THE RULES

OF THE

SUPREME COURT OF CANADA

PROMULGATED JUNE 19TH, 1907, WITH NOTES FORMS AND PRECEDENTS

BY

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ONE OF HIS MAJESTY'S COUNSEL
AND
REGISTRAR OF THE COURT

TORONTO:
Arthur Poole & Co., Law Publishers
1907

micat inter omnes
Julium sidus, velut inter ignes
Luna minores.

Hor Carm.

TO

THE RIGHT HONOURABLE SIR WILFRID LAURIER, P.C., G.C.M.G.

PREMIER OF CANADA,

THIS WORK

WITH HIS PERMISSION

IS

MOST RESPECTFULLY DEDICATED.

PREFACE

In June last the Judges of the Supreme Court of Canada promulgated a new body of Rules in substitution for all the General Orders and Rules of the Court then in existence, to take effect from the first of September following, as regards all appeals in which the security should be allowed after the last mentioned date.

These Rules are 143 in number, while the old Rules and Orders only numbered 88. The new Rules, in addition to re-enacting with alterations the old Rules, embody a large number of regulations for which no similar provision heretofore existed.

Having been entrusted by the Judges with the preparation of the first draft of the Rules, which necessarily required a careful consideration of their effect, and in addition it being obviously desirable that a large number of new forms should be provided in connection with the new Rules, the writer has felt justified in presenting to the members of the legal profession this volume, which, in addition to information furnished respecting appeals to the Supreme Court, it is hoped will be of special value in cases where the solicitors agree that the appeal must ultimately go to the Privy Council, and are desirous of printing the case and factums in the Supreme Court to conform to the practice of the Privy Council, so that it may be unnecessary to do more than add to the case the judgment of the Supreme Court and the opinions of its judges. To accomplish this there will be found in the Appendix, forms of case and factums printed, both as to type, style and material, in the manner required in an appeal to His Majesty in Council, and full information is also given in the text with respect to such appeals.

E. R. CAMERON.

OTTAWA, November 1st, 1907.

INDEX TO CASES CITED.

RULES
OF THE
SUPREME COURT
OF CANADA

ORDER AFFIRMING JURISDICTION.

R. 1. Order affirming jurisdiction. Appellant's application

RULE 1. Any party proposing to appeal to the Supreme Court, may at the time of his application to have the security approved, when the application is made in the Supreme Court, and in the Yukon Territory within twenty days, and in all other cases within ten days after the security has been approved by the court below, or has been deposited in Court as provided by the Act giving an appeal, or within such further time as may be allowed, apply to a Judge of the Supreme Court in Chambers, on notice, for an order affirming the jurisdiction of the Court to hear the appeal.

This and the four following Rules introduce an entirely new procedure, with the object of preventing the expenditure of large costs in printing the case and retaining counsel where the Court has no jurisdiction to hear the appeal. Where the jurisdiction of a Court is limited by statute, it is impossible to frame language so clear and precise that no question of its extent can arise. Under the old practice, if the appellant was in doubt as to the jurisdiction of the Court, no means were available for settling the question until the point was taken by the respondent or the Court. In the majority of cases, the motion to quash was not heard until the appeal was ripe for hearing, and if the motion was granted, as the bulk of the costs of the appeal had then been incurred, these costs were felt to have been entirely unnecessary and a useless expenditure of money, as they were incurred for the purpose only of the appeal being heard on the merits.

R. 1. Order affirming jurisdiction. Appellant's application.

S. 75 of the Supreme Court Act provides that the order allowing the security for an appeal to the Supreme Court may be made either by the court below or the Supreme Court.

By this Rule, where the application is made in the Supreme Court, the appellant is entitled to serve a notice of motion, returnable before the Registrar along with his application to that officer to have his security approved, asking for an order affirming the jurisdiction of the Court to hear the appeal.

Where the motion to approve the security is made in the court below, the application in the Supreme Court to affirm the jurisdiction of the Court to hear the appeal must be made within 20 days in the Yukon Territory, and in all other cases, within 10 days, after the security has been approved by the court below.

It will be perceived that the application on behalf of the appellant is not compulsory, and where the question of jurisdiction is clear, it is not presumed that any application will be made.

The person penalized for not having the question of jurisdiction promptly disposed of, is the respondent, as will be seen by the provisions of Rule 4.

The object of Rule 1 is simply to afford the appellant, when in doubt, an opportunity of speedily settling the question of jurisdiction.

It should be remembered that the expression "Judge of the Supreme Court in Chambers", or "Judge in Chambers", throughout the Rules, includes the Registrar exercising the jurisdiction of a Judge in Chambers under Rules 82 et seq., while the expression "Judge of the Supreme Court", or "Judge", always means any Judge of the Supreme Court, and does not include the Registrar. Vide Rule 142.

All motions to a Judge in Chambers under this and the next four following Rules, should be made to the Registrar sitting as a Judge in Chambers. The object of Rule 82 is to dispense with Chamber applications being made to Judges of the Court unless some special reason exists therefor.

R. 1. Order affirming jurisdiction. Appellant's application.

It must not be overlooked that s. 69 of the Supreme Court Act requires that all appeals shall be brought within 60 days from the signing, entry or pronouncing of the judgment appealed from, and that this limitation of time can only be extended by a Judge of the Court appealed from, so that where the appellant proposes applying in the Supreme Court to have his security approved, he must make his application returnable within the 60 days. If the motion is heard within the 60 days, and is taken *en délibéré*, the Supreme Court has held (Attorney-General v. Scott, 34 Can. S. C. R. 282), that the appellant could not be prejudiced by the delay of the Judge in deciding upon the application, following previous decisions of the Court.

If it is impossible to make the application in the Supreme Court to approve the security within the 60 days, then the appellant can apply in the court below, coupling his application with one to extend the time, under s. 71, for bringing the appeal. It has been held that the appellant cannot obtain the extension of time for bringing the appeal in the court below, and then apply in the Supreme Court to have his security approved. *Vide* Walmsley v. Griffith, 13 Can. S. C. R. 434; News Printing Co. v. Macrae, 26 Can. S. C. R. 695: Barrett v. Syndicat Lyonais du Klondyke, 33 Can. S. C. R. 667.

A form of Notice of Appeal will be found in the Appendix, infra p. 286.

A form of Notice of Motion to allow security will be found in the Appendix, infra p. 287.

A form of Notice of Motion by the appellant for an order affirming the jurisdiction will be found in the Appendix, infra p. 288.

A form of Order allowing the security will be found in the Appendix, infra p. 289.

And a form of Order affirming the jurisdiction of the Court will be found in the Appendix, infra p. 290.

A form of Bond for security for costs will be found in the Appendix, infra p. 296.

A form of Affidavit of execution of Bond will be found in the Appendix, infra p. 298.

A form of Affidavit of justification of sureties will be found in the Appendix, infra p. 298.

R. 2. Jurisdiction. Respondent's motion against.

RULE 2. When the application to allow the security is made in the Supreme Court, the respondent may, on the return of the motion, move to have the security refused on the ground that the Court has no jurisdiction to hear the appeal.

The object of this Rule is to provide a convenient method of questioning the jurisdiction of the Court where the application to approve the security is made to the Registrar. To take advantage of this Rule, the respondent should promptly after receiving the notice of motion to allow the security, serve a notice of motion upon the appellant's solicitor to the effect that, upon the hearing of the appellant's motion, he will move to have the security refused on the ground that the Court has no jurisdiction to hear the appeal.

In motions made by the respondent under this Rule, it may not be possible to give the four clear days' notice of motion ordinarily required under Rule 54, and it will be sufficient to serve notice of motion as promptly as he reasonably can. If the appellant has not time to answer the respondent's motion, the motions will be enlarged by the Registrar.

A Form of Notice of Motion by the respondent excepting to the jurisdiction of the Court, will be found in the Appendix, infra p. 291.

R. 3 Jurisdiction. Appeal from Order.

RULE 3. Any party dissatisfied with the order made upon any such motion, may appeal therefrom to the Court, and upon a notice of such appeal being served, all further procceedings in the main appeal shall be stayed until after the hearing of the said motion, unless a Judge of the Supreme Court shall otherwise order.

This Rule provides for an appeal from the Registrar to the Court by any party dissatisfied with the Registrar's decision on the question of jurisdiction. The party so dissatisfied should promptly serve a notice of appeal upon the opposite party, as

this will have the effect of staying all further proceedings until the question of jurisdiction has been disposed of by the Court. R. 3. Jurisdiction. Appeal from Order.

This motion should be served at least four clear days before the day of hearing, and should be brought on to be heard at once, if the Court is then, and will be on the return of the motion, in session, and in all other cases on the first day of the next ensuing session of the Court.

If the party against whom the appeal is being taken is of the opinion that the motion is made for the purpose of delay or is frivolous and without merit, he may serve a notice of motion at least four clear days before the return day thereof and returnable before a Judge sitting in Chambers, asking that the motion by way of appeal should not operate as a stay of proceedings. If the Judge grants this application, it will be the duty of the appellant to proceed with the printing of his case and factum, and to have the appeal ripe for hearing at the session for which it should be set down in accordance with the Rules. Rule 88 provides that appeals from the Registrar to a judge shall be brought on for hearing on a Monday, and a list is prepared at the beginning of the year fixing the Judges' Rota which can always be obtained from the Registrar's Clerk, so that the solicitor launching a motion to remove the stay of proceedings will know the Judge before whom the motion should be made.

Although the Rules provide for motions to a Judge being made on Monday, if the parties desire, the Registrar is generally able to obtain some other day more convenient to counsel on which the motion can be brought on to be heard.

A form of Notice of Appeal from the Registrar's order in matters of jurisdiction, will be jound in the Appendix, infra p. 291.

A form of Notice of Motion to remove stay of proceedings will be found in the Appendix, infra p. 292.

A form of Order removing stay of proceedings, will be found in the Appendix, infra p. 293.

RULE 4. When the appellant has not, within the time above limited, applied to have the jurisdiction of the Court

R. 4. Jurisdiction. Motion to quash.

affirmed, any respondent who desires to object to the jurisdiction of the Court to hear the appeal shall, in the Yukon Territory within thirty days, and in all other cases within fifteen days after the security has been approved by the court below, or within such time as may be extended by a Judge of the Supreme Court in Chambers, serve the appellant, his solicitor or agent, with a notice of motion to quash the appeal returnable at the then present, or on the first day of the next ensuing Session of the Court, and in default thereof, in the event of the appeal being quashed the respondent may, in the discretion of the Court, be ordered to pay all or part of the costs of the appeal.

Rule 1 provided for an application being made by the appellant to determine the question of jurisdiction. Rule 2 made a special provision for the respondent contesting the jurisdiction, where the appellant applied to the Registrar to have the security approved. Rule 4, on the other hand, provides for the respondent raising the question of jurisdiction in the Supreme Court where the security for the appellants appeal has been approved by the court below. As the Supreme Court alone has power to determine its own jurisdiction, it is not within the scope of the authority vested in the court below, when hearing an application to approve the security, to determine whether or not the case is one in which an appeal will lie. That power is reserved solely for the Supreme Court itself.

The function of the court below is simply to determine whether, assuming the case is one in which an appeal lies, the security offered is sufficient and proper within the provisions of s. 75 of the Supreme Court Act.

In the past it has been usual for the Judges below in hearing applications to approve the security, to hear argument upon the jurisdiction of the Supreme Court, and when of the opinion that there was no jurisdiction, to refuse to allow the security. Its determination proved futile, because the appellant immediately renewed his application to have his security approved

to the Registrar of the Supreme Court, who held himself bound to deal with the motion without regard to the view of the Judge below, and, on the other hand, the fact that the Judge below held that the case was appealable, and allowed the security, did not weigh with the Supreme Court if at the hearing, or upon a special motion to quash, the matter of its jurisdiction was raised before the Court.

R. 4. Jurisdiction. Motion to quash.

Rule 4 requires the respondent, if he intends to dispute the jurisdiction of the Supreme Court, to serve, in the Yukon Territory within 30 days, and in all other cases within 15 days after the security has been approved by the court below, a notice of motion to quash the appeal at the then present session of the Court if the Court will be in session four clear days after the service of the notice of motion, or returnable on the first day of the next ensuing session, or the earliest day thereafter which will permit of a four clear days' notice of motion being served.

The latter part of this Rule places primarily the obligation upon the respondent to move to quash the appeal at the earliest moment possible, as in default of his doing so, he may, in the discretion of the Court, even if he succeeds in quashing the appeal at the hearing, lose his own costs of the motion, and also be ordered to pay the costs which the appellant has incurred by reason of the motion to quash not having been made promptly.

A form of Notice of Motion to Quash for want of jurisdiction, will be found in the Appendix, infra p. 294.

R. 5. Jurisdiction. Stay of Proceedings.

RULE 5. Upon service of a notice of motion to quash an appeal for want of jurisdiction as hereinbefore provided, all further proceedings in the appeal shall be stayed until the motion has been disposed of, unless a Judge of the Supreme Court shall otherwise order.

This Rule provides for a stay of proceedings where a motion to quash has been made by the respondent, with a similar provision to that contained in Rule 2, permitting an application

R. 5. Jurisdiction. Stay of Proceedings.

to a Judge of the Court to remove the stay and to require the appellant to proceed in perfecting his appeal, where, in the opinion of the Judge, the grounds for the appeal are not of sufficient weight to warrant a delay in the hearing of the main appeal.

A form of Notice of Motion to remove stay of proceedings will be found in the Appendix, infra p. 292.

CASE TO CONTAIN REASONS FOR JUDGMENT.

RULE 6. The case provided for by the Supreme Court Act certified under the seal of the Court appealed from, shall be filed in the office of the Registrar, and in addition to the proceedings mentioned in said section, 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 a certificate signed by the clerk of such court or courts or an affidavit that such reasons cannot be procured, and stating the efforts made to obtain the same.

R. 6. Case. Contents. Reasons.

This Rule is adapted from old Rules 1 and 2, which read as follows :

"Rule 1. 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.

"Rule 2. 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."

In so far as old Rule 1 implied that the Supreme Court did not exercise jurisdiction until the case had been filed, it was incorrect. The following matters arising prior to the settlement of the case have always been dealt with by the Court :

(a) Applications for leave to appeal under s. 37, ss. c, of the Supreme Court Act which gave an appeal in the Provinces of Alberta and Saskatchewan, and in the North West Territories prior to the organization of these provinces, in cases where the action, suit, cause, matter, or other judicial proceeding, did not originate in a Superior Court. R. 6. Case. Contents. Reasons.

(b) Applications for leave to appeal per saltum under s. 42 of the Act.

(c) Applications for leave to appeal under s. 48, ss. e.

(d) Applications to allow security under s. 75.

(e) Motions to dismiss under s. 82.

The case referred to in this Rule is that described in s. 73 of the Act, which reads as follows :

"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."

Provisions for a certificate as to security will be found in Rule 10 infra.

A form of Certificate as to settlement of case, as to security and as to reasons for judgment will be found in the Appendix, infra p. 295.

Heretofore, it has not been the practice of the Registrar or Clerk of the court below, to include in his certificate as to the opinions or reasons for judgment any reference to the judgments pronounced in the lower courts, although this Rule and old Rule 2 required that the case should contain the opinions of all the Judges in the court or courts below. This defect in the certificate was not ordinarily objected to by the Registrar, because it was recognized that the Registrar of the Court of Appeal might have difficulty in giving any certificate as to the reasons of the Judges of the Superior Court. This omission, hereafter, will not be countenanced, and it will be the duty of the appellant's solicitor to furnish the Registrar of the Court of Appeal with a certificate from the Registrar or Clerk of the

R. 6. Case. Contents. Reasons.

court below, with reference to the opinions or reasons of the Judges of such Court, so that such certificate may be included in the certificate of the Registrar of the Court of Appeal.

A form of Certificate of the Registrar or Clerk of the Superior Court will be found in the Appendix, infra p. 296.

Old Rule 2 provided that where reasons were not procured, an affidavit showing the efforts made to procure them should be obtained. The new Rule, it will be seen, primarily requires that a certificate should be obtained from the Registrar or Clerk of the Court appealed from, and it is preferable that the explanation of the absence of reasons should not be by affidavit where it is possible to obtain a certificate.

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 could be obtained in time to be included when the case was printed.

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.

Reasons for judgment prepared after an appeal is launched, and with a view to the appeal, should not form part of the printed case.

Mayhew v. *Stone*, 26 Can. S. C. R. 58. Per Tashereau, 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.

But where the reasons for judgment were delivered after the taking of the appeal, and the delay is satisfactorily explained, they will be received.

Canadian Fire Ins. Co. v. *Robinson*, 9th Oct., 1901, Cout. Dig., 1105. R. 6. Case. Contents. Reasons.

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 it was a correct copy and that, owing to the Judge's absence from Canada, he 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.

Contents of Case.

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.

As to dispensing with printing, *vide* notes to Rule 14, infra.

Exchequer Court and Railway Commissioners.

In appeals from the Exchequer Court and the Board of Railway Commissioners, the statute in such cases provides that the security shall be deposited in the Supreme Court, and thereupon the Registrar shall set the appeal down for hearing at the nearest convenient time. In these appeals, therefore, the certificate as to the settlement of case contains no reference to the security.

R. 7. Case. Contents. Judgments.

CASE TO CONTAIN COPY OF JUDGMENTS BELOW AND ANY ORDER ENLARGING TIME.

RULE 7. The case shall also contain a copy of all judgments made in the courts below, and a copy of any order which may have been made by the court below, or any Judge thereof, enlarging the time for appealing.

The first part of this Rule which provides that the case shall contain a copy of all judgments made in the courts below, is new, although it has always been the practice of the Court, except under special circumstances, to refuse to hear an appeal where the case did not contain the formal judgments in the court or courts 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.

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.

R. 7. Case. Contents. Judgments.

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.

St. Stephen v. *County of 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.

The latter part of the Rule, which is a reproduction of old Rule 3, is necessary because by s. 69 of the Supreme Court Act, the Supreme Court only has jurisdiction where the appeal is brought within 60 days, unless the time has been extended under s. 71 by the court below or some Judge thereof.

CASE MAY BE REMITTED TO COURT BELOW

R. 8. Case. Correction of.

RULE 8. The Court, or a Judge of the Supreme Court in Chambers, may order the case to be remitted to the court below for correction, or in order that it may be made more complete by the addition thereto of further matter.

R. 8. Case. Correction of.

Correction of Case.

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.

The appeal must be heard upon the case as settled and certified to the Supreme Court.

Confederation Life Ass. v. *O'Donnell*, 10 Can. S. C. R. 93.

At 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."

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.

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.

Providence 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. R. 8. Case. Correction of.

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 considered, 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*, 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

R. 8. Case, Correction of.

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.

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.

MOTION TO DISMISS FOR DELAY.

R. 9. Filing Case.

RULE 9. If the appellant does not file his case in appeal with the Registrar within forty days after the security required by the Act shall be allowed, he shall be considered as not duly prosecuting his appeal, and the respondent may move to dismiss the appeal pursuant to the provisions of the Act in that behalf.

This is a reproduction of old Rule 5, except that the period allowed for filing the case is extended from 30 to 40 days. This additional time has become necessary owing to the provisions for determining the jurisdiction of the Court under the first five rules. It may happen that in cases where a motion to affirm the jurisdiction is made, that the 40 days by this Rule provided may prove insufficient, but the Registrar has power, in a proper case, under Rule 108, to extend the time.

Reading Rules 9 and 13 together, it is clear that the case certified to the Registrar of the Supreme Court by the Registrar of the court below, is intended to be a printed case, but the Rule has been relaxed in appeals from the Yukon Territory owing to the difficulty of complying with it, and it has been held that instead of a printed case, it will be sufficient if a written or typewritten case is certified to the Registrar of the Supreme Court by the Clerk of the Territorial Court.

Section 82 of the Supreme Court 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."

The immediate consequence of failing to file the case with the Registrar of the Supreme Court within the 40 days after security has been allowed, is that the appellant lays himself

R. 9. Filing Case.

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 is unwilling to ask the consent of the respondent to any extension of time, he must apply before the expiry of the 40 days 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 54, 55, 56 and 57.

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, Cout. Dig. 1111.

The Court has refused to interfere with the discretion exercised by a Judge in Chambers.

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. 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. 682, No. 72; Cass. Prac. 75.

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.

CERTIFICATE OF SECURITY GIVEN.

R. 10. Security. Certificate from Court below.

RULE 10. 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 said Act, and a copy of any bond or other instrument by which security may have been given, shall be annexed to the certificate.

A form of Certificate as to Security will be found in the Appendix, infra p. 295, where it forms part of the certificate as to settlement of the case.

Vide notes to Rule 6, supra p. 8.

S. 75 of the Supreme Court provides as follows :

"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*."

A form of Bond for Security for costs will be found in the Appendix, infra p. 296.

A form of Affidavit of Execution will be found in the Appendix, infra p. 298.

A form of Affidavit of Justification will be found in the Appendix, infra p. 298.

R. 10. Security. Certificate from Court below

The provisions of this section must be strictly complied with.

Holsten v. *Cockburn*, 1904.

In this case the appellants, on consent of the respondents, 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 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 Railway 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 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 section 75. R. 10 Security. Certificate from Court below.

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 10 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

R. 10. Security. Certificate from Court below.

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.

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).

R. 10. Security. Certificate from Court below.

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 furnishing 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. & 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. & A. Co., 18 P. R. 413, followed.

R. 10. Security. Certificate from Court below.

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 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, 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 (now 75), but also under section 47 (e) (now 76 (d)), 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." R. 10. Security. Certificate from Court below.

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 should be made in Chambers, and on motion, 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

R. 10. Security. Certificate from Court below.

for security under this section given in a suit in which it was a party. 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 (now 75). 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 or 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 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.

R. 10. Security. Certificate from Court below.

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.

Under Rule 58 there may be a *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 in the Appendix, infra p. 299.

The Interpretation Act, R. S., c. 1, s. 34, ss. (27), reads of 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.

R. 10. Security Certificate from Court below.

Exchequer Court and Railway Commissioners.

As stated in the notes to Rule 6, in appeals from the Exchequer Court and Board of Railway Commissioners, the statute provides that the security shall be deposited in the Supreme Court and thereupon the Registrar shall set the appear down for hearing at the nearest convenient time. In these appeals, therefore, the certificate as to the settlement of case contains no reference to the security.

Election Appeals.

The Dominion Controverted Elections Act, R. S., c. 7, secs. 65 and 66, read as follows :

"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 in legal tender or in the bills of any chartered bank doing business in Canada.

"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."

A form of Certificate which may be adopted as to the Case and Security will be found in the Appendix, infra p. 300.

CASE TO BE PRINTED AND TWENTY-FIVE COPIES DEPOSITED WITH REGISTRAR.

R. 11. Case. Copies.

RULE 11. 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.

2. As soon as the case has been printed the solicitor for appellant shall, on demand, deliver to the solicitor for the respondent, three printed copies thereof.

In most of the Provinces there are Rules of Court requiring the appellant to print for the purposes of any appeal to the highest appellate tribunal in the Province, a sufficient number of copies of the record or case in appeal to permit of at least 25 copies being preserved by the Registrar of such Court so as to be available to either party in the event of the case being carried to the Supreme Court of Canada. In most of the Provinces, however, notably Quebec, the Registrar of the appellate Court frequently fails to enforce the rule, and as a result, when an appeal is taken, the appellant is unable to obtain a sufficient number of copies to comply with the rule of the Supreme Court which requires 25 printed copies to be filed. This has led to numerous applications to the Registrar of the Supreme Court for leave to deposit a smaller number of copies than that provided for by this rule, and where the cost of reprinting would be excessive, he has in the past frequently made orders dispensing with its provisions Such orders, however, have sometimes occasioned inconvenience in the Registrar's office where the copies of the case have been distributed to the Judges more than once owing to the appeal not being disposed of when first called at the hearing. As a result the Registrar has been instructed to rigidly enforce this rule, except under very exceptional circumstances. It is therefore desirable that the members of the profession in the different provinces interested should exert their influence in the way of requiring a strict compliance with the local rules in this regard.

R. 11. Case. Copies.

As pointed out in a note to Rule 6, the Rules of the Supreme Court contemplate that the case certified by the Registrar or Clerk of the court below should be a printed case, although the Rule in this respect has been relaxed in appeals from the Yukon Territory, owing to the difficulty of complying with it.

Sub-section 2.

This is a new provision. The old Rules were defective in not providing that the appellant should 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 was 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 a copy, it was impossible to properly refer to the page of the printed case, where the evidence was to be found to which counsel preparing the factum desired to call attention. The appellant should promptly comply with the demand of the respondent's solicitor as otherwise the hearing of the appeal may be delayed by reason of the respondent being unable to file his factum within the time provided for by Rule 29.

Rex v. *Love.*

In this matter an application was made to a Divisional Court of the High Court of Justice for Ontario in the name of the King, on the prosecution of Thomas Ratcliffe, for a rule *nisi* calling upon the Police Magistrate of the City of London to show cause why he should not bind over said Ratcliffe under s. 595 of the Criminal Code, 1892, to prefer and prosecute an indictment against one James Burns on the charge of perjury, preferred by the said Ratcliffe, upon which the Police Magistrate had acquitted and discharged Burns on the ground that he had no jurisdiction under s. 791 of the Code to summarily adjudicate upon the case. The Divisional Court refused the Rule *nisi* and an appeal from such refusal to the Court of Appeal for Ontario was dismissed. (Rex v. Burns, 1 O. L. R. 341). The private prosecutor thereupon, had the proceedings certified

by the Registrar of the Court of Appeal and filed in the Supreme Court, but the same were not printed, nor were any printed copies or factums filed. Upon the case being called in the Supreme Court, November 14th, 1901, counsel appeared for the private prosecutor and no one contra. The Chief Justice (oral): "The appeal must fail, for if this is a criminal appeal there is no jurisdiction in the Court, as the Court of Appeal was unanimous in its judgment. On the other hand, if it is a civil appeal, it is not properly before the Court as the case and factums have not been printed." R. 11. Case. Copies.

FORM OF CASE.

RULE 12. 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 with the printed pages to the left, and the type shall be pica, 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. Where evidence is printed there shall be a head-line on each page, giving name of witness, and shewing whether the evidence is examination-in-chief, cross-examination, or as the case may be. All exhibits shall be grouped together and printed in chronological order. All pleadings, judgments, and other documents shall be printed in full unless dispensed with by the Registrar. The title page shall contain the name of the Court and Province from which the appeal comes, and the style of the cause, putting the appellant's name first, as follows : R. 12. Case. Form of.

A. B.
(Plaintiff or defendant, as the case may be),
Appellant.

AND

C. D.,
(Defendant or plaintiff, as the case may be),
Respondent.

R. 12. Case. Form of. Index.

The names of solicitors and agents may also be added.

There shall be an Index at the beginning of the case, which shall set out in detail, the entire contents of the case in four parts as follows :

Part I. Each pleading, rule, order, entry, or other document with its date, in chronological order.

Part II. Each witness by name, stating whether for plaintiff or defendant, examination-in-chief or cross-examination or as the case may be, giving the page.

Part III. Each exhibit with its description, date, and number, in the order in which they were filed.

Part IV. All judgments in the courts below, with the reasons for judgment, and the name of the Judge delivering the same.

2. If the appellant desires, the case may be printed according to the regulations as to form and type in appeals to His Majesty in Council.

This Rule, although in part a reproduction of old Rule 8, has been so largely amplified that it is substantially a new rule. Old Rule 8 reads as follows :

"8. 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."

The new Rule follows the language of the old Rule except that the type which formerly was small pica leaded, is now required to be pica.

When the Supreme Court Rules were first promulgated, small pica was a well known type amongst printers, but in

recent years it has gone completely out of use. It has been thought desirable therefore, to require that the type shall be the same as is required in appeals to His Majesty in Council. R. 12. Case. Form of Index.

Some solicitors persistently ignore the provisions as to the size of the case, namely, eleven inches by eight and one-half inches, and accept from their printers a case which is perhaps ten and one-half inches by eight. The provisions in this regard will be enforced hereafter with greater strictness, as the matter is of considerable moment when the cases are bound up in a volume. Where the cases are of different sizes it is impossible to retain any uniformity in the binding of the volumes.

Printing of the Evidence.

The new Rule requires that there should be a head line at the top of each page giving the name of the witness and showing whether the evidence is examination-in-chief, cross-examination or as the case may be. This provision will require the solicitor supervising the printing to carefully peruse the case when it has been set up in book form, so that the name of the witness and the nature of his evidence will be correctly set out at the top of the page.

Exhibits.

Exhibits are required to be printed in chronological order. This also will necessitate considerable care often on the part of the solicitor, as it generally happens that plaintiff only puts in at the trial such exhibits as are required to make his case, and the defendant supplements these in giving his evidence by putting in other exhibits explaining the plaintiff's exhibits, or necessary for some other reason to complete the evidence as to the transaction in question.

The Rule now requires that the exhibits should not be printed as formerly,—Plaintiff's exhibits, 1, 2, 3, &c., and then follow with the defendant's exhibits,—but all the exhibits are required to be printed following one another in chronological order.

R. 12. Case. Form of. Index.

Pleadings, Judgments, &c.

Many solicitors are in the habit, in preparing the printed case, of eliminating the style of cause, name of pleading, date, names of the Judges delivering judgment, date of the judgment, &c., &c. This often creates a great deal of unnecessary difficulty, more particularly with respect to the judgments, as, where the names of the Judges do not appear in the formal judgment, there is nothing to show in the case who the Judges were who sat, and makes it impossible also to tell whether the reasons for judgment which are printed are all the reasons which have been delivered.

It is now required that where a document is supposed to be contained in the case, it must be printed *verbatim* unless dispensed with by the Registrar under Rule 14.

Use of Italics.

May v. *McArthur*, Cout. Dig. 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 is a substantial compliance with Rule 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.

Title Page.

In most of the Provinces the style of cause as it appears in the writ of summons is retained throughout all the Courts,

with the name of the plaintiff first, and the name of the defendant following, with the addition that in the appellate Court the name of appellant or respondent, as the case may be, is inserted after the name of the plaintiff and defendant. It very frequently happens that this same style of cause is retained in the proceedings in the Supreme Court, and the case comes to the Registrar, where the appeal is by the defendant, with the plaintiff's name as respondent preceding that of the appellant. This is incorrect, and has necessitated often the reprinting of the first page of the case. The provisions of the Rule in this regard formerly appeared on the cover of each number of the Supreme Court reports, but solicitors were not at all careful to follow the instructions there given. The Rule now makes express provision in this regard and where the case is printed improperly, it will not be received or filed by the Registrar. R. 12. Case. Form of. Index.

It is necessary also that the entire style of cause should appear with the names of all the parties in full, as they appear in the record in the Court appealed from. It will not do to say "A. B. et al, plaintiffs, and C. D. et al, defendants." The neglect to insert the proper style of cause has frequently entailed difficulty in preparing the formal judgment of the Court.

A form of Title Page will be found in the Appendix, infra p. 301.

Index.

The Rule contains very elaborate provisions respecting the preparation of the Index, and the utmost care will be required from solicitors in complying with its terms. It will be perceived that the Index is divided into four parts, but this does not imply that the case should be printed also in four parts, although such would be a convenient arrangement, except that the certificate from the Registrar or Clerk of the Court appealed from should appear at the end of the printed case, and the Index itself should appear at the beginning of the case, immediately following the Title Page.

A form of Index will be found in the Appendix, infra p. 302.

R. 12. Case. Form of. Privy Council Regulations.

PRINTING ACCORDING TO REGULATIONS OF THE PRIVY COUNCIL.

ss. 2 of this Rule provides that where the appellant desires, the case may be printed according to the regulations as to form and type in appeals to His Majesty in Council.

In January last the Registrar of the Supreme Court received the following letter from the Registrar of the Privy Council :—

"PRIVY COUNCIL OFFICE, DOWNING STREET,
LONDON, S. W.
5th January, 1907.

"SIR,—

I am desired to remind you that, with a view to saving time and expense, their Lordships of the Judicial Committee are prepared to accept the Records as printed for the Canadian Courts, with the necessary additions bringing the Case up to date as the Records in Appeals in the Privy Council, if the former Courts adopt the form of printing now prescribed for Privy Council Records.

Their Lordships will feel obliged if you will make the purport of this letter as widely known as practicable.

I am, Sir,

Your obedient Servant,
(Signed) E. S. HOPE,
Registrar of the Privy Council.

The Registrar of the Supreme Court of Canada."

In view of this letter and the provisions of this Rule, it has been thought desirable to deal somewhat fully with the proceedings incidental to obtaining leave to appeal to the Privy Council, and the printing of the transcript record.

The provisions for an appeal direct from the Provincial Courts in each Province to His Majesty in Council are fully set out in Cameron's Supreme Court Practice, at pages 51-57. If in any such case it is desired to have the printing done in Canada, particulars as to the same will be found infra p. 49.

It should be pointed out that where the matter involved is of such consequence that the unsuccessful party in the Provincial Court will not be content until a decision of the Privy Council on the matter has been obtained, the first question to be determined is as to the advisability of taking an appeal direct from the Provincial Court to the Privy Council, instead of appealing to the Supreme Court. R. 12. Case. Form of. Privy Council Regulations.

If the party appeals to the Supreme Court, having a choice of going to the Privy Council, and fails to succeed, he frequently has a great deal of difficulty in obtaining leave to appeal.

Clergue v. *Murray*, (1903), A. C. 521.

Held,—"According to section 71 of the 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), 8 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.

S. 59 of the Supreme Court Act reads as follows :

The judgment of the Court shall, in all cases, be final and conclusive, and no appeal shall be brought from any judgment,

R. 12. Case. Form of. Privy Council Regulations.

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.

Owing to this provision of the Statute no appeal lies to His Majesty in Council from the Supreme Court except by special leave of the Privy Council.

The Judicial Committee will not entertain the application for leave until the final judgment of the Supreme Court has been drawn up and entered. Pion v. North Shore Rly. Co., Cass. Prac. 88.

Time.

There is no limit with respect to the time within which the King in Council will grant special leave to appeal from a 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.

Procedure.

The first step usually taken in an application for leave to appeal to the Judicial Committee is the filing of a præcipe 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. 170. 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.

A form of Petition for special leave will be found in the Appendix, infra p. 306. R. 12. Case. Form of. Privy Council Regulations.

A form of Affidavit to be lodged with the petition will be found in the Appendix, infra p. 309.

Petition—What to Contain.

It is incumbent upon a party applying for special leave to appeal to set out in the petition a full statement of the facts and legal grounds to show that there is a substantial case on the merits and a point of law involved proper to be determined by the appellate Court.

Goree Monee Dossee v. *Juggut Indro Narain Chowdery*, 11 Moo. I. A. 1.

Lord Justice Knight-Bruce :—"Their Lordships are of opinion that the statements both of law and fact contained in the petition are of too general a character to enable them to judge of the propriety of granting the special leave to appeal prayed for."

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.

R. 12. Case. Form of. Privy Council Regulations.

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 the Board to state succinctly, but fully, in their petition, the grounds upon which they make that demand. They certainly 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."

Dumoulin v. *Langtry*, 57 L. T. 317.

At the conclusion of the argument their Lordships gave judgment in part as follows :

"The questions of law involved in the action are, no doubt, of considerable importance to the litigants who are represented at the bar; and are also calculated to attract the attention of the public. At the same time their Lordships cannot regard these questions as being of general importance in the strict and proper sense of that term. Their determination, one way or another, will not affect other interests than those of the parties to the action. It will not be decisive of any general principle of law. In these circumstances the question which

their Lordships have to consider is this : whether the case is in itself of such importance, or of such nicety, as to require that this Board, in the interests of justice, should review the unanimous determination of nine Judges of the Canadian Courts." R. 12. Case. Form of. Privy Council Regulations.

The petition should state in the most candid way every circumstance which can have any bearing on the leave asked for, and the utmost good faith must characterize the statements contained in the petition.

Lyall v. *Jardine*, 7 Moo. P. C. 116.

Per Lord Cairns :—"Nothing can be more important than that it should be understood that those who come before this Committee upon an *ex parte* application for leave to appeal should consider it their absolute duty to state in the fullest and frankest way every circumstance connected with the history of the case, which possibly can have any bearing on the leave for which they ask. Now their Lordships do not mean to attribute either to the appellant or to his advisers any intentional disregard of this duty or any wish in the petition to suppress any fact which they might have thought material; but unfortunately the petition is one which when looked at cannot be described otherwise than as a petition which was calculated to mislead the tribunal before whom it was heard."

