

The eight days within which the deposit must be made is imperative, and the time cannot be extended by the Supreme Court.

Vide North Ontario Election Case, infra, p. 509.

Neither can the time be extended by the trial judges under section 71, as election petitions are expressly excluded by this section from the power given to the court below to extend the time for bringing an appeal.

Rules 1 to 50 inclusive of the Supreme Court, except Rule 12, do not apply to election appeals. *Vide* Rule 50, *supra,* p. 431.

Rule 12 provides for the convening of a special session of the Court for the hearing of election appeals.

The rules providing for the payment of fees to the Registrar and taxation of costs are applicable to election appeals.

The Registrar should not set down an election appeal until the fee of $10 provided by Rule 56, has been paid.

Re North Ontario Election Case, 3 Can. S.C.R. 374.

The record was transmitted to the Registrar of the Supreme Court on the 11th June, 1879. On the 24th September, 1879, application was made on behalf of the

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appellant to the Chief Justice, under Rule 55 to dispense with printing part of the record. It appearing, when this application was made, that the fee for entering the appeal had not been paid to the Registrar under Rule 56 and schedule therein referred to, the Chief Justice refused to entertain the application until such fee should be paid, and the appeal duly entered. Thereupon the agent for the appellant's solicitor paid the fee, and the Chief Justice made the order as asked.

As a matter of convenience, many of the rules of practice are followed in election appeals, although declared not applicable by Rule 50; *e.g.*, the rules relating to interlocutory applications.

67. The party so appealing shall, within three days after the said appeal has been so set down as aforesaid or within such other time as the court or trial judges by whom such decision appealed from was given allow, give to the other parties to the said petition affected by such appeal, or the respective attorneys, solicitors or agents by whom such parties were represented on the hearing of such preliminary objections or at the trial of the petition, as the case may be, notice in writing of such appeal having been so set down for hearing as aforesaid and may in such notice if he so desires, limit the subject of the said appeal to any special and defined question or questions.

2. The appeal shall thereupon be heard and determined by the Supreme Court of Canada, which shall pronounce such judgment upon questions of law or of fact, or both, as in the opinion of such Court ought to have been given by the court or trial judges whose decision is appealed from; and the Supreme Court of Canada may make such order as to the money deposited as aforesaid, and as to the costs of the appeal as it thinks just; and in case it appears to the court that any evidence duly tendered at the trial was improperly rejected, the Court may cause the witness

to be examined before the Court or a judge thereof, or upon commission. R.S., c. 9, s. 51; 54-55 V., c. 20, s. 17. Election appeals. Notice of appeal.

Notice of appeal.

North Ontario Election Case, Wheeler v. *Gibbs,* 3 Can. S.C.R. 374.

On a motion to quash the appeal on behalf of the respondent, on the ground that the appellant had not, within three days after the Registrar of the Court had set down the matter of the petition for hearing, given notice in writing to the respondent, or his attorney or agent, of such setting down, nor applied to and obtained from the judge who tried the petition further time for giving such notice, as required by the 48th section of the Supreme and Exchequer Court Act.

Held, that this provision in the statute was imperative; that the giving of such notice was a condition precedent to the exercise of any jurisdiction by the Supreme Court to hear the appeal; that the appellant having failed to comply with the statute, the Court could not grant relief under Rules 56 or 69; and that therefore the appeal could not be then heard, but must be struck off the list of appeals, with costs of the motion.

Subsequent to this judgment, the appellant applied to the judge who tried the petition, to extend the time for giving the notice, whereupon the said judge granted the application and made an order, "extending the time for giving the proscribed notice till the 10th day of December then next." The case was again set down by the Registrar for hearing by the Supreme Court at the February session following, being the nearest convenient time, and notice of such setting down was duly given within the time mentioned in the order. The respondent thereupon moved to dismiss the appeal, on the ground that the appellant unduly delayed to prosecute his appeal, or failed to bring the same on for hearing at the next session, and that the judge who tried the petition had no power to extend the time for giving such notice after the three days from the first setting down of the case for hearing by the Registrar of this Court.

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Held, that the power of the judge who tried the petition to make an order extending the time for giving such notice is a general and exclusive power to be exercised according to sound discretion, and the judge having made such an order in this case, the appeal came properly before the Court for hearing. Taschereau, J., dissenting.

Costs.

"The usual practice has been to certify the judgment of the Supreme Court to the court below, and to leave to the latter court the enforcement of the payment of the costs. But the Court may issue writs to enforce payment of the costs of an election appeal. This was done in the *North Ontario Election Case* (*Wheeler* v. *Gibbs*), but the execution was stayed by Taschereau, J., to permit an application to the Court for an amendment of the judgment, to enable the respondent to set-off against the costs of appeal, costs allowed respondent in court below. The amendment was made, and execution stayed by the Court, February, 1881. The payment of interlocutory costs will be enforced by writs of execution issued by the Supreme Court. This was done in the *North Ontario Election Case* on the 23rd January, 1880." Cass. Prac. 2nd ed., p. 120.

68. If an appeal, as provided by this Act is made to the Supreme Court of Canada from the judgment or decision of the trial judges, they shall make to the Supreme Court of Canada the report and certificate with respect to corrupt practices hereinbefore directed to be made, and may make the special report as to any matters arising in the course of the trial as herebefore provided, and the same, together with the decision and findings, if any, with respect to corrupt practices by agents hereinbefore provided for, shall form a part of the record in the said matter to be transmitted to the Supreme Court on such appeal. 54-55 V., c. 20, s. 14.

The certificate and report referred to in this section

are set out in the following sections of the Dominion Controverted Elections Act.

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58. At the conclusion of the trial, the trial judges shall determine whether the member whose election or return is complained of or any and what other person was duly returned or elected, or whether the election was void, and other matters arising out of the petition, and requiring their determination, and shall, except in the case of appeal hereinafter mentioned, within four days after the expiration of eight days from the day on which they shall so have given their decision, certify in writing such determination to the speaker, appending thereto a copy of the notes of evidence.

2. The determination thus certified shall be final to all intents and purposes. R.S., c. 9, s. 43.

59. Every certificate and every report sent to the speaker in pursuance of this Act shall be under the hands of both judges.

2. If the trial judges differ as to whether the member whose return or election is complained of was duly returned or elected, they shall certify that difference, and the member shall be deemed duly elected or returned.

3. If the trial judges determine that such member was not duly elected or returned, but differ as to the rest of the determination, they shall certify that difference, and the election shall be deemed to be void.

4. If the trial judges differ as to the subject of a report to the Speaker, they shall certify that difference and make no report on the subject on which they so differ. 54-55 V., c. 20, s. 17.

60. When any charge is made in an election petition of any corrupt practice having been committed at the election to which the petition relates, the trial judges shall, in addition to such certificate, and at the same time, report in writing to the Speaker.

(*a.*) Whether any corrupt practice has or has not been proved to have been committed by or with the knowledge and consent of any candidate at such election, stating the name of such candidate, and the nature of such corrupt practice;

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(*b.*) The names of any persons who have been proved at the trial to have been guilty of any corrupt practice;

(*c.*) Whether corrupt practices have, or whether there is reason to believe that corrupt practices have extensively prevailed at the election to which the petition relates;

(*d.*) Whether they are of opinion that the inquiry into the circumstances of the election has been rendered incomplete by the action of any of the parties to the petition, and that further inquiry as to whether corrupt practices have extensively prevailed is desirable. R.S., c. 9, s. 44.