Duty of solicitor where petition is unintentionally misleading.

Bandains v. *Liquidators of Jersey Banking Co.*, 13 App. Cas. 832.

The least that a petitioner can do, who has in fact misled their Lordships by presenting a petition not stating the true nature of the question raised in the court below, would be to come forward to say that he did not know, that he could not by ordinary inquiry have known, what the grounds of the judgment were, and therefore to excuse himself for not having brought the proper materials before the Committee.

R. 12. Case. Form of. Privy Council Regulations.

Duty of Respondent Where the Petition is Misleading.

Ram Sabuk Bose v. *Monmohini Bossee*, I. A. Vol. 2, p. 71.

At p. 81 their Lordships say :—

"Their Lordships desire further to say that if the objection (respecting inaccurate statements in the petition for leave to appeal) had been made as it ought to have been made by preliminary motion, they have little doubt that the motion would have been successful, and the order for hearing the appeal rescinded. Even if it had been made before the appeal had been entered upon by their Lordships' Bar—when it was called—they must have yielded to it : but considering that the appeal has been heard upon the merits and it was only in the course of the argument for the respondents that this objection was taken, they think, under all the circumstances of the case, that they ought not now to dismiss the appeal and that it will be enough to mark their sense of the impropriety of the petition by the refusal of costs. In their Lordships' opinion an objection of this kind ought to be taken by the respondents as early as the matter is brought to their notice, for the plain reason that if the leave to appeal is on that ground rescinded no further costs are incurred, and it is wrong to leave the objection until the hearing of the appeal, when the record has been sent from India, and when all the costs attending the hearing have been incurred."

Mussoorie Bank v. *Raynor*, 7 App. Cas. 321.

"Their Lordships desire to be distinctly understood that an Order in Council granting leave to appeal is liable at any time to be rescinded with costs if it appear that the petition upon which the order was granted contains any misstatement or any concealment of facts which ought to be disclosed."

Caviat.

If a respondent desires to show cause to the petition for leave to appeal, it is his duty to file a caviat with the Registrar of the Privy Council promptly after the judgment in his favour is rendered.

A form of Caviat will be found in the Appendix, infra p. 310.

Granting Leave to Appeal—Special Circumstances Necessary.

R. 12. Case. Form of. Privy Council Regulations.

Prince v. *Gagnon*, 8 App. Cas. 103, at p. 105 :

"Before the constitution of the Supreme Court of the Dominion of Canada there was a right to appeal from the Courts then in existence where the value of the matter in controversy was beyond £500, but that does not apply to the Supreme Court. The language of the Legislature of the Dominion is : 'The judgment of the Supreme Court shall in all cases be final and conclusive, saving any right which Her Majesty may be graciously pleased to exercise by virtue of her royal prerogative'; and their Lordships are not prepared to advise Her Majesty to exercise her prerogative by admitting an appeal to Her Majesty in Council from the Supreme Court of the Dominion, save where the case is of gravity involving matter of public interest or some important question of law, or affecting property of considerable amount, or where the case is otherwise of some public importance or of a very substantial character.

"Their Lordships proceed now to apply the principles laid down by this Board in the case of Johnston v. Minister of St. Andrews (3 App. Cas. 159) and in the case of Valin v. Langlois (5 App. Cas. 115), to the present petition; and as they are of opinion that they ought not to advise Her Majesty to exercise her prerogative by admitting an appeal in a case depending on a disputed matter of fact, in which there is no question involved of any magnitude or of any public interest or importance, their Lordships will humbly advise Her Majesty to refuse liberty to appeal in this case."

La Cité de Montreal v. *Les Ecclésiastiques de St. Sulpice*, 14 App. Cas. 660.

Per Lord Watson, p. 662 :—"Cases vary so widely in their circumstances that the principles upon which an appeal ought to be allowed do not admit of anything approaching to exhaustive definition. No rule can be laid down which would not necessarily be subject to future qualification, and an attempt to formulate any such rule might therefore prove misleading. In

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some cases, as in Prince v. Gagnon, 8 App. Cas. 103, their Lordships have had occasion to indicate certain particulars, the absence of which will have a strong influence in inducing them to advise that leave should not be given, but it by no means follows that leave will be recommended in all cases in which these features occur. A case may be of a substantial character, may involve matter of great public interest, and may raise an important question of law, and yet the judgment from which leave to appeal is sought may appear to be plainly right, or at least to be unattended with sufficient doubt to justify their Lordships in advising Her Majesty to grant leave to appeal."

Ex parte Applications.

Applications for leave to appeal are made *ex parte* unless a caviat has been filed.

Motions to Dismiss Appeal.

If there have been misstatements or bad faith in connection with the material upon which the leave has been granted, or if the respondent proposes to object that the Privy Council is incompetent to hear the appeal, a motion to dismiss the appeal should be made at the earliest moment possible to save needless expense, and a neglect in this regard by the respondent may affect his right to recover costs.

Motion to Supreme Court for Leave to Appeal.

The Court has no jurisdiction either to refuse or grant an application for leave to appeal to the Privy Council. Kelly v. Sullivan, 21st Jan., 1877; Moore v. Connecticut Mutual, 9th April, 1880; Queen Ins. Co. v. Parsons, 21st June, 1880.

Notice of intention to make such an application should not be put on the motion paper.

Nasmith v. Manning, 4th March, 1881.

Appeals in Forma Pauperis.

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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, 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.

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.

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. Laudry, 2 App. Cas. 102; Valin v. Langlois, 5 App. Cas., 115.

Section 69 of the Controverted Elections Act, 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, 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.

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The Exchequer Court of Canada is a Colonial Court of Admiralty, and by 54-55V. c. 29, being an Act to provide 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 appeal 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 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.

The Vice-Admiralty Rules in question read as follows:

"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."

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Since the publication of the writer's book on the Supreme Court Practice, judgment has been pronounced in the above appeal of Cape Breton v. Richelieu & Ontario Navigation Co., and the Privy Council has expressly held that in Admiralty cases an appeal lies *de plano* from the Supreme Court to His Majesty in Council. After reviewing the sections of the statute applicable, the Court said :

"Their Lordships are of opinion that the express provisions of the said 6th section of the Act of 1890 (Colonial Courts of Admiralty Act) conferred the right of appeal to His Majesty in Council from a judgment or decree of the Supreme Court of Canada pronounced in an appeal to that Court from the judgment or decree of the Colonial Court of Admiralty for Canada, constituted under the Acts aforesaid, given or made in the exercise of the jurisdiction conferred upon it by the said Act of 1890."

Their Lordships therefore permitted the appeal to proceed upon the merits, and the case was accordingly heard.

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.

For provisions relating to appeals from Provincial Courts direct to the Privy Council, *vide* Cam. Prac., p. 47.

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 Her Majesty's Privy Council, the hearing of the appeal to the Supreme Court will be stayed until the Privy Council appeal has been 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.

Stay of Execution on Appeal to Privy Council.

vide note to Rule 136, infra.

Printed Record.

It is desirable that the practice which obtains in England should be adopted in Canada between solicitors in printing the record in Canada in Privy Council appeals.

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The first step is the obtaining from the Registrar of the Supreme Court of a certified copy of the record in the Supreme Court, and if only part of the case in the Supreme Court has been printed, the solicitor should notify the Registrar of all documents of which he desires certified copies. Having satisfied himself that all the material for the record is complete, he should proceed in the preparation of the Index, which is a matter requiring the greatest care. The attention of the writer has been called to this point by Mr. Hope, the Registrar of the Privy Council, in a letter in which he says :

"It would be a great convenience to their Lordships if the Index to Canadian Records could always be made to follow as closely as possible the Index to the Record sent herewith. The marginal notes should correspond (with slight abbreviations where necessary) to the description of the documents as set out in the Index. I mention this point because in some Canadian cases the Index is prepared in a form to which their Lordships are not accustomed."

Index.

The Index should be headed with a short style of cause, with the appellant's name preceding that of the respondent.

It is desirable that the Index should be prepared with columns containing in the first column the number of the document; in the second, its description; in the third, its date; and in the fourth, the page of the record where the document will be found.

The documents themselves should be set out in chronological order : 1st, the pleadings in the cause; 2nd, the evidence in the order in which it was given in the Court of first instance, setting out the name of the witness and showing the page on which his examination, cross-examination or re-examination may be found; following this should appear the exhibits, set out as near as may be in chronological order. Next should appear the judgment of the trial Judge and reasons for judgment, and notice of appeal to the Court in banc. Having thus included

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all the documents and evidence in the Court of first instance, there will follow the proceedings in the Court in banc, with the formal judgment and reasons for judgment in that Court, and notice of appeal, appeal bond, and certificate of the Clerk of the full Court with respect to the case on appeal to the Supreme Court of Canada. Following this will be the proceedings in the Supreme Court of Canada, including the factums, formal judgment and reasons for judgment, with a certificate of the Registrar verifying the transcript record on the appeal to the Privy Council; and finally, the order granting leave to appeal in the Privy Council.

A form which has been approved of by the Registrar of the Privy Council, will be found in the Appendix, infra p. 229, et seq.

The documents in the record should be prepared for the printer in the order in which they appear in the Index.

The solicitor for the appellant will then submit the draft record to the solicitor for the respondent, who will satisfy himself that all the material requisite for the appeal is contained therein, and return it to the appellant's solicitor marked "approved."

If the parties disagree as to the contents of the record, an application should be made to the Registrar of the Supreme Court to settle the same, and if the respondent is unnecessarily long in returning the draft, the appellant may similarly apply to the Registrar of the Supreme Court for an order calling upon him to explain the reasons for the delay, and if necessary make an order authorizing the appellant to proceed with the printing.

The record having been settled between the parties, it will be the duty of the appellant to proceed forthwith with the printing, and the regulations of the Privy Council with respect to this require to be carefully followed.

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PRIVY COUNCIL PROVISIONS RESPECTING PRINTING.

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.

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.

R. 12. Case. Form of. Privy Council Regulations.

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 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.

* Vide infra p. 179.

R. 12. Privy Council. Printing.

The Specimen Sheet referred to in the Schedule will be found in the Appendix, infra p. 179, et seq.

The practice obtains in England of submitting to the respondent's solicitor the first proofs of the printed record, and it is desirable that this practice should be followed where the record is printed in Canada, and *pulls* of the subsequent revises should also be sent to the respondent's solicitor, and when the revise is in book form he should return it to the appellant's solicitor marked "approved for press", with the date.

The appellant should have 75 copies struck off, of which 12 copies should be retained, 12 copies given to the solicitor for the respondent, and the balance delivered to the Registrar of the Supreme Court to be forwarded by him to the Registrar of the Privy Council.

The Registrar of the Supreme Court will thereupon compare the record with the originals in his office, and certify the same to be correct on two copies, signing his name on every 8th page, and forward the same with his certificate to the Registrar of the Privy Council along with the balance of the printed record.

The solicitor for the appellant is required to furnish the Registrar with the amount required to be disbursed in connection with the forwarding of the certified record and copies to the Registrar of the Privy Council.

Where the record is printed in Canada, it will probably happen that the solicitors will also prepare and print their respective *cases* in Canada in connection with the appeal. The term "case" as used in England corresponds with the term "factum" in the Supreme Court. In Safford & Wheeler's Privy Council Practice, at p. 819, the authors have this to say with respect to the preparation and printing of the case :

The Case. Privy Council Appeals.

"The case consists of a detailed statement of the proceedings in the Court below, or such parts of them as are favourable to

the purposes of the appellant or respondent, as the case may be, and should show the orders made below, and in conclusion, the reasons or grounds of appeal should be shortly set forth. The party (appellant or respondent) should state the facts as they were proved in the Court below. He may also, if he please, argue the law which arises upon them, and may cite legal authority in support of the argument in such mode as he deems most expedient for the interest of his cause. The cases are generally drawn by the junior, and settled by the leading and junior counsel in consultation, and usually signed by both. These cases are prepared by each side without consultation with one another, and are lodged in the Council Office when prepared. The cases are then printed as directed by the Order in Council of 24th March, 1871, infra p. 51.

R. 12. Privy Council. The Case.

Specimen Case.

A specimen of a typical appellant's and respondent's case in the appeal of Barrette v. Syndicat Lyonnais du Klondike will be found in the Appendix, infra pp. 193-203, and in forwarding these to the writer, Mr. Hope says as follows :

"With respect to the cases, it is a matter of frequent comment among London practitioners how much longer the cases drawn in Canada are than those drawn in England. Of the enclosed two cases, that of the appellant (which was settled in England) is rather shorter than the average, while that of the respondents (which was settled in Canada and which, though dealing with the same appeal, is double the length of the appellant's case), is rather above the average—the average length of Privy Council cases being about eight pages. In many appeals the cases appear to be modelled on the "Factums" filed in the Supreme Court, the result being that large portions of the Record are printed several—sometimes five—times over, viz., in the record proper in each of the factums, and in each of the

R. 12. Privy Council. The Index.

cases. I may mention that large extracts from the record are not allowed on taxation as part of the "drawing" of cases. It is probable that the factums serve a different purpose from the "cases", and it might therefore save a good deal of trouble and expense if you could point out that, under the existing practice, the object of the Privy Council "cases" is not to present a complete argument of the case on one side or the other (which is reserved for the hearing), but merely to present, for the convenience of their Lordships, a short statement of the facts and proceedings in the Courts below, to emphasize or refer to (not re-print) the salient parts of the evidence or judgments, and to direct attention to the legal points at issue.

"In conclusion, may I say that, in my opinion, the new Rule mentioned by you as to the printing of records will decidedly tend to reduce the expense, and to expedite the hearing, of Canadian appeals."

Lodging Case. Privy Council Appeals.

There is no particular time in which a case must be lodged in the Council Office, but if there is any unusual delay on either side it is open to the party who has lodged his case to take out what are called *orders*. Whoever lodges first informs his opponent that he has lodged his case in the Council Office, and is ready to exchange copies, 10 or 12 being the number usually asked for. Each side lodges 40 copies at the Council Office.

"Care must be taken to see that the registered number of the appeal, and the title, correspond with the petition on appeal as lodged." Preston's Privy Council Practice, p. 15.

Costs in Privy Council Appeals.

Where the King's Order gives a successful appellant his costs in connection with the appeal to the Privy Council incurred in Canada, the practice obtains in the Privy Council Office

of not taxing such costs in England, but reserving them to be taxed by the Registrar of the Supreme Court. These costs will, in addition to the usual costs taxable in England where the work is done there, include certain other items which necessarily are incurred in Canada in connection with such appeals. R. 12. Privy Council. Costs

A Form of the ordinary Bill of Costs taxed in the Privy Council to a successful appellant, will be found in the Appendix, infra p. 221, and from it may be extracted the items for work performed in Canada which would be taxable by the Registrar of the Supreme Court under such an order.

In addition however to this, there will be found in the Appendix, infra p. 273, a Bill of Appellant's Costs incurred in Canada, which has been revised by one of the taxing officers in the Privy Council. Certain items taxed off were held to be not properly party and party costs, and the reasons for the reduction will be found in the *Observations* of the Taxing Officer following the Bill. *Vide* p. 277 infra.

CASE NOT TO BE FILED UNLESS RULES COMPLIED WITH.

RULE 13. 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.

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

R. 13. Filing Case.

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.

For Form of Affidavit of Disbursements *vide* infra p. 283.

DISPENSING WITH PRINTING. ORIGINAL RECORD.

RULE 14. The Court or a Judge in Chambers may dispense with the printing or copying of any of the documents or plans forming part of the case.

2. The original record in the Court appealed from and all exhibits and documentary evidence filed in the cause, shall be transmitted to the Registrar with the certified case provided for in the Act.

Old Rule 10 has been entirely altered in the present Rule. It read as follows :

"RULE 10. 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."

The old rule which required certified copies of original documents and exhibits to be deposited with the Registrar, was never put in practice, and where it was considered necessary or desirable that the originals should be produced for the inspection of the Court, an order was obtained from the Registrar directing the Registrar, Clerk or Prothonotary of the Court

appealed from to forward the original record to the Supreme Court. In preparing the present rules, it was thought better that in all cases the original material in the Court appealed from should be transmitted to the Registrar along with the certified case. It will be the duty, therefore, of the appellant's solicitor to praecipe these papers from the custodian of them in the Court below, and to attend in the office of the Regsitrar after the case has been disposed of, and pay the necessary charges for thier transmission back. R. 13. Printing. Dispensing with.

The Court has severely commented upon the practice of solicitors in agreeing between themselves to print only part of the material intended to be used, or referred to, in the Supreme Court. Everything which is made part of the case by consent of parties, or by order of the Judge below settling the case, must be printed unless specially dispensed with by the Registrar.

Robb v. *Stafford*, Oct. 11th, 1906. (Cam. Prac. *add et corr.*).

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.

NOTICE OF HEARING OF APPEAL.

RULE 15. 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

R. 15. Notice of hearing.

session there shall not be sufficient time to enable the appellant to serve the notice as hereinafter prescribed, then such notice of hearing shall be given for the session following the then next ensuing session.

Rule 17 regulates the form of the notice of hearing, and Rule 18 fixes the time within which service of the notice must be made.

Rule 67 provides that in criminal appeals and appeals in matters of *habeas corpus*, the notice of hearing should be served at least five days before the day of the session at which the appeal is proposed to be heard.

It will be noted that in the latter cases, notice may be served during a session of the Court, and that the day for which notice of hearing is given may be any day of the session and not the first day of the session as required in other appeals by this Rule.

Rule 19, sub-secs. 2 and 3, provide for a notice of hearing being served upon the Attorney General of Canada and the Attorney General of any Province, where constitutional matters are involved.

The Court has refused to hear an appeal until such notice has been given.

SPECIAL NOTICE CONVENING COURT—FORM OF.

RULE 16. The notice convening the Court for the purpose of hearing election or criminal appeals, or appeals in matters of *habeas corpus*, or for other purposes under the provision of the Act in that behalf, 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 Puisne Judge may direct, and may be in the form given in Form A, of the Schedule to these Rules. R. 16. Notice in Gazette.

Where the matter has been urgent, the Registrar has obtained a special issue of the Canada Gazette, so as to comply with the provisions of this Rule.

FORM OF NOTICE OF HEARING.

RULE 17. The notice of hearing may be in the form given in Form B of the Schedule to these Rules.

When an appeal is heard *ex parte*, the Court requires an affidavit proving service of notice of hearing. Kearney v. Kean, 31st January, 1879; Domville. v. Cameron, 13th October, 1897.

WHEN TO BE SERVED.

RULE 18. 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.

This Rule now applies to Election appeals, differing in that regard from the old practice. *Vide* note to Rule 68; and the notice of hearing must be served within three days after the appeal has been set down by the Registrar under s. 67 of the Dominion Controverted Elections Act (R. S., c. 7).

The Rule does not apply to criminal or habeas corpus appeals for which special provisions are made in Rule 67.

R. 18. Notice of hearing. Service.

Nor does it apply to Exchequer appeals, or to appeals from the Board of Railway Commissioners, where the statute (R. S. c. 140, s. 82; and R. S. c. 37, s. 56, ss4) provides for a ten day notice of hearing being given.

HOW NOTICE OF HEARING TO BE SERVED.

RULE 19. 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 domicile of such attorney or solicitor at the City of Ottawa, and if such attorney or solicitor shall have no booked agent or elected domicile 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 an appeal to the Supreme Court, notice of hearing, stating the matter of jurisdiction raised, shall be served on the Attorney General of Canada.

3. When the validity of a Statute of a Legislature of a Province of Canada is brought in question in an appeal to the Supreme Court, notice of hearing stating the matter of jurisdiction raised shall be served on the Attorney General of Canada and the Attorney General of the Province.

Where the appellant or respondent appears in person, *vide* Rules 24 and 25.

"THE AGENT'S BOOK."

RULE 20. 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 domicile at the said City. R. 20. Agent's book.

There has been great laxity in complying with the provisions of this Rule by lawyers who only occasionally have cases in the Supreme Court, and a neglect in this regard may often lead to serious consequences, as in default of a solicitor having an Ottawa agent, notice of motion may be sufficiently served under Rule 55, by posting the same in the office of the Registrar.

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.

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.

Wallace v. *Burkner*, May 2nd, 1883.

In this case the appellant had no Ottawa agent, and mailed, addressed to the Registrar of the Court, his bond as security

R. 20. Agent's book.

for the costs in connection with his appeal. The papers were not received so as to permit of the security being allowed within the time fixed by the Statute. The point having been taken during the argument, the appeal was struck from the list with costs.

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.

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.

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.

SUGGESTION BY APPELLANT OR RESPONDENT WHO APPEARS IN PERSON.

RULE 21. In case any appellant or 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 : R. 21. Suggestion.

"A. vs. B.

"I, C. D., intend to appear in person in this appeal.

(Signed) C. D."

This is a reproduction of the old Rule 17, except that it goes farther and includes the appellant as well as the respondent.

Charlevoix Election Case (*Valin* v. *Langlois*), 10th June, 1880.

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.

Continuing Retainer of Solicitor in Court below.

IF NO SUGGESTION FILED.

RULE 22. If no such suggestion be filed, and until an order has been obtained as hereinafter provided for a change of solicitor or attorney, the solicitor or attorney who appeared for any party in the Court below shall be deemed to be his solicitor or attorney in the appeal to this Court.

SUGGESTION BY APPELLANT OR RESPONDENT WHO ELECTS TO APPEAR BY ATTORNEY.

RULE 23. When an appellant or respondent has appeared in person in the Court below, he may elect to appear by attorney

R. 23. Suggestion.

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 all papers are to be served on such attorney or solicitor as hereinbefore provided.

This Rule is a reproduction of old Rule 19, except that it is made applicable to the appellant as well as the respondent.

ELECTION OF DOMICILE BY APPELLANT OR RESPONDENT WHO APPEARS IN PERSON.

RULE 24. An appellant or respondent who appears in person may, by a suggestion filed in the Registrar's office, elect some domicile 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 all notices and papers shall be deemed good service.

This is a reproduction of old Rule 20, except that it is made applicable to the appellant as well as the respondent.

SERVICE WHEN APPELLANT OR RESPONDENT APPEARS IN PERSON WITHOUT ELECTING DOMICILE.

RULE 25. In case the appellant or respondent who shall have appeared in person in the Court appealed from, or who shall have filed a suggestion under Rule 21 shall not, before service, have elected a domicile at the City of Ottawa, service of all papers may be made by affixing the same in some conspicuous place in the office of the Registrar.

This is a reproduction of old Rule 21, except that it is made applicable to the appellant as well as the respondent. R. 25. Service.

CHANGING ATTORNEY OR SOLICITOR.

RULE 26. 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.

SUBSTITUTIONAL SERVICE.

RULE 27. Where personal service of any notice, order or other document is required by these Rules, or otherwise, and it is made to appear to the Court or a Judge in Chambers that prompt personal service cannot be effected, the Court or Judge in Chambers may make such order for substitutional or other service, or for the substitution of notice for service by letter, public advertisement, or otherwise, as may be just.

R. 27. Service, Substitutional

This Rule is new. Formerly there was no special provision for substitutional service.

In ordering substitutional service, the primary consideration is how the matter should be best brought to the personal attention of the person in question himself. *Re* McLaughlin, 1905, A. C. 347.

One of the following methods is usually followed in making the substitutional service :

1. Service on a person.

2. By leaving a copy of the document at the residence or place of business of the person desired to be served.

3. By advertisement and through the post.

A form of Order will be found in the Appendix, infra p. 278.

Proof of Service by Letter.

If the order is in the usual form for substituted service by prepaid letter, it is essential that the affidavit proving service should show the letter was prepaid. Walthemston v. Henwood, 1897, 1 Chy. 41.

Effect of Service under Order.

Whilst the order is undischarged, service under it is equivalent to actual service for all parties, although the proceedings never came to defendant's knowledge, Watt v. Barnett, 3 Q. B. D. 363.

Service upon Other Persons.

Service will be ordered upon such persons as are impliedly authorized to accept that particular service, or who will certainly communicate the process so served to the party. Hope v. Hope, 4 De G. M. & G. 341.

The order for service was made in the following cases :

Upon general agents (Jones v. Cargill, 11 L. T. 566); special agents (Hobhouse v. Courtney, 12 Si. 140); upon relations of a mortgagor who had absconded, the mortgagee undertaking

to ask for a sale at trial (Wolverhampton, &c., Co. v. Bond, 29 W. R. 599). On solicitors who have acted for defendant in the subject-matter of the suit (Hornby v. Holmes, 4 Ha. 306; Jay v. Budd, (1898), 1 Q. B. p. 16; cf. Margrett v. Emmanuel, 6 Times Rep. 453; on a former solicitor of defendant (Seton, p. 4, F. 3); on solicitor who had acted for defendant in another action, but who sent back the writ saying he did not intend to act for the defendant in any further litigation (Watt v. Barnett, 3 Q. B. D. 183, 363), in which case, however, the defendant so served was allowed after judgment to re-open the case on showing that he had had no notice of the proceedings and had a good defence. Where the defendant was in India, and his solicitors refused to accept service on the ground that they had no instructions, an order was made for substituted service upon defendant's managing clerk at his offices and upon his solicitors, defendant to have six weeks to appear (Armitage v. Fitzwilliam, W. N. (75) 238; cf. Jay v. Budd, (1898) 1 Q. B. 12 (C. A.); Tottenham v. Barry, 12 C. D. 797); on *feme covert* when husband out of jurisdiction (Seton, p. 4, F. 3 (n.); Bank of Whitehaven v. Thompson, W. N. (77) 45); on person in communication with defendant (Dicker v. Clarke, 11 W. R. 635). R. 27. Service. Substitutional.

Election Cases.

Held that under the Dominion Elections Act, service of an election petition cannot be made outside of Canada. Re King's N. S., Election, Parker v. Borden, 36 Can. S. C. R. 520.

AFFIDAVITS OF SERVICE.

RULE 28. Affidavits of service shall state, when, where and how and by whom such service was effected.

R. 29. Factum Depositing.

FACTUMS TO BE DEPOSITED WITH REGISTRAR.

RULE 29. 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 of argument in appeal.

The factums under this Rule should be deposited not later than the third Saturday preceding the opening of the session.

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.

Criminal Appeals; Habeas Corpus Appeals.

Memorandum in lieu of factum required. *Vide* Rule 65.

Election Appeals.

Factum must be printed as in ordinary appeals. Rule 68, infra.

An order may be made dispensing with the factum. Rule 71, infra.

Exchequer Appeals.

A factum is required as in other appeals. Rule 63, infra.

References by the Governor in Council.

R. 29. Factum Depositing.

Factums are required. Rule 80.

References by the Board of Railway Commissioners.

Factums are required. Rule 80.

Appeals from the Board of Railway Commissioners.

Factums are required. Rule 81.

CONTENTS OF FACTUM.

RULE 30. The factum or points for argument in appeal shall consist of three parts, as follows :

Part 1. A concise statement of the facts.

Part 2. A concise statement setting out clearly and particularly in what respect the judgment it alleged to be erroneous. When the error alleged is with respect to the admission or rejection of evidence, the evidence admitted or rejected shall be stated in full. When the error alleged is with respect to the charge of the Judge to the jury, the language of the Judge and the objection of counsel shall be set out *verbatim*.

Part 3. A brief of the argument setting out the points of law or fact to be discussed, with a particular reference to the page and line of the case and the authorities relied upon in support of each point. When a statute, regulation, rule, ordinance or by-law is cited, or relied on, so much thereof as may be necessary to the decision of the case shall be printed at length.

The number of appeals set down for hearing has largely increased during recent years. Treating the legal year as beginning on the 1st September, the cases heard in the Supreme

R. 30. Factum, Contents of.

Court in 1903-4 were 103; in the year 1904-5, 106; in 1905-6, 130; and in 1906-7, 140.

With the organization of the new Provinces, and the natural increase of business throughout the country, the work of the Court may reasonably be anticipated to increase in the future. The Judges, therefore, have had to consider the necessity of economizing the time to be allowed for the hearing of each appeal, and as a result of their inquiry and consideration, they have concluded, that if factums are prepared with greater care, the time allotted to counsel for addressing the Court could be very materially reduced. Accordingly, by this Rule very special provisions are made with respect to the preparation of the factum, and by Rule 38, the time allotted to counsel for argument, without special leave of the Court, is fixed at three hours for each side.

The provisions as to the contents of the factum are largely modelled upon the corresponding provisions of the Supreme Court of the United States, and if it has appeared to the writer that the best assistance he can give to counsel in preparing the factum in accordance with these Rules, is to furnish him with a well prepared factum in an appeal to the United States Supreme Court. Through the kind offices of the Clerk of the Supreme Court of the United States, a model factum, will be found in the Appendix, infra p. 236.

Some slight alterations will require to be made in this form to correspond with the practice in the Supreme Court of Canada, and wherever such changes are required, they will be found pointed out in a foot note to the form.

Contents of Factum.

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 or 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 or opinions of the Judges of the Courts below may be ordered by any Supreme Court when deemed necessary.

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

R. 30. Factum, Contents of.

before first day of session, and factum not yet filed on behalf of the Crown. Counsel for Crown consenting. Refused.

Appeal submitted on Factums.

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.

Charlevoix 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, 1686, 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*, Cam. Prac. p. 422.

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.

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

R. 30. Factum, United States Supreme Court.

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 (now 32).

FACTUMS IN UNITED STATES SUPREME COURT.

Rule 21 of the United States Supreme Court Rules, deals with factums, therein called briefs. The portion of this Rule covering the same points as Rule 30, reads as follows :

"1. The counsel for plaintiff in error or appellant shall file with the clerk of the Court, at least six days before the case is called for argument, twenty-five copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side.

2. This brief shall contain, in the order here stated—

(1) A concise abstract or statement of the case, presenting succinctly the questions involved and the manner in which they are raised.

(2) A specification of the errors relied upon, which, in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged; and in cases brought up by appeal the specification shall state as particularly as may be, in what the decree is alleged to be erroneous. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the Court, the specification shall set out the part referred to *totidem verbis*, whether it be instructions given or instructions refused. When the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report and the action of the Court upon it.

(3) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record and the authorities relied upon in support

of each point. When a statute of a State is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length." R. 30. Factum, United States Supreme Court.

The following are decisions of the United States Supreme Court on Rule 21 :—

An assignment of error which simply avers that the Court below erred in giving the instructions which were given to the jury on its own motion, in the general charge, in lieu of the instructions asked for by the parties, without specifying in what the error consisted, or in what part of the charge it is contained, is an insufficient assignment under paragraph 2 of Rule 21. (Lucas v. Brooks, 18 Wall. 436, 356.)

If counsel for appellant or plaintiff in error disregard Rule 21, and do not file a brief in the form required by it, the appeal or writ of error will be dismissed. (Portland Cement Co. v. United States, 15 Wall, 1, 3.)

And the Supreme Court was particular in requiring a statement of the points and facts in the earlier cases. (Faw v. Marsteller, 2 Cranch, 10; Reily v. Lamar, 2 Cranch, 344, 350.)

It seems, however, that the Supreme Court will, in its discretion, reinstate a case dismissed for want of a brief in the form required by the Rule, by consent of both parties to the suit. (Schooner Catherine v. United States, 7 Cranch, 99.)

It is the duty of the Supreme Court to keep its records clean and free from scandal. If therefore the printed arguments submitted in the case contain allegations and statements wholly aside from the issues or questions involved in the controversy, which bear reproachfully upon the moral character of individuals, and which are clearly impertinent and scandalous and unfit to be submitted to the Court, the brief containing such scandalous allegations and statements will be stricken from the files. (Green v. Elbert, 137 U. S. 615, 624.) Statements in a printed argument which reflect on a member of the Supreme Court and are thereby disrespectful to the Court itself will be stricken out.

By the uniform course of decision, no exceptions to rulings at a trial can be considered by the Supreme Court, unless they

R. 30. Factum, United States Supreme Court.

were taken at the trial, and were also embodied in a formal bill of exceptions presented to the Judge at the same term, or within a further time allowed by order entered at that term, or by standing rule of Court, or by consent of parties; and, save under very extraordinary circumstances, they must be allowed by the Judge and filed with the clerk during the same term. (Michigan Ins. Bank v. Eldred, 143 U. S. 293, 298; Waldron v. Waldron, 156 U. S. 361, 378.)

The fact that objections are made to the admission or rejection of evidence and overruled, is not sufficient, in the absence of exceptions, to bring them before the Supreme Court. Errors cannot be assigned to the admission or exclusion of evidence, over the objection of the party, unless the bill of exceptions shows an exception was preserved to the action of the Court in overruling the objection. (Newport News & Miss. Valley Co. v. Pace, 158 U. S. 36, 37; United States v. Breitling, 20 How. 252, 254).

The Supreme Court has repeatedly held that where a party upon a trial excepts to a ruling of the Court, but does not stand upon such exception, and acquiesces in the ruling and elects to proceed with the trial, he thereby waives his exception, (Campbell v. Haverhill, 155 U. S. 610, 612); where, for example, at the close of the plaintiff's evidence, on a trial before a jury, the defendant moves the Court to direct a verdict for him on the ground that the plaintiff has not shown sufficient facts to warrant a recovery, and the motion is denied, and the defendant excepts to the ruling of the Court, the exception fails, if the defendant does not rest his case, but afterwards introduces evidence. (Robertson v. Perkins, 129 U. S. 233; Accident Ins. Co. v. Crandall, 120 U. S. 527, 530; Grand Trunk Railway Co. v. Cummings, 106 U. S. 700).

And when the statute of a State dispenses, by its provisions, with exceptions and bills of exceptions, this will not control the proceedings in the United States Courts, either in civil or criminal cases, inasmuch as the power to review any judgment or decree of a Court of the United States depends upon the acts of Congress and the Rules of practice which the Supreme Court

recognizes as essential in the administration of justice. (St. Clair v. United States, 154 U. S. 134, 153).

R. 30. Factum, United States Supreme Court.

If, upon the conclusion of the plaintiff's testimony, the defendant moves the Court to direct a verdict in his favour, or for a non-suit, as the case may be, for reasons specified in the motion, and the motion is denied by the Court, and an exception is taken by the defendant to the ruling, and the defendant, instead of standing on the exception, proceeds to introduce testimony in his own behalf, he thereby waives the exception. The defendant may, however, renew his motion upon the conclusion of the entire testimony in the case, again take an exception to the ruling of the Court, and thereby preserve his right to have the question decided. (Wilson v. Haley Live Stock Co., 153 U. S. 39, 43; Runkle v. Burnham, 153 U. S. 216, 222; Bogk v. Gassert, 149 U. S. 17, 23).

The rejection of evidence immaterial to the result does not constitute reversible error (Runkle v. Burnham, 153 U. S. 216, 224); nor does the admission of immaterial and irrelevant evidence constitute a sufficient ground for reversing a judgment, when it does not affect the verdict or special finding of the Court injuriously to plaintiff in error. (Mining Co. v. Taylor, 100 U. S. 37 , 42; Home Insurance Co. v. Baltimore Warehouse Co., 93 U. S. 527, 547; Railroad Co. v. Pratt, 22 Wall. 123; Cavazos v. Trevino, 6 Wall. 773).

The rulings of the court as to the allegations and proofs upon the subject of exemplary damages, in an action for personal injuries, become immaterial by the subsequent instruction of the Court withdrawing from the consideration of the jury the claim for such damages, and by the return of a verdict for actual damages only. (Texas Pacific Railway v. Volk, 151 U. S. 73, 77).

If testimony has been improperly admitted over the objection and exception of a party, but the Court subsequently instructs the jury to disregard such testimony altogether, error cannot be assigned upon the rulings of the Court (New York, &c., v. Madison, 123 U. S. 524); it has long been settled that abstract questions of law only, which may or may not have been

R. 30. Factum, United States Supreme Court.

ruled in a way to affect a party injuriously will not be considered by the Supreme Court upon writ of error, unless it appears from the bill of exceptions, or otherwise, in the record, that the facts were such as to make them material to the issue that was tried. (New York, &c. v. Madison, 123 U. S. 524, 526).

Under the practice in the Supreme Court, and according to the requirement of Rule 21, a party who complains of the rejection of evidence must make it appear, in his bill of exceptions, that he was injured by the rejection. And, by the rule, where the error assigned is to the admission or rejection of evidence the specification shall quote the full substance of the evidence offered, or copy the offer as stated in the bill of exceptions, for the purpose of enabling the Supreme Court to see whether the evidence offered is material, since it would be idle to reverse a judgment for the admission or rejection of evidence, that could have had no effect upon the verdict. (Packet Co. v. Clough, 20 Wall. 528, 542, 543).

At common law an objection to the competency of a witness on the ground of interest was required to be made before his examination in chief; or, if his interest was then not known, as soon as it was discovered. And the rule was the same in criminal as in civil cases. If no objection is made to the testimony at the time it is offered, the objection will be waived, and a motion to strike the testimony from the record, long after its admission, will be too late. If a party does not object to testimony when offered, he cannot afterwards be heard to say there was error in receiving it. (Benson v. United States, 146 U. S. 325, 332.)

Where the trial Court admits irrelevant evidence under objections and to which proper exceptions are preserved, such exceptions are not waived by failure of the party to except to the charge of the Court to the jury upon such evidence. (Boyd v. United States, 142 U. S. 450).

When a jury is waived in writing and the case tried by a Court, the Court's finding of facts, whether general or special, has the same effect as the verdict of a jury; and although a bill

of exceptions is the only way of presenting rulings made in the progress of the trial, the question whether the facts set forth in a special finding of the Court, which is equivalent to a special verdict, are sufficient in law to support the judgment, may be reviewed on writ of error without any bill of exceptions, no exception being necessary, in case of special findings by the Court, to raise the question whether the facts found support the judgment. (Seeberger v. Schlesinger, 152 U. S. 581, 586; Allen v. St. Louis Bank, 120 U. S. 20, 30; Insurance Co. v. Boon, 95 U. S. 117, 125; Tyng v. Grinnell, 92 U. S. 467, 469; St. Louis v. Ferry Co., 11 Wallace, 423, 428).

A statement of facts by the Court in a recapitulation of the evidence, based on uncontradicted testimony, no rule of law being inc rrectly stated, and the facts being submitted to the determination of the jury is not open to exception and does not constitute reversible error. (Wiborg v. United States, 163 U. S. 632, 656; Simmons v. United States, 142 U. S. 148, 155; Hansen v. Boyd, 161 U. S. 397).

HOW TO BE PRINTED.

RULE 31. 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.

MOTION BY RESPONDENT TO DISMISS APPEAL ON GROUND OF DELAY IN FILING FACTUM.

RULE 32. If the appellant does not deposit his factum or points for argument in appeal within the time limited by Rule

R. 32. Factum, Delay.

29, the respondent shall be at liberty to move to dismiss the appeal on the ground of undue delay under the provisions of the Act in that behalf.

APPELLANT MAY INSCRIBE *EX PARTE* IF FACTUM NOT FILED.

RULE 33. 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*.

SETTING ASIDE INSCRIPTION *EX PARTE*.

RULE 34. Such setting down or inscription *ex parte* may be set aside or discharged upon an application to a Judge in Chambers sufficiently supported by affidavits.

REGISTRAR TO SEAL UP FACTUMS FIRST DEPOSITED.

RULE 35. 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.

INTERCHANGE OF FACTUMS.

RULE 36. As 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. R. 36. Factum, Interchange.

REGISTRAR TO INSCRIBE APPEALS FOR HEARING.

RULE 37. 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 in Chambers.

By section 32 of the Supreme Court 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 29, 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. (Cass. Prac., 2nd ed., 145).

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

R. 36. Factum, Interchange.

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*, and Board of Railway Commissioners.

Election Appeals.

The inscription is made by the Registrar, and not by the solicitor for the appellant (Dominion Controverted Elections Act, R. S., c. 7, s. 66). But it is the duty of the solicitor to pay the Registrar for the inscription, the fee of $10, before the inscription is made. North Ontario Election, 3 Can. S. C. R. 374.

The Registrar will inscribe for hearing after hearing the application provided for in Rule 70.

Exchequer Appeals.

The inscription in Exchequer appeals is also by the Registrar, and not by the solicitor. (Exchequer Court Act, R. S., c. 140, s. 82).

Criminal and Habeas Corpus Appeals.

These appeals are also set down by the Registrar after he has determined when the appeal can be most conveniently heard in view of the provisions of Rule 66.

Board of Railway Commissioners.

Appeals are inscribed by the Registrar and not by the solicitor for the appellant. *Vide* The Railway Act, R. S., c. 37, s. 56, ss. 4.

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.

R. 36. Factum, Interchange.

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 of Inscription.

Bank of Toronto v. *Les Cure, 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.

COUNSEL AT HEARING.

RULE 38. Except by leave on special grounds no more than two counsel on each side shall be heard on any appeal,

R. 38. Counsel.

and but one counsel shall be heard in reply. Three hours on each side will be allowed for the argument, and no more, without special leave of the Court. The time thus allowed may be apportioned between the counsel on the same side at their discretion.

Former Rule 32 read as follows :

"No more than two counsel on each side shall be heard on any appeal, and but one counsel shall be heard in reply."

The Court occasionally relaxed this Rule and heard more than two counsel, where special reasons existed.

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 itself sufficient ground to cause the Court to depart from its rule.

In re Representation in the House of Commons, 33 Can. S. C. R. 594, was a 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.

Three Hours for Argument.

R. 38. Counsel.

Rule 22 of the United States Supreme Court reads as follows:

"1. The plaintiff or appellant in this Court shall be entitled to open and conclude the argument of the case. But when there are cross-appeals they shall be argued together as one case, and the plaintiff in the Court below shall be entitled to open and conclude the argument.

"2. Only two counsel will be heard for each party on the argument of a case.

"3. Two hours on each side will be allowed for the argument, and no more, without special leave of the Court, granted before the argument begins. The time thus allowed may be apportioned between the counsel on the same side, at their discretion : Provided, always, that a fair opening of the case shall be made by the party having the opening and closing arguments."

As to this it has been said, May's United States Supreme Court Practice, p. 342 :

"Notwithstanding paragraphs 2 and 3 of Rule 22, the Supreme Court has, by special leave, in cases involving questions of great importance, permitted more than two counsel to be heard on a side, or for each party, in the oral argument of a case; and it has also, upon application, in proper cases, enlarged the time allowed by the rule for oral argument, to more than two hours on each side of the case. (McCullough v. State of Maryland, 4 Wheaton, 316, 322; Pollock v. Farmers' Loan and Trust Co., 158 U. S. 601, 607; s. c. 157 U. S. 429; United States v. Texas, 162 U. S. 1, 3)."

Counsel--Right to Begin.

The "Thrasher" Case, Cout. Dig. 1118.

Inasmuch as all statutes should *prima 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.

R. 38. Counsel.

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. 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.

Foreign Counsel.

R. 38. Counse

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.

Illness of Counsel.

Consumer's 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, is 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.

R. 38. Counsel.

Other Cases.

Provident Savings & Assurance Society v. *Mowat*, 11th Oct., 1901. Cout. Dig. 1107.

An application was made on behalf of respondent to 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.

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.

POSTPONEMENT OF HEARING.

RULE 39. 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 withdraw 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. 39. Postponement.

If the case does not contain the formal judgment of the Court below, or the reasons of the Judges of the Court below, or the certificate or affidavit required by Rule 6, 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; Ottawa Electric v. City of Ottawa, 5th Nov., 1906.

DEFAULT BY PARTIES IN ATTENDING HEARING.

RULE 40. 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.

R. 40 Default at Hearing.

If neither party be represented when the appeal is called for hearing, it will be struck out of the list. If the 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. R. 40 Default at Hearing.

JUDGMENTS—HOW TO BE SIGNED.

RULE 41. All orders and judgments of the Court shall be settled and signed by the Registrar.

Former Rule 35 provided that the order of the Court should bear the date of the day of the judgment. This provision is now contained in Rule 48.

A form of Judgment allowing appeal will be found in the Appendix at page 279.

A form of Judgment dismissing appeal will be found in the Appendix at page 280.

ENTRY OF JUDGMENT.

RULE 42. The solicitor for the successful party shall obtain an appointment from the Registrar for settling the judgment, and shall serve a copy of the draft minutes and a copy of the appointment upon the solicitor for the opposite party two clear days at least before the time fixed for settling the judgment. The Registrar shall satisfy himself in such manner as he may think fit that service of the minutes of judgment and of the notice of appointment has been duly effected.

This and the following seven Rules have been adopted from the corresponding English Rules.

Vide English Rules of the Supreme Court, Orders 51 & 62.

R. 43. Judgment, Entry of.

RULE 43. If any party fails to attend the Registrar's appointment for settling the draft of any judgment, the Registrar may proceed to settle the draft in his absence.

RULE 44. Where the successful party neglects or refuses to obtain an appointment to settle the minutes of judgment, the Registrar may give the conduct of the proceedings to the opposite party.

RULE 45. The Registrar may adjourn any appointment for settling the draft of any judgment or order to such time as he may think fit, and the parties who attended the appointment shall be bound to attend such adjournement without further notice.

RULE 46. Notwithstanding the preceding Rules, the Registrar shall in any case in which the Court or a Judge may think it expedient, settle any judgment or order without making any appointment, and without notice to any party.

RULE 47. Any party dissatisfied with the minutes of judgment as settled by the Registrar may move the Court to vary the minutes as settled, upon serving the solicitor for the opposite

party with two clear days' notice of his motion, and the said motion shall be brought on for hearing at the nearest convenient session of the Court, but the said motion shall not stay the entry of the judgment, if the Registrar is of the opinion that the motion is frivolous or would unreasonably prejudice the successful party, unless a Judge of the Supreme Court shall otherwise order. Such a motion shall be based only on the ground that the minutes as settled do not in some one or more respects specified in the notice of motion accord with the judgment pronounced by the Court. R. 47. Judgment. Varying.

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.

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 motu* in 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

R. 47. Judgment, Varying.

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*.

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 rehearing. 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. R. 47. Judgment, Varying.

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 loo 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 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

R. 47. Judgment. Varying.

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 Maunfacturing Co. v. *Willet*, 34 Can. S. C. R. 502.

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.

R. 47. Judgment. Varying.

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

R. 47. Judgment, *stare decisis.*

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. *Ratte*, 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.

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

R. 47. Judgment, Entry of.

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.

R. 47. Judgment, Settling Minutes.

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 constitute a quorum. *Held*, that a quorum of four Judges had jurisdiction to hear criminal as well as civil appeals.

Settling Minutes of Judgment.

The former rules made 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 were often of the impression that the minutes will be settled, signed and entered by the Registrar as a matter of course after the judgment has been pronounced.

This was not the case even under the old rules. The practice although not covered by any rule, was well settled substantially in the way now covered by Rules 42 to 47.

In some instances, under the old rules, the Court has, upon a motion to vary the minutes as settled by the Registrar, amended or varied its judgment as originally pronounced.

Now such applications will be made under Rule 61, as it is irregular to move to vary the minutes where the Registrar has settled them in strict accordance with the judgment of the Court. *Vide* the provisions of the last part of this Rule.

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 forma* 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. 47. Judgment, Settling Minutes.

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 48. Every judgment shall be dated as of the day on which such judgment is pronounced, unless the Court shall otherwise order, and the judgment shall take effect from that date; provided that by special leave of the Court or a Judge a judgment may be ante-dated or postdated.

RULE 49. Every judgment or order made in any cause or matter requiring any person to do an act thereby ordered shall state the time, or the time after service of the judgment or order, within which the act is to be done, and upon the copy of the judgment or order which shall be served upon the person required to obey the same, there shall be indorsed a memorandum in the words or to the effect following, viz. : "If you, the within-named A. B., neglect to obey this judgment (or order) by the time therein limited, you will be liable to process of execution for the purpose of compelling you to obey the same."

"To Do an Act."

A judgment in the K. B. D. for recovery of a sum of money is not within this Rule, nor can a subsequent order be made

R. 49. Judgment, Service of.

limiting the time for payment so as to ground execution by sequestration (Hulbert v. Cathcart, (1894) 1 Q. B. 244). An order to pay costs is not an order "requiring any person to do an act," and need not be indorsed or personally served under this rule (Re Deakin, (1900) 2 Q. B. 478).

"*Memorandum.*"

This memorandum must be indorsed on all orders which are required to be served, whether personally or not (Hampden v. Wallis, 26 C. D. 746); but not on merely prohibitive orders (Selous v. Croydon Local Board, 53 L. T. 209; Hudson v. Walker, 64 L. J. Ch. 204).

An order containing a positive undertaking to forthwith do a certain act should be indorsed and served in accordance with this rule (Halford v. Hardy, 81 L. T. 721; but see D. v. A. & Co., (1900) 1 Ch. 484).

An indorsement in the form formerly used in the Court of Chancery was held sufficient, as it is "*to the effect*" of the indorsement *supra* (Treherne v. Dale, 27 C. D. 66).

Order for attachment set aside because memorandum not indorsed (Shurrock v. Lillie, 52 J. P. 263).

Attachment refused because the affidavit served with the notice of motion omitted to state that the copy order served was duly endorsed with the memorandum prescribed by this rule (Stockton Football Co. v. Gaston, (1895) 1 Q. B. 453).

Attachment refused in a divorce action for non-compliance with an order for payment of taxed costs, &c., because the order was not indorsed as required by this rule (Pace v. P., 67 L.T. 383).

Although it was doubted in Evans v. E., 67 L. T. 719, whether a citation in Probate proceedings was within this rule. it is the practice to require it to be indorsed hereunder.

Attachment refused in probate proceedings on the ground that an order directing an executor to prove a will which had been disobeyed was not indorsed under this rule (In re Goods of Bristow, 66 L. T. 60).

Where an order for possession named no time within which possession was to be given, and no memorandum pursuant to

this rule could be indorsed, attachment ordered to issue, but to lie in the office for a week (Re Higgs' Mortgage, W. N. (94) 73. R. 49. Judgment, Service of.

Omission to fix Time.

When the order omits to fix a time, it is not thereby rendered ineffectual, but the Court will make a supplemental order fixing the time, (Needham v. N., 1 Hare, 633). But until a time is fixed the order cannot be enforced (Gilbert v. Endean, 9 C. D. 259). As to an order in K. B. D., see judgment of Wills, J., Hulbert v. Cathcart, (1894) 1 Q. B. 244.

"*Forthwith*" is a sufficient expression of time (Thomas v. Nokes, L. R. 6 Eq. 521, approved in Halford v. Hardy, 81 L. T. 721; but see Gilbert v. Endean, *ubi supra*).

An order containing a positive undertaking to "forthwith" do a certain act should be served in accordance with this rule, (Halford v. Hardy, 81 L. T. 721; Carter v. Roberts, (1903) 2 Ch. 312).

Service Within Time Fixed.

Where a certain time is limited for doing the act required, the order must be served within that time, otherwise proceedings to enforce it will be set aside (Duffield v. Elwes, 2 Beav. 268; Adkins v. Bliss, 2 De G. & J. 286); or else a supplemental order extending the time fixed must be obtained; but this order need not be endorsed under the rule (Treherne v. Dale, 27 C. D. 66).

Where Service Unnecessary.

An order to sign judgment unless a sum is paid before a day named need not be served on the defendant before judgment is signed upon it (Hopton v. Robertson, W. N. (84) 77; 126 (n).

ADDING PARTIES BY SUGGESTION.

RULE 50. In any case not already provided for by the Act, in which it becomes essential to make an additional party to

R. 50. Adding Parties.

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 which may be in the Form C in the Schedule to these Rules.

This and the next three Rules vary from the old Rules 36, 37 and 38, in providing that the notice of filing a suggestion shall be served upon the other party or parties to the appeal.

Rule 36 afforded the only provision for adding parties in the Supreme Court under the former practice, but now there is a special provision for intervention by Rule 60.

Sections 83 to 89 of the Supreme Court Act provide for suggestion in case of death.

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 be 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.

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 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. R. 50. Adding Parties.

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 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 non-suited 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.

R. 51. Suggestion set aside.

SUGGESTION MAY BE SET ASIDE.

RULE 51. The suggestion referred to in the next preceding Rule may be set aside on motion, by the Court or a Judge thereof.

SERVICE OF NOTICE.

RULE 52. Notice of the filing of such suggestion shall be served upon the other party or parties to the appeal.

DETERMINING QUESTIONS OF FACT ARISING ON MOTION.

RULE 53. Upon any motion to set aside a suggestion, 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.

MOTIONS.

RULE 54. All interlocutory applications in appeals shall be made by motion, supported by affidavit to be filed in the office of the Registrar. The notice of motion shall be served at least four clear days before the time of hearing.

By reference to Rule 87 it will be seen that in cases of appeals from the Registrar to a Judge of the Court, two clear days' notice only is required.

NOTICE OF MOTION, HOW SERVED.

R. 55. Motions, Service of Notice.

RULE 55. 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.

As pointed out in the note to Rule 20, it is very important that solicitors practising in the Supreme Court should appoint Ottawa agents, as neglect to do so may sometimes lead to very serious results where notices of motion are served by affixing a copy in the Registrar's office. It is not the practice, however, to dispose of motions where the notice 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.

AFFIDAVITS IN SUPPORT OF MOTION.

RULE 56. Service of a notice of motion shall be accompanied by copies of affidavits filed in support of the motion.

SETTING DOWN MOTIONS.

RULE 57. 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.

In carrying out the provisions of this Rule it is necessary that a copy of the notice of motion and the affidavit be filed in

R. 57. Motions. Setting down.

the office of the Registrar four clear days before the day upon which the motion is to be brought on to be heard. The party showing cause to the motion is entitled to object to the motion being heard if the affidavits have not been filed before the service of the notice of motion.

Solicitors must strictly comply with the provisions of this rule as the Court requires that it should have an opportunity of reading the papers before the motion comes on to be heard.

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.

EXAMINATION ON AFFIDAVIT.

RULE 58. Any party desiring to cross-examine a deponent who has made an affidavit filed on behalf of the opposite party, may, by leave of a Judge in Chambers, serve upon the party by whom such affidavit has been filed, or his solicitor, a notice in writing, requiring the production of the deponent for cross-examination before the Registrar or a commissioner for taking affidavits in the Court; such notice shall be served within such time as the Registrar may specially appoint ; and unless such deponent is produced accordingly, his affidavit shall not be used as evidence unless by the special leave of the Court or a Judge in Chambers. The party producing such deponent for cross-examination shall not be entitled to demand the expenses thereof in the first instance from the party requiring such production unless the Registrar so direct.

This Rule is new.

Discretion of Court.

There is no obligation on the Court to make an order for cross-examination under this Rule upon an affidavit filed on a motion. La Trinidad v. Brown, 36 W. R. 138.

There is a discretion to order cross-examination of an affidavit witness after his affidavit has been used. Strauss v. Goldschmidt, 8 Times Rep. 239.

Foreigner Resident out of Jurisdiction.

The Court will, if necessary, make an order for cross-examination of a foreign witness resident out of the jurisdiction. Strauss v. Goldschmidt, 8 Times Rep. 239.

"*A Notice in Writing.*"

The notice to cross-examine must comply with the above rule, and must state when, where, and before whom the cross-examination is to take place. Otherwise the affidavit cannot be rejected if the deponent is not produced (De Mora v. Concha, 32 C. D. 133; Concha v. C., 11 App. Cas. 541).

"*Unless such Deponent is Produced,*" *&c.*

A motion by the defendant to take affidavits filed by the plaintiff off the file on account of the non-production of the deponent for cross-examination before an examiner, was refused as irregular, the proper course being to object to the affidavits being read (Meyrick v. James, 46 L. J., Ch. 579). In the absence of the deponent from illness, the defendant was held entitled to insist on his affidavit being withdrawn, or the cause standing over (Nason v. Clamp, 12 W. R. 973; and see Re Sykes, 2 J. & H. 415.

The Court may refuse to act upon an affidavit if the deponent cannot be cross-examined (Shea v. Green, 2 Times Rep. 533).

"*For Cross-Examination.*"

If the counsel for the opposite party refuses to cross-examine the deponent when produced, the counsel for the party

R 58. Affidavits, Cross-examination.

producing him may examine him *viva voce* (Glossop v. Heston etc, Board 26 W. R. 433).

Cross-examination before an examiner should not, as a rule, take place until the affidavit evidence is complete (Muir v. Kirby, 32 Sol. Jo. 139; Re Davies, 44 C. D. 253).

As to cross-examination of a foreigner resident out of the jurisdiction, see Strauss v. Goldschmidt, 8 Times Rep. 239.

Cross-Examination on Affidavit Filed for Use in Chambers.

As a rule affidavits will not be allowed to be filed after cross-examination; though there is no hard-and-fast rule on the point. In ordinary cases, and under ordinary circumstances, the practice is a good and convenient one (Re Davies, 44 C. D. 253).

"*Expenses.*"

Under G.O. 5 Feb., 1861, r. 19 (English), the party was entitled *ex debito justitiæ* to an immediate order for taxation and payment of the expenses of production (Richards v. Goddard, L. R. 10 Ch. 288.

APPEAL ABANDONED BY DELAY.

RULE 59. 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 shall otherwise order.

INTERVENTION.

RULE 60. Any person interested in an appeal between other parties may, by leave of the Court or a Judge, intervene

therein upon such terms and conditions and with such rights and privileges as the Court or Judge may determine. R. 60. Interventions.

2. The costs of such intervention shall be paid by such party or parties as the Supreme Court shall order.

This Rule is adapted from the provisions of the Code of Civil Procedure of the Province of Quebec. Art. 220 reads as follows :

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

Art. 1237 reads as follows :

"Interventions, continuance of suits, changes of attorney and other incidental proceedings, take place in appeal upon petition, according to the formalities prescribed by the Court."

The following decisions are taken from Martineau & Delfausse, Code of Civil Procedure, Vol. 1, p. 783.

The Court of Appeal may order a third party interested in the issue to be called into the case, and the record to be sent to the Court below for that purpose. C. A. 1866. Joubert & Rascony 12 J., 228; 17 R. J. R., 476.

Where parties shew sufficient legal interest in the subject matter of the appeal, they will be allowed to intervene and obtain an order of suspension of the case in appeal until judgment be rendered on proceedings instituted in the Court below by petitioners, provided due diligence be used in the prosecution of such proceedings. C. A. 1883. Riddell & Evans & Hannan, 27 J., 184.

A motion by respondent to oblige the Eastern T. Bank to intervene. and to become appellants instead of Maher, on the grounds that Maher, who was the party in the Court below, was really appealing for the bank, was rejected. C. A. 1879. Maher & Aylmer, 2 L. N. 378.

Generally those who have an interest may appeal; even those not parties to the suit may intervene to prosecute the appeal. And so a notary whose minutes is attacked *en faux* and who has been examined as a witness on the inscription *en faux* and declared he had no interest in the suit, will be allowed

R. 60. Interventions.

to intervene in order to appeal from the judgment declaring his deed to be *faux*. C. A. 1879. Defoy & Forte, 3 L. N. 36.

Une personne qui, bien que n'étant pas partie à un procès, y est intéressée, peut, en son propre nom, interjeter appel de jugement qui l'a décidé. C. A. 1893. Rolland & La Caisse d'Economie Notre-Dame, 4 R. J. O. 314.

Le défendeur en garantie, dans le cas de garantie formelle, peut appeler en son nom personnel du jugement rendu sur l'action principale, lors même qu'il n'a pas pris le fait et cause du défendeur principal. C. A. 1892. Robert & Lavoilette & Desjardins, 1 R. J. O. 286.

Une partie intéressée dans un appel, pour soutenir le jugement attaqué, alors même que l'intimé s'est désisté du jugement porté en appel.

Un désistement ne peut avoir d'effet qu'entre les parties et ne peut porter préjudice aux tiers intéressés dans le jugement au sujet duquel il est fait. C. A. 1893. Choquette & Pelletier, 4 R. J. O. 303.

Un désistement n'est valable qu'en autant qu'il a été signifié à toutes les parties dans la cause.—Un désistement non singifié à toutes les parties ne met pas fin à l'instance et ne peut empêcher une partie d'intervenir pour protéger ses droits en appel. C. A. 1901. McNally & Préfontaine & Picken, 3 R. P. 401.

RE-HEARING.

RULE 61. There shall be no re-hearing of an appeal except by the leave of the Court on a special application, or at the instance of the Court.

The rehearing referred to in this Rule simply means a re-argument of an appeal, and the Rule is intended to cover cases where after judgment is pronounced it is found that the judgment has not dealt with all the matters in issue in the appeal

or conditions have arisen after the delivery of the judgment which make it necessary to provide in the formal judgment for matters not specially covered by the judgment as pronounced in Court or by the reasons for judgment. Such applications heretofore were made by motions to vary the minutes as settled by the Registrar. As pointed out in the note to Rule 47, this procedure was irregular, and is now expressly discountenanced by the latter part of that Rule.

R. 61. Re-hearing.

DISCONTINUANCE.

RULE 62. When a notice of discontinuance has been given by an appellant to a respondent, the latter shall be entitled to have his costs taxed by the Registrar without any order, unless the notice of discontinuance is served after the appeal has been inscribed for hearing in the Supreme Court. In the latter event, such order shall be made by the Court as to costs and otherwise as to the Court may seem meet.

This Rule is new, and is based upon S. 80 of the Supreme Court Act which reads as follows :

"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.

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 first part of the Rule deals with a case where the notice of discontinuance has been filed before the appeal has been in-

R. 62. Discontinuance

scribed for hearing. In this case, upon the filing of the notice, the respondent can obtain an appointment from the Registrar to tax costs, and no order is necessary in the Supreme Court dismissing the appeal.

If, however, the appeal has been inscribed, the effect of the notice of discontinuance is that the respondent may, upon notice, apply to the Court to dismiss the appeal with costs. Such an order was made by the Court in the appeal of Great Northern Rly. Co. v. Royal Trust Co., 4th March, 1907.

RULES APPLICABLE TO EXCHEQUER APPEALS.

RULE 63. The foregoing Rules shall be applicable to appeals from the Exchequer Court of Canada, except in so far as the Exchequer Court Act has otherwise provided.

The procedure in Exchequer Court appeals differs in the following respect from that in ordinary appeals :

Security.

In ordinary appeals, the security is $500 (Supreme Court Act, R. S., c. 139, s. 75); whereas by the Exchequer Court Act (R. S., c. 140, s. 82, ss. 1), the security is $50. This security is given by obtaining from the Registrar of the Supreme Court an authority directed to the Bank to receive the money and the payment therein of the $50 in accordance with the provisions of Rule 104.

Time for Giving Security.

In ordinary appeals the time allowed for giving security is 60 days (Supreme Court Act, s. 69), whereas in Exchequer appeals, the security must be given in 30 days. (Exchequer Court Act, R. S., c. 140, s. 82, ss. 1).

Inscription.

R. 63. Exchequer Appeals.

In ordinary appeals under Rule 37, the inscription is by the appellant and must be made fourteen days before the first day of the session of the Court fixed for the hearing of the appeal. In Exchequer appeals it is the duty of the Registrar to inscribe the appeal for the nearest convenient time, according to the Rules in that behalf of the Supreme Court. (Exchequer Court Act, R. S., c. 140, s. 82, ss. 2).

This section of the Exchequer Court Act differs from the corresponding section of the old Act, R. S. C., c. 135, s. 40, as amended by 50-51 V. c. 16, which required the Registrar to inscribe the appeal for the first day of the next session of the Court, even when the deposit on the appeal was made immediately preceding the beginning of the session.

The Act itself required formerly that the appellant should give ten days' notice that the appeal had been set down, which was sometimes impossible to comply with if the appeal was inscribed for the first day of the next session. The Commissioners for the revision of the Statutes have made the section workable by redrafting the clause so as to provide that the appeal shall be set down, 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.

As the statute now stands, in Exchequer Court cases no appeal will be inscribed by the Registrar unless the provisions with respect to filing the case and factums have been complied with.

Notice of Hearing.

Rule 18 provides that in ordinary cases the notice of hearing shal' be served at least 15 days before the first day of the session. In Exchequer appeals, as above mentioned, the notice of hearing shall be given within ten days after the appeal is set down, and the party is not entitled to wait until 15 days before the first day of the session.

R. 63. Exchequer Appeals.

The Exchequer Court Act makes provision (R. S., c. 140, s. 82, ss. 2) for the Supreme Court or a Judge, extending the time for giving the notice of hearing.

RULES NOT APPLICABLE TO CRIMINAL APPEALS NOR HABEAS CORPUS.

RULE 64. The foregoing Rules shall not, except as hereinbefore provided, apply to criminal appeals, nor to appeals in matters of *habeas corpus* under section 62 of the Act.

CASE IN CRIMINAL APPEALS AND HABEAS CORPUS.

RULE 65. Criminal appeals may be heard on a written case certified under the seal of the Court appealed from and in which case shall be included all judgments and opinions pronounced in the Courts below. The appellant shall also file six type-written or printed copies of the case with a memorandum of the points for argument except in so far as dispensed with by the Registrar.

2. In appeal in *habeas corpus* cases under sec. 62 of the Act, a printed or typewritten case containing the material before the Judge appealed from, and the judgment of the said Judge, together with a memorandum of the points for argument, except is so far as dispensed with by the Registrar, shall be filed.

This Rule differs somewhat from the former Rule 47, respecting criminal and *habeas corpus* appeals, in providing that in criminal appeals the appellant shall file six typewritten or printed copies of the case and also six copies of a factum or points for argument, except in so far as dispensed with by the Registrar.

In *habeas corpus* appeals, under s. 62 of the Act, one printed or typewritten case, with a factum or points for argument, is all that is required. R. 65. Criminal Appeals.

The only appeal in *habeas corpus* cases under s. 62 is the appeal from a single Judge to the full Court.

WHEN CASE TO BE FILED.

RULE 66. In criminal appeals and in appeals in cases of *habeas corpus*, under section 62 of the Act, unless the Court or Judge in Chambers shall otherwise order, the case shall be filed fifteen clear days before the day of the session of the Court at which the appeal is proposed to be heard.

Former Rule 48 provided that in criminal appeals from all the Provinces except British Columbia, the case should be filed at least one month before the first day of the session for which it was set down to be heard, and in British Columbia appeals two months before the said day

By the present Rule, this has been altered, and if the case is filed 15 days before the day of the session at which the appeal is proposed to be heard, it will be sufficient.

It is to be noted that the 15 days is not 15 days before the first day of the session of the Court, but 15 days before the particular day of the session on which the appeal is to be heard.

NOTICE OF HEARING IN CRIMINAL APPEALS AND IN APPEALS IN MATTERS OF HABEAS CORPUS.

RULE 67. In cases of criminal appeals and appeals in matters of *habeas corpus*, under section 62 of the Act, notice of

R. 67. Criminal Appeals, Notice of hearing.

hearing shall be served at least five days before the day of the session at which the appeal is proposed to be heard.

Under former Rule 49, in criminal appeals and appeals in matters of *habeas corpus*, under s. 62 of the Act, a very lengthy notice of hearing was required, namely, two weeks in Ontario and Quebec; three weeks in Nova Scotia, New Brunswick and Prince Edward Island; one month in Manitoba; and six weeks in British Columbia.

This unreasonably delayed the hearing of appeals of this character, and was inconsistent with the provisions of s. 65 of the Act which provides as follows :

"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."

And also the provisions of s. 1024, ss. 3, of the Criminal Code, which provides as follows :

"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.

The present Rule only requires that 5 days' notice should be given and the notice may be given for any day in the session of the Court.

ELECTION APPEALS.

RULE 68. Except as otherwise provided by the Dominion Controverted Elections Act, and by the three following Rules, the Supreme Court Rules shall, so far as applicable, apply to appeals in controverted election cases.

Former Rule 50, which dealt with Election appeals, expressly provided that the foregoing Rules should not apply in controverted election cases. The present Rule brings election cases into harmony with other appeals, except in the matters provided by the three next following Rules, and the special provisions of the Dominion Controverted Elections Act. R. 68. Election Appeals.

The particulars in which the procedure in Election appeals differs from ordinary appeals are the following :

Security.

The security is not given in the Supreme Court, but in the Election Court, under the Dominion Controverted Elections Act, R. S., c. 7, s. 65, which reads as follows :

"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.

Inscription.

Differing from the ordinary cases, the appeal is not inscribed by the party appellant but by the Registrar, who is directed by s. 66 of the said Act to set the appeal down for hearing at the nearest convenient time according to the rules of the Supreme Court.

R. 68. Election Appeals.

Notice of Hearing.

By s. 67 of the Act, the notice of hearing shall be given within three days after the appeal has been set down by the Registrar.

Factums.

Former Rules 53 and 54, read as follows :

"53. The factum or points for argument in appeal in controverted election appeals, shall be printed as hereinbefore provided in the case of ordinary appeals."

"54. 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."

Under the present Rule, factums are filed and exchanged at the same time and in the same manner as obtains in ordinary appeals.

The other provisions with respect to the procedure in Election appeals are contained in the three next following Rules.

RULE 69. 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 in Chambers may direct to be printed, and shall have forty (40) copies of the said certified copy printed in the same form as herein 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.

2. For printing in election appeals the same fees shall be allowed on taxation as for printing the Case in ordinary appeals. R. 68. Election Appeals.

The practice which obtains in the Registrar's office is to permit the solicitors for the appellant to copy in the office of the Registrar's clerk the case directed to be printed under Rule 71 infra.

FIXING TIME OF HEARING.

RULE 70. As soon as the Registrar shall have received the record duly certified by the clerk of the Election Court, the appellant shall apply on notice to a Judge in Chambers to have a day fixed for the hearing and to have the appeal set down, and on one week's default the respondent may move to dismiss the appeal.

In order of time, this Rule should precede Rule 69.

It is the duty of the solicitor for the appellant to apply promptly to the Registrar to have a day fixed for the hearing and to have the appeal set down, and if it is desired to dispense with the printing of a part of the record, to make an application in regard to this at the same time.

To avoid a motion to dismiss the appeal under this Rule, it will be necessary that the appellant's solicitor should keep closely in touch with the clerk of the Election Court so as to be informed promptly as soon as the record has been transmitted to the Registrar of the Supreme Court, and to notify his Ottawa agents of this fact.

Upon the solicitors for the parties appearing before the Registrar, under this Rule, the Registrar will set the appeal down for hearing at such a date as will permit of the printing of the case and factums being ready.

R. 71. Election Appeals. Printing.

ORDER DISPENSING WITH PRINTING OF RECORD OR FACTUM IN ELECTION APPEALS.

RULE 71. In election appeals a Judge in Chambers may, upon the application of the appellant or respondent, make an order dispensing with the printing of the whole or any part of the record, and may also dispense with the delivery of any *factum* or points for argument in appeal.

Under former Rule 54, the appellant alone had power to move to dispense with the printing of the whole or part of the record. By this rule the respondent has the same privilege.

It was held, Brassard v. Langevin, 1 Can. S. C. R. 201, that where, under the former rule, the appellant failed to apply for an order dispensing with the printing, which might save a great deal of useless expense, he might, even if he succeeded, have to pay the cost of printing the unnecessary matter.

As the present rule gives the right to apply to both the appellant and respondent, it is probable that this decision is no longer applicable.

The Court will only dispense with the printing of the entire case and factums in exceptional cases, for instance where it is urgent that the appeal should be heard promptly, and there is not sufficient time in which to have the printing done.

HABEAS CORPUS.

RULE 72. Applications for writs of *habeas corpus ad subjiciendum* shall be made by motion for an order which, if the Judge so direct, may be made absolute *ex parte* for the writ to issue in the first instance; or the Judge may direct a summons for the writ to issue, and the Judge in his discretion may refer

the application to the Court. Such summons and order may be in the Forms D and E respectively set out in the Schedule to these Rules. *Vide* pp. 167-168, infra. R. 72. Habeas Corpus motions.

This and the following rules dealing with *Habeas Corpus* matters, are new and have been adapted from the practice which obtains in the Crown office in England.

S. 62 of the Supreme Court Act reads as follows :

"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."

At the time of the publication of the writer's book on Supreme Court Practice, it was thought that the only jurisdiction the full Court had in such matters was sitting in appeal upon the refusal of a single Judge of the Court to grant a writ or to remand the prisoner under this section. Recently, however, it has been held, in re Richard, 38 Can. S. C. R. 394, Idington and Maclennan, JJ., dissenting, that on an application to a Judge for a writ of habeas corpus, he may refer the same to the Court which has jurisdiction to hear and dispose of it.