61. The trial judges may, at the same time, make a special report to the Speaker as to any matters arising in the course of the trial, an account of which ought, in their judgment, to be submitted to the House of Commons. R.S., c. 9, s. 45.

69. The Registrar shall certify to the Speaker of the House of Commons, the judgment and decision of the Supreme Court, confirming, changing or annulling any decision, report or finding of the trial judges upon the several questions of law as well as of fact upon which the appeal was made, and therein shall certify as to the matters and things as to which the trial judges would have been required to report to the Speaker, whether they are confirmed, annulled or changed, or left unaffected by such decision of the Supreme Court; and such decision shall be final. R.S., s. 9, s. 51;—54-55 V., c. 20, s. 13.

Re Glengarry Election, 59 L.T. 379; 4 Times L.R. 664.

In delivering judgment upon a petition for leave to appeal from the judgment of the Supreme Court of Canada, 14 Can. S.C.R. 453, the Judicial Committee of the Privy Council decided that no appeal in a controverted election case would be entertained.

THE RAILWAY ACT.

R.S., c. 37.

55. The Board may, of its own motion, or upon the application of any party, and upon such security being given as it directs, or at the request of the Governor in Council state a case, in writing, for the opinion of the Supreme Court of Canada upon any question which in the opinion of the Board is a question of law.

2. The Supreme Court of Canada shall hear and determine the question or questions of law arising thereon, and remit the matter to the Board with the opinion of the Court thereon. 3 E. VII., c. 58, s. 43.

56. The Governor in Council may, at any time, in his discretion, either upon petition of any party, person or company interested, or of his own motion and without any petition or application, vary or rescind any order, decision rule or regulation of the Board, whether such order or decision is made *inter partes* or otherwise, and whether such regulation is general or limited in its scope and application; and any order which the Governor in Council may make with respect thereto shall be binding on the Board and all parties.

2. An appeal shall lie from the Board to the Supreme Court of Canada upon a question of jurisdiction, but such appeal shall not lie unless the same is allowed by a judge of the said Court upon application and upon notice to the parties and the Board and hearing such of them as appear and desire to be heard; and the costs of such application shall be in the discretion of the judge.

Railway appeals.

3. An appeal shall also lie from the Board to such Court upon any question which in the opinion of the Board is a question of law, upon leave therefor having been first obtained from the Board; and the granting of such leave shall be in the discretion of the Board.

4. Upon such leave being obtained the party so appealing shall deposit with the Registrar of the Supreme Court of Canada the sum of two hundred and fifty dollars, by way of security for costs, and thereupon the Registrar shall set the appeal down for hearing at the nearest convenient time; and the party appealing shall, within ten days after the appeal has been so set down; give to the parties affected by the appeal, or the respective solicitors by whom such parties were represented before the Board, and to the Secretary, notice in writing that the case has been so set down to be heard in appeal as aforesaid; and the said appeal shall be heard by such Court as speedily as practicable.

5. On the hearing of any appeal, the Court may draw all such inferences as are not inconsistent with the facts expressly found by the Board, and are necessary for determining the question of jurisdiction, or law, as the case may be, and shall certify its opinion to the Board, and the Board shall make an order in accordance with such opinion.

6. The Board shall be entitled to be heard, by counsel or otherwise, upon the argument of any such appeal.

7. The Court shall have power to fix the costs and fees to be taxed, allowed and paid upon such appeals, and to make rules of practice respecting appeals under this section; and until such rules are made, the rules and practice applicable to appeals from the Exchequer Court shall be applicable to appeals under this Act.

8. Neither the Board nor any member of the Board shall in any case be liable to any costs by reason or in respect of any appeal or application under this section.

Railway appeals.

9. Save as provided in this section,—

(*a.*) every decision or order of the Board shall be final; and,

(*b.*) no order, decision or proceeding of the Board shall be questioned or reviewed, restrained or removed by prohibition, injunction, certiorari, or any other process or proceeding in any court. 3 E. VII., c. 58, s. 44.

General Order No. 88 of the Supreme Court, passed on the 14th June, 1905, contains the following provisions with respect to appeals from the Board of Railway Commissioners for Canada:

"3. Wherever a reference is made to the Court by the Governor in Council or by the Board of Railway Commissioners for Canada, the case shall only be inscribed by the Registrar upon the direction and order of the Court or a judge thereof, and factums shall thereafter be filed by all parties to the reference in the manner and form and within the time required in appeals to the Court.

4. Whenever an appeal is taken from any decision of the Board of Railway Commissioners for Canada pursuant to the provisions of the Railway Act, the appeal shall be upon a case to be stated by the parties, or in the event of difference, to be settled by the said Board or the chairman thereof, and the case shall set forth the decision objected to and so much of the affidavits, evidence and documents as are necessary to raise the question for the decision of the Court.

All the rules of the Supreme Court from 1 to 44 both inclusive, shall be applicable to appeals from the said Board of Railway Commissioners for Canada, except in so far as the Railway Act otherwise provides."

Section 55 provides for obtaining the opinion of the Supreme Court of Canada upon any question which in the opinion of the Board is one of law, where the opinion is desired by

(*a.*) The Board,

(*b.*) Any party, or

(*c.*) The Governor in Council.

Railway appeals. Practice and procedure.

In any such event the Board states a case for the opinion of the Court which is forwarded to the Registrar of the Supreme Court, and an application should then be made either to the Court or a judge for a direction under the above General Order, No. 88, to have the case set down at some sittings of the Court, and after the direction is made, the case and factums should be printed and filed as in ordinary appeals.

Section 56 confers an appellate jurisdiction upon the Supreme Court from the order or decision of the Board, where a question of the jurisdiction of the Board is involved and leave to appeal has been granted by a judge of the Supreme Court.

In the case of the *Montreal Street Rly. Co.* v. *Montreal Terminal Rly. Co.*, 35 Can. S.C.R. 478, Mr. Justice Sedgewick, before whom the application was made for leave to appeal, directed the Registrar to request the attendance of the solicitor for the Board, as sub-section 2 contained the express provision that the Board should be heard on such applications. Since then, on applications for leave the solicitor for the Board has always been present.

Montreal Street Rly. Co. v. *Montreal Terminal Rly. Co.*, 35 Can. S.C.R. 478; 36 Can. S.C.R. 369.

The Montreal Terminal Rly. Co. by virtue of its charter and an agreement with the town, passed through the town of Maisonneuve and obtained an order from the Board of Railway Commissioners approving of a branch line on Ernest Street in said town. The Montreal Street Rly. operated a tramway which extended into Maisonneuve, and without constructing the intermediate section, proceeded to place a double set of tracks on Pius IX. Avenue, where it crossed Ernest Street, thus preventing the Terminal Co. from proceeding with the construction of its road on Ernest Street. The Board directed that the appellants should at their own cost and expense, within forty-eight hours after service of the order, remove the rails, ties, etc., laid by them at the intersection of Ernest Street, and Pius IX. Avenue, and restore the roadway as nearly as possible to its original condition.

Railway appeals. Practice and procedure.