Habeas Corpus ad Subjiciendum.

This writ is issued for protecting the liberty of the subject by examining into the legality of commitments for criminal or supposed criminal matters, or for any other forcible detentions, including impressments; also for admitting to bail prisoners legally committed. This writ is the great constitutional remedy for all manner of illegal confinement, and is a high prerogative writ, which at common law issues not only during the sittings, but also in vacation. It is the legal process which is employed for the summary vindication of the right of personal

R. 72. Habeas Corpus applications.

liberty when illegally restrained, and extends to all cases of illegal imprisonment, whether claimed under public or private authority. Rex v. Mead, 1 Burr. 542.

The writ is supposed to have been in use before the date of Magna Charta. Parliament, by 16 Car. I., c. 10, interfered to strengthen and protect its efficacy, and to do away with other abuses which had crept in, passed the Habeas Corpus Act, 31 Car. II., c. 2.

Secs. 3, 4, and 5 of this Act provide :

"That on complaint and request in writing by or on behalf of any person committed or detained other than persons convicted or in execution for any crime (unless for treason or felony plainly expressed in the warrant, or upon suspicion of any felony, or as accessory before the fact to any felony), attested and subscribed by two witnesses that were present at the delivery of the copy of the warrant of commitment and detainer, the Lord Chancellor or any of the Judges *in vacation*, upon viewing a copy of the warrant, or affidavit that a copy has been denied to be given, shall (unless the party has neglected for two whole terms to apply for a habeas corpus for his enlargement), award a habeas corpus for such prisoner returnable immediately before himself or some other judge, and within two days after the party shall be brought before him, shall discharge such party, if bailable, upon giving security by himself, and one or more surety or sureties in any sum having regard to the quality of the prisoner and the nature of the offence, to appear and answer in the Court in which the offence is properly cognizable. Every such writ to be marked "per statutum tricesimo primo Caroli secundi regis". Any officer refusing to make a return to the writ, or refusing or neglecting to deliver within six hours after demand by the prisoner, or on his behalf, a copy of the warrant of commitment and detainer, renders himself liable to a penalty of £100 for a first offence and to forfeit his office, and of £200 for a second offence to be recovered by action against such officer, his executors or administrators."

The procedure on the common law writ was amended by 56 Geo. III., c. 100.

By sect. 1 of this Act the Judges are required to award this writ in vacation time, where any person shall be confined or restrained of his or her liberty, *otherwise than for some criminal or supposed criminal matter*, and except persons imprisoned for debt or by process in any civil suit, upon complaint made to them, by or on behalf of the person so confined or restrained, if it shall appear by affidavit or affirmation that there is a probable and reasonable ground for such complaint. By sect. 2, wilful disobedience to such writs is declared to be a contempt of the Court under the seal of which such writs shall have issued, and the Judges are empowered to issue warrants for apprehending parties guilty of such disobedience in order to their being punished for the same; and it is provided that writs issued in vacation may be made returnable in Court in the next term; and writs issued in term may be made returnable before a Judge in vacation.

R. 72. Habeas Corpus applications.

By sect. 3, although a return to a writ of habeas corpus may be good and sufficient in law, the Judge before whom such writ may be returnable may examine into the truth of the facts set forth in such return by affidavit or affirmation, and in case such Judge may consider it doubtful whether the material facts set forth be true or not, he may admit the prisoner to bail with one or more sureties to appear in Court in the next term, and may also remit the matter to the Court to examine into, in a summary way by affidavit or affirmation, and to order and determine touching the discharging, bailing, or remanding the party.

Sect. 4 provides for the like proceeding being had for controverting the truth of the return to any such writ granted by and returnable before the Court itself.

Sect. 6 applies the provisions of sect. 2 of this Act to all writs of habeas corpus awarded in pursuance of the Act of 31 Car. 2, c. 2."

The writ is used to obtain the discharge of prisoners from custody on commitment, whether civil or criminal, for some illegality or informality in such commitment, or for want of or excess of jurisdiction. It does not in general lie when the party

R. 72. Habeas Corpus applications.

is in execution on a criminal charge after judgment on an indictment, according to the course of common law. Ex parte Lees, E. B. E. 828.

Nor does it lie in cases of commitments by any Court of Record for a contempt, or by the House of Lords or Commons for a contempt or breach of privilege; as they are commitments in execution, and need not specify the particulars of the offence, every Court being held to be the proper judge of what does or does not constitute a contempt. This also applies where colonial legislatures are vested with the same privileges as the English Houses of Parliament, and have committed any one for contempt.

Affidavits.

The application must be supported by an affidavit by the person restrained, showing that such application is made at his instance, and that he is illegally restrained, or there must be an affidavit by some other person that he is so coerced as to be unable to make one.

Warrant of Commitment.

When the application is on behalf of a prisoner detained in custody of any gaoler of a prison, or other officer, the application must be supported by a copy of the warrant or commitment, verified by affidavit, which copy such gaoler or other officer is bound by sect. 5 of 31 Car. II, c. 2, to deliver within six hours after demand, made by the prisoner or any person on his behalf, under heavy penalties.

Dispensing with Prisoner's Attendance.

It has always been the practice in the Supreme Court, where a writ of *habeas corpus* has been ordered to issue, to dispense with the prisoner's attendance before the Judge making the order. In the order for the writ of *habeas corpus* made in re Smitheman, 35 Can. S. C. R. 189, the following clause was inserted :

"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 solicitors signing upon said writ an indorsement dispensing with the production of the body of the said William Smitheman." R. 72. Habeas Corpus applications.

RULE 73. If a summons for the writ to issue is granted, a copy thereof shall be served upon the Attorney-General of the Province in which the warrant of commitment was issued, and shall be returnable within such time as the summons shall direct.

RULE 74. On the argument of the summons for a writ to issue, the Judge may in his discretion, direct an order to be drawn up for the prisoner's discharge instead of waiting for the return of the writ, which order shall be a sufficient warrant to any gaoler or constable or other person for his discharge.

RULE 75. The writ of *habeas corpus* shall be served personally, if possible, upon the party to whom it is directed; or if not possible, or if the writ be directed to a gaoler or other public official, by leaving it with a servant or agent of the person confining or restraining, at the place where the prisoner is confined or restrained, and if the writ be directed to more than one person, the original delivered to or left with such principal person, and copies served or left on each of the other persons

R. 75. Habeas Corpus applications.

in the same manner as the writ. Such writ of *habeas corpus* may be in the Form F set out in the Schedule to these Rules.

For Form *vide* p. 168 infra.

RULE 76. If a writ of *habeas corpus* be disobeyed by the person to whom it is directed, application may be made to the Judge or the Court on an affidavit of service and disobedience, for an attachment for contempt. The affidavit of service may be in the Form G set out in the Schedule to these rules.

For Form *vide* p. 169 infra.

RULE 77. The return to the writ of *habeas corpus* shall contain a copy of all the causes of the prisoner's detention endorsed on the writ, or on a separate schedule annexed to it.

RULE 78. The return may be amended or another substituted for it by leave of the Court or a Judge.

RULE 79. When a return to the writ of *habeas corpus* is made, the return shall first be read, and motion then made for discharging or remanding the prisoner, or amending or quashing the return.

REFERENCES.

R. 80. References to Court.

RULE 80. 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 fyled by all parties to the reference in the manner and form and within the time required in appeals to the Court.

References to the Supreme Court by the Governor in Council are authorized by s. 60 of the Supreme Court Act.

References may also be made to the Supreme Court by the Board of Railway Commissioners, or by the Governor in Council, R. S. c. 37, s. 55.

The procedure to be adopted in carrying out the provisions of this rule is for the party having the carriage of the reference to apply to the Court to fix a day for the hearing and to direct what parties shall be served with notice, and be entitled to file factums and take part in the argument. The object of the rule is to provide that all parties affected by the reference should have an opportunity of being heard.

APPEALS FROM BOARD OF RAILWAY COMMISSIONERS.

RULE 81. 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. 81. Railway Commissioners. Appeals.

2. All the Rules of the Supreme Court from 1 to 62, 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.

The Railway Act, R. S. c. 37, s. 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.

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.

THE REGISTRAR'S JURISDICTION.

RULE 82. The transaction of any business and the exercise of any authority and jurisdiction in respect of the same, which by virtue of any statute or custom, or by the practice of the Court, was, on the 23rd day of June, 1887, or might thereafter be done, transacted or exercised by a Judge of the Court sitting in Chambers, except the granting of writs of *habeas corpus* and adjudicating upon the return thereof, and the granting of writs of *certiorari*, may be transacted and exercised by the Registrar.

The Supreme Court Act, R. S. c. 139, s. 109, authorizes the Judges of the Supreme Court to confer upon the Registrar all the powers, authority and jurisdiction that might be exercised in Chambers by a Judge of the Court. Pursuant to this statute, a General Order was passed on the 17th October, 1887. R. 82. Registrar's Jurisdiction.

It has been thought desirable to include in the Rules everything contained in the General Orders, and the provisions of the former General Order No. 83 are now contained in the Rules 82 to 89, both inclusive.

The object of these rules is to relieve the Judges of the Court, so far as possible, from dealing with interlocutory applications, and wherever in the rules motions may be made to a Judge in Chambers, they should be made returnable before the Registrar, as Rule 142 expressly provides that the expression "Judge of the Supreme Court in Chambers" or "Judge in Chambers" shall include the Registrar sitting in Chambers.

RULE 83. 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.

RULE 84. 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.

R. 85. Registrar's Jurisdiction.

RULE 85. All orders made by the Registrar sitting in Chambers shall be signed by the Registrar.

RULE 86. Any person affected by any order or decision of the Registrar, except as otherwise in these Rules provided, may appeal therefrom to a Judge of the Supreme Court.

Except as otherwise in these Rules Provided.

The exceptions here referred to are the provisions under Rules 1 to 4, which provide for an appeal from a Judge in Chambers to the full Court, where the question of jurisdiction is raised.

RULE 87. All appeals from the Registrar to a Judge of the Court 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.

It will be noted that under this Rule, appeals from the Registrar to a Judge of the Court may be made upon a two days' notice, whereas in all other motions, four days' notice is required. *Vide* Rule 54 supra.

RULE 88. Appeals from the Registrar to a Judge of the Court shall be brought on for hearing on the first Monday after

the expiry of the delays provided for by the next preceding Rule, or so soon thereafter as the same can be heard, and shall be set down not later than the preceding Saturday in a book kept for that purpose in the Registrar's office. R. 88. Registrar's Jurisdiction.

Although Monday is the day provided by this Rule for hearing appeals from the Registrar, the practice obtains, where the parties consent and a Judge can be conveniently obtained, to bring the appeals on from the Registrar's decision at once. This often saves counsel who come from a distance from making two trips to Ottawa.

RULE 89. 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.

FEES TO BE PAID REGISTRAR.

RULE 90. The fees mentioned in Form H set out in the Schedule to these Rules shall be paid to the Registrar by stamps to be prepared for that purpose.

Form H. in the Schedule to these Rules expressly dispenses with the fees being paid in *habeas corpus* and criminal appeals.

Vide infra p. 170.

Appeals in forma pauperis.

The Supreme Court or a Judge thereof has no power to allow an appeal *in forma pauperis* or to dispense with the giving

R. 90. Fees, Stamps.

of the security required by the statute. Fraser v. Abbott, 22nd February, 1878, and 16th March, 1878.

Where leave to appeal is granted in *forma pauperis* by the Privy Council, this will entitle the appellant to obtain the transcript record without the payment of any fees.

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 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 *forma pauperis*, the ordinary rules could not apply.

COSTS.

RULE 91. Costs in appeal between party and party shall be taxed pursuant to the tariff of fees contained in Form I set out in the Schedule to these Rules. *Vide* infra p. 170.

There is no provisions for the taxation of costs as between solicitor and client. Vide Boak v. Merchants Marine Ins. Co., 3rd June, 1879.

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. R. 91. Costs.

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.

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.

A form of Bill of Appellant's Costs will be found in the Appendix at p. 281 infra.

A form of Bill of Respondent's Costs will be found in the Appendix at p. 282 infra.

A form of Affidavit of Disbursements will be found in the Appendix at p. 283 infra.

A form of Sheriff's Account will be found in the Appendix at p. 284 infra.

RULE 92. 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 93. In any case in which by the order or direction of the Court, or Judge, or otherwise, a party entitled to receive

R. 93. Costs.

costs is liable to pay costs to any other party, the Registrar may tax the costs such party is so liable to pay, and may adjust the same by way of deduction or set-off, or may, if he shall think fit, delay the allowance of the costs such party is entitled to receive until he has paid or tendered the costs he is liable to pay; or such officer may allow or certify the costs to be paid, and direct payment thereof, and the same may be recovered by the party entitled thereto, in the same manner as costs ordered to be paid may be recovered. This rule shall not apply to appeals from the Province of Quebec.

This Rule, and the six following Rules are new, and are adapted from the corresponding English Order 65.

This Rule, however, does not apply to the Province of Quebec. Art. 553 of the Code of Civil Procedure reads 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."

Costs, therefore, being the property of the solicitor, are not the subject of set off in that Province.

"By Way of Deduction or Set-Off."

Where several points are in dispute, and each party succeeds on some of them, the costs may be set off one against the other, and the plaintiff or defendant ordered to pay the balance (Bankart v. Tennant, L. R. 10 Eq. 141, 150; and see Knight v. Pursell, 28 W. R. 90; Badische Anilin v. Levinstein, 29 C. D. 366; Jenkins v. Jackson (1891), 1 Ch. 89. Costs payable under different orders in the same suit, and notwithstanding change of solicitors (Robarts v. Buee, 8 C. D. 198), or in two suits in which the same estate is being administered (Lee v. Pain, 4 Hare, 255), may be set off against each other; but the costs of two independent proceedings in different Courts cannot be set off against each other (Collett v. Preston, 15 Beav.

458; Wright v. Mudie, 1 Sim. & Stu. 266; Ex p. Griffin, 14 C. D. 37); thus, the costs of appeal from a County Court to a Divisional Court cannot be set off against the costs of a bankruptcy appeal to a Divisional Court, though both Courts belong to the K. B. D. (Re Bassett, (1896) 1 Q. B. 219); and costs in interpleader proceedings cannot be set off against costs in the action (Barker v. Hemming, 5 Q. B. D. 609). Chitty, J., refused to set off costs of an application to remove a County Court action into the C. D. against the costs of the action (Hassell v. Stanley, (1896) 1 Ch. 607). R. 93. Costs.

Where the C. A. dismissed an action, and remitted a cross action for trial, but the order was silent as to any set-off of costs, an application for stay of taxation and for set-off of the costs which might be ordered to be paid by plaintiffs in the cross-action against costs payable to them in the original action, was refused, the Court declining to deprive the party of the present right to costs given to him by the order of the C. A. (Automatic Weighing Machine Co. v. Combined Weighing Co., 37 W. R. 636).

Costs which a party is entitled to receive out of a fund in Court may be set off against costs which such party is ordered to pay personally (Batten v. Wedgwood, &c., Co., 28 C. D. 317). Where a party entitled under an order to costs out of the estate, appealed from an interlocutory order, and his appeal was dismissed with costs, the C. A. refused to order the costs of the respondent of the appeal to be set off against the costs payable to the appellant under the previous order. The Court directed that no costs should be paid out to the appellant for a fortnight, so that the taxing master might consider the question of set-off on taxing the costs of the appeal (Re Crawshay, 45 C. D. 318).

Solicitor's Lien.

The costs may be directed to be set off without regard to the lien of the solicitors, which only extends to the ultimate balance (Cattell v. Simons, 6 Beav. 304; Bawtree v. Watson, 2 Keen, 713.

R. 93. Costs.

Married Woman.

Costs payable by a married woman out of her separate estate may be a set-off against costs payable to her personally. A judgment against her, though limited, is a personal one (Pelton v. Harrison, (1892) 1 Q. B. 118; and cf. Holtby v. Hodgson, 24 Q. B. D. 103; but the death of her husband does not convert a judgment limited to her separate estate in the form of Scott v. Morley, 20 Q. B. D. 120, into a judgment upon which the widow can be personally called upon to pay (Re Hewett, (1895) 1 Q. B. p. 332, per Vaughan Williams, J.).

Set-off of Debt Against Costs.

See Pringle v. Gloag, 10 C. D. 676.

Forms of Direction as to Set-off.

See Seton, 248-252.

RULE 94. The Registrar may, whenever he deems it advisable, reserve any question arising on the taxation of costs for the opinion of a Judge.

RULE 95. The Registrar shall, for the purpose of any proceeding before him, have power and authority to administer oaths and examine witnesses, and shall in relation to the taxation of costs have authority to direct the production of such books, papers and documents as he shall deem necessary.

RULE 96. Any person who may be dissatisfied with the allowance or disallowance by the Registrar, in any bill of costs taxed by him, of the whole or any part of any items, may, at any time before the certificate or allocatur is signed, or such earlier time as may in any case be fixed by the Registrar, deliver to the other party interested therein, and carry in before the Registrar, his objection in writing to such allowance or disallowance, specifying therein by a list, in a short and concise form, the items or parts thereof objected to, and the grounds and reasons for such objections, and may thereupon apply to the Registrar to review the taxation in respect of the same. The Registrar may, if he shall think fit, issue, pending the consideration of such objections, a certificate of taxation or allocatur for or on account of the remainder of the bill of costs, and such further certificate or allocatur as may be necessary shall be issued by the Registrar after his decision upon such objections. R. 96. Costs. Taxation.

Grounds and reasons for objections.

Objection to Principle of Taxation.

This Rule applies only where specific objections are made as to the allowance or disallowance of particular items, and not where the general principle on which the taxation has proceeded is objected to (Sparrow v. Hill, 7 Q. B. D. 362; Re Fletcher & Dyson, 19 Times Rep. 682). And where there has been a refusal to tax, and a certificate given that there is nothing to tax, the Court has juridsiction to vary or discharge the certificate on summons without objections being carried in (Re Castle, 36 C. D. 194). See, however, Craske v. Wade, 80 L. T. 380.

No Review on Points not Raised by Objections.

Points not raised in the written objections before the taxing officer cannot be raised on summons to review (Re Nation, 57

R. 96. Costs. Taxation.

L. T. 648; Shrapnel v. Laing, 20 Q. B. D. p. 334, per Lord Esher, M. R.; Strousberg v. Sanders, 38 W. R. 117).

RULE 97. Upon such application the Registrar shall reconsider and review his taxation upon such objections, and he may, if he shall think fit, receive further evidence in respect thereof.

This rule differs from the corresponding English Rule in not requiring the Registrar to state the grounds and reasons of his decision.

RULE 98. Any party who may be dissatisfied with the certificate or allocatur of the Registrar as to any item which may have been objected to as aforesaid, may within two days from the date of the certificate or alloctaur, or such other time as the Registrar at the time he signs his certificate or allocatur may allow, appeal to a Judge of the Supreme Court from the taxation as to the said item, and the Judge may thereupon make such order as to him may seem just; but the certificate or allocatur of the Registrar shall be final and conclusive as to all matters which shall not have been objected to in manner aforesaid.

Appeal to a Judge of the Supreme Court.

A form of Notice of Motion will be found in the Appendix, infra p. 285.

CASES WHERE REVIEW DIRECTED—DISCRETION OF TAXING OFFICER.

The certificate of the taxing officer will not generally be reviewed on a mere question of *quantum* (Re Catlin, 18 Beav. 508; Friend v. Solly, 10 Beav. 329; Alsop v. Lord Oxford, 1 My. & K. 564); or of *quoties* (Re Brown, L. R. 4 Eq. 464); but only where the taxing officer has acted on some mistaken principle, or where there has been some irregularity in the proceedings before him (Fenton v. Crichett, 3 Mad. 496; Russell v. Buchanan, 9 Sim. 167; and see Turnbull v. Janson, 3 C. P. D. 264; The Neera, 5 P. D. 118; Hargreaves v. Scott, 4 C. P. D. 21; Brown v. Sewell, 16 C. D. 517; Ager v. Blacklock, 56 L. T. 890; Budgett v. B., (1895) 1 Ch. 202; Oliver v. Robbins, 43 W. R. 137).

In a proper case, however, the taxation may be reviewed even upon a question of *quantum*, *e.g.*, where there has been a very exorbitant charge (Smith v. Buller, L. R. 19 Eq. p. 474, per Malins, V. C.).

Where the Court has delegated to the taxing officer the decision of a question as to costs, the matter is within his discretion, and there can be no appeal from his decision, unless he has failed to exercise his discretion at all (Boswell v. Coaks, 36 C. D. 444).

"Final and Conclusive."

Objections need not be carried in where the ground of review is that the taxing officer has proceeded on a wrong principle, and specific items are not objected to, but the Court has jurisdiction to vary or discharge the certificate (Re Castle, 36 C. D. 194; Sparrow v. Hill, 7 Q. B. D. 362; Re Fletcher & Dyson, 19 Times Rep. 682). Where, however, in taxing a bill of costs in an action where judgment on a counterclaim had been given for the plaintiff, the master disallowed the whole of the costs incurred by the plaintiff in meeting the counterclaim upon the merits and in detail, it was held that objections must be carried in (Craske v. Wade, 80 L. T. 380). Where a party carried in objections to the disallowance of items

R. 98. Costs, Taxation and Appeal.

before the taxing-master which were allowed, and the opposite party carried in no objections to the allowance of such items, but applied to review the taxation, it was held that objections ought to have been carried in, and the application was refused (Strousberg v. Sanders, 38 W. R. 117). A point not raised in the objections carried in before the taxing-master cannot be taken upon the hearing in review (Re Nation 57 L. T. 648; Shrapnel v. Laing, 20 Q. B. D. 334).

RULE 99. Such appeal shall be heard and determined by the Judge upon the evidence, which shall have been brought in before the Registrar and no further evidence shall be received upon the hearing thereof, unless the Judge shall otherwise direct, and the costs of such appeal shall be in the discretion of the Judge.

Cases.

See Sturge v. Dimsdale, 9 Beav. 170, where the Court, having communicated with the taxing officer at to the proceedings in his office, refused to receive an affidavit by the parties as to what had taken place there; and see Charlton v. C., 31 W. R. 237; Hester v. H., 34 C. D. 617.

CROSS-APPEALS.

RULE 100. 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 fifteen days after the security has been approved, or such further time as may be prescribed by

the Court or a Judge in Chambers, give notice of such intention to all parties who may be affected thereby. 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 Court, be ground for an adjournment of the appeal, or for special order as to costs. R. 100. Cross-Appeals.

This Rule contains an important change from the provision of former Rule 61, in that notice of cross appeal must be given within fifteen days after the security has been approved, and not fifteen days before the first day of the next session.

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 Railway 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-

R. 100. Cross-Appeals.

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.

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. R. 100. Cross-Appeals.

McNichol v. *Malcolm*, 1907.

In this case the plaintiff (respondent) Malcolm, brought an action against McNichol, appellant, and the Standard Plumbing Co., claiming $18,000 damages under the following circumstances : The defendant McNichol was plaintiff's landlord, and by the lease between them, covenanted to keep the premises heated up to 70° above zero. During the winter the heating proved defective, and plaintiff gave notice to her landlord to have the heating made satisfactory. Upon examination of the premises, the landlord found it necessary to make a change in the radiators, and for that purpose called upon the Standard Plumbing Co., who were under contract with him in connection with the construction of the building, to put in the necessary plant for suitably heating the premises, to make the plaintiff's rooms satisfactory. In the course of installing the new radiators, the plaintiff's premises were flooded with steam and her stock in trade destroyed.

At the trial she recovered judgment against both defendants but upon appeal to the full Court, the judgment in her favour against the Plumbing Co. was set aside, and the action dismissed as against them without costs. Thereupon McNichol appealed to the Supreme Court, and the case on his appeal was certified to the Registrar of the Supreme Court on the 13th April, 1907. On the 18th April, the respondent Malcolm served upon the Standard Plumbing Co. the following notice of cross-appeal :

"Take notice that on the hearing of the appeal of the above named appellants, the plaintiff will contend that the decision of the Court of Appeal should be varied and the judgment of Chief Justice Dubuc entered at the trial of this action in the court of King's Bench should be restored except as to damages by water. Dated this 18th day of April, 1907."

The Plumbing Co. filed a factum upon the cross-appeal and appeared by counsel upon the argument, and took objection

R. 100. Cross-Appeals.

to the notice of cross-appeal, claiming that no security had been given the Plumbing Co. by the respondent Malcolm, and that her proceeding was a substantive appeal from the Court of Appeal and that no relief in the present appeal could be obtained against them. They also filed the following letters :

"Winnipeg, May 14th, 1907.

"Messrs. Aikins, Robson & Co., Barristers, etc., City,
(Solicitors for McNichol).

Re Malcolm vs. McNichol.

"DEAR SIRS :—As there seems to be some doubt as to whether or not you propose to claim relief over against the Standard Plumbing Co. upon the hearing of the appeal in the Supreme Court, we would be glad if you would write us a note and state positively whether it is your intention upon the appeal to do so. We do not know that it will be necessary for us to appear on the appeal unless you intend to claim relief over against our clients. Please let us hear from you.

"Yours truly,

("Signed) Hough, Campbell & Ferguson,"
(Solicitors for Standard Plumbing Co.).

"Winnipeg, May 16th, 1907.

"Messrs. Hough, Campbell & Ferguson, Barristers,
Winnipeg, Man.

Re Malcolm v. McNichol.

"DEAR SIRS :—We have your letter of the 14th. We are not claiming relief over against your clients at the hearing of the appeal in the Supreme Court, in accordance with the arrangement made between Mr. Aikins and Mr. Wilson when the case came up before the Court of Appeal, that the question of indemnity or relief over against your clients should not be taken up until the rights of the plaintiff against each of the defendants had been determined.

Yours truly,

"(Signed) Aikins, Robson & Co."

The Court reserved judgment on the application of the Plumbing Co., heard the entire case on the merits, and gave judgment that the notice of cross-appeal was properly given, and dismissed the appeal of McNichol, but reversed the Court of Appeal below and allowed the cross-appeal against the Plumbing Co. with costs. R. 100. Cross-Appeals.

RULE 101. The respondent who gives a notice of cross-appeal shall deposit a printed factum or points for argument in appeal with the Registrar in the manner hereinbefore provided as regards the principal appeal, and the parties upon whom such notice has been served shall also deposit their printed factum in the manner hereinbefore provided as regards the principal appeal. Factums on the cross-appeal shall be interchanged between the parties as hereinbefore provided as to the principal appeal. The factum on the cross-appeal may be included in the factum on the main appeal.

This Rule also varies considerably from former Rule 63. Under the old practice the respondent who gave the notice of cross-appeal, was required, within two days after he had served his notice of cross-appeal, to deposit a printed factum, and the appellant was only allowed a week within which to deposit his printed factum in reply. It was quite impossible to print the factum in reply in the time allowed by the rule.

There is no good reason why a party intending to cross-appeal should not serve his notice within fifteen days after the security has been allowed. Under the present rules as to cross-appeals, the factums are required to be ready and deposited within the same time as the factums on the main appeal, and may be included therein if desired.

R. 102. Translation of Factum.

TRANSLATION OF FACTUM.

RULE 102. 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.

TRANSLATIONS OF JUDGMENTS AND OF OPINIONS OF JUDGES OF COURT BELOW.

RULE 103. 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 Judges shall fix the number of copies of the translation to be printed and the time within which they shall be deposited with the Registrar, and such translation shall thereupon be printed at the expense of the appellant.

PAYMENT OF MONEY INTO COURT.

RULE 104. Money required to be paid into Court shall be paid into the Bank of Montreal at its Ottawa agency, or such other bank as shall be approved of by the Minister of Finance.

2. The person paying money into Court shall obtain from the Registrar a direction, to the bank to receive the money. R. 104. Payment into Court.

3. The bank receiving money to the credit of any cause or matter shall give a receipt therefor in duplicate; and one copy shall be delivered to the party making the deposit, and the other shall be posted or delivered the same day to the Registrar.

4. The stamps for the fees payable on money paid into Court shall be affixed to the receipt directed by this Rule to be posted or delivered to the Registrar.

The procedure provided by former Rule 66 for payment of money into Court has been done away with, and that in force in the High Court of Justice for Ontario adopted. Under the old rule the Registrar was unable to efficiently supervise the affixing of stamps required to be obtained in such cases. Under the present rule the receipt from the Bank, which is required to be forwarded to the Registrar by the banker, shows the amount of money paid into Court and should have attached thereto the stamps required by the tariff of fees, Form H., Rule 90. *Vide* infra p. 170.

PAYMENT OF MONEY OUT OF COURT.

RULE 105. If money is to be paid out of Court, an order of the Court or a Judge in Chambers must be obtained for that purpose, upon notice to the opposite party.

HOW MADE.

RULE 106. Money ordered to be paid out of Court is to be so paid upon the cheque of the Registrar, counter-signed by a Judge.

R. 107. Formal objections.

FORMAL OBJECTIONS.

RULE 107. 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."

EXTENDING OR ABRIDGING TIME.

RULE 108. In any appeal or other proceeding the Court or a Judge in Chambers may by order, 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, and such order may be granted, although the application for the same is not made until after the expiration of the time appointed or allowed.

This Rule differs from former Rule 70 in containing an express provision that the application may be made after the expiration of the time appointed or allowed by the Rules.

Gilbert v. *The King.*

Held, that the power given by s. 1024 of the Criminal Code, R. S. 1906, c. 146, to a Judge of the Supreme Court of Canada

to extend the time for service on the Attorney General of notice of an appeal in a Crown case reserved, may be exercised after the expiration of the time limited by the Code for the service of such notice. R. 108. Time, extending or abridging.

Orders will not be granted under this rule simply on consent of parties or their solicitors. Some good reason must be afforded for an extension of the time provided by Rules.

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 this Rule, a Judge of 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.

R. 109. Rules, Non-compliance.

NON-COMPLIANCE WITH RULES.

RULE 109. The Court or a Judge may, under special circumstances, excuse a party from complying with any of the provisions of the Rules.

REGISTRAR TO KEEP NECESSARY BOOKS.

RULE 110. 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.

ADJOURNMENT IF NO QUORUM.

RULE 111. 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.

COMPUTATION OF TIME.

RULE 112. 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. R. 112. Time, computation.

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.

By Rule 143, the word "month" means "calendar month," where "lunar months" are not expressly mentioned.

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' 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 anything 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."

OTHER NON-JURIDICAL DAYS.

RULE 113. Where any limited time less than six days from or after any date or event is appointed or allowed for doing any act or taking any proceedings, Sundays and other days on

R. 113. Non-juridical days.

which the offices are closed shall not be reckoned in the computation of such limited time.

The old rules were defective in that they contained no provision eliminating Sundays and holidays from the days to be reckoned in computing a less number of days than six. This rule is substantially the same as English Order 64, Rule 2.

Limited Time.

Where the limited period is not less than six days, Sundays and holidays are counted. Ex parte Viney, 4 C. D. 794.

In such cases it is only when the last day is Sunday that by the next rule an extension of time is given.

RULE 114. Where the time for doing any act or taking any proceeding expires on a Sunday, or other day on which the offices are closed, and by reason thereof such act or proceeding cannot be done or taken on that day, such act or proceeding shall, so far as regards the time of doing or taking the same, be held to be duly done or taken, if done or taken on the day on which the offices shall next be open.

This rule is new and reproduces English Order 64, Rule 3.

RULE 115. Services of notices, summonses, orders, and other proceedings, shall be effected before the hour of six in the afternoon, except on Saturdays, when it shall be effected before the hour of two in the afternoon. Service effected after six in the afternoon on any week-day except Saturday shall, for the purpose of computing any period of time subsequent to such service, be deemed to have been effected on the following day.

Service effected after two in the afternoon on Saturday shall for the like purpose be deemed to have been effected on the following Monday. R. 115. Time, Hours for service.

This Rule is also new and reproduces English Order 64, Rule 11.

SITTINGS AND VACATIONS.

RULE 116. The office of the Supreme Court shall be open between the hours of ten o'clock in the forenoon and four o'clock in the afternoon (except on Saturdays, when it shall close at one o'clcok), every day in the year except statutory holidays, and Long Vacation and Christmas Vacation.

2. During Vacation the office shall be open between the hours of ten o'clock in the forenoon and one o'clock in the afternoon.

This Rule is new. ss. 2 varies the former practice by requiring that the Registrar's office in vacation shall be open from ten to one o'clock, instead of from eleven to twelve o'clock on each juridical day.

Chambers are not held in vacation, although in cases of urgency applications will be heard by the Registrar or a Judge of the Court.

CHRISTMAS VACATION.

RULE 117. There shall be a vacation at Christmas, commencing on the 15th of December and ending on the 10th of January.

R. 118. Long Vacation.

LONG VACATION.

RULE 118. The Long Vacation shall comprise the months of July and August.

VACATION IN COMPUTATION OF TIME.

RULE 119. 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.

The effect of this Rule 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.

WRITS.

RULE 120. 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.

It is not the practice of the Court to issue a writ of execution to enforce the payment of costs except under special circumstances.

Although full provisions are made for the issue of writs of *fieri facias*, the Supreme Court Act, R. S. c. 139, s. 58, expressly provides for the enforcing of the judgment of the Supreme Court by the Court of original jurisdiction. That section reads as follows : R. 120. Writs.

"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."

This Rule, and the following 20 Rules formerly appeared as General Order No. 85, made on the 18th October, 1888.

RULE 121. 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.

RULE 122. Writs of *fieri facias* against goods and lands shall be executed according to the exigency thereof, and may be in the Form J set out in the Schedule to these Rules.

Vide p. 172, infra.

RULE 123. Upon the return of the sheriff or other officer, as the case may be, of "lands or goods on hand for want of

R. 123. Writs.

buyers," a writ of *venditioni exponas* may issue to compel the sale of the property seized. Such writ may be in the Form K set out in the Schedule to these Rules.

Vide infra p. 174.

RULE 124. 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, ar as is otherwise provided by these Rules, 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.

RULE 125. A writ of attachment shall be executed according to the exigency thereof.

RULE 126. No writ of attachment shall be issued without the order of the Court or a Judge. It may be in the Form L. set out in the Schedule to these Rules.

Vide infra p. 174.

RULE 127. 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. R. 127. Writs.

RULE 128. 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 *praecipe* 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 *praecipe* for a writ may be in the Form M set out in the Schedule to these Rules.

Vide infra p. 175.

RULE 129. No writ of execution shall be issued without the production to the officer by whom the same shall be issued of the judgment or order upon which the execution is to issue, or an office copy thereof showing the date of entry. And the officer shall be satisfied that the proper time has elapsed to entitle the judgment creditor to execution.

R. 130. Writs.

RULE 130. 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.

RULE 131. 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 five per cent. per annum, from the time when the judgment or order was entered up.

RULE 132. 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.

RULE 133. 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, showing the same to have been renewed, shall be *prima facie* evidence of its having been so renewed. R. 132. Writs.

RULE 134. 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.

RULE 135. 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.

RULE 136. 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.

R. 136. Writs. Stay of Execution.

Adams & Burns v. *Bank of Montreal*, 31 Can. S. C. R. 223.

Held, that a Judge in Chambers of the Supreme Court 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.

I do not find that this Rule, although then in force as part of General Order No. 85, was called to the attention of the Court either in this or in any other case where applications were made to stay proceedings pending an appeal to the Judicial Committee.

RULE 137. 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.

RULE 138. Sheriffs and coroners shall be entitled to the fees and poundage set out in Form N of the Schedule to these Rules.

Vide. p. 175 infra.

RULE 139. Every order of a Judge in Chambers 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.

RULE 140. 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. R. 140 Writs.

ACTING REGISTRAR.

RULE 141. In the absence of the Registrar through illness or otherwise, the Chief Justice or acting Chief Justice may appoint an acting Registrar to perform the duties of the Registrar, and all powers and authorities vested in the Registrar may be exercised by the acting Registrar.

This Rule is new. During the illness of the late Registrar, Mr. Cassels, a General Order was passed by the Court authorizing the reporter to act as Registrar during his absence. This Rule makes a general provision for such a case.

INTERPRETATION.

RULE 142. In the preceding Rules, unless the context otherwise requires, "Judge" or "Judge of the Court" means any Judge of the Supreme Court, and the expression "Judge of the Supreme Court in Chambers" or "Judge in Chambers" shall also include the Registrar sitting in Chambers under the powers conferred upon him by Rules 82 to 89 inclusive.

R. 143. Interpretation

RULE 143. 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 :

(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.

(5). The words "the Act" mean "The Supreme Court Act."

(6). The word "month" means calendar month where lunar months are not expressly mentioned.

SCHEDULE TO THE SUPREME COURT RULES.

FORM 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). E. R. C.
Registrar.

Dated this day of , 19 .

FORM B.

Schedule, Form 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 A. B. or C. D. his solicitor,

E. F. Appellant's solicitor (or attorney, or appellant in person)

Dated this day of , 19 .

FORM C.

SUGGESTION OF DEATH, INSOLVENCY, &c.

A. v. B.

It is required owing (to the death, insolvency, or as the case may be) that be made a party (appellant or respondent) to this appeal.

(Signed). C. D.

FORM D.

SUMMONS FOR WRIT OF HABEAS CORPUS AD SUBJICIENDUM.

IN THE SUPREME COURT OF CANADA.

The Honourable Mr. Justice

(Style of Cause).

Upon reading the several affidavits of, &c., filed the day of , 19 , and upon hearing Mr. of counsel (or the solicitor for)

Schedule, Form D.

It is ordered that all parties concerned attend before me (or before the Honourable Mr. Justice , or before the Court, as the case may be) at the Supreme Court Building, Ottawa, on the day of , 19 , at the hour of in the noon, to show cause why a writ of *Habeas Corpus* should not issue directed to to have the body of before a Judge of the Supreme Court at the Supreme Court Building in the City of Ottawa, forthwith to undergo, &c.

Dated, &c.

FORM E.

ORDER FOR WRIT OF HABEAS CORPUS AD SUBJICIENDUM.

IN THE SUPREME COURT OF CANADA.

Upon reading the several affidavits of, etc., filed the day of 19 , and upon hearing counsel (or the solicitors) on both sides (or as the case may be)—

It is ordered that a writ of Habeas Corpus issue directed to , to have the body of A. B. before me (or the Honourable Mr. Justice) at the Supreme Court Building in the City of Ottawa, on the day of at the hour of to undergo and receive, etc.

Dated, &c.

FORM F.

WRIT OF HABEAS CORPUS AD SUBJICIENDUM.

Edward, by the Grace of God, &c., to greeting :

We command that you have in the Supreme Court of Canada before the Honourable Mr. Justice

at the Supreme Court Building in the City of Ottawa, on the day of , the body of A. B. being taken and detained under your custody as is said, together with the day and cause of his being taken and detained, by whatsoever name he may be called therein: to undergo and receive all and singular such matters and things as Our Judge shall then and there consider of concerning him in this behalf; and have you there then this Our writ.

Witness, &c. Schedule, Form F.

To be indorsed,

By order of Mr. Justice }
This writ was issued by & }

FORM G.

AFFIDAVIT OF SERVICE OF WRIT OF HABEAS CORPUS AD SUBJICIENDUM.

IN THE SUPREME COURT OF CANADA. }

I, A. B., of &c., make oath and say :

1. That I did on the day of 19 , personally serve C. D. with a writ of Habeas Corpus issued out of and under the seal of this Honourable Court, directed to the said C. D., commanding him to have the body of before ( ) immediately to undergo, &c. (describe the direction and mandatory part of the writ), by delivering such writ of Habeas Corpus to the said C. D., personally at in the Province of

Sworn, &c.

Schedule, Form H.

FORM H.

Tariff of Fees to be Paid to the Registrar of the Supreme Court of Canada.

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.	
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	1 00
A percentage on money over $200.00 paid in at the rate of one per cent.	
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	Schedule, Form H.
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	

FORM I.

Tariff of Fees.

To be taxed between party and party in the Supreme Court of Canada :	
On stated case required by 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
Notice of appeal.....	4 00
On consent to appeal directly to the Supreme Court from the court of original jurisdiction.....	3 00
Notice of giving security.....	2 00
Attendance on giving security.....	3 00
On motion to quash proceedings under 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 in Chambers.....	
On *factums* in the discretion of the registrar to	50 00
Subject to be increased by order of the Court or a Judge in Chambers.....	
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
On dismissal of appeal if case be not proceeded with, in the discretion of the registrar to.....	25 00

Schedule, Form I.

Subject to be increased by order of the Court or a Judge in Chambers.....	
Suggestions under sections 83, 84 & 85 including copy and service.....	$2 50
Notice of intention to continue proceedings under section 87.....	4 00
On depositing money under section 66 of the Dominion controverted Elections Act.....	2 50
Notice of appeal in election cases limiting the appeal to special and defined questions under 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 in Chambers.....	
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

FORM J.

Writ of Fieri Facias.

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 :

Schedule. Form J.

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 $2 50 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 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 theret then this writ.

Witness the Right Honourable Sir Charles Fitzpatrick, K.C.M.G., 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.

Schedule, Form K.

FORM K.

WRIT OF VENDITIONI EXPONAS.

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 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*).

FORM L.

WRIT OF ATTACHMENT.

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. Schedule, Form L.

Witness, etc. (*as in the writ of fieri facias*).

FORM M.

PRÆCIPE FOR WRIT.

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*].

FORM N.

SHERIFFS' AND CORONERS' FEES.

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 services in such cases to be allowed unless service made or recognized by the sheriff.....	1 50

Schedule, Form N.

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
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

	Schedule Form N
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
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.	

GENERAL ORDER.

It is hereby ordered that all the Rules and Orders of the Supreme Court of Canada now in force, except as hereinafter provided, be and the same are hereby repealed from and after the first day of September, 1907.

2. It is further ordered that the Rules, including the Schedule of Forms therein referred to and hereunto annexed, and marked A, and initialed on each page thereof by the Regis-

General Order promulgating rules.

trar, be the Rules regulating the procedure of and in the Supreme Court of Canada and the bringing of cases before it from courts appealed from or otherwise.

3. It is further ordered that the said Rules shall not apply to any appeal in which the security shall have been allowed previous to the first day of September, 1907, but that to such appeals the present Rules and General Orders of the Supreme Court of Canada shall be applicable.

Dated at Ottawa this Nineteenth day of June, A. D. 1907.

Signed

C. FITZPATRICK, C. J.

D. GIROUARD, J.

L. H. DAVIES, J.

JOHN IDINGTON, J.

JAMES MACLENNAN, J.

LYMAN P. DUFF, J.

APPENDIX

SPECIMEN SHEET GIVING RECORD OF PROCEEDINGS.

In the Privy Council

ON APPEAL FROM THE HIGH COURT OF JUDICATURE, AT FORT WILLIAM IN BENGAL.

BETWEEN

MAHARANEE INDURJEET KOONWUR - - - *Appellant.*

AND

MUSST. AMEEROONISSA BEGUM *alias* NUNKOO SAHEBA, Widow of TALIB ALLY KHAN *alias* KHAWJEH SULTAN JAN, deceased; MUSST. AFZULUN NISSA BEGUM and SYUD MAHOMED HOSSEIN KHAN, Heiress and Heir respectively of SYUD KASIM ALLY KHAN, deceased - - - - - - - *Respondents.*

No. 302 of 1865.

RECORD OF PROCEEDINGS.

PART I.

IN THE COURT OF THE PRINCIPAL SUDDER AMEEN OF BEHAR.

PLEADINGS AND PROCEEDINGS.

In the Court of the Principal Sudder Ameen of Zillah Behar.

Pleadings and Proceedings.

No 1. Plaint on behalf of Maharajah Hetnarain Singh Bahadoor, dated the 20th of Feb., 1861.

No. 1.

PLAINT on behalf of Maharajah Het Narain Sing Bahadoor.
No. 75 of 1861 A.D., Regular.

Maharajah Het Narain Sing Bahadoor, Zemingar of Purgunnah Sunote, &c., inhabitant of Kusba Tekaree of the said Purgunnah, Zillah Behar, professionally a Zemindar - - *Plaintiff*,

versus

Mussumat Ameeroon Nessa Begum *alias* Nunkoo Sahiba, pleading the collusive Kobalah, dated 18th November, 1847 A.D. - - - - - - - - - *Appellant*.

Claim to recover Rs. 2,49,800, the principal and

Claim to recover Rs. 2,49,800, the principal and interest of a decree, and the cost of a decision passed by the Principal Sudder Ameen of Zillan Behar, dated 30th December, 1856 A.D., and of the decision passed by (Dewanee) 1825;

RECORD.

In the Court of Queen's Bench for Lower Canada.

No. 67.

Judges' Reasons

Opinion of Chief Justice Meredith, S.C.—*continued.*

SPECIMEN FROM ANOTHER RECORD

but there is nothing in the donation to show that Pierre Roy had any idea of curtailing the powers which by his will he had previously given to his son. The reasons for giving those powers were as cogent at the date of the donation as at the date of the will. And the confidence which the father reposed in the prudence and discretion of his son appears not to have decreased, but on the contrary to have increased, in the period that intervened between the will and the donation. The object of the donor as expressly avowed in the donation was to acknowledge "les bons et essentiels services" which Joseph Roy had rendered to his father, and to recompense him for those services, "l'en récompenser," and this object was carried out by giving to Joseph Roy the power to appropriate to himself during his father's lifetime such portions of the property mentioned in the donation as he might require for building lots, and by giving him an irrevocable title to the deed of donation to the property therein mentioned, of which previously he had only an expectation under his father's will. And yet it is contended that although the will affords proof of the father's confidence in his son having increased, and although the avowed and direct object of it was to recompense him for the important services which he rendered to his father, yet that it indirectly deprived him, in the event of his

not having children, of the power respecting his father's property which under the will he was to have had in that case.

Schedule No. 8.

No. 10. Donation by Pierre Roy to his son Joseph Roy, dated 21st May, 1825, filed 24th September, 1861.

Pardevant les notaires de la ville et district de Montréal, dans la province du Bas Canada, y résidant, soussignés fut présent le Sieur Pierre Roy, ci-devant marchand, demeurant au Fauxbourg St. Laurent en cette cité de Montréal. Lequel désirant reconnoitre les bons et essentiels services qui lui a rendus Mtre. Joseph Roy, notaire de cette ville, son fils, et l'en récompenser a reconnu et confessé avoir fait et donation entre vifs, et pour plus grande validité a promis et promet garantir de tous troubles, dons, douaires, dettes, hypothèques, évictions, substitutions, aliénations et autres empêchements généralement quelconque au dit Mtre. Joseph Roy son fils, à ce présent et acceptant donataire pour lui et ses hoirs et ayant cause à l'avenir un terrain scis et scitué au dit Fauxbourg St. Laurent en cette cité de Montréal de la contenance qu'il peut avoir tant en front qu'en profondeur, tenant d'un bout au Sud Est à la rue Dorchester d'autre bout au Nord Ouest à la rue Ste. Catherine d'un côté au Sud Ouest à la rue Ste. Elizabeth d'autre côté au Nord Est à la rue Sanguinet avec cinq maisons et autres bâtiments dessus construits et le reste du terram occupé en pairies, verger, et jardin ainsi que le tout se poursuit et comporte et étend de toutes parts circonstances et dépendances que le dit cessionaire a dit bien scavoir et connoitre pour l'avoir vu et visité en est content et satisfait pour du dit terrain et jouir, user, faire, et disposer, par le dit Mtre. Joseph Roy à titre

de constitut et précaire sa vie durante à commencer la dite jouissance

du dit terrain et jouir, user, faire, et disposer, par le dit Mtre. Joseph Roy à titre de constitut et précaire sa vie durante à commencer la dite jouissance seulement au désèc du dit donateur qui se reserve la jouissance et usufruit du dit terrain sa vie durante à titre de constitut et précaire seulement; et après le décès du dit Mtre. Joseph Roy donataire la propriété du dit terrain demeurera à ses enfants nés en légitimes mariages et à deffaut d'enfants nés en légitime mariage du dit

EXTRACT CONTINUED FROM FIRST RECORD

I am aware that the bank is suing on the promissory note for five thousand pounds; that transaction went through my hands. The last endorser (Nany Tamby) gave me the note for the purpose of discounting, it was brought to me before Nany Tamby brought it to me. Sinne Lebbe Brothers brought it to me. The representative of the firm at Colombo brought it to me.*

*It is observed that this sheet of sand was formerly the bed of the river, and the portion of land connected with this estate which was situated to the west of the green colour up to the black line, was washed away by the river.

I cannot say when the note was first brought to me. When it was brought it was drawn by Sinne Lebbe Brothers, and endorsed by the Defendants. Sinne Lebbe brought it to the bank for discount. I objected to it at the time. I said it was not strong enough, and that he as the maker could not get the money I suggested that he should get a third name to it. He took it away and brought it back endorsed by Nany Tamby, then reputed to be a very wealthy native.

Nos. 292, 291, 290, 275, 474, 263, 264, 265, 261, 260, 269, 254, 252, 245, 242, 241, 217, 216, 215, and 447.

I discounted the promissory note. I gave the money, five thousand pounds

the full five thousand, to Nany Tamby, by putting it to his credit. I have no recollection of anyone being present on behalf of Sinne Lebbe Brothers when this was done. I advanced this on the security of the names of Defendants and Nany Tamby.

I never saw Tatham before the bill was discounted.

I had no discussion with him before it was drawn.

I don't remember having said to Mr. Tatham, " I wish you would sign a " promissory note for Sinne Lebbe Brothers." I knew that Mr. Tatham was negotiating a loan of fifty thousand pounds to Sinne Lebbe Brothers. I don't recollect having said to Mr. Tatham, If negotiations go on the note will be all right, if not I will make other arrangements. It would have been a temporary affair if the other arrangements had been carried out. If Mr. Tatham had carried out the arrangements by advancing the fifty thousand pounds, the five thousand pounds would have been retired; that is, he would have paid the five thousand pounds to the bank and taken up his note.

If the fifty thousand pounds had not been advanced, I should have looked to the parties whose names were on the note for the amount thereof. The note was to be paid in any event.

And the said Francis Wharton Le Marchand being then and there cross-examined by the said Mr. Philbrick on the part of the Defendants, the following were the answers given on such cross-examination :

There was no particular or special arrangement that the note was to be paid in any event.

The firm of Sinne Lebbe and Co. was then [illegible]

The firm of Sinne Lebbe and Co. was then largely indebted to the bank, and also to Tatham's firm.

I had many conversations with Tatham as to keeping Sinne Lebbe's firm on foot. The business to be done was very large, and the agency valuable. Whoever lent the money was to have Sinne Lebbe's business. Tatham was interested in keeping Sinne Lebbe's firm on foot. We, as bankers, were applied to for money for that purpose. Several estates belonging to Sinne Lebbe

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Grounds of Appeal.

The same as in Appeal No. 102.

Order of Appellate Court and Grounds of Decision accepting or rejecting Appeal.

The same as in Appeal No. 102.

(Signed) GORE OUSELEY, Commissioner, Lucknow Division.

Commissioner's Court, Lucknow Division,
Dated 2nd September, 1868.

True copy. (Signed) BRIJ BHOOKHUN LALL, Registrar, Judicial.
(L.S.) Commissioner's Court, Oudh.

No. 15.

Settlement Department.

Appeal No. 100 of 1868.

Appeal, Settlement Court, instituted on the 31st July, 1868. Disposed of by the Commissioner, Lucknow Division, Gore Ouseley, Esquire, from the

No. 23.
Minutes of Assistant Settlement Officer, July and August, 1867.

Order of H. H. Butts, Esquire, Assistant Settlement Officer of Lucknow, dated 30th June, 1868.

Choudhree Mohomed Nasir -*Plaintiff, Appellant.* *versus* Raja Ameer Hussen Khan -*Plaintiff, Respondent.*

Kalee Pershad Wakeel and Choudhree Mohomed Nasir, in person, Nawazich Ally Wakeel, present, on 2nd September, 1868.

Nature of case and point at issue.

Claim to proprietary title of Khan Mahomedpoor, Pergunnah Koorsee.

DECREE.

I dismiss this Appeal.

(Signed) GORE OUSELEY, Commissioner, Lucknow Division.

Commissioner's Court, Lucknow,
Dated the 2nd September, 1868.

True copy. (Signed) BRIJ BHOOKHUN LALL, Registrar to the Court of the Judicial Commissioner, Oudh.
(L.S.)

No. 16.
Settlement Department.
Appeal No. 163 of 1868.

No. 23. Judgment dated 8th Aug., 1867.

Appeal, Settlement Court, instituted on the 15th August, 1868. Disposed of by the Commissioner, Lucknow Division, Gore Ouseley, Esquire,

from the Order of H. H. Butts, Esquire, Assistant Settlement

Appeal, Settlement Court, instituted on the 15th August, 1868. Dis-
20 posed of by the Commissioner, Lucknow Division, Gore Ouseley, Esquire,

from the Order of H. H. Butts, Esquire, Assistant Settlement Officer of Lucknow, dated 17th July, 1868.

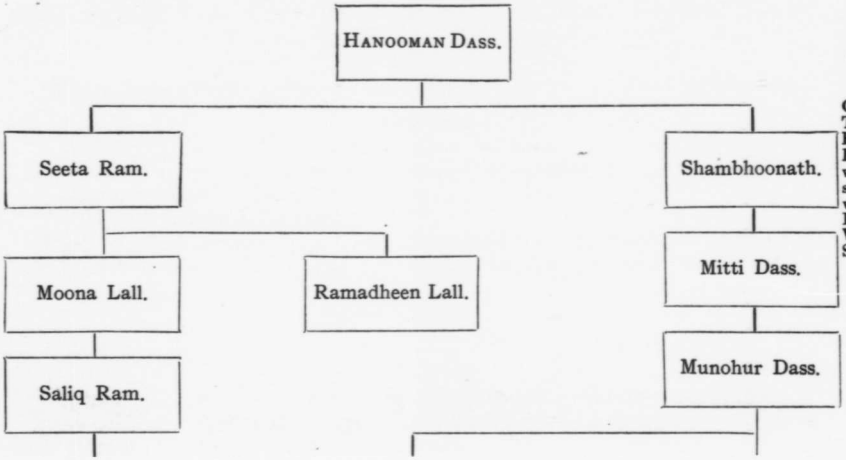
True copy. (Signed) BRIJ BHOOKHUN LALL, Registrar to the Court
(L.S.) of the Judicial Commissioner, Oudh.

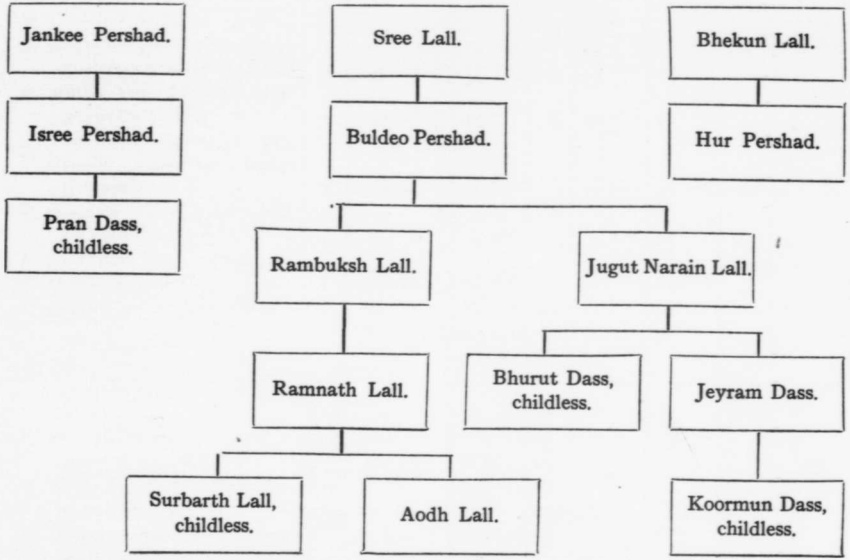
In the Court of the Principal Sudder Ameen of Zillah Goruckpoor.

No. 4. Genealogical Table of the Family of Baboo Bhowanee Pershad, filed with Defendants' Written Statement.

No. 15.

GENEALOGICAL TABLE of the family of Baboo Bhowannee Pershad, the husband and brother-in-law (husband's brother) of the Defendants.




Jankee Pershad.
Isree Pershad.
Pran Dass, childless.
Sree Lall.
Buldeo Pershad.
Rambuksh Lall.
Ramnath Lall.
Surbarth Lall, childless.
Aodh Lall.
Bhekun Lall.
Hur Pershad.
Jugut Narain Lall.
Bhurut Dass, childless.
Jeyram Dass.
Koormun Dass, childless.

Name of the Holders.	Arabic Nos. (how many Fields).	Extent.	Assessment.	Allowance Cash	Total.	Rate of Pay fixed.	The difference to be levied now.	Do. to be levied after.
		A.. G A.	RS.AS.P.					
1. Bylapa, son of Dodbusapa -	1	57 14 ,,	35 ,, ,,	—	35 ,, ,,	14 ,, ,,	—	21 ,, ,,
2. Faraji Walluker, Havaldar-	1	25 16 ,,	15 ,, ,,	—	15 ,, ,,	14 ,, ,,	—	1 ,, ,,
3. Hirayama; his substitute, Tirkapa, son of Bylapa -	1	11 8 ,,	8 4,,	—	8 4 ,,	14 ,, ,,	—	
4. Bassapa, son of Fukeerapa Rukasaji - - -	1	18 37 ,,	12 ,, ,,	—	12 ,, ,,	14 ,, ,,	—	
5. Genepa Tulwar, absconded; manager, Rawalla bin Ningupa, Dessai - -	1	21 14 ,,	10 ,, ,,	—	10 ,, ,,	14 ,, ,,	—	
6. Muree Tamapa Nargoond, absconded; manager, ditto	2	20 11 ,,	13 ,, ,,	—	13 ,, ,,	14 ,, ,,	—	
7. Lugmana, son of Chennanna	1	22 9 ,,	16 ,, ,,	—	16 ,, ,,	14 ,, ,,	—	2 ,, ,,
8. Bussapa Wooklee, son of Shivapa - - -	1	25 8 ,,	20 ,, ,,	—	20 ,, ,,	14 ,, ,,	—	6 ,, ,,
9. Shivana, son of Ningappa -								

[illegible]	1	22	9 ,,	10 ,, ,,	—	10 ,, ,,	14 ,, ,,	—	2 ,, ,,
8. Bussapa Wooklee, son of Shivapa - - -	1	25	8 ,,	20 ,, ,,	—	20 ,, ,,	14 ,, ,,	—	6 ,, ,,
9. Shivana, son of Ninganna Barmudgee - - -	1	83	7 ,,	12 ,, ,,	—	20 ,, ,,	14 ,, ,,	—	
10. Golapa, son of Genapa Anermony - - -	1	26	20 ,,	20 ,, ,,	—	12 ,, ,,	14 ,, ,,	—	6 ,, ,,
11. Firkapa, son of Sukrapa Koodree - - -	3	34	25 ,,	24 ,, ,,	—	24 ,, ,,	14 ,, ,,	—	10 ,, ,,
12. Sinjeevuna, son of Mullana Doolud - - - -	3	39	8 ,,	24 ,, ,,	—	24 ,, ,,	14 ,, ,,	—	10 ,, ,,
13. Rayapa, son of Rachapa, substitute of Sivya and Hunma Tulwar - -	3	79	29 ,,	30 ,, ,,	—	30 ,, ,,	14 ,, ,,	—	16 ,, ,,
14. Malana, son of Rayana -	8	88	27 ,,	20 ,, ,,	—	20 ,, ,,	14 ,, ,,	—	6 ,, ,,
15. Kunka Ruksgee, absconded; manager, Ramapa bin Ningupa, Dessai - -	8	8	34 ,,	8 ,, ,,	—	8 ,, ,,	14 ,, ,,	—	
16. Irapa, son of Hoochapa, substitute of Irapa Muree, Tumapo and Roodrapa -	8	30	5 ,,	20 ,, ,,	—	60 ,, ,,	14 ,, ,,	—	6 ,, ,,
17. Hatelsaheb, son of Sooltan-saheb Kurnachi - -	2	21	38 ,,	21 ,, ,,	—	21 ,, ,,	14 ,, ,,	—	7 ,, ,,
18. Sunjeeva, substitute of Timana Bhogapoor - -	2	31	8 ,,	35 ,, ,,	—	35 ,, ,,	14 ,, ,,	—	21 ,, ,,
19. Dodapa, son of Honopa Bellee Kutleen - -	2	28	19 ,,	30 ,, ,,	—	30 ,, ,,	14 ,, ,,	—	16 ,, ,,

Name of the Holders.	Arabic Nos. (how many fields).	Extent.	Assessment.	Allowance Cash	Total.	Rate of Pay fixed.	The difference to be levied now.	Do. to be levied after.
20. Ningapa, Gonnel, son of Ganyapa - - -	2	40 23 ,,	25 ,, ,,	—	25 ,, ,,	14 ,, ,,	—	11 ,, ,,
21. Ningapa Hoonkoonte, son of Boodapa, absconded; manager, Ramapa bin Ningapa, Dessaee - -	2	54 10 ,,	30 ,, ,,	—	30 ,, ,,	14 ,, ,,	—	16 ,, ,,
	62	1,134 20 ,,	813 ,, ,,	—	813 4 ,,	—	—	863 ,, ,,

In the Privy Council.

No. 12 of 1906.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

BETWEEN

JOSEPH BARRETTE . . . . . *Appellant,*

AND

THE SYNDICAT LYONNAIS DU KLONDIKE . *Respondents.*

APPELLANT'S CASE.

1. This is an appeal by special leave from a judgment of the Supreme Court of Canada, dated 2nd May, 1905, reversing a judgment of the Territorial Court en banc of the Yukon Territory and restoring in part the judgment of the Trial Judge. Record, p. 421. l. 46. p. 370. l. 35. p. 337. l. 12.

2. In June, 1901, the Appellant sold a number of mining claims and other property in the Yukon Territory to the Respondents for the sum of $167,500, of which $75,000 was paid in cash and the remaining $92,500 was secured by a promissory note and a mining and a chattel mortgage payable on the 1st October, 1901. The Respondents thereupon entered into possession and worked the mining claims. p. 3, l. 18. p. 375, l. 36, *et. seq.* p. 376, l. 9.

3. The note and mortgages having been transferred by the Appellant to the Canadian Bank of Commerce and default having been made in payment, the Bank brought an action in October, 1901, against the Respondents and the Appellant to recover the sum of $92,500 and interest due under the said note and mortgages. p. 300, l. 15. p. 2, l. 23.

4. The Respondents by their defence dated 20th June, 1902, alleged (inter alia) that the note and mortgages in question were made by their Manager named Paillard, without authority; that the note was collateral to the mortgages; that they had been induced to make the note and give the mortgages by the false and fraudulent representations of the Appellant in reference to the property sold and that the Appellant in selling the mining claims acted for himself and as agent for the Bank; and the Respondents counterclaimed against the Bank for the amount of the note and mortgages and against the Appellant for the sum of $400,000 as damages for the alleged false representations. p. 3, l. 14. p. 4, l. 4, *et seq.* Record, p. 4, l. 31, *et seq.* p. 9, l. 4.

5. The rule governing counterclaims is Rule 109 of the Rules of the Yukon Territorial Court, as follows :—

Territorial Court, as follows :—

109. A Defendant in an action may set off or set up by way of counterclaim against the claims of the Plaintiff any right or claim whether such set-off or counterclaim sounds in damages or not, and such set-off or counterclaim shall have the same effect as a cross action so as to enable the Judge to pronounce a final judgment in the same action both on the original and cross claims; but the Judge may on application of the Plaintiff before trial if in his opinion such set-off or counterclaim cannot be conveniently disposed of in the pending action or ought not to be allowed, refuse permission to the Defendant to avail himself thereof; and if in any case in which the Defendant sets up a counterclaim the action of the Plaintiff is stayed, discontinued or dismissed the counterclaim may nevertheless be proceeded with.

6. The Appellant, who had not been personally served with the counterclaim appeared in Court by counsel on the fourth day of the trial of the action and, waiving the want of service, lodged a defence denying misrepresentation and alleging that any representations made were not material and had not been relied upon, and that the Respondents made an independent examination of the property. p. 336, l. 8. p. 51, l. 20. p. 11, l. 35, *et seq.*

7. Particulars of the alleged misrepresentations, said to have been made verbally during the visits extending over several days made to the mining claims by two representatives of the Respondents, are given in the Respondents' defence and counterclaim. Between the dates of these visits and the trial some fifteen months elapsed and there was a conflict of evidence between p. 4, l. 31, *et seq.* p. 154, l. 17. p. 302, l. 17. p. 337, l. 13.

the Respondents' representatives and the Appellant as to the substance and effect of the conversations which took place.

8. In the result the great majority of the alleged misrepresentations were disproved or not established, but the Trial Judge (Mr. Justice Craig) found that in respect of two of the mining claims sold certain misstatements of fact had been made by the Appellant and he came to the conclusion that the true facts must have been known to the Appellant. In respect of the mining claim No. 32 below Upper Discovery on Dominion Creek the Trial Judge found that the Appellant had falsely represented that, having prospected the claim all over, he found the " pay " even and extensive from rim to rim of the claim; that it was as good in the part unworked as in the part already worked and would yield profits exceeding $400,000 and that a certain working by a former owner did not exceed 900 feet in area. In respect of the mining claim No. 12 above Lower Discovery on Dominion Creek his Lordship also found that an old working, from which $11,000 had been won by third parties, had not been pointed out and the ground covered by it had been represented to be unworked.

p. 376, l. 43.

p. 305, l. 41, *et seq.* p. 308, l. 42.

p. 304, l. 45.

p. 305, l. 9.

9. The representatives of the Respondent Syndicat, Paillard and Tarut, to whom, as already mentioned, these representations were alleged to have been made and on whose recollection the Case of the Respondents in this respect depended, were gentlemen of considerable experience in mining matters, employed by the Respondents expressly to purchase mining property. They had first visited these properties in April, 1901, and had then, to some extent, examined them. They did not then contemplate buying, though it appears the Appellant mentioned to them that he would sell, as the properties then

Record, pp. 56-59.

the Appellant mentioned to them that he would sell, as the properties then

stood, for $260,000. In June, 1901, they returned as intending purchasers and made an elaborate examination lasting four days. It was during this latter examination that the representations are alleged to have been made. p. 39, l. 37. p. 60, l. 8.

10. Paillard kept a memorandum of the facts communicated to himself and his colleague by the Appellant during their visit and stated in his evidence that in this he put down " everything of moment " that the Appellant said. The memorandum, which was in the form of notes on rough plans entered in a note book (Exhibit F 3), was produced at the trial and does not contain a record of any one of the misrepresentations of which the Appellant has been found guilty. The original leaves of the note book have been transmitted and a facsimile is with the record. No correspondence between these two gentlemen and their principals was produced, but it was admitted that they had been blamed for making the purchase. It was said that no copies had been kept of the letter reporting the purchase, and that a letter received in reply had been lost. It was not alleged that any specific complaint of misrepresentation was made to the Appellant before action except verbally as to the amount taken out of a drift on Claim 12, not now in question. p. 61, ll. 25-32. p. 430, l. 20. p. 90, ll. 25-27. p. 68, l. 19. p. 288, l. 4. p. 80, l. 15-21.

11. The Appellant denied making the representations alleged. With regard to the richness of the ground he admitted saying that he had no reason to believe the pay was not as good beyond his workings as it was where he had worked, because he did not know. The learned Judge however not only found that these representations of fact had been made but that the Appellant knew they were false. There were five holes in the unworked ground, and the learned Judge drew the inference that the Appellant " must have known " p. 180, ll. 4-8.

of them. These holes however (as the learned Judge conceded in his judgment when sitting en banc) were in fact made after the sale. p. 308, l. 29. p. 357, ll. 3-10.

12. With regard to the representations as to the extent of working in Claim 32 the evidence of Paillard and Tarut was that the Appellant showed them an old drift in which they could see the ice about thirty feet each way, telling them that it was one of the earliest drifts on the claim and did not exceed thirty feet by thirty. The Appellant said that he had been shown the hole by the former owner when he (the Appellant) bought and that he showed Paillard and Tarut the tailings that had come out and said he did not think, judging by the tailings, the drift could be large. He had been told by the former owner that it was between nine and ten box lengths but did not know what amount of excavation that represented. The working subsequently turned out to be larger than 900 square feet but there was in any case no evidence to show that the Appellant knew this. The Trial Judge, however, found that the representation was made as alleged and adds that the Appellant " must have known" the extent of the working. p. 41, ll. 3-7. p. 170, ll. 9-33. p. 94, l. 45. p. 195, l. 18. p. 305, l. 7.

13. With regard to the old working on Claim No. 12, this was a shaft formerly worked by one Cassidy and the workings adjoined those of one Lemar. It was conceded that Paillard and Tarut were shown Lemar's workings and there is independent evidence that the name Cassidy was mentioned and the two workings shown. Moreover some plant left by Cassidy was still visibly projecting from the old shaft. The learned Judge felt considerable doubt with regard to this point but he ultimately found against the Appellant. The evidence with regard to various allegations is collected in greater detail in the Record, p. 93, l. 20. p. 210, l. 1-10. p. 220, ll. 26, 27. p. 265, l. 44. p. 211, ll. 37-41.

evidence with regard to various allegations is collected in greater detail in the p. 211, ll. 37-41.

factum of the now Appellant (then Respondent) in the Supreme Court. The factum is printed in the record. pp. 402-419.

14. In the result the Trial Judge gave judgment in favour of the Plaintiffs, the Canadian Bank of Commerce, both on the claim and counterclaim, but against the now Appellant on the counterclaim for $40,500 damages. The Respondents have not appealed from this decision and the only subsisting issues are those arising between the Appellant and Respondents on the counterclaim as to the issues found against the Appellant. p. 337, l. 40, *et seq.* p. 375, l. 22.

15. The $40,500 damages awarded by the Trial Judge was made up of $35,000 in respect of Claim 32 and $5,500 in respect of Claim 12. The sum of $35,000 was fixed in respect of Claim 32 on the ground that of the total purchase price that sum might be allocated to that claim. The sum of $5,500 represented the value to the owner of the mineral worked out from Claim 12. Now the purchase included six claims (Nos. 12, 32 and four others), a fifth interest in 150 other claims, and a road-house or hotel with provisions and other personal property and it is conclusively established by the evidence of both parties that $167,500 was a lump sum price payable in consideration of the transfer of the whole of the properties and that no separate value was put upon each particular parcel. It was never suggested that the other parcels might have been or, but for the misrepresentations, would have been purchased apart from Claim 32 or that they would have been purchased for $35,000 less than was actually given. The Respondents have retained the whole property and no evidence was given to show that its actual value as a whole was less p. 67, l. 1. p. 333, l. 6.

than the sum given for it. Consistently with the evidence the Respondents may not have lost anything by the transaction. p. 333, l. 37. p. 370, l. 36.

16. On appeal to the Territorial Court en banc that Court, composed of Dugas, Craig (the Trial Judge) and Macaulay, JJ., gave judgment on the 16th June, 1904, reversing the judgment below. Mr. Justice Craig adhered to his original decision adding only an explanation with reference to an admitted misapprehension in his judgment at the trial. Dugas and Macaulay, JJ., came to the conclusion that no fraudulent misrepresentation had been proved and that, apart from the question of fact, the Respondents, not having shown that they had suffered any loss on the purchase as a whole, could not recover damages. p. 357. p. 355, l. 24. p. 367, l. 25. p. 355, l. 37. p. 368, l. 21. p. 369, l. 38.

17. On the Respondents' appeal to the Supreme Court of Canada that Court on the 2nd May, 1905, gave judgment, by a majority of three to two, restoring the judgment of the Trial Judge but reducing the amount of damages in respect of Claim 32 by the sum of $13,317, to which extent it was admitted that profit had been made by the Respondents out of that claim. p. 421, l. 45.

18. The majority of the Judges in the Supreme Court, disregarding the findings on appeal to the Territorial Court en banc, accept the findings of fact of the Trial Judge apparently almost entirely on the ground that he alone had the opportunity of observing the demeanour of the witnesses. Chief Justice Taschereau and Mr. Justice Idington dissented. Upon the facts the Chief Justice would not have reversed the decision of the majority of the Territorial Court en banc. Mr. Justice Idington upon an independent examination of the evidence considered that the weight of evidence was against the Appellants p. 423, ll. 1 & 7. p. 427, l. 35. Record, p. 442, l. 39.