In granting leave to appeal Mr. Justice Sedgewick held that there was grave doubt as to the jurisdiction of the Board of Railway Commissioners to make the order complained of, and whether or not the order amounted to an interference with a matter falling exclusively within the jurisdiction of the Superior Court of the Province of Quebec, and that the questions raised were of sufficient public importance to call for a decision of the Supreme Court as to the conflict of jurisdiction, and the construction of the provisions of the statute constituting the Board of Railway Commissioners and defining their powers.

The Supreme Court held, Taschereau, C.J., and Girouard, J., dissenting, that the order of the Board of Railway Commissioners was without jurisdiction.

The James Bay Rly. Co. v. *The Grand Trunk Rly. Co.*, 37 Can. S.C.R. 372.

The Board of Railway Commissioners allowed the James Bay Rly. Co. to cross under the tracks of the Grand Trunk Rly. Co. An application was made by the James Bay Co. to Idington, J., for leave to appeal to the Supreme Court on the ground that the Board had no jurisdiction to make the order in so far as it directed that the masonry work of the under crossing should be sufficient to allow of the construction of an additional track on the line of the Grand Trunk Rly.

The Supreme Court held that the question involved in the matters in dispute between the companies was one of law and not a question of the jurisdiction of the Board and that therefore there was no appeal to the Supreme Court without leave of the Board which had not been obtained in this case.

Williams v. *Grand Trunk Rly. Co.*, 36 Can. S.C.R. 321.

Held, no appeal lies to the Supreme Court of Canada from an order of a judge of that Court in chambers granting or refusing leave to appeal from a decision of the Board of Railway Commissioners.

C. P. Rly. Co. v. *James Bay Rly. Co.*, 36 Can. S.C.R. 42.

Held, on a reference concerning an application to the

Railway appeals. Practice and procedure.

Board of Railway Commissioners for Canada for the approval of deviations from plans of a proposed branch line, under section 43 of "The Railway Act, 1903," it is competent for objections as to the expiration of limitation of time to be taken by the said Board, of its own motion, or by any interested party.

G. T. Rly. Co. v. *Perrault*, 36 Can. S.C.R. 671.

Orders directing the establishment of farm crossings over railways subject to "The Railway Act, 1903," are exclusively within the jurisdiction of the Board of Railway Commissioners for Canada.

The right claimed by the plaintiff's action, instituted in 1904, to have a farm crossing established and maintained by the railway company cannot be enforced under the provisions of the Act, 16 V., c. 37, (Can.) incorporating the Grand Trunk Railway Company of Canada.

Judgment appealed from reversed, Idington, J., dissenting in regard to damages and costs.

An application to have the appeal quashed on the grounds that the cost of the establishing the crossing demanded together with the damages sought to be recovered by the plaintiff would amount to less than $2,000 and that the case did not come within the provisions of the Supreme Court Act permitting appeals from the Province of Quebec was dismissed.

Toronto v. *Grand Trunk Rly. Co.*, 37 Can. S.C.R. 232.

Sections 187 and 188 of the Railway Act, 1888, empowering the Railway Committee of the Privy Council to order any crossing over a highway of a railway subject to its jurisdiction to be protected by gates or otherwise, are *intra vires* of the Parliament of Canada, Idington, J., dissenting. (Sections 186 and 187 of the Railway Act, 1903, (now R.S., c. 37, ss. 232-3), confer similar powers on the Board of Railway Commissioners.)

An appeal also lies to the Supreme Court by leave of the Board upon any question which in the opinion of the Board is a question of law.

Railway appeals. Practice and procedure.

It will be perceived that under section 56, sub-section 3, the Board may grant leave to appeal in *in its opinion* a question of law is involved, whereas an appeal under sub-section 2 only will lie if a question of jurisdiction in fact is involved.

The first proceeding upon an appeal after leave granted under section 56, is the filing in the office of the Registrar of a case certified under the seal of the Board. The practice in this respect is substantially the same as obtains in ordinary appeals. The parties agree as to the contents of the case and the appellant has the same printed and certified to the Registrar of the Supreme Court by the Secretary of the Board of Railway Commissioners. If the parties are unable to agree, the case is settled by the Board or the chairman thereof.

S. 56, ss. 2.

Section 69 of the Supreme Court Act would appear to be applicable to appeals under this sub-section, and if leave to appeal is not applied for before sixty days have elapsed from the signing, entry or pronouncing of the judgment appealed from, there would appear to be no power either in the Supreme Court or in the Board to extend the time for bringing the appeal, and no appeal would accordingly lie in such case.

S. 56, ss. 4. As they have done with respect to the corresponding section of the Exchequer Court Act, the Commissioners for the Revision of the Statutes have redrafted the original section, 3 E. VII., c. 58, s. 44, so as to provide that the time from which notice of appeal runs shall be the date of the setting down of the appeal and not the date of the deposit. *Vide* notes to Exchequer appeals, s. 82, sub-s. 2, *supra*, p. 479.

THE WINDING-UP ACT.

R.S., c. 144.

101. Except in the North-West Territories, any person dissatisfied with an order or decision of the court or a single judge in any proceeding under this Act may,—

(*a.*) if the question to be raised on the appeal, involves future rights; or

(*b.*) if the order or decision is likely to affect other cases of a similar nature in the winding-up proceedings; or

(*c.*) if the amount involved in the appeal, exceeds five hundred dollars,

by leave of a judge of the court, appeal therefrom. R.S., c. 129, s. 74.

102. Such appeal shall lie.—

(*a.*) in Ontario, to the Court of Appeal for Ontario;

(*b.*) in Quebec, to the Court of King's Bench; and

(*c.*) in any of the other Provinces, and the Yukon Territory, to a Superior Court *in banc*. R.S., c. 129, s. 74.

103. In the North-West Territories, any person dissatisfied with an order or decision of the court or a single judge, in any proceeding under this Act may, by leave of a judge of the Supreme Court of Canada, appeal therefrom to the Supreme Court of Canada. R.S., c. 129, s. 74.

104. All appeals shall be regulated, as far as possible, according to the practice in other cases of the court appealed to, but no appeal hereinbefore authorized shall be entertained unless the appellant has, within fourteen days from the rendering of the order or decision, or within such further time as the court or judge appealed from or in the North-West Territories a judge of the Supreme

Winding-up Act. Appeals.

Court of Canada allows, taken proceedings therein to perfect his appeal, nor unless within the said time, he has made a deposit or given sufficient security, according to the practice of the court appealed to that he will duly prosecute the said appeal and pay such damages and costs as may be awarded to the respondent. R.S., c. 129, s. 74.

105. If the party appellant does not proceed with his appeal, according to this Act and the rules of practice applicable, the court appealed to, on the application of the respondent, may dismiss the appeal with or without costs. R.S., c. 129, s. 75.

106. An appeal if the amount involved therein exceeds two thousand dollars shall by leave of a judge of the Supreme Court of Canada lie to that court from,—

(*a.*) the Court of Appeal for Ontario;

(*b.*) the Court of King's Bench in Quebec; or

(*c*) a Superior Court *in banc*, in any other of the other Provinces or in the Yukon Territory. R.S., c. 129, s. 76.

Leave to appeal.

It is doubtful whether the powers of a judge in chambers conferred upon the Registrar by section 109 of the Supreme Court Act, and General Order, No. 83, extend to cases where, by another Act, jurisdiction is conferred upon a judge of the Supreme Court. Until recently, applications for leave to appeal under the Winding-up Act, section 106, were made to the Registrar in chambers, who granted or refused the applications subject to an appeal to a judge of the Court. *Allen* v. *Hanson*, 18 Can. S.C.R. 667; *Ontario Bank* v. *Chaplin*, 20 Can. S.C.R. 115; *McCaskill* v. *Common*, Cass. Prac. 2nd ed., 123.

In *Common* v. *McArthur*, 29 Can. S.C.R. 239, on the argument of the appeal, Sir Henry Strong expressed some doubts as to the power of the Registrar to grant leave to appeal in that case.

Recently, the Registrar has disclaimed jurisdiction and the applications have been made to a judge in chambers.

Winding-up Act. Appeals. *Per saltum.*

Per saltum appeals.

Re Cushing Sulphite Fibre Co., 36 Can S.C.R. 494.

Leave to appeal *per saltum* under section 26 of the Supreme Court Act, cannot be granted in a case under the Dominion Winding-up Act. An application under section 76 (now 106) of the Winding-up Act, for leave to appeal from a judgment of the Supreme Court of New Brunswick was refused where the judge had made no formal order on the petition for a winding-up order and the proceedings before the full Court were in the nature of a reference rather than of an appeal from his decision.

Time for appealing.

The general procedure relating to appeals to the Supreme Court is applicable to appeals under the Winding-up Act, and the appeal must be brought within 60 days from the signing or entry or pronouncing of the judgment appealed from, as provided in section 69 of the Supreme Court Act. As the court below has no power to grant leave to appeal, it cannot, under section 71 of the Supreme Court Act, extend the time for bringing the appeal. *Barrett* v. *Syndicat Lyonnais du Klondike*, 33 Can. S.C.R. 667; and as the Supreme Court itself has no power to allow an appeal to be brought after the 60 days have expired provided for by section 69, it follows that where the appeal is not taken within the time provided by the Supreme Court Act no power exists anywhere to allow the appeal.

Canadian Mutual Loan Co. v. *Lee*, 34 Can. S.C.R. 224.

Per Taschereau, C.J.—"The appellant now asks that, failing his maintaining his appeal as of right, we should grant him special leave under sub-section (*c*.). But that application is too late, assuming that it could be heard without notice to the respondent. More than sixty days have

Winding-up Act. Time for appealing.

elapsed since the judgment he would now appeal from; section 40 Supreme Court Act (now section 69); and under a constant jurisprudence, our power to grant special leave is gone, and the time cannot be extended for such a purpose either under section 42 (now section 71) which applies exclusively to appeals as of right, or under Rule 70 which has always been construed as not applying to delays fixed by statute. Our jurisprudence on the subject under this Ontario Act is the same that we have followed as to leave to appeal *per saltum* under section 26, sub-section 3 (now section 42).

Ontario Bank v. *Chaplin*, 20 Can. S.C.R. 115.

After this appeal had been set down for hearing in the Supreme Court, without any leave having been obtained from a judge of the Supreme Court in accordance with section 76 (now 106) of the Winding-up Act, the appellant applied and obtained from a judge of the court below an extension of time for bringing his appeal. The appellant then applied to the Registrar of the Supreme Court in chambers for leave to appeal, which was granted *nunc pro tunc*, and his order declared that all proceedings had upon the appeal should be considered as taken subsequently to the order granting leave to appeal. No objection was taken before the Supreme Court to these orders, and the appeal was heard on the merits, but the decision in *Barrett* v. *Syndicat Lyonnais du Klondike*, 33 Can. S.C.R. 667, and *Canadian Mutual* v. *Lee*, 34 Can. S.C.R. 224, above cited, shew that the order of the judge of the court below extending the time, as well as the order of the Registrar granting leave, were without jurisdiction, and this decision must be taken to be overruled.

Final judgment.

In re Cushing Sulphite Fibre Co., 37 Can. S.C.R. 173.

A judgment setting aside an order made under the Winding-up Act for the postponement of foreclosure proceedings and directing that such proceedings should be continued, is not a final judgment within the meaning of

the Supreme Court Act, and does not involve any controversy as to a pecuniary amount. Winding-up Act. Amount involved.

Amount involved.

Stephens v. *Gerth*, 24 Can. S.C.R. 716.

Appeal from a decision of the Court of Appeal for Ontario, reversing the order of the master in ordinary who settled the respondents on the list of contributories of the Ontario Express and Transportation Co. under the Winding-up Act.

An appeal will only lie to the Supreme Court in proceedings under the Winding-up Act where the amount involved is $2,000 or over. In this case there were six persons on the list by the master, one for $1,000 and the others for $900 each, and all were released from liability by the decision of the Court of Appeal from which this appeal was brought.

The Supreme Court held that the aggregate amount for which the respondents were sought to be made liable exceeding $2,000 did not give it jurisdiction, but that the position was the same as if proceedings had been taken separately against each.

Appeal quashed with costs.

Re Cushing Sulphite Fibre Co., 37 Can. S.C.R. 427.

Held, that a judgment refusing to set aside a winding-up order does not involve any amount, and leave to appeal therefrom cannot be granted. An appeal lies to the Supreme Court only in cases where monetary questions are to be considered as for instance, where the question is as to whether anyone should be placed upon the list of contributories or should be held liable or not liable *quoad* his character as a shareholder or where some such similar matter is in controversy. It is regrettable that there is no appeal to the Supreme Court upon all matters under the Winding-up Act, so that there might be a tribunal by which the practice in all the provincial courts should be made uniform.

In Schoolbred v. *Clark*, 17 Can. S.C.R. 265, no question

Winding-up Act. Amount involved.

of jurisdiction being raised, the Supreme Court entertained an appeal from the decision of the Court of Appeal for Ontario which dismissed an appeal from the judgment of Boyd, C., who made an order for winding-up the Union Fire Ins. Co., under the Dominion Winding-up Act.

Liability of liquidator for costs.

Hood v. *Eden*, 11th Dec., 1905.

In this case a motion was made to the Court to vary the minutes of judgment of the Registrar who settled the same making the costs payable out of the estate and not against the liquidator personally as asked for by the successful appellants. The master had placed the appellants upon the list of contributories and his judgment had been affirmed by the courts below. The Supreme Court dismissed the motion with costs.

Sections 101, 102, 103 and 104 of the Winding-up Act are reproductions of R.S., c. 129, s. 74, sub-ss. 1, 2, 3, and 4.

In re Cushing Sulphite Fibre Co., 37 Can. S.C.R. 427.

It was contended on behalf of the respondents on the motion to quash, that the provisions of sub-section 4 requiring that the appeal should be brought within 14 days, applied to appeals to the Supreme Court of Canada, but this contention was rejected by the Court.

Section 104 of the Winding-up Act, it will be perceived now makes it clear that the provisions of that section only apply to appeals to the provincial courts of appeal, and not to the Supreme Court.

125. The courts of the various Provinces, and the judges of the said courts respectively, shall be auxiliary to one another for the purposes of this Act; and the winding up of the business of the company or any matter or proceeding relating thereto may be transferred from one court to another with the concurrence, or by the order or orders of the two courts, or by an order of the Supreme Court of Canada. R.S., c. 129, s. 84.