(the present Respondents)

Court en banc. Mr. Justice Idington upon an independent examination of p. 442, l. 39.
the evidence considered that the weight of evidence was against the Appellants

(the present Respondents) and that the claims of misrepresentation fell to p. 435, l. 4.
the ground.

19. The Judges of the Supreme Court also differed in their views of the proper principle on which damages should be assessed in cases where two or more parcels have been sold for a lump sum price. The Chief Justice and Mr. Justice Idington considered that, as it had not been shown that the value p. 422, l. 29.
of the property purchased was as a whole less than the price paid, the Syndicat p. 435, l. 25.
could not recover damages. Mr. Justice Davies and Mr. Justice Nesbitt were of opinion that for the purpose of assessing damages the several parcels p. 423, l. 34.
might be considered separately and that the proper measure of damages was p. 426, l. 25. *et seq.*
the difference between the actual value of each parcel and the amount at which that parcel was assumed to have been taken into account in making up the lump sum price. Although Mr. Justice Davies at least did not consider the p. 423, l. 38.
evidence clear and conclusive upon the point, they accepted the Trial Judge's view that the price for Claim 32 might be put at $35,000, and deducted from this the sum of $13,317, as above mentioned. Mr. Justice Girouard would have restored the judgment of the Trial Judge purely and simply, but, as the majority of the Court thought that the amount of damages should be reduced p. 423, l. 1.
he did not dissent.

20. The Appellant submits that the judgments of the Supreme Court and of the Trial Judge are wrong and should be reversed and that the judgment of the Territorial Court en banc should be restored for the following amongst other

REASONS.

1. Because the making of the representations alleged has not been proved.
2. Because it has not been proved that any representations that were made by the Appellant were not made honestly.
3. Because the findings of the Trial Judge as to the representations made and the knowledge possessed by the Appellant are against the weight of evidence.
4. Because the purchase of the properties and chattels in question was a single transaction for a lump sum price and no evidence was given that their actual value was less than the price paid.
5. Because there was no evidence that the Respondents were induced to pay or ever did pay $35,000 for Claim 32.
6. Because loss of profit is not the measure of damages applicable.
7. Because there was no evidence of any damage.
8. Because the counterclaim having been dismissed against the Plaintiff should also have been dismissed against the Appellant (co-Defendant).
9. For the reasons contained in the judgments of Taschereau, C.J., Idington, J., and Dugas and Macaulay, JJ.

S. A. T. ROWLATT.

In the Privy Council

In the Privy Council.

No. 12 of 1906.

ON APPEAL

FROM THE SUPREME COURT OF CANADA.

BETWEEN

JOSEPH BARRETTE (Defendant) (Defendant to Counterclaim) *Appellant*

AND

THE SYNDICAT LYONNAIS DU KLONDIKE (Defendant) (Plaintiff in Counterclaim) - - - - - - *Respondent.*

CASE FOR THE RESPONDENT.

SHEWETH :—

1. This is an appeal from a judgment of the Supreme Court of Canada, delivered on 2nd May, 1905, whereby the said Court allowed the present

Respondent's appeal from a Judgment of the Territorial Court dated 16th June, 1904, and affirmed the Judgment of the Trial Judge Craig, J., dated 16th February, 1903, and 2nd March, 1903, but varied the damages thereby awarded in favour of the Respondent against the Appellant from $40,500 to $27,183. The Respondent does not appeal against such reduction of the damage awarded to them by the Trial Judge.

2. The issues raised in this appeal are substantially three :—

(1) Whether owing to the form of procedure the Appellant is in law entitled to have the counterclaim on which the Judgment is found-
10 ed dismissed because the Trial Judge dismissed such counterclaim against the Plaintiffs in the Action, the Canadian Bank of Commerce.

(2) Whether there was evidence on which Craig. J., could properly find that the Appellant made certain fraudulent misrepresentations and that the Respondent acted thereon.

(3) Whether $27,183 was properly recoverable by the Respondent against the Appellant as damages for such misrepresentations.

3. In reference to the first point the facts of the case are as follows :—

On 23rd June, 1901, the Respondent acting by their authorized agent purchased from the Appellant certain property in Klondyke for a sum of
20 $167,500, of which $75,000 was paid to the Appellant on completion, and $92,500 secured to the Appellant by a promissory note to his order dated 22nd June, 1901, payable on 1st October, 1901, and a mortgage. The Appellant endorsed the note and transferred the mortgage to the Canadian Bank of Commerce. The Respondent having refused to pay the said $95,000, the

Canadian Bank of Commerce sued both the Respondent and the Appellant.
The Statement of Claim...

June, 1901, payable on 1st October, 1901, and a mortgage. The Appellant endorsed the note and transferred the mortgage to the Canadian Bank of Commerce. The Respondent having refused to pay the said $95,000, the

Canadian Bank of Commerce sued both the Respondent and the Appellant. The Statement of Claim was delivered on 16th May, 1902. The Respondent on 20th June, 1902, delivered a defence and counterclaim joining the Appellant its co-Defendant as Defendant to such counterclaim and counterclaiming against him $400,000 as damages for fraudulent misrepresentations for inducing it to enter into the contract dated 23rd June, 1901. Such counterclaim was not served upon the Appellant and the trial began on September 9th, 1902. On 12th September, 1902, the Appellant delivered a defence to the counterclaim and applied by counsel to strike out the counterclaim. Craig, J., refused to strike out the counterclaim, and the Appellant thereupon attended by counsel and exercised his full rights as a party, and on 18th September, 1902, expressly waived all irregularities as to service of the counterclaim. Craig, J., after a hearing of 10 days reserved Judgment, and on the 2nd May, 1905, he delivered Judgment in favour of the Plaintiffs against the Respondent and dismissed the Respondent's counterclaim against the Plaintiffs, and he gave Judgment for the Respondent on its counterclaim for damages for fraudulent misrepresentation against the Appellant and assessed the damages at $40,500.

Rec. p. 106.

4. It was not contended before Craig, J., that the counterclaim should be dismissed, and he gave no Judgment on the point, but he did incidentally find the following facts relevant to such contention, if it be now put forward by the Appellant as a ground of appeal, viz. : (1) That the Appellant was by consent a party regularly to the suit. (2) That the counterclaim was practically a cross-action. (3) That the damages for deceit against the Appellant, arose

Rec. p. 336.
Rec. p. 336.
Rec. p. 335.

out of one transaction, and that no further evidence could have been given upon the case which would throw any light upon the parties than had been given.

5. On the entry of the formal Judgment in the presence of Counsel for all parties on 16th February, 1903, no objection was taken that by reason of the dismissal of the Counterclaim against the Plaintiffs the Counterclaim against the Appellant should also be dismissed, nor was any such contention raised as a ground of appeal to the Territorial Court either in the first notice of appeal dated 1st April, 1903, or in the second notice of appeal dated 21st September, 1903. Rec. p. 337. Rec. pp. 340, 341.

6. For the first time this question was raised by the Judgment of Dugas, J., in the Territorial Court of Yukon *en banc* on the 16th June, 1904, and then rather as a matter of prejudice than as a point of law, although he does say, without deciding the point, that such a contention might be upheld. The question is not dealt with by Macaulay, J., or Craig, J., and although it finds mention in the factum of the Appellant and in the factum of the Respondent, none of the Judges of the Supreme Court of Canada refer to it at all except Nesbitt, J., who at the end of his Judgment treats the jurisdiction as one given by consent and therefore not appealable. Rec. p. 344, l. 41-45, 1-17. Rec. p. 375. Rec. pp. 402, 403.

7. In reference to the appeal on the merits the misrepresentations were made in the following circumstances :—

A French gentleman named Louis Paillard represented the Respondent Syndicate in Klondyke and he desired in the year 1901 to acquire and work on its behalf mining concessions. The Appellant at this time was the owner, amongst other property, of four claims which he had partially worked out on

Dominion Creek, situate some four days' journey [illegible]

on its behalf mining concessions. The Appellant at this time was the owner, amongst other property, of four claims which he had partially worked out on

Dominion Creek, situate some four days journey from Dawson City. Louis Paillard was introduced to the Appellant by Dugas, J., and met him frequently at his house. Louis Paillard again and again stated most emphatically that this introduction gave him a complete confidence in the integrity and truthfulness of the Appellant. The result of this introduction was an invitation by the Appellant to Louis Paillard to visit his Dominion Creek claims, and in April, 1901, he accompanied by his assistant Alfred Tarut spent three days in the camp with the Appellant.

Craig, J., finds that although at that time Louis Paillard was, and was known by the Appellant to be, a prospective purchaser of mining properties, he had not at that time any intention of buying the Appellant's property, nor did he inspect the property at that visit for the purpose of carrying out a purchase at that time. The property was indeed under snow, and the dumps resulting from the winter working were still intact. Both Paillard and Tarut admit that during the two or three days of that visit they were shown by the Appellant his four claims, and that they went down into some of the drifts, saw some gold, and that the Appellant on claim 12 took a pan which went between $5 and $6. A conversation also took place as to a purchase of the property with the dumps for $260,000.

Rec. p. 301, l. 30 to 45.

8. From April till June no material fact occurred, but in that month Paillard and Tarut again went to the properties, and the direct result of what was said and done during this visit and on the subsequent days in Dawson City was the contract of purchase and sale dated 23rd June, 1901. The Respondent's case at the trial was that in conversation during this visit and at

Dawson prior to the contract the Appellant made many verbal representations to its agent L. Paillard concerning these properties by which it was induced to enter into that contract, and that these representations were fraudulent and caused it damage. The Appellant's case was that he did not make any representations and that if he did the Respondent did not act on them or believe them, but acted solely upon its investigation of the various properties. After an exhaustive trial Craig, J., was satisfied (1) that the Appellant had stated as a fact known to himself by having prospected that the unworked portion of claim No. 32 contained as much pay as the portion he had worked out, or as it was put in more technical language, that the pay in the claim was even and extensive from rim to rim. (2) That the Appellant had stated that only 30 by 30 feet, in all 900 square feet, had been worked out of the drift marked 9 in claim No. 32 whereas about 8000 square feet had been in fact worked out, and (3) that the Appellant in pointing out what ground had been worked and what ground was virgin, represented on claim No. 12 that a drift marked 3 had alone been worked and did not point out or mention that an adjacent drift marked 4 had been worked, out of which a layman named Cassidy had under a working agreement with the Appellant himself extracted $11,000 at a profit of $5,500. Craig, J., further found that these representations were fraudulent, and induced Paillard to enter into the contract. The second misrepresentation as to the ground worked in drift 9 is not material in this Appeal inasmuch as the Respondent is not appealing against the reduction of the damages by $13,317 made by the Supreme Court of Canada. Craig, J.,

had set off this $13,317 against dam[illegible]

[illegible] is not appealing against the reduction of the damages by $13,317 made by the Supreme Court of Canada. Craig, J.,

had set off this $13,317 against damages for this and other misrepresentations as to the quantities of unworked ground.

9. In June it is common ground that Paillard, accompanied by Tarut, did inspect the properties with a view to purchase, and no serious dispute arose as to what was done on that occasion. The result of the material evidence is shortly as follows :—

Paillard states that the Appellant took him over the properties, and shewed him on Claim No. 32 the various drifts that he had worked, and which are indicated on Exhibit H. 2 namely, 1, 2, 3, 4, 5, 6, 8, and 9 marked in straight lines, and that he noted the amounts of gold which the Appellant told him had been won from the drifts and their size, and that he went down a shaft marked O in drift 7 which the Appellant had just begun to work by two shafts marked O and N, and that the Appellant pointed out shaft B at the limit between the creek and the hill side as a place where he rocked out $25 in 1½ hours, and shaft F. as a place where rich pay had been found. Paillard entered this information in a memorandum Exhibit F. 3, which he stated that he made in order to have an idea of the ground worked out, and to see how much ground was left to work, and to see how much the claim had yielded, and to see how much it would yield. He made no entry of the verbal representations as to quality. Paillard says the Appellant showed him his books but that he took his figures from the Appellant himself, and Tarut corroborates the evidence of Paillard. There was no dispute as to the amount of gold that had been taken from the claim by the Appellant.

Rec. pp. 40, 41.

Rec. p. 61.

Rec. p. 78.

10. It is also common ground that no inspection was made by Paillard of the unworked ground. The proportion on claim 32 was approximately 303,000 feet unworked to 72,000 worked. The configuration of the drifts was a line some 200 feet broad across the centre of the claim. The subject matter of the purchase in claim No. 32 was the unworked ground on either side of the existing drifts, and the main misrepresentation which Craig J. held to be proved was as to the value of this unworked ground. The evidence in support was the clear and precise statement of Paillard, corroborated by Tarut, that the Appellant stated over and over again as a fact to his knowledge that the pay extended through the unworked ground, and was even and extensive from rim to rim. The Appellant denied that he had asserted this fact, but admitted that something had been said as to the richness of the unworked ground, and that he had said he had no reason to believe it was not as good, because he did not know. Rec. pp. 41, 44, 73, 74, 92. Rec. p. 180.

Paillard also stated, and Craig J. accepted his word, that he believed implicitly what the Appellant said, and that, but for his assurance that the pay which had been obtained from the portion already worked extended over the portion unworked, he would not have entered into the contract. Craig J. also found that the unworked ground on claim 32 was practically a worthless mining property, and that the representations made by the Appellant were fraudulent.

11. The evidence as to the third fraudulent misrepresentation found by Craig J. again depends upon the credibility attached by him to Paillard and Tarut. They both swear that the Appellant in indicating the area of ground

worked out on claim No. 18 pointed out [illegible]

11. The evidence as to the third fraudulent misrepresentation found by Craig J. again depends upon the credibility attached by him to Paillard and Tarut. They both swear that the Appellant in indicating the area of ground

worked out on claim No. 12 pointed out a drift numbered 3 in Exhibit J. 2 as the only ground worked, and did not point out a working marked 4 which is on the left of the creek. Both Paillard and Tarut are positive that this area marked as 3 was stated by the Appellant as the only ground that had been worked on that part of claim No. 12. It was proved by Cassidy that he had worked out 4, and that a net profit in gold of $5,500 had been extracted from it under an agreement between himself and the Appellant, and that since his operations the creek had altered its course so that in 1901 his working would appear on the left and under the creek and not on the right of the creek. Soper, a witness called by the Appellant, stated that the Appellant, in pointing out the area worked, indicated work on the right and no work on the left side of the creek. This witness, and another witness Renaud, gave somewhat vague evidence as to conversations either at the first visit in April or in June, when they say that Cassidy's name was mentioned. This was denied by Paillard. Craig J. having carefully considered the evidence, found that the Appellant did not point out drift No. 4. The evidence on this question is carefully summarized in the Appellant's Factum. Record, pages 387, line 40 to page 389, line 22.

Rec. pp. 42, 93.

Rec. p. 108.

Rec. p. 210.

Rec. p. 305.

12. In the Territorial Court, Dugas J. and Macaulay J. overruled Craig J. and set aside his findings of fact. These Judgments are exhaustively dealt with in the factum of the Appellant. Record page 374 to 401.

The written Judgment of Craig J. was wrong on one point. He is reported as having stated : "The laymen swear that the lays extended up the creeks from the lower part—three 50 foot lays which would take in 150 feet of the

claim, and that Barrett must have known of the holes G. F. H. K. and I. J." In an earlier part of the Judgment where the Judge is dealing with the question whether the results of the prospecting done by the Respondent sufficiently proved that the unworked portion of claim 32 was worthless refers to these very holes F. G. H. I. J. and K., and those marked 1, 2, 3 and 4, as places from which the Respondent drifted and got no pay. Upon his attention being called to this point Craig J. sitting in the Territorial Court makes a personal explanation and says that that passage in the Judgment did not correctly state his views or his knowledge of the evidence, and he then corrects the mistake. Rec. p. 308. Rec. p. 307.

Apart from the error so explained it is not suggested that Craig J. in coming to his conclusions was in error as to the facts or omitted to consider any material circumstance or applied his mind to the questions for his decision under any misapprehension as to the law : The only difference between Craig J. and the Appellate Judges who overruled his findings of fact is that the former saw and heard the witnesses, and the latter formed their opinions upon the report of the evidence. In overruling his carefully considered judgment it is submitted that Dugas J. by his own candid admissions was disqualified from judicially considering the moral aspects of the case and that he misconceived the law as to proof of the guilty intentions of the Vendor who remains in possession, and that Macaulay J. lays a stress unwarranted by Craig J.'s Judgment taken as a whole on the opinion expressed by the Judge that " Barrett's manner of giving evidence was not dishonest." The keynote of Craig J.'s Judgment is to be found in the sentences : " It did not occur to them that Mr. Barrett Rec. p. 343.

might have been imposing on the good nature

of giving evidence was not dishonest." The keynote of Craig J.'s Judgment is to be found in the sentences : " It did not occur to them that Mr. Barrett

might have been imposing on the good nature not only of themselves but of the Judge, and under the cloak of this good company he was endeavouring to unload upon them properties which he had worked out," and " I believe he made the representations which they said he made and that he knew at the time he was making it that it was not correct. There is no doubt in my mind that these parties have been overreached, that they have acquired in a practically worthless property." Rec. p. 310. Rec. p. 309.

In the Supreme Court of Canada, Idington J. in a dissenting Judgment gave his reasons for overruling Craig J. on these questions of fact. He says that he had no doubt that Paillard discarded as of no consequence what he was told, and the reason for this opinion is that in the memo exhibit "F. 3" Paillard only entered the information relative to quantities and did not make a note of the verbal representations, and he discarded Craig J.'s personal explanation of the admitted error in his Judgment as reported and says that it deprives his Judgment of the weight which it is usual to give to the Trial Judge's opinion. Rec. p. 433.

In the Supreme Court of Canada, Girouard J., Davies J. and Nesbitt concurred in restoring Craig J.'s Judgment on the facts, and Nesbitt J. said : " I do not think we can in view of the authority substitute ourselves in such a " case as this for the Trial Judge, and I think the findings of fact should not " have been interfered with, and they should be restored by this Court. The " memorandum book so much relied on does not impress me in the same way " it has my brother Idington. The entries made in it are of an entirely distinct " character from the representations relied on." Rec. p. 427.

13. The third question namely the damages has caused differences of opinion in the Courts below.

Craig J. in awarding $40,500 apparently regarded the $13,317 an admitted profit taken out of claim 32 as a set off against the value of ground taken out of drift 9 and in other places in excess of the representation. Apparently however the learned Judge did not assess $13,317 as damages for these misrepresentations and stated that the excess in drift 9 and the excess in other parcels would have to be the subject matter of calculation requiring a reference. In the Supreme Court of Canada the damages were reduced by this amount and the Respondent does not appeal against such reduction.

In the Supreme Court of Canada Chief Justice Taschereau dismissed the Appeal upon the ground that the Respondent had not proved that it suffered any loss over the contract as a whole, i.e., that the whole property was not worth the price paid, and Idington J., who concurred with the Chief Justice, dismissed the Appeal on the ground that on the facts of the case there was no evidence of damage. On the question of damage they practically concurred in the opinion of Dugas J. and Macaulay J.

On the other hand subject to the reduction by $13,317, Nesbitt J. and Davies J. restored the Judgment of Craig J. while Girouard J. was of opinion that no reduction should be ordered.

14. The facts on which the assessment of damages depend are not in dispute except the finding of Craig J. that claim No. 32 was practically worthless as a mining property. This finding of fact is in entire accordance with the evidence, and it is difficult to see what other conclusion Craig J. could

have drawn from the evidence. A[illegible]

less as a mining property. This finding of fact is in entire accordance with the evidence, and it is difficult to see what other conclusion Craig J. could

have drawn from the evidence. Apart from Tarut, Hilditch, Gatin, Wilkins, Johnstone, and Bell all give testimony to the effect that the unworked portion of claim No. 32 was worthless, and although their opinions were criticised as being founded upon insufficient data no evidence was tendered in support of the criticism. Craig J. describes in detail this evidence. Rec. pp. 114-120, 121-124, 124-128, 147.

15. Assuming therefore that the unworked portion of claim 32 was worthless except as to $13,317 won from it, the facts are as follows :—

The Appellant by fraudulently puffing the value of claim 32 induced Paillard to buy in one contract for $165,000 five separate properties. The lying statements as to the value of claim 32 were the bait. It is true that in form all the properties were included in one contract at a lump sum for the whole, but it is also clear that the Appellant himself before the $165,000 was agreed had put $35,000 as the separate value for each of the four claims. The Appellant's evidence as to this is clear and he states that the conversation took place in June, while Paillard agrees that the Appellant at the first interview said he valued the four claims at $35,000 each, and that he was sure that 32 would yield a net profit of $400,000. It is hardly overstating the facts to say that the fraudulent statements as to the richness of claim 32 and the anticipated returns from it overshadowed the other parcels passed by the contract. Rec. p. 190. Rec. p. 177. Rec. p. 74.

Craig J. further points out that in case the equities of Willett and Curry should prevail against this claim $35,000 was the sum. The equity of Willett and Curry if it was an equity at all went to the whole claim, and he further points out that one Starnes was the owner of a half interest, and that half interest was got in at $17,500. He concludes, " All these various pieces of Rec. p. 333.

evidence coming together would lead me to believe that the value fixed by Barrett to the knowledge of the Respondent for this claim in estimating the total value was $35,000."

Dugas J. and Macaulay J. appear to think that inasmuch as all the properties were admittedly bought for a lump sum, and that no formal separate valuation was made of claim 32, the evidence as to $35,000 being in fact the value fixed to the knowledge of Paillard was irrelevant and inadmissible. Rec. p. 355. Rec. p. 369.

16. Davies J. says :—

In the case now before us the trial Judge found that the price paid for the property "No. 32" was $35,000. He also found that the purchaser had before the trial realised a net profit from the working of part of that lot of $13,317 and that the property as it then stood after deducting that $13,317 was practically worthless. This net profit being deducted from the price paid would leave the damages on lot "No. 32" at $21,683, which was the actual loss or damage sustained by the Plaintiff on that lot. Then, as to the damages on the other property "Claim No. 12 for the Cassidy drift known as No. 4" he finds on the same principle the damages to be $5,500 which added to the $21,683 would make $27,183 for which amount Judgment should be entered. Rec. p. 424.

Nesbitt J. page 426, line 25, to page 427, deals exhaustively with this question, says :— Rec. p. 426.

" It was urged very strenuously that the rule laid down in Peek v. Derry (37 Ch. D. 541) in the Court of Appeal in England, was the rule applicable here, and that the Plaintiffs were compelled to show that the balance of the property remaining in their hands was not of such value that no loss might

ultimately be suffered

nere, and that the Plaintiffs were compelled to show that the balance of the property remaining in their hands was not of such value that no loss might

ultimately be suffered. I do not think that this is correct. I think that as to the balance of the property, although the purchase money is a lump sum, as the trial Judge has found, that in making up that lump sum, 32 was taken at $35,000, that in absence of proof to the contrary by the Plaintiffs it must be presumed that the representation as to the balance of the property was true, and that the property is worth the price agreed upon between the parties, and that as the Plaintiffs could not claim for speculative profits in connection with it, so the Defendant cannot claim that there may be speculative value over and above the value at which it was taken between the parties, and the Plaintiffs are entitled by their bargain to any speculative values which may exist in the properties, or to any enhanced value which may arise after the sale. The Defendant cannot claim these enhanced values as an offset to the damage arising from fraudulent representation in respect to a distinct and separate parcel. The price at which the property is sold is not conclusive as to its value though very strong evidence, and so thought Lord Denman in Clare v. Maynard (7 C. & P. 741 at page 743). Had the sale been of all the properties for a lump sum without referring to the price separate as to one of them, I still think it is a question of evidence entirely as to damages suffered in respect of one parcel. It may be difficult of proof. It cannot be the law that if I purchase five undivided mining properties and in developing the first one at a large expense I find I have been swindled and an action of deceit lies against the seller, that I cannot recover the damages I have suffered from such fraud in respect of that property. I think the rule would be in such case that if I could prove what the fair proportionate value of such property was to the

other properties included in the purchase, and so establish what my loss was in respect of that one, I am entitled I think to assume that the representations as to the others are correct, and that there is no loss to me in regard to them. But surely I cannot be compelled, at a vast expenditure of money, to go on and explore these properties to show that they too are worthless, or if I do go on and explore them and find speculative value in them that this can be set off against my loss on the one on which loss has been occasioned. I am entitled by my bargain to get the benefit of any such speculative values if they should be found. The seller cannot claim the benefit of them. He is entitled, on the contrary, until his representations are proved to be false and fraudulent, to have it assumed that the properties are of the character represented, and if the true proportionate value can be established at which they were taken in making up the lump sum, then the difference between the true porportionate value and the lump sum which I have paid for the whole would be my actual loss by reason of the fraud in reference to one, if that one were worthless. I could also add the legitimate expense I have undertaken by reason of the fraud such as was necessary to be expected to be undertaken as attributable to Defendant's fraud.

" Mr. Aylesworth illustrated a case of purchase of fifty shares of stock in one company and fifty shares in another company, and the purchaser retaining both stocks and bringing an action for deceit. One stock proved, at the trial, to be utterly worthless and the other to have risen largely in value since the date of the purchase. He claimed that as it was only the actual loss which could be recovered in an action of deceit, that the person committing the fraud

was entitled to set off the loss arising from the worthl

date of the purchase. He claimed that as it was only the actual loss which could be recovered in an action of deceit, that the person committing the fraud was entitled to set off the loss arising from the worthlessness of one stock by appealing to the enhanced value of the other. I do not think this is sound. I think the purchaser is entitled to the benefit of his bargain of the fifty shares, with all its possibilities and that the vendor is liable for the fraudulent deceit in reference to the other. We are not, however, in view of the trial Judge's finding in this case, driven to solve this difficulty because he finds that "claim 32" had a price set apart for it and we are able to arrive at the damage arising to the purchaser from the fraud which has been practised."

17. The difficulty lies not in the principle of assessment but in the application of the principle to the facts of this case. The general rule is that the damage recoverable is the direct loss arising from having acted upon the misrepresentation, and where the misrepresentation induces a purchase of property, the measure of the loss is the difference between the real value of the property passed by the contract and the price paid.

It is clear in this case if the sale had been of claim No. 32 alone, at a price of $35,000 the measure of damage would have been on the facts found $35,000 less $13,317, i.e., the difference between the price paid and the actual value.

Inasmuch however as the action was tried when no evidence was available as to whether the balance of the property was in actual value more or less than the balance of price paid $164,000 it is contended by the Appellant that some rule of law probihited enquiry as to the loss then actually proved. Such a contention amounts to an untenable proposition that proof of loss on a part is as matter of law no evidence of loss on the whole, and that the tortfeasor

could legally defeat a present claim upon a nebulous anticipation of a future value which should make the other parcels exceed in value the price paid and thus re-adjust the balance.

The Respondent submits that the Judgment below should be maintained and the appeal dismissed for the following among other

REASONS.

BECAUSE :—

1. On the facts found the relief by way of counterclaim was within the jurisdiction conferred upon the Judge by the Yukon Judicature Ordinance (Consolidated Ordinances, 1902, cap. 17, Rule of Law 8 (3).)
2. The Appellant consented to the jurisdiction of the Judge to try the counterclaim as if it were in form as well as in substance an independent action.
3. The Appellant is not entitled to rely upon a contention not raised before the Trial Judge or in the notice of appeal to the Territorial Court.
4. The findings of fact of the Trial Judge are right and are supported by ample evidence, and his conclusions are based upon the credibility he attached to the witnesses after full consideration of all material circumstances.
5. The assessment of damages is upon the facts proved right.

G. A. SCOTT.

5. The assessment of damages is upon the facts proved right.

G. A. SCOTT.

BILL OF APPELLANT'S COSTS TAXED IN PRIVY COUNCIL.

COSTS OF SUCCESSFUL APPELLANT.

RECORD OF PROCEEDINGS PRINTED ABROAD, SHOWING ITEMS TAXED OFF.

IN THE PRIVY COUNCIL

NO. of 1 .

ON APPEAL FROM

BETWEEN

A. B. - - - - - - - *Appellant,*

AND

Y. Z. - - - - - - - *Respondent.*

Bill of Costs of the *Appellant* to be taxed as between party and party in accordance with an Order of Judicial Committee dated day of 1 .

Taxed off.		Disbursements.			Charges.		
£ s. d.		£	s.	d.	£	s.	d.
	21st April—Retainer fee					13	4
	Drawing and fair copy Appearance for Appellant					5	0
	Attending at Council Office entering Appearance.					10	0
	Paid fee		10	0			
	Attending obtaining six prints of Record . .					10	0
	Perusing Record, 25 quarto sheets of 8 pages .				26	5	0
	Instructions for Petition of Appeal . . .					10	0
	Drawing same, folios 9, at 2s. per folio . .					18	0
	Attending Counsel therewith to settle . .					10	0
	Paid his fee and clerk	5	15	6			
	Attendance on paying fee					10	0
	Copy Petition of Appeal to lodge folios 9 . .					4	6
	Attending lodging Petition					10	0
	Paid lodging fee	1	1	0			
	Paid entering fee	1	1	0			
	Attending searching if Respondents had appeared; found they had not					10	0
	Drawing petition for Order summons to Respondents to appear					10	0

	[illegible]				10	0
	Drawing petition for Order summons to Respondents to appear				10	0
	Copy to lodge				5	0
	Attending lodging Petition				10	0
	Paid lodging Petition	1	1	0		
	Paid for Committee Order	1	12	6		
	Having received Order and Summons from the Privy Council Office—Copy Summons to affix at the Royal Exchange				2	6
	The like, Lloyd's Coffee House				2	6
	Attending at the Royal Exchange, affixing one copy				10	0
	Paid affixing fee	1	1	0		
	Attending at Lloyd's Coffee House, affixing the other copy				10	0
	Paid fee		2	6		
	Instructions for case				1	0	0
	Drawing same, folios 24				2	8	0
	Copy Petition of Appeal as lodged for counsel, folios 9				4	6
10	0	Attending him with papers to settle draft case				1	0	0
		Paid his fee and clerk	11	0	6		
		Attendance paying fees				10	0
		Having received notice from Messrs. that they had entered appearance for the					

Taxed off.		Disbursements.	Charges.
£ s. d.		£ s. d.	£ s. d.
	Respondents—Making copy Petition of Appeal, folios 9		4 6
	Attending serving them therewith		10 0
	Making copy case as settled by counsel, folios 24		12 0
	Attending him for appointment for conference		10 0
	Paid his conference fee and clerk	5 15 6	
	Attendance paying fees		10 0
	Attending conference when case settled		1 0 0
	Making copy case as settled in conference for the printer, folios 24		12 0
	Attending printer therewith instructing him to strike off proof		10 0
10 6	Revising proof of case (4 pp.)		1 1 0
	Attending printer with revised proof instructing him to strike off 75 copies		10 0
	Paid printer's bill	1 12 6	
	Attending at Council Office, and lodging 40 copies of the Appellant's Case		10 0
	Paid lodging fee	1 1 0	

Paid setting down [illegible]

	Attending at Council Office, and lodging 40 copies of the Appellant's Case				10	0
	Paid lodging fee	1	1	0		
	Paid setting down fee		10	0		
	Writing to Respondent's solicitors that F. had lodged Appellant's Case, and with appointment to exchange Cases.				5	0
	Attending Respondent's solicitors, exchanging Cases				10	0
	Perusing Respondent's Case				1 1	0
	Attending for 10 sets of Records and papers for binding				10	0
	Attending binder with 13 sets of proceedings and with instructions as to binding same with labels, &c.				10	0
	Paid binder's bill (part of)	1	2	0		
	Instructions to counsel to argue				1 0	0
10 0	Attending counsel with brief				1 0	0
	Paid his fee and clerk	27	11	0		
	Attending paying fees				10	0
	Attending counsel for appointing conference				10	0
	Paid his conference fee and clerk	5	15	6		
	Attendance paying fees				10	0
	Attending conference				1 0	0
	Attending lodging 10 bound sets of cases and records				10	0
	Paid summons to attend hearing.		10	0		

Taxed off.		Disbursements.	Charges.
£ s. d.		£ s. d.	£ s. d.
	Paid Privy Council Messenger with summons to attend hearing	2 6	
	Copy summons for counsel		2 6
	Attending him therewith		10 0
	Attending Council Chamber when Appeal called on and heard, and judgment reserved		3 6 8
	Dec. 8—Paid summons to hear judgment	10 0	
	Paid Privy Council Messenger with same	2 6	
	Copy summons for counsel		2 6
	Attending him therewith		10 0
10 0	Attending marking counsel's brief to hear judgment		10 0
	Paid his fee and clerk	5 15 6	
	Attendance paying fees		10 0
	Attending Council Chamber when judgment given for the Appellant with costs		1 6 8
	Attending at the Privy Council Office, paying fees and obtaining receipt		10 0

Attending at the Privy Council Office, paying fees and obtaining receipt					10	0
Drawing bill of costs and fair copy for taxation, folios 16				1	4	0
Attending to lodge bill for taxation and obtaining appointment to tax					10	0
Paid for Committee Report	1	10	0			
Paid for Order to tax	1	12	6			
Copy thereof for service on Respondent					5	0
Copy Bill of Costs for Respondent's solicitors					8	0
Attending Respondent's solicitors therewith, and with appointment to tax					10	0
Attending taxation of costs at Privy Council Office				2	2	0
Paid fee on taxation	3	3	0			
Paid fee for Final Order of Her Majesty in Council	3	2	6			
Paid Privy Council Messenger with same		2	6			
Attending bespeaking two copies of the Order					10	0
Paid for same		10	0			
Writing to Appellant's Agent in..... with original Order					10	0
Sessions fee				3	3	0
Letters, postage, messengers, and other incidental expenses throughout the Appeal				2	2	0

SUMMARY.

Page in Bill.	Taxed off.			Payments.			Charges.		
	£	s.	d.	£	s.	d.	£	s.	d.
Page 1.....									
" 2.....									
" 3.....									
" 4.....									
" 5.....									
" 6.....									
" 7.....									
£									

Payments brought down..... £

Total of Solicitors' Fees and Payments..... £
Taxed off..... £

Allowed..... £
Agreed at £ s. d.

Signed by Solicitors on both sides.

Allowed..... £

Agreed at £ s. d.

Signed by Solicitors on both sides.

INDEX IN APPEAL TO THE PRIVY COUNCIL.

IN THE PRIVY COUNCIL.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

BETWEEN

JOSEPH BARRETTE . . . . . *Appellant,*

AND

THE SYNDICAT LYONNAIS DU KLONDIKE . . *Respondent.*

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appeal

FACTUM IN UNITED STATES SUPREME COURT.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 187.

ADELAIDE V. TILT, BENJAMIN B. TILT, JOSEPH W. CONGDON and JOHN R. CURRAN, as Executors of the last will and testament and codicil of Albert Tilt, deceased,
Plaintiffs in Error,

VERSUS

OTTO KELSEY, Comptroller of the State of New York,
Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

This is a writ of error (55)* to review the determination of the Court of Appeals of the State of New York (50) and the judgment of the Surrogates' Court of New York County entered thereon (51) affirming an order of that court (43) adjudging that Albert Tilt, the decedent, was a resident of the State of New York at the time of his death, May 2, 1900 (5), and the " personal estate of said Albert Tilt, wherever situated, is subject to the payment of a transfer tax under the Tax Law of the

*Note. The figures which appear throughout this model factum represent the page of the case on which the document referred to is to be found. The rule of the Supreme Court of the United States only requires that the page should be given, whereas the rule of the Supreme Court of Canada requires the line also. The bracket, therefore, should contain the letter p. followed by the number of the page, and the letter l. followed by the number of the line.

State of New York." The aggregate amount of the tax assessed upon the personal estate under this determination is $13,405.33 (35).

Under the New York statute, Chapter 399 of the Laws of 1892, such transfer tax is "due and payable at the time of the transfer" (§ 3), and, if not paid within eighteen months thereafter, "interest shall be charged and collected thereon at the rate of ten per centum per aunnm from the time the tax accrued" (§ 4).

The amount assessed, as above, with such interest to November 2, 1906, would be $22,118.79.

STATEMENT.

Albert Tilt died May 2, 1900 (5). He left a last will and a codicil thereto.