CRIMINAL APPEALS

THE CRIMINAL CODE.

R.S., c. 146.

1013. An appeal from the verdict or judgment of any court or judge having jurisdiction in criminal cases, or of a magistrate proceeding under section seven hundred and seventy-seven, on the trial of any person for an indictable offence, shall lie upon the application of such person if convicted, to the Court of Appeal in the cases hereinafter provided for, and in no others.

2. Whenever the judges of the Court of Appeal are unanimous in deciding an appeal brought before the said court their decision shall be final.

3. If any of the judges dissent from the opinion of the majority, an appeal shall lie from such decision to the Supreme Court of Canada as hereinafter provided.

1024. Any person convicted of any indictable offence, whose conviction has been affirmed on an appeal taken under section ten hundred and thirteen may appeal to the Supreme Court of Canada against the affirmance of such conviction; Provided that no such appeal can be taken if the Court of Appeal is unanimous in affirming the conviction, nor unless notice of appeal in writing has been served on the Attorney General within fifteen days after such affirmance or such further time as may be allowed by the Supreme Court of Canada or a judge thereof.

2. The Supreme Court of Canada shall make such rule or order thereon, either in affirmance of the conviction or for granting a new trial, or otherwise, or for granting

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or refusing such application, as the justice of the case requires, and shall make all other necessary rules and orders for carrying such rule or order into effect.

3. Unless such appeal is brought on for hearing by the appellant at the session of the Supreme Court during which such affirmance takes place, or the session next thereafter if the said Court is not then in session, the appeal shall be held to have been abandoned, unless otherwise ordered by the Supreme Court or a judge thereof.

4. The judgment of the Supreme Court shall, in all cases be final and conclusive.

1025. Notwithstanding any royal prerogative, or any thing contained in the Interpretation Act or in the Supreme Court Act, no appeal shall be brought in any criminal case from any judgment or order of any court in Canada to any Court of Appeal or authority, by which in the United Kingdom appeals or petitions to His Majesty in Council may be heard.

Section 2 of the Criminal Code contains a definition of the following expressions:

Section 2, sub-section (2). "Attorney General" means the Attorney General or Solicitor General of any province in Canada in which any proceedings are taken under this Act, and, with respect to the Territories, the Attorney General of Canada.

Sub-section (5). "Court of Appeal" includes,—

(*a.*) in the Province of Ontario, the Court of Appeal for Ontario;

(*b.*) in the Province of Quebec, the Court of King's Bench, appeal side;

(*c.*) in the Provinces of Nova Scotia, New Brunswick and British Columbia, the Supreme Court *in banc;*

(*d.*) in the Province of Prince Edward Island, the Supreme Court of Judicature;

(*e.*) in the Province of Manitoba, the Court of Appeal; Criminal appeals.

(*f.*) in the Provinces of Alberta and Saskatchewan, the Supreme Court of the North-West Territories *in banc*, until the same is abolished, and thereafter such court as is by the legislature of the said provinces respectively substituted therefor;

(*g.*) in the Yukon Territory, the Supreme Court of Canada.

Laliberté v. *The Queen*, 1 Can. S.C.R. 117.

Held, that, since the passing of 32 & 33 V., c. 29, s. 80, repealing so much of c. 77 of Cons. Stat. L.C. as would authorize any court of the Province of Quebec to order or grant a new trial in any criminal case, and of 32 & 33 V., c. 36, repealing s. 63 of c. 77 Cons. Stats. L.C., the Court of Queen's Bench of the Province of Quebec has no power to grant a new trial, and that the Supreme Court of Canada, exercising the ordinary appellate powers of the court, under s. 38 (now 51) of 38 V., c. 11, should give the judgment which the court whose judgment is appealed from ought to have given, viz.: to reverse the judgment which has been given, and order prisoner's discharge.

Amer v. *The Queen*, 2 Can. S.C.R. 592.

In Michaelmas term, 1877, certain questions of law reserved, which arose on the trial of the appellants, were argued before the Court of Queen's Bench for Ontario, composed of Harrison, C.J., and Wilson, J., the third judge of said court being absent; and on the 4th February, 1878, the said court, composed of the same judges, delivered judgment affirming the conviction of the appellants for manslaughter.

Held, that the conviction of the Court of Queen's Bench, although affirmed but by two judges was unanimous, and therefore not appealable.

Viau v. *The Queen*, 19 Can. S.C.R. 90.

An appeal to the Supreme Court of Canada does not lie in cases where a new trial has been granted by the Court of Appeal, under the provisions of the Criminal

Criminal appeals.

Code, 1892, sections 742 to 750 inclusively (now 1013 to 1024 inclusive). The word "opinion" as used in sub-section 2 of section 742 of "The Criminal Code, 1892," must be construed as meaning a "decision" or "judgment" of the Court of Appeal in criminal cases.

Ellis v. *The Queen*, 22 Can. S.C.R. 7.

Contempt of court is a criminal proceeding and unless it comes within the provisions of the Criminal Code an appeal does not lie to the Supreme Court from a judgment in proceedings therefor.

McIntosh v. *The Queen*, 23 Can. S.C.R. 180.

Where on a criminal trial a motion for a reserved case made on two grounds is refused, and on appeal to the Court of Queen's Bench (appeal side), that Court is unanimous in affirming the decision of the trial judge as to one of such grounds, but not as to the other, an appeal to the Supreme Court can only be based on the one as to which there was dissent.

Rice v. *The King*, 32 Can. S.C.R. 480.

Appeals to the Supreme Court of Canada in criminal cases are regulated solely by the provisions of the Criminal Code.

Gosselin v. *The King*, 33 Can. S.C.R. 255.

Under the provisions of "The Canada Evidence Act, 1893," the husband or wife of a person charged with an indictable offence is not only a competent witness for or against the person accused but may also be compelled to testify. Mills, J., dissenting.

Evidence by the wife of the person accused of acts performed by her under directions of counsel sent to her by the accused to give the directions, is not a communication from the husband to his wife in respect of which the Canada Evidence Act forbids her to testify. Mills, J., dissenting.

Cf. The Canada Evidence Act, 1906, c. 145.

Clement v. *La Banque Nationale*, 33 Can. S.C.R. 343. Criminal appeals.

On a contestation of a statement of an insolvent trader by a creditor claiming a sum exceeding $2,000, the judgment appealed from condemned the appellant, under the provisions of Art. 888 C.P.Q., to three months' imprisonment for secretion of a portion of his insolvent estate, to the value of at least $6,000.

Held, that there was no pecuniary amount in controversy and there could be no appeal to the Supreme Court of Canada.

Gaynor & Green v. *United States of America*, 36 Can. S.C.R. 247.

A motion for a writ of prohibition to restrain an extradition commissioner from investigating a charge of a criminal nature upon which an application for extradition has been made is a proceeding arising out of a criminal charge within the meaning of section 24 (*g.*) of the Supreme Court Act, as amended by 54 & 55 V., c. 25, s. 2, and, in such a case no appeal lies to the Supreme Court of Canada. In *Re Woodhall* (20 Q.B.D. 832), and *Hunt* v. *The United States* (16 U.S.R. 424) referred to.

The procedure in Criminal appeals in the Supreme Court is regulated by Rules 46, 47, 48 and 49.

No printed case, or factum, is required, and no fees have to be paid to the Registrar, and no security has to be given. See section 75, sub-section 2, Supreme Court Act.

PRIVY COUNCIL ORDERS.

ORDERS

OF

HER LATE MAJESTY IN COUNCIL.

ESTABLISHING CERTAIN RULES AND REGULATIONS IN APPEALS.

AT THE COURT AT BUCKINGHAM PALACE,

The 13th day of June, 1853.

PRESENT:

THE QUEEN'S MOST EXCELLENT MAJESTY.

HIS ROYAL HIGHNESS PRINCE ALBERT.

LORD PRESIDENT.
LORD STEWARD.
DUKE OF NEWCASTLE.
DUKE OF WELLINGTON.
LORD CHAMBERLAIN.
EARL OF ABERDEEN.
EARL OF CLARENDON.
VISCOUNT PALMERSTON.
MR. HERBERT.
SIR JAMES GRAHAM, BART.

WHEREAS there was this day read at the Board a Report from the Right Honourable the Lords of the Judicial Committee of the Privy Council, dated the 30th May last past, humbly setting forth that the Lords of the Judicial Com-

Privy Council Orders.

mittee have taken into consideration the practice of the Committee with a view to greater economy, despatch, and efficiency in the appellate jurisdiction of Her Majesty in Council, and that their Lordships have agreed humbly to report to Her Majesty that it is expedient that certain changes should be made in the existing practice in Appeals, and recommending that certain Rules and Regulations therein set forth should henceforth be observed, obeyed, and carried into execution provided Her Majesty is pleased to approve the same.

HER MAJESTY, having taken the said Report into consideration, was pleased, by and with the advice of Her Privy Council, to approve thereof, and of the Rules and Regulations set forth therein in the words following, videlicet:—

I. That, any former usage or practice of Her Majesty's Privy Council notwithstanding, an Appellant who shall succeed in obtaining a reversal or material alteration of any judgment, decree, or order appealed from, shall be entitled to recover the costs of the Appeal from the Respondent, except in cases in which the Lords of the Judicial Committee may think fit otherwise to direct.

II. That the Registrar or other proper officer having the custody of records in any Court or special jurisdiction from which an Appeal is brought to Her Majesty in Council be directed to send by post, with all possible despatch,

(*a*) One certified copy of the transcript record in each cause to the Registrar of Her Majesty's Privy Council, Whitehall;

(*b*) And that all such transcripts be registered in the Privy Council Office, with the date of their arrival, the names of the parties, and the date of the sentence appealed from;

(*c*) And that such transcript be accompanied by a correct and complete index of all the papers, documents, and exhibits in the cause;

(*d*) And that the Registrar of the Court appealed from, or other proper officer of such Court, be directed to

omit from such transcript all merely formal documents, provided such omission be stated and certified in the said index of papers; Privy Council Orders. Transcript.

(*e*) And that especial care be taken not to allow any document to be set forth more than once in such transcript;

(*f*) And that no other certified copies of the record be transmitted to agents in England by or on behalf of the parties in the suit;

(*g*) And that the fees and expenses incurred and paid for the preparation of such transcript be stated and certified upon it by the Registrar or other officer preparing the same.

III. That when the record of proceedings or evidence in the cause appealed has been printed or partly printed abroad, the Registrar or other proper officer of the Court from which the Appeal is brought.

(*a*) Shall be bound to send home the same in a printed form, either wholly or so far as the same may have been printed,

(*b*) And that he do certify the same to be correct, on two copies, by signing his name on every printed sheet,*

(*c*) And by affixing the seal, if any, of the Court appealed from to these copies, with the sanction of the Court,

(*d*) And that in all cases in which the parties in Appeals shall think fit to have the proceedings printed abroad, they shall be at liberty to do so, provided they cause fifty copies of the same to be printed in folio,†

(*e*) And transmitted, at their expense, to the Registrar of the Privy Council,

(*f*) Two of which printed copies shall be certified as above by the officer of the Court appealed from;

(*g*) And in this case no further expense for copying or printing the record will be incurred or allowed in England.

IV. That on the arrival of a written transcript of appeal at the Privy Council Office, Whitehall, the Appellant or the agent of the Appellant prosecuting the same shall be at liberty.

Privy Council Orders. Transcripts printed in England.

(*a*) To call on the Registrar of the Privy Council to cause it, or such part thereof as may be necessary for the hearing of the case,

(*b*) And likewise all such parts thereof as the Respondent or his agent may require, to be printed by Her Majesty's Printer,

(*c*) Or by any other printer on the same terms,

(*d*) The Appellant or his agent engaging to pay the cost of preparing a copy for the printer at a rate not exceeding one shilling per brief sheet [now three half-pence per folio typed],

(*e*) And likewise the cost of printing such record or appendix,

(*f*) And that one hundred copies [now seventy-five] of the same be struck off,

(*g*) Whereof thirty [now twenty] copies are to be delivered to the agents on each side and forty [now thirty-five] kept for the use of the Judicial Committee;

(*h*) And that no other fees for solicitors' copies of the transcript, or for drawing the joint appendix, be henceforth allowed,

(*i*) The solicitors on both sides being allowed to have access to the original papers at the Council Office,

(*j*) And to extract or cause to be extracted and copied such parts thereof as are necessary for the preparation of the petition of appeal, at the stationer's charge not exceeding one shilling per brief sheet [now three half-pence per folio typed].

V. That a certain time be fixed within which it shall be the duty of the Appellant or his agent to make such application for the printing of the transcript,

(*a*) And that such time be within the space of six calendar months from the arrival of the transcript and the registration thereof in all matters brought by appeal from Her Majesty's colonies and plantations east of the Cape of Good Hope, or from the territories of the East India Company,

(*b*) And within the space of three months in all matters brought by appeal from any other part of Her Majesty's dominions abroad,

(*c*) And that in default of the Appellant or his agent taking effectual steps for the prosecution of the Appeal within such time or times respectively, the Appeal shall stand dismissed without further order, Privy Council Orders. Printing. Time limit.

(*d*) And that a report of the same be made to the Judicial Committee by the Registrar of the Privy Council at their Lordships' next sitting.

VI. That whenever it shall be found that the decision of a matter on appeal is likely to turn exclusively on a question of law, the agents of the parties, with the sanction of the Registrar of the Privy Council, may submit such question of law to the Lords of the Judicial Committee in the form of a Special Case, and print such parts only of the transcript as may be necessary for the discussion of the same; provided that nothing herein contained shall in any way bar or prevent the Lords of the Judicial Committee from ordering the full discussion of the whole case, if they shall so think fit; and that in order to promote such arrangements and simplification of the matter in dispute, the Registrar of the Privy Council may call the agents of the parties before him, and having heard them, and examined the transcript, may report to the Committee as to the nature of the proceedings.

And HER MAJESTY is further pleased to order, and it is hereby ordered, that the foregoing Rules and Regulations be punctually observed, obeyed, and carried into execution in all Appeals or petitions and complaints in the nature of Appeals brought to Her Majesty, or to Her heirs and successors, in Council, from Her Majesty's colonies and plantations abroad, and from the Channel Islands or the Isle of Man, and from the territories of the East India Company, whether the same be from courts of justice or from special jurisdictions, other than Appeals from Her Majesty's Courts of Vice-Admiralty, to which the said Rules are not to be applied.