The will (28-33) was made May 29, 1891. It recited that the testator was then "of the Borough of Manhattan, in the City and State of New York." By the Ninth clause of this will the testator established a trust in favor of his daughter Addie Estelle Acer in one fourth part of his residuary estate—including real as well as personal property—and constituted The Fifth Avenue Trust Company of the City of New York the trustee of such trust. And by the Thirteenth clause of this will the testator nominated and appointed his wife, Adelaide V. Tilt, and his sons, Benjamin B. Tilt and Albert Tilt, Junior, his executors.

The codicil (33-34) was made February 23, 1900. It recited that the testator was then "formerly of the Borough of Manhattan, in the City and State of New York, now of the Borough of Mount Arlington, in the County of Morris and State of New Jersey." By the Third clause of this codicil he revoked the appointment of The Fifth Avenue Trust Company of the City of New York, as trustee of the trust for the benefit of his daughter, and constituted the New Jersey Title Guarantee and Trust Company of Jersey City, in the State of New Jersey, the trustee of that trust. And by the Fourth clause of this codicil he revoked the appointment of his son, Albert Tilt, Junior, as executor,

and in his place nominated and appointed his friends, Joseph W. Congdon, of Paterson in the State of New Jersey, and John R. Curran, of said Paterson, as executors.

Both will and codicil were drawn by Hamilton Wallis, an attorney and counsellor at law of the States of New York and New Jersey (8), and a witness to both will and codicil (33, 34). In his instructions to Mr. Wallis for the drawing of the codicil the testator told Mr. Wallis that, since the drawing of the will, he, the testator, had changed his residence from New York to New Jersey, had removed all of his securities from New York to New Jersey, and intended to reside in New Jersey permanently; and that for that reason he wished to substitute the New Jersey Title Guarantee and Trust Company for the Fifth Avenue Trust Company as trustee of the trust for the benefit of his daughter (8).

The testator's business interests were wholly in the State of New Jersey. For twenty-two years prior to his death he was President of the Phœnix Silk Manufacturing Company, a New Jersey corporation, having its factories and offices at Paterson, New Jersey. This was his principal business, and he held stock in this company to the amount of $985,900 par value, inventoried at $809,312.50. In this business for the last fifteen years of his life his executor, James W. Congdon, was associated with him. Prior to the execution of the codicil the testator told Mr. Congdon " that he no longer considered himself a resident of the State of New York, but of New Jersey, and that he wished to have his will changed so as to express his change of residence," and requested Mr. Congdon to accept the appointment of executor. He also said to Mr. Congdon " at or about the time the codicil was made that he had removed all of his securities from the State of New York to New Jersey, as he wished to have his property in the State where he resided " (11-12).

From the year 1889 the testator owned and maintained a residence at Mount Arlington, in Morris County, New Jersey, which he occupied with his family and servants from May to October or November in every year, and kept open and in charge of servants and ready for occupancy " all the year round " ;

and it was frequently occupied by him or by members of his family, for short periods, at all seasons of the year (9). During this same period he also owned a house at No. 5 East Sixty-seventh Street in New York City, which was also kept open "the year round" in charge of caretakers and ready for occupancy when not occupied by the family (13). Thus the testator had two residences, one in New York and the other in New Jersey, each of which was habitually occupied by him and his family for about one half of the year, and occasionally during the other half.

During the summer of 1899 the testator frequently spoke to his son, Benjamin B. Tilt, of his intention to become a resident of New Jersey, instead of New York, and afterwards on several occasions said that he considered himself a resident of New Jersey (9).

Benjamin B. Tilt gave further details upon his oral examination. He said that the testator talked of changing his residence from New York to New Jersey "about the time we left for our country home, in June of '99" (17). "He talked about it all summer long." Said that he had decided absolutely to change his residence and then he was going to vote in Mount Arlington that fall" (18). "Q. Did you ever hear him state to yourself or to anyone else whether or not he considered himself a resident of New York or New Jersey? A. Yes, I did. Q. When? A. Right along the latter part of that summer after he had talked about it so much; and then he made the codicil—that was to show that he had absolutely become a resident of New Jersey. Q. And did he so state to you? A. Yes, he did. Q. More than once? A. Yes, several times. Q. Did you ever hear him make that statement to General Congdon? A. Yes, several times. Q. Did he state that he was going to make a codicil to his will for the purpose of changing his residence, or because he had changed his residence? A. *Because he had changed his residence.* Q. What did he say about changing the trust company in New York? Did he say that he was going to change from the Fifth Avenue Trust Company to the New Jersey Title Guarantee & Trust Company for the purpose

of changing his residence, or because he had changed his residence ? A. *Because he had* " (18).

The property which the testator had in New York was real estate, household furniture, horses and carriages, and a small account in the Plaza Bank (20). The household furniture was valued at $8,000 and the horses and carriages at $3,000 (3), and the amount of cash in the Plaza Bank was $2,901.21; making $13,901.21, out of a total of personal property of $1,108,079.71 (3). The remainder of his personal property was in New Jersey (10).

This will and codicil of Albert Tilt were proved before the Surrogate of Morris County, New Jersey, as being the county in which the testator resided at the time of his death; the petition for probate described him as late of the Township of Roxbury in said county (25), Mount Arlington being within the legal limits of that township (28); the Surrogate assumed jurisdiction on the ground that Albert Tilt was at the time of his death a resident of Morris County, New Jersey, and no other ground of jurisdiction was shown; and that basis of jurisdiction was shown and is recited in the letters testamentary in compliance with the requirement of the New Jersey General Statutes (25-26).

The letters testamentary read as follows :

" Morris County Surrogate's Office, Morristown, N. J.

" I, DAVID YOUNG, Surrogate of said county, do certify the annexed to be a true copy of the last will and testament of Albert Tilt, late of the County of Morris, deceased, and that Adelaide V. Tilt, Benjamin B. Tilt, Joseph W. Congdon and John R. Curran, the executors therein named, proved the same before me and are duly authorized to take upon themselves the administration of the estate of the testator, agreeable to the said will.

" Witness my hand and seal of office this 23rd day of May, in the year of our Lord, A. D., one thousand nine hundred.

" DAVID YOUNG,
" Surrogate."

The Surrogate's Seal of the County of Morris is affixed (26).

On May 24, 1900, an order was made by the Surrogate of Morris County, New Jersey, limiting the time of creditors of the estate of Albert Tilt to bring in their debts, demands or claims against that estate (27).

On February 25, 1901, a further order was made by the same Surrogate determining that the time so limited had expired, and that all creditors who had then neglected so to bring in their claims and demands "be forever barred from their actions therefor against the executors of said deceased." And this order, under the laws of New Jersey, the Surrogate had full and competent jurisdiction to make. And no claim of the State of New York against the estate of Albert Tilt was presented to the executors within the time so limited (27).

Thereafter the executors accounted in the Orphans' Court of Morris County, New Jersey, a court having jurisdiction under the laws of New Jersey to entertain such accounting and to direct final distribution of the estate of the testator thereon. Upon that accounting a decree was made in that Court by the judge presiding therein, on June 20, 1901, finally settling and allowing the accounts of the executors, and directing the distribution of the balance of the estate then remaining in their hands (27-28).

Thereupon, and prior to August, 1901, the executors made such distribution in conformity with the directions of that decree; after which there remained no money or personal property whatsoever of the estate of Albert Tilt in their hands (28).

The executors paid the inheritance, succession and legacy taxes imposed on the estate of Albert Tilt by the laws of the United States and by the laws of New Jersey; the United States taxes were paid to the Collector of Internal Revenue in New Jersey (28).

After all this had been done the State of New York first asserted its claim to a transfer tax (28) through a petition of Edward H. Fallows as Attorney for the State Comptroller and an order of the Surrogate of New York County thereon, on August 16, 1901, "for the appraisal, under the act relating to taxable transfers of property, of the property of Albert Tilt, deceased" (1).

The appraiser thereby appointed appraised the whole personal estate of the testator, and upon his report taxes amounting to $13,405.33 were assessed upon legacies amounting in the aggregate to $1,054,733.96 (35).

Upon appeal to the Surrogate (36) specifying the objections which are now presented here, the Surrogate affirmed this assessment and by order of May 17, 1905, entered it was

"Ordered and adjudged that the legal residence of said Albert Tilt was within the State of New York at the time of his death; and that said personal estate of said Albert Tilt, wherever situated is subject to the payment of a transfer tax under the Tax Law of the State of New York" (43-44).

The executors duly filed their exceptions (44-46) to the findings of the Surrogate, and took an appeal to the Appellate Division of the Supreme Court (1) where, after hearing the order of the Surrogate was affirmed (48), Judges PATTERSON and INGRAHAM dissenting. (*Matter of Tilt*, 107 App. Div. 616.)

On appeal to the Court of Appeals (49) and after hearing, the determination of the Appellate Division was affirmed, Judges GRAY and BARTLETT dissenting, (*In re Tilt*, 182 N. Y. 657,) and the record was remitted to the Surrogates' Court (50-51), where final order of affirmance was entered October 18, 1905 (51), which is now brought here upon writ of error (55).

No opinion was delivered by the Appellate Division or by the Court of Appeals; and the only opinion delivered by the Surrogate was in these words:

"Estate of Albert Tilt.—On the evidence submitted I will determine as a fact that the decedent was at the time of his death a resident of New York County" (38).

ASSIGNMENT OF ERRORS.

FIRST. That inasmuch as in conformity with the statutes of the State of New Jersey, the will of said Albert Tilt, the decedent, was established and admitted to probate by the Surrogate of Morris County, New Jersey, a court of competent jurisdiction, as the will of a resident of New Jersey, and said will was never offered for probate or admitted to probate in any court

or tribunal of the State of New York, and said executors derived their authority wholly from such probate and the issue of letters testamentary to them by said Surrogate of Morris County, New Jersey, and not otherwise, such action of such court of the State of New Jersey, which has never been vacated, reversed or set aside in that State, is conclusive upon the question of the residence of the decedent, upon all parties having any interest in his estate, and that the aforesaid determination and decision herein that said Albert Tilt was, at the time of his death, a resident of the State of New York, is a denial of the full faith and credit which is secured to the statutes, and the judicial proceedings and determinations of the courts, of New Jersey, in the State of New York, and is a denial of the privileges and immunities of the said testator and said executors as citizens of New Jersey in their several individual and official capacities, in said State of New York; all as secured to them under the provisions of Sections 1 and 2 of Article IV. of the Constitution of the United States.

SECOND. That, inasmuch as, in compliance with the statutes of New Jersey, notice was duly given to all persons having any claim against the estate of said decedent, and no claim on behalf of the State of New York was ever presented thereunder, and an order was duly made thereafter, barring all claims against the said executors thereunder, and said executors were appointed and qualified solely in the State of New Jersey, the aforesaid determination and decision that the estate of the said Albert Tilt within the State of New Jersey was subject to a transfer tax under the laws of the State of New York, is a denial of the full faith and credit which is secured to the statutes, and the judicial proceedings and determinations of the courts, of New Jersey, in the State of New York, and is a denial of the privileges and immunities of the said testator and said executors as citizens of New Jersey in their several individual and official capacities in the State of New York; all as secured to them under the provisions of Sections 1 and 2 of Article IV. of the Constitution of the United States.

THIRD. That, inasmuch as the right to bequeath and dispose of property by last will and testament is derived solely from provisions of positive law, and the taxing of the right of succession through such last will and testament is dependent upon the right so conferred by provisions of positive law, and as the last will and testament of said decedent derives its sole force and effect as to his personal estate which was within the State of New Jersey from the laws of that State and from its establishment as his last will and testament through probate in the proper court of that State, and said executors were appointed and qualified solely in the State of New Jersey, the aforesaid determination and decision that the personal estate of said decedent in the State of New Jersey is subject to a transfer tax under the laws of the State of New York is a denial of the full faith and credit which is secured to the statutes, and the judicial proceedings and determinations of the courts, of New Jersey, in the State of New York, and is a denial of the privileges and immunities of the testator and said executors as citizens of New Jersey in their several individual and official capacities in said State of New York; all as secured to them under the provisions of Sections 1 and 2 of Article IV. of the Constitution of the United States.

FOURTH. That inasmuch as all of the personal estate of said decedent has been fully administered and distributed in due and regular proceedings had in the Orphans' Court of Morris County, New Jersey, a court of competent jurisdiction, and such administration was fully had and completed and the personal estate of said decedent was fully distributed thereunder, without notice or knowledge of any claim on the part of the State of New York for any tax thereon, and as said executors had been appointed and qualified solely in the State of New Jersey, and had been duly discharged therein, the aforesaid determination and decision that the personal estate of the said decedent in the State of New Jersey is subject to a transfer tax under the laws of the State of New York is a denial of the full faith and credit which is secured to the statutes, and, the judicial pro-

ceedings and determinations of the courts, of New Jersey, in the State of New York, and is a denial of the privileges and immunities of the said testator and said executors in their several individual and official capacities in said State of New York; all as secured to them under the provisions of Sections 1 and 2 of Article IV. of the Constitution of the United States.

ARGUMENT.

The question of residence, when arising upon undisputed facts, is, like all other questions arising upon undisputed facts, a question of law. It is the province of the court to draw the proper legal conclusions from admitted or established facts. And it cannot affect the controlling force of this rule, based upon fundamental principles, that the conclusion so drawn is stated in the form of a finding or adjudication of matter of fact.

It will be seen that, in the present case the facts in no wise compel to the conclusion that Albert Tilt was legally a resident of New York at the time of his death, but are wholly in harmony with the jurisdiction assumed by the New Jersey courts in admitting his will to probate and administering his estate, and involve no elements or features which could justify the courts of New York in denying full faith and credit to the probate and administration in New Jersey.

It seems desirable, therefore, for the fullest understanding of the matter, to consider first the facts relative to residence, and their natural and legal effect; and then the action of the New Jersey courts, and the faith and credit which should be accorded to that action.

POINT FIRST. The Legal Residence of Albert Tilt at the Time of his Death was in the State of New Jersey.

The right, in this country, of each individual, to change his residence at will, cannot be questioned.

Change of citizenship, as distinguished from change of residence, is not always so simple a matter. As between this

country and foreign countries a change of citizenship must be accompanied by acts of more or less solemnity, as in abandoning allegiance to one and vowing allegiance to the other. But ordinarily in a change of citizenship from one state of the union to another no special formalities are required, and a change of citizenship naturally follows a change of residence, unless some intention to the contrary is manifested.

But a change of residence does not in itself necessarily involve any change of citizenship. A change of residence between two towns or cities of the same State is accomplished in precisely the same way as a change of residence between two towns or cities of different States.

The legal requisites for effecting such a change are but two : an intent; and an act in furtherance of that intent.

The intent, not acted upon, is a mere condition of mind, which, without the co-operation of the act, brings forth no fruit.

The act, without the intention, means nothing, because the actor means nothing by it.

In many cases cited the intent is not clear, and has to be inferred from the act, and the circumstances surrounding the act. But when the intent is clear, acts in furtherance of it should be interpreted in the light of the known intent.

The general rules are summarized by Judge RAPPALO in *Dupuy v. Wurtz*, 53 N. Y., as follows : " One leading rule is that for the purposes of succession every person must have a domicil somewhere, and can have but one domicil. * * * To effect a change of domicil for the purpose of succession there must not only be a change of residence, but an intention to abandon the former domicil, and acquire another as the sole domicil. Residence alone has no effect *per se*, though it may be most important, as a ground from which to infer intention. Length of residence will not alone effect the change. Intention alone will not do it, but the two together do constitute a change of domicil. * * * The question what shall be considered the domicil of a party, is in all cases rather a question of fact than of law. With respect to the evidence necessary to establish

the intention, it is impossible to lay down any positive rule. Courts of justice must necessarily draw their conclusions from all the circumstances of each case, and each case must vary in its circumstances; and, moreover, in one a fact may be of the greatest importance, but in another the same fact may be so qualified as to be of little weight. * * * The intention may be gathered both from acts and declarations. Acts are regarded as more important than declarations, and written declarations are more reliable than oral ones."

Chief Justice SHAW, in **Thorndike v. Boston*, 1 Met., 242, said: "The questions of residence, inhabitancy or domicil,—for though not in all respects precisely the same, they are nearly so, and depend upon much the same evidence,—are attended with more difficulty than almost any other which are presented for adjudication. No exact definition can be given of domicil; it depends upon no one fact or combination of circumstances, but from the whole taken together it must be determined in each particular case. It is a maxim that every man must have a domicil somewhere; and also that he can have but one. Of course it follows, that his existing domicil continues until he acquires another; and *vice versa*, by acquiring a new domicil, he relinquishes his former one. From this view it is manifest that *very slight circumstances* must often decide the question."

The right which every individual has to change his residence at will could not be denied or restricted in the case of the present testator, Albert Tilt, by reason of the fact that he already possessed two "homes," one in New York City, and one in Mount Arlington, New Jersey, and occupied each, with his family, for

*Note. It will be perceived in the balance of this factum that copious references are made to decisions of the United States Courts on the question in issue in the appeal, and very considerable extracts taken from the judgments in the cases cited. From a number of the factums of the Supreme Court of the United States which I have consulted, I find this to be the practice there. It adds largely to the size of the factum, and it may be that the Supreme Court of Canada will, upon an early occasion express its opinion as to the desirability of adopting this practice. It is opposed to that of the Privy Council, as will be seen on consulting the model factums given on pp. 193-202 supra.

about one-half of each year. It would seem that his was emphatically one of the cases where, in the language of Chief Justice SHAW "very slight circumstances must often decide the question."

As it was competent for Albert Tilt to have his legal residence in New York, while living one-half of the year in his house at Mount Arlington, New Jersey, it was equally competent for him to have his legal residence in New Jersey, while living one-half of the year in his house in New York City. It was no more essential or important for him to give up and abandon his house in New York City in order to have his legal residence in New Jersey, than it was for him to give up and abandon his house at Mount Arlington in order to have his legal residence in New York.

Obviously, then, in the present case, the evidence of legal change of residence is not to be sought in a visible change of his habit of the past ten years to divide his time about equally between those two houses, but in other acts conforming to his clearly proved intention, and wholly unexplained unless done in pursuance of that intention.

Three specific acts of this sort are shown : The removal by Albert Tilt of his personal securities from New York to New Jersey; the substitution of two residents of New Jersey, Gen. Congdon and Mr. Curran, as executors; and the substitution of the New Jersey Title Guarantee and Trust Company in place of the Fifth Avenue Trust Co. as trustee of one quarter of his residuary estate, for the benefit of his daughter. And these the testator spoke of as acts which he had done because of his change of residence. He told Mr. Wallis that he *had changed* his residence and *had removed* his securities from New York to New Jersey (8). He told Mr. Congdon that he *had removed* all his securities from New York to New Jersey "*as he wished to have his property in the State where he resided*" (12). He said to the latter that he wished to change his will so as to express his change of residence (12). And under the solemnity of the making of a codicil to his will, he declared himself to be "formerly of the Borough of Manhattan, in the City and State

of New York, now of Mount Arlington, in the County of Morris and State of New Jersey " (33). All of his personal property was in New Jersey at the time of his death, with the exception of $2,901.21 cash on deposit in the Plaza Bank, and the furniture, horses and carriages in New York City (10).

It is difficult to imagine anything more which the testator could have done to carry into effect his declared intention, short of abandoning his New York house, which he was clearly under no obligation to do.

To hold, as the courts of New York have held, that the legal residence of Albert Tilt remained unaffected by this clearly expressed intention, by these undisputed acts done in avowed furtherance of that intention, and otherwise purposeless and meaningless, and by the further declarations that this intention had been carried out, is to deny to him and to all similarly situated the right to change his residence at all.

There lurks in the argument in behalf of the State the suggestion that there is some sort of moral obliquity involved in such a change of residence; that in some kind of a way every resident owes the State a duty to die a resident and thus subject his estate to a transfer tax, and that such change of residence as Albert Tilt attempted, and believed he had made, operated or would operate to defraud the State of some vested right, and should be discredited in the interest of public policy.

It is needless to say that this view has no support in either morals or law. The absolute right of every man to change his residence from one town or city or state to another is not limited or affected by the difference in the rates of taxation in one locality or the other upon his estate, in life, or in death. If it were otherwise, if it were reprehensible to change from a higher to a lower rate of taxation, so that every presumption, like that of innocence would run to the contrary, and the offense must be clearly proved, *not* to secure punishment, but *to secure success;* then, on the other hand, it would be an act of positive merit to change from a lower rate of taxation to a higher one, with every presumption in its favor.

There is no more reason why a man should not choose his residence where the taxes are least heavy, than there is why he should not choose it where rents are lowest. As was said by MORTON, J., in *Thayer v. Boston*, 124 Mass., 139, "The fact that any man changes his home or his domicil for the purpose of avoiding, or escaping, or lessening his taxes, is of no consequence whatever." And to this the opinion of the Supreme Court adds (p. 148): "The wish to change for that purpose does not tend to show any want of a real intention to change, but *rather the contrary*."

In Story on Conflict of Laws, Section 47, it is said :

"Eleventhly, if a married man has two places of residence at different times of the year, that will be deemed his domicil which he himself selects, or describes, or deems to be his home, or which appears to be the centre of his affairs, or where he votes or exercises the rights and duties of a citizen;" citing among other cases *Somerville v. Somerville*, 5, Vesey, 750.

In *Somerville v. Somerville*, the question was whether the personal estate of Lord Somerville was to be administered under the law of Scotland or under that of England. He had domicils in both countries, dividing his time between them. He died in London. The Master of the Rolls said : "Here the question is which of the two acknowledged domicils shall preponderate; or rather which is the domicil according to which the succession to the personal estate shall be regulated." "The succession to the personal estate of an intestate is to be regulated by the law of the country in which he was a domiciled inhabitant at the time of his death; without any regard whatsoever to the place either of the birth or death, or the situation of the property at the time." "A man may have two domicils for some purposes, but he can have only one for the purpose of succession." Upon the facts shown, the chief one of which was that some time before his death Lord Somerville *had talked about making a will in Scotland*, it was adjudged that Scotland was his domicil for purposes of succession.

In *Thayer v. Boston*, 124 Mass., 132, the plaintiff, who had paid taxes to the City of Boston under protest, sued and recovered a verdict for them. He had two residences, both in Massachusetts; one being in Boston and one in Lancaster. Prior to 1869, while his legal residence was admittedly in Boston, he had entertained and declared an intention of changing his residence at some time to Lancaster, but had fixed no definite time. In 1868, his taxes in Boston having been increased, he declared to the assessors that if they should be again increased he would pay no more taxes in Boston. They were again increased in 1869, and thereupon the plaintiff gave notice to the assessors that he had removed his residence to Lancaster. He continued after this notice, as before, to divide his actual occupancy between the two residences, and did no act to effect any change of residence, beyond giving this notice. The Supreme Court, upon full hearing, ordered judgment for plaintiff on the verdict, approving the language of MARTIN, J., in his instructions to the jury as follows :

"Generally, where the question is whether a man has changed his home, it is easy to determine ; because, ordinarily, a man has either to build or buy or hire a house for himself and his family in the new town to which he intends and purposes to remove; and that fact would ordinarily be so significant a fact of his intention, and where he moves into the house that fact would be so significant of his actual change of his home, as would compel the mind to the conclusion that he had changed his domicil, and that he intended to do so. The plaintiff was under no such necessity, because he had two establishments at the time, one in Boston and one in Lancaster, both, according to the evidence, complete establishments, fit to move into at a moment's notice.

But still, before he could effect a legal change of his domicil, he must have done something. * * * If you are satisfied that a man has an honest intention and purpose to change his home from Boston to Lancaster, under the circumstances in which the plaintiff was placed, that intention would be very significant as illustrating and giving character to even trifling

acts that he might have done in carrying out that intention—trifling acts that he might have done to remove his domicil in pursuance of that intention." The plaintiff's notice to the assessors was the only evidence of the fact of change, and was held sufficient inasmuch as the verdict which rested on it was sustained.

During the summer of 1889 the testator frequently expressed his intention of making New Jersey the place of his legal residence. He could not accompany these expressions by the corresponding act of removing from New York to New Jersey, *because he was actually living in his New Jersey home at the time.* But he could and did declare that whereas he had previously come to New Jersey *animo revertendi*, he had now come there *animo manendi.* He was actually residing in New Jersey when he declared this intention, and thenceforth he acted upon the assumption that the change had been effected, and shaped his testamentary provisions in conformity with it. In October he came back to New York a very sick man, too ill to carry out his intention of voting at Mount Arlington that fall (18, 24) and he died on the second day of May, following.

The requirements of the case are to be judged in the spirit of the utterance of Judge DANFORTH in *Bassett v. Wheeler*, 84 N. Y. 466 : " I am unable to see *how she could do more than she has done* to indicate her intention to become a resident of New York, or to carry that intention more completely into effect."

And, so far as these declarations are concerned, they fall precisely within the principle laid down by Chancellor WALWORTH in *Matter of Roberts*, 8 Paige, 519. There the testatrix had formerly been domiciled with her husband in Cuba. They had left Cuba four years before and in 1837 were residing on Staten Island. In that year the testatrix went to Cuba alone " to see to their property, which remained on that island," and while she was in Cuba her husband died at Staten Island. She then announced to her friends in Cuba her intention of fixing her residence in Cuba, and of returning there after settling the

affairs of her husband in New York. She died on the voyage to New York. The Chancellor said : " These are not mere declarations of a future intention to change an actual residence from Staten Island to the island of Cuba, for the purpose of changing her domicil. Such declarations, I admit, would not, without an actual removal from the former place or residence, be sufficient to constitute a change of domicil. But in this case, it must be recollected, that at the time the declarations were made her husband was dead; and she, having no family, was *actually residing in Cuba*, where she declared it to be her intention to fix her permanent residence for the remainder of her life. * * The declarations of the party himself, where he can have no object or inducement to falsify the truth or to deceive those to whom such declarations were made, are the best evidence of his intention to make his actual residence his permanent residence also. Here the declarations of the decedent appear to have been repeatedly and deliberately made, at different times and to various persons; and I think there can be no reasonable doubt that she intended what she said." It was held that, upon this evidence, the domicil in Cuba was sufficiently established.

If the question of the residence of Albert Tilt arose between private parties, and affected the validity of his testamentary dispositions of his property, it cannot well be doubted that his change of residence had been effectual. If the will and codicil contained provisions establishing trusts valid in New Jersey and invalid in New York, no court would be justified, upon the evidence here, in defeating the intention of the testator, by holding that he remained legally a resident of New York in spite of his doing everything possible to become legally a resident of New Jersey.

Certainly the consideration that by such change the State of New Jersey gains, and the State of New York loses, the right to exact a succession tax on the death of the testator, does not alter the ordinary rules, or entitle the State of New York to any more favor than if the question of legal effect arose wholly between private parties.

POINT SECOND. THE PROBATE OF THE WILL OF ALBERT TILT IN NEW JERSEY IS CONCLUSIVE UPON THE QUESTION OF HIS RESIDENCE FOR PURPOSES OF ADMINISTRATION AND TAX.

Article IV., Section 1, of the Constitution of the United States provides: "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state."

To no proceedings does this provision apply with greater force than to those which involve the administration of the estates of decedents. The state stands as guardian of all interests in these estates; provides for safeguarding those interests, whether of next of kin, legatees, or creditors, and for the safe keeping of the property from the time of death of the decedent to the time of final distribution. The state regulates the succession, whether in intestacy or through the privilege of testamentary disposition; and in certain cases the state itself takes the decedent's property, and holds it for its own benefit.

In all such matters the state acts in the exercise of its sovereignty. It has absolute control, except for the limitations imposed by the Constitution of the United States; and that very Constitution recognizes and enforces the sovereignty of the state within those limitations, in the very provision above quoted.

The authorities defining the scope and effect of this constitutional provision in its application to a case like the present one are summed up by Justice LEVENTRITT in *Plant v. Harrison*, 36 Misc. (N. Y.), 649. The question was whether the probate in Connecticut of the will of Mr. Plant was conclusive upon the question of Mr. Plant's residence, and upon the determination of this question hung the validity of the will which contained provisions for perpetuities allowed in Connecticut but forbidden in New York.

The point is thus stated in the opinion (p. 678); "The decree of the probate judge of New Haven, admitting the will of Mr. Plant to probate as the will of a resident of New Haven, is conclusive here if it is conclusive there. If a collateral attack can

be made upon it there, then such an attack can be made upon it here with the resultant consequence of declaring his *correct* domicil, as I have declared it, and of admitting his will here as that of a resident of this state at the time of his decease. The faith and credit given by law and usage by the Connecticut courts to a probate decree when attacked collaterally in the courts of Connecticut, is what we must now turn our attention to. As was said in *Hancock National Bank v. Farnum*, *supra*, the question is not answered by referring to general principles of law, by determining what at common law was the significance and effect of a judgment, but can be answered only by an examination of the decisions of the courts of Connecticut. It may be said at the outset of this discussion that the defendant's position would be well nigh unexceptionable were the judgment or decree one rendered in the great majority of the states of the Union."

In following out this line of inquiry an extended examination of the decisions of the courts of Connecticut led to the conclusion that while the probate courts of this country, originally derived from the ecclesiastical courts of England, have, in the great majority of instances, outgrown their limited and inferior jurisdiction, Connecticut " has remained *a signal exception*, and there the *sounder rule* that when the mistake is one of fact, the record should be collaterally invulnerable, *has not found favor* in the case of the Probate Courts." For this reason, that is, that the probate was not conclusive in Connecticut, and for this reason only, it was held that it was not conclusive in New York,—and that the courts of New York were therefore free to treat the question of Mr. Plant's residence as an open question and to determine it upon the evidence before them.

In the present case, upon the same reasoning and the same authority, the decree of the Surrogate of Morris County, New Jersey, admitting the will of Albert Tilt to probate as the will of a resident of that county, is conclusive here if it is conclusive in New Jersey. If a collateral attack can be made upon it there, then it can be made upon it here, with the resultant consequence of declaring Albert Tilt's correct domicil to have been New York,.

and not New Jersey, if the proofs so establish it. But if the probate is conclusive in New Jersey the question is not an open one. And, adopting the language of *Hancock National Bank v. Farnum*, 176 U. S. 643, this is a question not answered by referring to general principles of law, by determining what at common law was the significance and effect of a judgment, but can be answered only by an examination of the decisions of the courts of New Jersey.

These decisions show that New Jersey is not, as Connecticut is, an exception to the general rule that the record of probate should be collaterally, invulnerable.

In *Matter of Abraham Caursen's Will*, 3 Green's Ch. 406, the Chancellor, sitting as Ordinary of the Prerogative Court, said of the Surrogates : " Their acts were recognized as valid by the courts, and they came to be considered as lawful and competent judges of the matters submitted to their cognizance. And although they are unknown to the constitution they have been frequently recognized by acts of the legislature." " I receive the certified copy of the surrogate's proceedings as a verity. I am bound to respect his attestation under his official seal. In this Court it has the effect of a record against which I cannot admit counter averments. The proof which has been offered to impeach it I cannot receive. Any error or irregularity in the proceedings of the surrogate can come before me only by appeal."

In *Straub's Case*, 49 N. J. Eq. 264, the Chancellor, sitting as ordinary, said : " The Surrogate's probate was a *judicial act*, and, as such, is conclusive until it shall be vacated, either through appeal or by proceedings in direct attack upon it."

In *Quidort's Case*, 3 C. E. Green, 472, it was held by the Chancellor : " The granting administration is exclusively with the ordinary and his surrogates. The grant is a proceeding *in rem*, in the strict sense of that term. It constitutes the person to whom it is granted, the administrator, whether rightly or wrongly granted; and it cannot be inquired into here collaterally. The act of the Surrogate can only be reviewed by appeal to the Orphans' Court or Prerogative Court. Like the acts of all other

regularly constituted tribunals, the acts of the Surrogate cannot be impeached collaterally."

And in *Ryno's Executor v. Ryno's Administrator*, 12 C. E. Green, 522, where the will had been admitted by the Surrogate, it was said by the Court of Errors and Appeals : "The probate of this will was granted immediately after the death of the wife, by the officer upon whom the law has conferred the exclusive power of granting probate and administration. It was a *judicial act* of a tribunal having competent authority, and *is conclusive* until repealed. So long as a probate remains unrevoked, the seal of the ordinary cannot be contradicted; neither can evidence be admitted to impeach it in a temporal court."

The same rule has been repeatedly applied by the Courts of New York.

Thus it was said by Judge PECKHAM in *Bolton v. Shriever*, 135 N. Y., 65, 69 : "The petition of the executor named in the will to the Surrogate of New York, alleged that the deceased was at or immediately previous to his death, an inhabitant of the County of New York, by means of which the proving of the will belonged to such Surrogate. The Surrogate, in admitting the will to probate and issuing letters testamentary to the executor, in effect decided the fact of inhabitancy, for it was a fact necessary for the Surrogate to decide before admitting the will to probate or granting letters, and his decision of that fact, based upon evidence having a legal tendency to support it, ought, it would seem, on general principles, to stand until reversed or set aside, even though it were erroneous."

In *Roderigas v. East River Savings Institution*, 63 N. Y., 460, 467, it had been said : "The fact of inhabitancy is frequently one difficult to be determined. It is one the Surrogate *must* determine before he can issue letters, and its determination frequently depends upon disputed and fallible evidence; and if error as to the fact of death will leave him with no jurisdiction, so will error as to the fact of inhabitancy, and the consequence will be that in such a case his proceedings will give no protection

to anyone. A construction of the statutes which will lead to such results will make the laws as to the jurisdiction and proceedings of Surrogates' Courts difficult and hazardous to execute, and should not be tolerated unless the language used will admit of no other construction."

This decision was subsequently reconsidered in *Roderigas v. East River Savings Institution*, 76 N. Y., 316, and while, owing to changes in the proofs, the Court modified its prior utterances as to the conclusiveness of a finding of the fact of death, it reaffirmed what it had said as to the conclusiveness of the determination of the fact of residence. "There are some general rules," said CHURCH, C. J., "that are well settled. One is that the proceedings of Courts, especially of limited jurisdiction, may be attacked collaterally for want of jurisdiction over the subject matter. Another is that if the Court or officer has jurisdiction of the subject matter, then the exercise of that jurisdiction however irregular or erroneous is *conclusive* until reversed. Surrogates' Courts have a stinted jurisdiction, but their decrees and orders are protected, when acting within their jurisdiction. If the Surrogate has jurisdiction of the general subject matter and may exercise that jurisdiction in a variety of cases *depending upon residence* and the like, his decision after a hearing of the parties upon the question whether the case calling for the exercise of jurisdiction exists or not, is protected from collateral attack."

In the prior case of *Kinnier v. Kinnier*, 45 N. Y., 535, 540, the same learned judge, writing the opinion of the Court had said: "Sufficient facts are alleged to give the Illinois court power to decide the question of domicil, and the judgment is not void, if we concede the decision was erroneous. A wrong decision does not impair the power to decide, or the validity of the decision when questioned collaterally."

In *Schluter v. Bowery Savings Bank*, 117 N. Y., 125, 130, the court said: "The statutes of New Jersey were proved, showing that the Surrogate of the county, of which Mrs. Knittel was an inhabitant and resident of the time of her death, had jurisdiction to grant letters of administration upon her estate.

While he had no authority to grant letters of administration unless she died intestate, intestacy, *like inhabitancy*, was one of the facts which he was to determine. He had general jurisdiction of the subject of administration, and having determined that she died intestate, he was authorized to grant administration upon her estate."

Two decisions of this court have been cited as at variance with the rule laid down in the above cases. This claim is not well founded.

The first is *Thorman v. Frame*, 176 U. S., 350. The decedent died in Louisiana, owning there a tomb with some accompanying seats and vases. He left a will describing himself as of Wisconsin, where he had a residence and a considerable amount of personal property. After the will had been offered for probate in Wisconsin a daughter of the debtor on an *ex parte* application took out letters of administration in Louisiana. It was held that this was not conclusive as to decedent's domicil, which was material only as affecting the validity of the will; as there was necessarily administration in each state of the property therein. "The order of appointment by the Louisiana Court did not make, nor did the letters themselves recite, any finding as to Fabacher's last domicil, and as he died in the parish of Orleans, and owned, as contended, immovable property and effects, there, such a finding was wholly unnecessary to jurisdiction, and is not to be presumed."