Whereof the Judges and Officers of Her Majesty's Courts of Justice abroad, and the Judges and Officers of the Superior Courts of the East India Company, and all other persons whom it may concern, are to take notice, and govern themselves accordingly.

W. L. BATHURST.

Privy Council Orders. Power to dispense with.

AT THE COURT AT BUCKINGHAM PALACE,

The 31st day of March, 1855.

PRESENT:

THE QUEEN'S MOST EXCELLENT MAJESTY IN COUNCIL.

WHEREAS doubts have arisen with reference to the power of the Judicial Committee of the Privy Council to suspend or relax, under certain special circumstances, the regulations in appeal causes established by Her Majesty's Order in Council of the 13th of June, 1853:

HER MAJESTY, by and with the advice of Her Privy Council, is pleased to order and

IT IS HEREBY ORDERED, That in Appeal Cases in which a Petition of Appeal to Her Majesty shall have been lodged, and referred by Her Majesty to the Judicial Committee, the said regulations shall be subject to any order or direction which, in the opinion of the Lords of the Judicial Committee, the justice of any particular case may seem to require.

C. C. GREVILLE.

ORDER IN COUNCIL.

FOR THE REGULATION OF THE FORM AND TYPE TO BE USED IN THE PRINTING OF THE CASES, RECORDS, AND PROCEEDINGS IN APPEALS AND OTHER MATTERS PENDING BEFORE THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

AT THE COURT AT WINDSOR CASTLE,

The 24th day of March, 1871.

Privy Council Orders. Type, etc.

PRESENT:

THE QUEEN'S MOST EXCELLENT MAJESTY IN COUNCIL.

WHEREAS there was this day read at the Board a Representation from the Lords of the Judicial Committee of the Privy Council, dated the 20th January, 1871, humbly recommending to Her Majesty in Council that certain Rules be established by the authority of Her Majesty, by and with the advice of Her Privy Council, to be observed in the form and type used in the printing of all Cases, Records, and other proceedings in Appeals and other matters pending before the Judicial Committee of the Privy Council:

HER MAJESTY having taken the said Representation into consideration, and the Schedule of Rules hereunto annexed, was pleased, by and with the advice of Her Privy Council, to approve thereof, and to order, and it is hereby ordered, that the same be punctually observed, obeyed, and carried into execution:

Whereof the Judges and Officers of all the Courts of Justice in Her Majesty's dominions from which an Appeal lies to Her Majesty in Council, and all other persons whom it may concern, are to take notice and govern themselves accordingly.

ARTHUR HELPS.

SCHEDULE ANNEXED TO THE FOREGOING ORDER.

I. All Cases, Records, and other proceedings in Appeals, or other matters pending before the Judicial Committee of the Privy Council, are henceforth to be printed in the

Privy Council Orders. Type, etc.

form known as DEMY QUARTO, and not in demy folio, as hath heretofore been used.

II. The size of the paper used is to be such that the sheet, when folded, will be eleven inches in height and eight inches and a half in width.

III. The type to be used in the text is to be Pica type, but Long Primer is to be used in printing accounts, tabular matter, and notes.

IV. The number of lines in each page of Pica type is to be forty seven, each line being five inches and three quarters or 146 millimetres in length.

V. The foregoing Rules do not apply to cases now pending in which the printing of the Record is begun before the receipt of this Order, but in all cases printed after the receipt of this Order the form and type herein prescribed are to be used exclusively.

VI. The price in England for printing 75 copies in the form herein established is to be thirty-eight shillings per sheet (eight pages) of pica with marginal notes, not including corrections, tabular matter, and other extras.

VII. The form of paper and type of the present Order in Council [with the pages hereunto annexed*], are to serve as a specimen sheet or pattern for the printing of the proceedings before the Judicial Committee of the Privy Council.

A. H.

*Omitted in this reprint.

AT THE COURT AT WINDSOR CASTLE.

The 26th day of June, 1873.

PRESENT:

THE QUEEN'S MOST EXCELLENT MAJESTY IN COUNCIL.

WHEREAS in many Appeals now pending before Her Majesty in Council no effectual steps have been taken by the parties or their agents to set down their cases for hear-

ing, although more than twelve months have elapsed since the arrival and registration of the transcript of appeal in this country, and it is expedient to make further provision in that behalf. Privy Council Orders. Speedy hearing ordered.

HER MAJESTY, by and with the advice of Her Privy Council, and upon a recommendation of the Lords of the Judicial Committee of the Privy Council, is pleased to order, and it is hereby ordered, that the solicitors or agents for the party appellant in all such Appeals now pending before Her Majesty in Council are hereby required to take effectual steps to set down their cases for hearing within six months from the date of this Order, and in all other Appeals to Her Majesty in Council within a period not exceeding twelve months from the date of the arrival and registration of the transcript in this country.

And HER MAJESTY is further pleased to order, and it is hereby ordered, that it shall be the duty of the Registrar of the Privy Council to report to the Lords of the Judicial Committee the names of the parties and dates of the Decrees in Appeals in which no effectual steps have been taken within the aforesaid periods of time to set down the case for hearing; and the Lords of the Judicial Committee of the Privy Council shall be at liberty to call upon the Appellant or his agent in such cases to shew cause why the said Appeal or Appeals should not be dismissed for non-prosecution, and (if they shall so think fit) to recommend to Her Majesty the dismissal of any such Appeal, or to give such directions therein as the justice of the case may require.

And HER MAJESTY is further pleased to order that nothing in the present Order shall prevent the dismissal of an Appeal under the 5th of the Rules approved by Her Majesty on the 13th of June, 1853, in cases to which that Rule is applicable.

Whereof the Governors of Her Majesty's Plantations and Dominions abroad, and the Judges or Officers of Her Majesty's Courts of Justice from which an Appeal lies to Her Majesty in Council, and all other persons whom it may concern, are to take notice and govern themselves accordingly.

35 ARTHUR HELPS.

Privy Council Orders. Rules.

AT THE COURT AT WINDSOR,

The 6th day of March, 1896.

PRESENT:

THE QUEEN'S MOST EXCELLENT MAJESTY IN COUNCIL.

WHEREAS there was this day read at the Board a Representation from the Lords of the Judicial Committee of the Privy Council, in the words following, viz.:—

> "The Lords of the Judicial Committee of the Privy Council have the honour, with their humble duty to Your Majesty, to represent that it would be advisable that the Rules, established by Your Majesty's Order in Council of the 31st March, 1870, should be amended; and their lordships beg leave to recommend that Your Majesty will be graciously pleased to approve the Rules set forth in the Schedule hereunto annexed, and to declare that the said Rules shall be observed by all Proctors, Solicitors, Attorneys, Agents, or other persons employed in the conduct of Appeals, Petitions, or other matters pending before Her Majesty in Council."

HER MAJESTY having taken the said Representation and the Schedule of Rules annexed into consideration, was pleased, by and with the advice of Her Privy Council, to approve thereof, and to order, as it is hereby ordered, that the said Rules (copy of which is hereunto annexed) be punctually observed, obeyed, and carried into execution, in lieu of the Rules established by the Order of Her Majesty in Council of the 31st March, 1870.

C. L. PEEL.

SCHEDULE annexed to the foregoing Order.

Privy Council Orders. Declaration of Practitioners.

RULES.

I. Every Proctor, Solicitor, or Agent admitted to practise before Her Majesty's Most Honourable Privy Council, or any of the Committees thereof, shall subscribe a Declaration to be enrolled in the Privy Council Office, engaging to observe and obey the Rules, Regulations, Orders, and Practice of the Privy Council; and also to pay and discharge, from time to time when the same shall be demanded, all fees or charges due and payable upon any matter pending before Her Majesty in Council; and no person shall be admitted to practise, or allowed to continue to practise, before the Privy Council, without having subscribed such Declaration in the following terms:—

FORM OF DECLARATION.

We, the Undersigned, do hereby declare, that we desire and intend to practise as Solicitors or Agents in Appeals and other matters pending before Her Majesty in Council; and we severally and respectively do hereby engage to observe, submit to, perform, and abide by all and every the Orders, Rules, Regulations, and Practise of Her Majesty's Most Honourable Privy Council and the Committees thereof now in force, or hereafter from time to time to be made; and also to pay and discharge, from time to time, when the same shall be demanded, all fees, charges, and sums of money due and payable in respect of any Appeal, Petition, or other matter in and upon which we shall severally and respectively appear as such Solicitors or Agents.

II. Every Proctor or Solicitor practising in London shall be allowed to subscribe the foregoing Declaration, and to practise in the Privy Council, upon the production of his Certificate for the current year; and no fee shall be payable by him on the enrolment of his signature to the foregoing Declaration.

Privy Council Orders. Declaration of Practitioners.

III. Persons not being certificated London Solicitors, but having been duly admitted to practise as Solicitors by the High Courts of Judicature in England and Ireland, or by the Court of Session in Scotland, or by the High Courts in any of Her Majesty's Dominions respectively, may apply, by petition, to the Lords of the Committee of the Privy Council, for leave to be admitted to practise before such Committee; and such persons may, if the Lords of the Committee please, be admitted to practise by an Order of their Lordships, for such periods and under such conditions as their Lordships are pleased to direct.

IV. Any Proctor, Solicitor, Agent, or other person practising before the Privy Council, who shall wilfully act in violation of the Rules and Practice of the Privy Council, or of any rules prescribed by the authority of Her Majesty, or of the Lords of the Council, or who shall misconduct himself in prosecuting proceedings before the Privy Council, or any Committee thereof, or who shall refuse to omit to pay the Council Office fees or charges payable from him when demanded, shall be liable to an absolute or temporary prohibition to practise before the Privy Council, by the authority of the Lords of the Judicial Committee, of the Privy Council, upon cause shewn at their Lordships' Bar.

AT THE COURT AT BUCKINGHAM PALACE.

The 20th day of March, 1905.

PRESENT:

THE KING'S MOST EXCELLENT MAJESTY.
ARCHBISHOP OF CANTERBURY.
LORD PRESIDENT.
LORD SUFFIELD.
SIR WILLIAM WALROND.

WHEREAS there was this day read at the Board a representation from the Judicial Committee of the Privy

Council, dated the 16th day of March, 1905, and in the words following, viz.:— Privy Council Orders.

"The Lords of the Judicial Committee having taken into consideration the practice under which an Appeal to Your Majesty in Council cannot in the absence of a special Order in that behalf made by their Lordships be set down for hearing *ex parte* as against a Respondent to the Appeal who has failed to enter an Appearance thereto in the Registry of the Privy Council unless the Appellant shall have previously obtained from their Lordships two successive Orders commonly known as 'Appearance Orders' requiring the said Respondent to enter an Appearance to the Appeal within the periods by the said Orders respectively limited and shall have duly published the said Orders by affixing the same on the Royal Exchange and elsewhere in the usual manner and unless the said periods so limited by the said Orders as aforesaid shall have expired. And being of opinion that the said practice is inconvenient and ought in certain cases and subject to certain conditions to be dispensed with. Their Lordships do this day agree humbly to recommend to Your Majesty to order as follows, that is to say:— *Ex parte* hearing.

"1. That where a Respondent to an Appeal to Your Majesty in Council whose name has been entered on the Record of the Appeal by the Court admitting the Appeal fails to enter an Appearance to the Appeal in the Registry of the Privy Council and it appears from the Transcript Record in the Appeal or from a Certificate of the Officer of the Court transmitting the said Transcript Record to the Registrar of the Privy Council that the said Respondent has received notice of the Order admitting the Appeal to Your Majesty in Council or of the Order of Your Majesty in Council giving the Appellant special leave to appeal to Your Majesty in Council (as the case may be) and has also received notice of the dispatch of the said Transcript Record to the Registrar of the Privy Council the Appellant shall not subject to any direction by their Lordships to the contrary be required to take out Appearance Orders calling upon the said Respondent to enter an Appearance in the Appeal and the Appeal may subject

Privy Council Orders. *Ex parte* hearing.

as aforesaid be set down for hearing *ex parte* as against the said Respondent at any time after the expiration of three calendar months from the date of the lodging of the Appellant's Petition of Appeal in like manner as if the said Appearance Orders had been taken out by the Appellant and the times thereby respectively limited for the said Respondent to enter an Appearance had expired.

"2. That where a Respondent to an Appeal to Your Majesty in Council whose name has been brought on the Record of the Appeal by an Order of Your Majesty in Council fails to enter an Appearance to the Appeal in the Registry of the Privy Council and it appears from the Transcript Record or from a Supplementary Record in the Appeal or from a Certificate of the Officer of the Court transmitting the said Transcript Record or Supplementary Record to the Registrar of the Privy Council that the said Respondent has received due notice of any intended application to Your Majesty in Council to bring him on the Record as a Respondent to the Appeal the Appellant shall not subject to any direction by their Lordships to the contrary be required to take out Appearance Orders calling upon the said Respondent to enter an Appearance in the Appeal, and the Appeal may subject as aforesaid be set down for hearing *ex parte* as against the said Respondent at any time after the expiration of three calendar months from the date on which the said Respondent shall have been served with a copy of Your Majesty's Order in Council bringing him on the Record of the Appeal in like manner as if the said Appearance Orders had been taken out by the Appellant and the times thereby respectively limited for the said Respondent to enter an Appearance had expired.

"3. That nothing herein contained shall be deemed to affect the power of their Lordships to order the Appellant in an Appeal referred by Your Majesty to their Lordships to take out Appearance Orders or to be excused from taking out Appearance Orders in any case in which their Lordships shall think fit so to order and generally to give such directions as to the time at which and the conditions on which an Appeal so referred as aforesaid shall be set

down as in the opinion of their Lordships the circumstances of the case may require. Privy Council Orders.

"4. That this Order shall apply to all Appeals in which the Petition of Appeal shall be lodged after the date hereof." *Ex parte* hearing.

HIS MAJESTY having taken the said representation into consideration, was pleased, by and with the advice of His Privy Council, to approve thereof, and of what is therein recommended. Whereof all persons whom it may concern are to take notice, and govern themselves accordingly.

A. W. FITZROY.

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