The second is *Overby v. Gordon*, 177 U. S., 214. The estate of the decedent, with trifling exceptions, was within the District of Columbia at the time of his death; he had some little property in the State of Georgia. On January 23, 1896, his will was offered for probate in the District of Columbia as that of a resident of that District, and on March 6, 1896, certain of the next of kin appeared and filed a caveat against the probate. On April 6, 1896, the same next of kin, who had filed the caveat in the District of Columbia against the probate, filed an unverified petition in Georgia, alleging that decedent was a resident there and had died intestate leaving property there, and on that petition letters

of administration were issued in Georgia in May, 1896. The granting of such letters in Georgia was held not to be conclusive as to the question of residence, upon the issues which had already been raised in the proceeding for probate in the District of Columbia. And it was held that the courts of each jurisdiction had the undoubted power to direct the administration of the decedent's property within that jurisdiction.

These two cases have much in common. In each the parties dissatisfied with the will of the decedent undertook to cut off the legitimate proceedings for probate by going into another jurisdiction where the testator had left a little property, and by filing there an application for administration upon the false statement that the decedent had left no will, and by obtaining letters of administration there, *ex parte*, on the strength of that false statement.

In each of these two cases the application for administration in the second jurisdiction after the will had been offered for probate in the first, was manifestly designed to *create* evidence of intestacy and of non-residence in the first. It was a fraud upon the probate courts of the second jurisdiction, and the grant of administration in those jurisdictions would have doubtless been set aside in those jurisdictions upon a proper application by the executors, showing the true state of facts, if the property within those jurisdictions had been of sufficient value to make it worth the while.

In each case the courts of the first jurisdiction had acquired jurisdiction to determine the validity of the will, and the resultant question of intestacy, before administration was sought in the second jurisdictions, upon the alleged ground of intestacy. The testator had a right, which devolved upon his executors, to have his estate administered under his will; and his legatees and devisees had the same right. And these rights could not be cut off by the device of having a dissatisfied party go to another state and there obtaining administration through a false denial of the existence of a will. And both of these decisions are abundantly supported by that ground.

In both cases the executors contented themselves by sustaining the wills in the jurisdictions where they had been offered for probate, where they had brought before the court all persons entitled to be heard upon the question of probate, including the very persons who had thus sought administration elsewhere. And thus these courts had both jurisdiction *in rem* as to the property within the limits of their territorial jurisdiction, and jurisdiction *in personam* over all parties interested in the questions presented by the offer of probate.

In the present case there is no question of conflicting administrations. The will was duly probated in New Jersey. There has been no attempt at administration elsewhere. The whole of the testator's personal estate, with trifling exceptions was within the State of New Jersey, whose courts had the undoubted right to administer upon it, and to determine the questions of the validity of the will and the residence of the testator, for the purpose of such administration.

POINT THIRD. THE CLAIM OF THE STATE OF NEW YORK AGAINST ALBERT TILT'S EXECUTORS FOR THE PAYMENT OF A SUCCESSION TAX WAS BARRED BY THE FAILURE OF THE STATE OF NEW YORK TO PRESENT THAT CLAIM UPON THE ADMINISTRATION IN NEW JERSEY.

On May 24, 1900, an order was made by the Surrogate of Morris County, New Jersey, limiting the time of the creditors of the estate of Albert Tilt to bring in their debts, demands, or claims against that estate; and on February 25, 1901, a further order was made by that Surrogate determining that the time so limited had expired, and that all creditors who had then neglected to bring in their claims and demands "be forever barred from their actions therefor against the executors of said deceased"; and this order the Surrogate had, under the laws of New Jersey, full and competent jurisdiction to make (27).

If the claim of the State of New York to a transfer tax against the estate of Albert Tilt was valid as regards the property

in New Jersey, the State of New York was in New Jersey nothing more than a creditor of the estate.

It is true that section 222 of the New York Tax Law says: "Every such [transfer] tax shall be and remain a lien upon the property transferred until paid and the person to whom the property is so transferred and the administrators, executors, and trustees of every estate so transferred shall be personally liable for such tax until its payment."

But it was clearly incompetent for this or any statute of New York to create a lien in its own favor upon property in New Jersey. The statutes of New York have no force or effect of their own beyond the boundaries of the State. If the State of New York wishes to assert a claim outside of its own limits, it must leave its sovereignty behind, and put itself upon the level of any other suitor.

It is not to be supposed that if this claim had been presented in obedience to the order of the New Jersey Surrogate, it would not have been considered, and determined upon its merits. The New Jersey court had undoubted jurisdiction to reconsider its determination of the question of residence as bearing on the rights of any creditor, and it is inconceivable that it would not have done so, justly and fairly.

But no such claim was presented. Nor was any notice given of the existence of any such claim until after full administration and distribution and after the State of New Jersey had collected its own succession tax upon the estate of Albert Tilt as a resident of New Jersey (28).

There is no reason, therefore, why the executors are not entitled to the benefit of this order as barring any action against them upon this claim, with like effect as in the case of all other claims barred by the same order.

POINT FOURTH. THE TRANSFER AND SUCCESSION OF THE ESTATE OF ALBERT TILT TOOK EFFECT UNDER THE LAWS OF NEW JERSEY AND ARE NOT TAXABLE UNDER THE LAWS OF NEW YORK.

The right of succession to the property of a decedent, either through intestacy or through last will and testament, is derived purely from provisions of positive law.

As was said in *United States v. Perkins*, 163 U. S., 625, "While the laws of all civilized States recognize in every citizen the absolute right to his own earnings, and to the enjoyment of his own property, and the increase thereof, during his life, except so far as the State may require him to contribute his share for public expenses, the right to dispose of his property by will has always been considered purely a creature of statute and within legislative control."

"In this view, the so-called inheritance tax of the State of New York is in reality a limitation upon the power of a testator to bequeath his property to whom he pleases; a declaration that, in the exercise of that power, he shall contribute a certain percentage to the public use; in other words, that the right to dispose of his property by will shall remain, but subject to a condition that the State has a right to impose."

In *Magoun v. Trust Co.*, 170 U. S., 283, 288, after stating that legacy and inheritance taxes were in force in many of the states, including New Jersey and New York, and citing many cases in which they had been upheld, the opinion goes on to say: "It is not necessary to review these cases, or state at length the reasoning by which they are supported. They are based on two principles: 1. An inheritance tax is not one on property, but on the succession. 2. The right to take property by devise or descent is the creature of the law, and not a natural right—a privilege, and therefore the authority which confers it may impose conditions upon it."

As was said by Judge CULLEN, in *Matter of Vanderbilt*, 172 N. Y., 6974, "a tax is a property tax when imposed by reason of the ownership of property; a transfer tax when imposed on the method of its acquisition."

The present claim of the State of New York of the right to collect a transfer tax upon the succession to the estate of Albert Tilt must rest, therefore, upon the proposition that such succession derived its efficacy from a privilege conferred by the laws

of New York, and the conditions which the authority conferring that privilege has imposed upon its exercise and enjoyment.

But this proposition is not supported by the facts.

The efficacy of the will to transfer to the various legatees the property which is here sought to be subjected to the New York Transfer Tax was in no way derived from any privilege conferred by the laws of New York, or from any action of any court or officer of New York.

The will was validated by the laws of New Jersey, contained in the New Jersey statute of wills. It derived its efficacy from its conformity with the provisions of that statute and from its admission to probate by the Surrogate of Morris County, New Jersey. Under that authority the executors have qualified, and have received and distributed the estate. And the executors have paid to the State of New Jersey the succession tax which the laws of that state have imposed as a condition of the privilege conferred by those laws, upon the testator in allowing him to bequeath his personal property, and upon the legatees in allowing them to succeed to it.

Thus this claim of the State of New York wholly fails for want of consideration.

POINT FIFTH. THE ADMINISTRATION IN NEW JERSEY IS A BAR.

The probate was but the first step in the course of administration upon the personal estate of Albert Tilt.

Every argument for the conclusiveness of honest and legitimate probate applies with vastly greater force in favor of the conclusiveness of full and complete administration and distribution.

The probate is conclusive until it is reversed and set aside. But, in the very nature of things, a completed administration and distribution, fairly and regularly conducted, cannot be reversed or set aside. The legatees have acquired title and possession of their legacies, and the executors, after complying with all orders and directions of the court and distributing all property in their hands, are freed of all further liability.

In the present case the executors accounted in the Orphans' Court of Morris County, New Jersey, and on June 20, 1901, a decree was made in that court finally settling and allowing their accounts and directing the distribution of the balance remaining in their hands; such distribution was actually made by them prior to August, 1901, and after that distribution no money or personal property of the estate of Albert Tilt remained in their hands; and the present claim was not asserted until the initiation of this proceeding, on August 16, 1901 (27-28), after payment of succession taxes to the state of New Jersey and to the United States (28).

It is settled beyond controversy that the probate of a will is, of itself, a proceeding *in rem*. Thus it is said in *Tompkins v. Tompkins*, 1 Story, 547 : "Such sentences [of probate] are treated as of the like nature of sentences or proceedings *in rem*, necessarily conclusive upon the matter in controversy, for the common safety and peace of mankind."

The subject was very fully considered in the opinion of NORTON, J., concurred in by FIELD, J.,—later a distinguished Justice of this Court,—in the case of *California v. McGlynn*, 20 Cal. 233, 264. "A probate of a will of personal property is * * * * a judicial determination of the character of the will itself. It does not necessarily or ordinarily arise from any controversy between adverse claimants, but is *necessary in order to authorize a disposition of the personal estate* in pursuance of its provisions." "In the United States the probating of wills is regulated in most States, and probably in all, by statutes in which the power to probate wills is conferred upon a special court, a Probate or Surrogate Court, corresponding in this respect to the ecclesiastical courts of England. Upon examining the decisions of the Supreme Court of the United States, and of the Courts of the several states, it will be found that they have uniformly held that the principles established in England apply and govern the cases arising under the probate laws of this country; that in the United States, wherever the power to probate a will is given to a Probate or Surrogate's Court, the decree of such court is final and conclusive, and not subject, except on

appeal to a higher Court, to be questioned in any other Court." " In the case of *Durland and James v. Harrington's Heirs* (29 Ala. 95) the Court say : ' The probate of a will, under any circumstances, is a proceeding *in rem*. It operates upon the thing itself. It defines, and in a great degree, creates its *status*. The *status* thus defined adheres to it as a fixture; and the judgment or decree in the premises, unless avoided in some mode prescribed by law, binds and concludes the whole world.' In the case of *Bogardus v. Clark* (4 Paige 625) the Court say : ' It [the probate of a will of personality] is in the nature of a proceeding *in rem* to which any person having an interest may make himself a party, by applying to the proper tribunal before which such proceeding is had, and *who will therefore be bound* by the sentence or decree of such tribunal although he is not in fact a party.' In *Woodruff v. Taylor* (20 Vermont 65) the Court say : ' The probate of a will I conceive to be a familiar instance of a proceed- *in rem* in this state. The proceeding is in form and substance upon the will itself.' "

This, being true of the probate, must be equally true of the administration of the estate within the jurisdiction of the state where probate is had. And this is recognized in the two decisions of this court which have been discussed under the Second Point, above.

Thus in *Thorman v. Frame*, it was said in reference to the grant of administration in Louisiana in its relation to the probate proceedings in Wisconsin : " Whatever the effect of the appointment, it must be as a judgment, and operate by way of estoppel. Now a judgment *in rem* binds only the property within the control of the court which rendered it; and a judgment *in personam* binds only the parties to that judgment and those in privity with them. This appointment cannot be treated as a judgment *in personam*, and as a judgment *in rem* it merely determined the right *to administer the property within the jurisdiction* whether considered as directly operating on the particular things seized, or the general status of assets there situated."

The language of the opinion in *Overby v. Gordon* is to similar effect.

Clearly, then, the administration of the testator's estate which was in New Jersey at the time of his death, under the probate of his will in New Jersey was a proceeding *in rem*. And the same is true of the property in New York which was properly turned over to the executors in recognition of their title, in conformity with the rule declared in *Schluter v. Bowery Savings Bank, supra*. The total estate which came into their hands was $1,108,079.71, all of which excepting $13,901.21 was in New Jersey at the time of Albert Tilt's death.

It is familiar law, in regard to proceedings *in rem* that the tribunal which first acquires jurisdiction and control, acquires not only the right, but the duty as well, to proceed to complete administration, and the rights of all parties in interest having been determined, to direct and enforce final distribution among the parties entitled according to their respective interests.

Thus, in *Peck v. Jeuness*, 7 How. 612, 624 : " It is a doctrine of law too long established to require a citation of authorities, that, where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court; and that, where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. * * * Neither can one take property from the custody of the other by replevin or any other process, for this would produce a conflict extremely embarassing to the administration of justice."

And, in *Peale v. Phipps*, 14 How. 368, 374 : " The property, in legal contemplation, was in the custody of the court of which he [plaintiff in error] was the officer, and had been placed there by the laws of Mississippi. And while it thus remained in the custody and possession of that court, awaiting its order and decision, no other court had a right to interfere with it, or to wrest it from the hands of its agent, and thereby put it out of his power to perform his duty. The case falls within the principle decided by this court in *Vaughn v. Northrop*, (15 Pet. 1,) in which it was held, that an administrator could not be sued in another

State for a debt due from his intestate, because he is bound to account for all the assets he receives, to the proper tribunals of the government from which he derives his authority. And that decision was made in a case where the assets, by reason of which the administrator was sought to be charged, were received in the jurisdiction of the government in which the suit was brought against him, but in which he had not taken out letters of administration."

Byers v. McAuley, 149 U. S. 608, 615, is directly in point. "An administrator appointed by a state court is an officer of that court; his possession of the decedent's property is a possession taken in obedience to the orders of that court: it is the possession of the court, and it is a possession which cannot be disturbed by any other court."

On this ground alone the administration and distribution should be held final and conclusive upon all claims and interests.

But it may properly be urged in the present case that there was also jurisdiction *in personam*, so far as such jurisdiction may be predicated of the administration of a decedent's estate.

The persons interested in the probate and the administration are the testator himself represented by those whom he has named to carry out his will after his death, the beneficiaries named in the will, the heirs at law and next of kin. In addition to these are the creditors of the decedent, who have only the right to present and establish their claims, and to prevent distribution until their claims have been satisfied.

In the present case the executors necessarily submitted themselves to the jurisdiction. They could not obtain the property without it. The heirs and next of kin were all included among the beneficiaries named, all of whom accepted the jurisdiction by accepting their distributive interests on the final accounting.

In any point of view, then, the administration of this estate was lawfully vested in the courts of New Jersey, and has been lawfully carried out and completed in those courts. The executors were only responsible to those courts, and have faithfully

performed the duties which they assumed, and have been fully discharged. They were and are accountable only in those courts. The succession has been accomplished without any aid from the courts of New York or the laws of that state.

If Albert Tilt had in reality been a resident of New York at the time of his death, and if, as was substantially true, all of his personal estate was actually within New Jersey at the time of his death, and if the claim of the State of New York of the right to subject that personal estate in New Jersey to a transfer tax was legally valid, and if, as was the fact, the will was probated in New Jersey, and there only, and administration was had in New Jersey, and there only, then it would seem to be manifest that such claim could only be asserted and enforced by presenting it in New Jersey and establishing it in the course of administration there. And so far as the validity of such claim depended upon the residence of the testator, that question, being thus raised in the very proceedings in which his residence in New Jersey had been found, would have been open to reconsideration, and, it must be presumed, would have been decided justly and fairly.

The courts of New Jersey, having jurisdiction over the subject matter and over the property, assumed jurisdiction to admit the will to probate on the sole ground that the testator was a resident of that state; and this was followed in due and orderly course by full and complete administration of the estate. That probate and administration are entitled to receive in the courts of New York the same full faith and credit to which they are entitled in the courts of New Jersey. That is to say, they cannot be attacked collaterally, and can only be vacated or annulled by direct proceedings for that purpose in the courts which exercised that jurisdiction, or by appeal from the judgments of those courts.

The New Jersey record stands complete, and, upon the foregoing principles, is unassailable here. And if it is competent, in the face of this record, for the New York Surrogate to hold that the New Jersey Surrogate and the New Jersey Orphans'

Court were without jurisdiction, the argument, carried to its logical result, leads directly to a *reductio ad absurdum*. If the probate court of New Jersey had not the jurisdiction which it assumed to exercise, to admit to probate the will of Albert Tilt and to issue letters testamentary thereon, then the probate goes for nothing, the will has never been proved, the will may never be proved, there are no executors, and there may never be any executors. Until the will shall lawfully be proved it cannot be known whether it is a valid will or not, and it cannot be known upon whom, or in what shares, the succession has devolved, and there can be no basis for fixing any taxes. And as the New York Surrogate has in no case jurisdiction over executors of a will which has not been probated in New York, still less can he have jurisdiction over the executors of a will which it finds has never been lawfully probated at all. Thus, to establish any foundation for its present claim, the State of New York, through its Comptroller, is compelled to prove itself out of court.

That this is a fair presentation of the logical consequences of the argument on behalf of the Comptroller is made still clearer by the ground upon which the jurisdiction of the New York Surrogate, to entertain and decide such questions, has been placed.

In *Matter of McPherson*, 104 N. Y. 306, it was said : "It is also objected that the act confers powers upon surrogates' courts not authorized by and contrary to the Constitution. There is nothing in the Constitution which in any way specifies or defines the powers or duties of surrogates. * * * Surrogates' courts have always had jurisdiction of the administration adjustment and settlement of the estates of deceased persons, and *the imposition and collection of this tax are simply incidents in the final settlement and adjustment of such estates.*"

Thus the New York Surrogate, in assuming to render this decision, is assuming to exercise a power which is an incident to the final settlement and adjustment of an estate over which he has never acquired any jurisdiction whatever, either by application for probate or by application for administration; an estate which in fact has been finally settled and adjusted by the proper courts of another state.

The decision in the present case violates the spirit, even more than the letter, of the constitutional provision regarding full faith and credit.

The only inquiry into the validity of the judgment of another state which this provision permits is an inquiry into the jurisdiction of the court which rendered it over the subject matter, over the parties, or, in the case of a proceeding *in rem*, over the *res*.

And such jurisdiction once being found, the judgment is conclusive. No further inquiry is permitted as to the correctness of the judgment or the sufficiency of the evidence upon which it was rendered. The power to decide, which jurisdiction confers, necessarily includes the power to render an erroneous decision, and an erroneous judgment. And experience shows that such decisions and judgments are often rendered. But the resulting injustice is not to be remedied by a retrial of the question in another proceeding in another court, either of the same state or of a different state. It must be corrected by an application to the original court for rehearing or a new trial, or by appeal to the lawfully constituted appellate tribunal.

This proposition is supported in a long and unbroken line of decisions in this court, as well as in the courts of the several states, and is not open to discussion. It is founded on the maxim, *interest reipublicae ut sit finis litium*, wisely extended to comprehend the country as a whole, in the " more perfect union " of the states, which it was the purpose of the Constitution to establish.

The rule applies as well and with equal force to probate proceedings and administrations as to ordinary suits at law or in equity. *Simmons v. Saul*, 138 U. S., 439.

In the present case the decedent unequivocally intended to make his residence in New Jersey, and did everything possible to carry that intention into effect. He manifestly believed that he had accomplished that intention. He told his executors that he had done so. And he declared, under the solemnity of the execution of a codicil to his last will and testament that he was then a resident of New Jersey.

It was the duty of the executors to accept these statements, corroborated by the facts which were known to them, and wholly uncontradicted. There was no possible reason why they should doubt their truth.

Accordingly, as in duty bound, the executors presented the will for probate to the New Jersey Surrogate, as the will of a resident of New Jersey. It was duly and regularly admitted to probate as such, and letters testamentary to that effect were issued to them. It does not appear that any party in interest thought of raising any question as to the fact or as to the jurisdiction.

The administration proceeded in due and orderly manner. The debts were advertised for and paid. The succession taxes under the laws of the United States and under the laws of New Jersey were paid. The executors accounted for the whole personal estate of the testator, amounting to $1,108,079.71, and distributed the whole under the decree of the New Jersey court. They had fully performed their duties and the estate had been fully administered. The *res* had been distributed in accordance with all known interests. Unless it be for the State of New York, which had not thus far uttered a claim or made a sign, all the world is satisfied and all the world is bound.

Is it tolerable that, in this situation, after all the purposes of probate and administration had been fairly and fully accomplished, the State of New York should be permitted to come forward, and, for the sole purpose of subjecting this estate to a transfer tax when not one dollar of the estate passed through its courts or reached the successors by the operation of its laws, to dispute and discredit this administration and its conclusive effect, on the ground that it proceeded on the wrongful assumption that the testator was a resident of New Jersey?

If this may be, then no administration is final, and no distribution is conclusive, and the protection of the Constitution is illusory.

POINT SIXTH. THE ORDER OR DECREE OF THE SURROGATE SHOULD BE REVERSED AND THE PROCEEDING DISMISSED, WITH COSTS.

WILLIAM G. WILSON, Of Counsel.

BILL OF APPELLANT'S COSTS INCURRED IN CANADA.
(Privy Council Appeal.)

IN THE SUPREME COURT OF CANADA.

BETWEEN

UNION DAMPSCHIFFSRHEDERI ACTIEN GESELLSCHAFT, a body corporate . . *Appellants;*

AND

THE STEAMSHIP "PARISIAN" AND HER FREIGHT . . . . . *Respondents.*

Appellants' Costs of Appeal to Privy Council incurred in Canada.

Off.					Add.
		Appeal to the Supreme Court of Canada having been dismissed with costs.....			
$2.50	*(1)	Attg for copy of Reasons for judgment and paid.....	$2.50	$5.00	
5.00	*(2)	Instructions for appeal to Privy Council.....	5.00		
		Drawing notice of appeal.....	1.00		$3.00
		Copy to serve 3 folios.....	.25		.05
1.50	*(3)	Letter to Agents with to file and serve.....	1.50		
2.00		Attg to file and paid.....	2.50	.10	
2.10	*(4)	Attg to serve and paid.....	2.50	.10	
1.50		Affidavit of service.....	2.50		
1.25		Engrossing.....	1.25		
2.50	*(5)	Attg to serve.....	2.50		
2.50	*(6)	Attg to ascertain amount of bail required in other cases where security allowed in Supreme Court...	2.50		

*Vide *Observations* infra p. 277.

Off.			Add.
2.50	*(7)	Attg Mr. Roach, Appellant's Agent at Halifax, to advise him as to amount of security required and as to arranging for.....	$2.50	
$2.50	*(8)	Attg U. S. Fidelity & Guaranty Co. as to providing security.....	2.50	
2.50	*(9)	Attg at Supreme Court to enquire as to acceptability of U. S. Fidelity & Guaranty Bond as security.....	2.50	
2.50	*(10)	Attg Mr. Roach re preparation of bond.....	2.50	
2.50	*(11)	Attg Agent U. S. Fidelity & Guaranty Co. as to execution of bonds.....	2.50	
		Drawing bond.....	1.50	$3.50
.05		Engrossing.....	.35	
.60		Drg Notice of tender of bail	1.50	
.05		Engrossing.....	.35	
.05		Copy to serve.....	.35	
1.50		Attg to serve.....	2.50	
.60		Drg notice of Motion for order fixing bail.....	1.50	
.05		Engrossing.....	.35	
.05		Copy to serve.....	.35	
2.00		Attg to serve notice of motion to fix bail.....	2.50	
1.50		Attg for appointment to pass on sufficiency of bail.....	2.50	
.10		Drg notice as to date fixed by Registrar to pass on sufficiency of bail.....	1.00	
.25		Engrossing.....	.25	
.25		Copy to serve.....	.25	

Off.					Add.
$2.50		Attg to serve.....	$2.50		
2.50	*(12)	Attg Agent of U. S. Fidelity & Guaranty Co. to arrange for execution of bond	2.50		
		Fee on application for order fixing bail.....	10.00		$5.00
.60	*(13)	Drg order fixing bail.....	1.50		
1.00		Copy.....	1.00		
1.50		Attg to get order fixing bail signed (spl).....	2.50		
		And paid.....		2.00	
1.50		Attg to execute bail bond before Registrar (spl)	2.50		
1.50		Attg on appointment to have sufficiency of bail passed upon and filing bond (spl.)	2.50	.10	
		Paid Commission on bail.....		10.00	
2.50		Attg to bespeak certified copy of Reasons for judgment.....	2.50		
		1906			
1.50	*(14)	Ap. 3 Attg to bespeak, certified copy of transcript record.....	2.50		
2.50	*(15)	25Attg Supreme Court to inquire if transcript record ready	2.50		
2.50	*(16)	26 Attg Supreme Court to urge preparation of transcript record	2.50		
1.50		27 Attg to have certified copy of transcript record forwarded to London and paid..	2.50	17.50	

Off.					Add.
$2.50	*(17)	28 Attg Supreme Court, record not yet complete, to be forwarded to-day.....	$2.50		
		Paid Registrar.....		$3.93	
1.50		Letter from Agents advg.....	1.50		
		Appeal to Privy Council having been allowed and King's Order received.			
		Letter to Agents with King's Order.....	1.50		
5.00		Instructions for motion to having King's Order made an order of the Supreme Court.....	5.00		
1.50		Drg. Notice of Motion	1.50		
.35		Engrossing.....	.35		
.35		Copy.....	.35		
2.00		Attg to file King's Order and paid.....	2.50	.10	
2.00		Attg to serve notice of motion.....	2.50		
		Fee on motion.....	10.00		
7.50	*(18)	Drg Order, 15 fols.....	7.50		
1.80		Copy of Order.....	1.80		
2.50		Attg to have signed	2.50		
		Paid on order.....		2.00	
2.50		Attg to serve copy of order.....	2.50		
		Bill of costs, 10 fols....	1.50		.50
		Copy for taxing officer	.75		.25
		Copy to serve.....	.75		.25
1.50		Attg for appointment to tax and paid....	2.50	.50	

Off.		Add.
$5.50	Attg on taxation.....$10.50	
	Paid on taxation..... $1.00	
	Paid filings.....	
	Paid Registrar's postage.....	
5.00	Paid postages, telegrams & cablegrams 10.00	
15.75	Extra letters..... 15.75	

Note.—In addition to the items taxed off pursuant to the observations of the Privy Council Taxing Master which follow, the other items have been taxed on the basis of similar charges incurred in Canadian Superior Courts and not according to the tariff in England.

OBSERVATIONS.

(1) Appears to be either a charge in the Appeal *to* the Supreme Court, not in the Appeal to His Majesty in Council : or in the alternative a charge in connection with preliminary work done to ascertain the expediency of appealing from the Supreme Court, and, as such, not a proper charge in a " party and party " taxation.

(2) It seems doubtful whether this should be allowed *in addition* to the " Instructions " allowed in the Privy Council.

(3) Letters to the solicitors' own agents would not be allowed in the Privy Council (party and party).

(4) The amount is very small but it is not apparent what the .10 is paid for, on serving.

(5) Should that not be " attending to *file* " ?

(6) This seems an attendance at the Supreme Court to obtain information as to the practice of the Court : a like attendance would not be allowed in the Privy Council on party and party scale.

(7-11) Do not seem to be charges which can be treated as party and party charges.
(12) do do
(13) Such an Order would be drawn in the Privy Council Office.
(14) It would seem that this attendance was unnecessary in addition to that last charged for.
(15), (16) and (17) Would not in ordinary practice be allowed in the Privy Council (party and party).
(18) See note on (13).

ORDER FOR SUBSTITUTIONAL SERVICE.

IN THE SUPREME COURT OF CANADA.

BETWEEN

A. B. (Plaintiff or Defendant) - - *Appellant,*

AND

C. D. (Defendant or Plaintiff) - - *Respondent.*

BEFORE THE REGISTRAR IN CHAMBERS.

On the application of , upon hearing read the affidavit of filed, and upon hearing what was said by the solicitors for all parties,

It is ordered that service of a copy of this order and a copy of by sending the same by a prepaid post letter addressed to at (*or as the case may be*) shall be good and sufficient service of the said .

Dated the day of A.D. 19 .

(Signed)

Registrar.

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 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 (appeal side) (*or* in the said Court of Appeal for Ontario, *or as the case may be*) as in this Court.

*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."

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

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
Paid, search for particulars, to draft minutes		25

	Fees	Payment
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		

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 securtiy	$ 3 00	
[Not taxable in election appeals.]		
Fee on special case	25 00	
[Not taxable in election appeals.]		
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		
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

	Fees.	Payments
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		

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. :

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

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.

.....

.....

APPEAL FROM TAXATION

NOTICE OF MOTION TO JUDGE IN CHAMBERS.

BETWEEN

A. B., (Plaintiff or Defendant) - - - *Appellant,*

AND

C. D., (Defendant or Plaintiff) - - - *Respondent.*

Take notice that a motion will be made before the presiding Judge in Chambers in the Supreme Court Building at the City

of Ottawa, on the day of A. D. 19 , at the hour of , that the objections of the applicant dated the day of 19 , to the taxation of the costs under the judgment dated the day of 19 , may be allowed and that it may be referred back to the Registrar to vary his certificate accordingly; and that the said appellant (*or* respondent *as the case may be*) may be ordered to pay to the applicant the costs of this application and consequent thereupon.

Dated this day of A. D. 19 .

To E. F., Solicitors for appellant (*or* respondent *as the case may be*).

(Signed) G. H.,
Solicitors for the respondent (*or* Appellant *as the case may be*).

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 to the Supreme Court of Canada 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 dissatisfied with such decision, and intends to appeal against the same."

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 15, 17, 18 and 19); 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.]

NOTICE OF MOTION TO ALLOW SECURITY

IN THE SUPREME COURT OF CANADA.

Between

A. B., (Plaintiff or Defendant) Appellant;

AND

C. D., (Defendant or Plaintiff) Respondent.

Take notice that a motion will be made before the Registrar at his chambers in the Supreme Court Building, in the City of Ottawa, on the day of

A.D. 19 , at the hour of 11 o'clock in the forenoon, or so soon thereafter as the application can be heard, for an order approving of the security tendered by the appellant that he will effectually prosecute his appeal and pay such costs and damages as may be awarded against him by the Supreme Court.

And take notice that in support of said application will be read the Bond of dated the day of (*or* the certificate of the Accountant of the Bank of at) and the affidavit of filed.

Dated at this day of

To E. F. of
Respondent's Solicitor.

(Signed) G. H.,
Appellant's Solicitor.

NOTICE OF MOTION FOR ORDER AFFIRMING JURISDICTION.

IN THE SUPREME COURT OF CANADA.

Between :

A. B., (Plaintiff or Defendant) Appellant;

AND

C. D., (Defendant or Plaintiff) Respondent.

Take notice that a motion will be made before the Registrar at his chambers in the Supreme Court Building, in the City of Ottawa, on the day of 19 , for an order affirming the jurisdiction of the Supreme Court of Canada to hear the appellant's appeal.

And take notice that in support of said application will be read (set out in detail the material necessary to disclose the question of jurisdiction raised).

Dated at this day of

To E. F. of
Respondent's Solicitor.

(Signed) G. H., Appellant's Solicitor.

ORDER ALLOWING APPELLANT'S SECURITY.

IN THE SUPREME COURT OF CANADA.

Before the Registrar in Chambers.

the day of A.D. 19 .

Between :

A. B., (Plaintiff or Defendant) Appellant;

AND

C. D., (Defendant or Plaintiff) Respondent.

Upon the application of the above named appellant, upon hearing read the notice of motion and material therein referred to, and upon hearing what was alleged by Counsel for all parties,

It is ordered that the bond entered into the day of A. D. 19 , in which are obligors, and are obligees (*or* the sum of $500 paid into the Bank of as appears by the receipt of the said Bank, dated the day of *as the case may be*), duly filed as security that the appellant will effectually prosecute his appeal from the judgment of the Court of (*as the case may be*), dated the day of , and will pay such costs and damages as may be awarded against him by this Court, be and the same is hereby allowed as good and sufficient security.

And it is further ordered that the costs of this application be costs (in the cause, *or* to the appellant, *or* to the respondent *as the case may be*).

(Signed)

Registrar.

ORDER AFFIRMING OR REJECTING JURISDICTION OF THE COURT.

IN THE SUPREME COURT OF CANADA.

Before the Registrar in Chambers.

the day of A. D. 19 .

Between :

A. B., (Plaintiff or Defendant) Appellant;

AND

C. D., (Defendant or Plaintiff) Respondent.

Upon the application of the above named appellant and upon hearing read (*set out the material filed on the application*), and upon hearing what was alleged by counsel for all parties.

It is ordered, adjudged and declared that the Supreme Court of Canada has (*or* has not, *as the case may be*) jurisdiction to hear and determine the appeal of the above named appellant from the judgment of the (*set out the name of the court appealed from*) bearing date the day of A. D. 19 in a certain cause in which was appellant and was respondent.

And it is further ordered that the costs of this application be costs (in the cause, *or* to the appellant, *or* to the respondent, *as the case may be*).

(Signed)

Registrar.

NOTICE OF MOTION BY THE RESPONDENT EXCEPTING TO THE JURISDICTION OF THE COURT.

IN THE SUPREME COURT OF CANADA.

Between :

A. B., (Plaintiff or Defendant) appellant;

AND

C. D., (Defendant or Plaintiff) Respondent.

Take notice that a motion will be made on behalf of the respondent before the Registrar at his chambers in the Supreme Court Building, in the City of Ottawa, on the day of A. D. 19 , at the hour of 11 o'clock in the forenoon, or so soon thereafter as the application can be heard for an order refusing the security offered by the appellant on his appeal to the Supreme Court, on the ground that the Court has no jurisdiction to hear the appeal.

And take notice that in support of said motion will be read (*the material necessary to raise the question of jurisdiction*).

Dated at this day of

To E. F.,

Appellant's Solicitor.

(Signed) G. H.,

Respondent's Solicitor.

NOTICE OF APPEAL FROM REGISTRAR'S ORDER IN MATTERS OF JURISDICTION.

IN THE SUPREME COURT OF CANADA.

Between :

A. B., (Plaintiff or Defendant) appellant.

AND

C. D., (Defendant or Plaintiff) Respondent.

Take notice that the Court will be moved at the Supreme Court Building in the City of Ottawa, on the day of A. D. 19 , at the hour of 11 o'clock in the forenoon, or so soon thereafter as counsel can be heard, by way of appeal from the order of the Registrar, made on the day of A. D. 19 , whereby it was ordered, adjudged and declared that the Supreme Court of Canada had (*or* had not *as the case may be*) jurisdiction to hear and determine the appeal of the said from the judgment of the (*name of the Court appealed from* bearing date the day of A. D. 19 , made in a certain cause in which was appellant and was respondent, on the ground (*set out the grounds of the appeal*).

And further take notice that on the said motion will be read (*set out the material used before the Registrar*).

Dated at this day of

To E. F., (Appellant's *or* Respondent's, *as the case may be*), Solicitor.

(Signed) G. H., (Respondent's *or* Appellant's, *as the case may be*), Solicitor.

NOTICE OF MOTION TO REMOVE STAY OF PROCEEDINGS.

IN THE SUPREME COURT OF CANADA.

Between :

A. B., (Plaintiff or Defendant) Appellant;

AND

C. D., (Defendant or Plaintiff) Respondent.

Take notice that a motion will be made before the Honourable Mr. Justice or such other Judge of the Supreme

Court as may be sitting for him, at his Chambers in the Supreme Court Building, at the City of Ottawa, on the day of , at the hour of 11 o'clock in the forenoon, or so soon thereafter as the motion can be heard for an order removing the stay of proceedings in this appeal.

And take notice that on the return of the said motion will be read the notice of appeal given by the (appellant *or* respondent, *as the case may be*), from the order of the Registrar made herein, bearing date the day of A. D. 19 , whereby it was ordered, adjudged and declared that the Supreme Court of Canada had (*or* had not, *as the case may be*) jurisdiction to hear this appeal.

And further take notice that in support of said application will be read (*set out the material upon which the motion is based*).

Dated at this day of

To E. F., (Appellant's *or* Respondent's, *as the case may be*), Solicitor.

(Signed) G. H., (Respondent's *or* Appellant's, *as the case may be*), Solicitor.

ORDER REMOVING STAY OF PROCEEDINGS.

IN THE SUPREME COURT OF CANADA.

Before the Honourable Mr. Justice in Chambers.
the day of A. D. 19 .

Upon the application of , upon hearing read (*Affidavits or papers filed in support of the motion*), upon hearing what was said by Counsel for

It is ordered that the stay of proceedings herein be and the same is hereby removed.

And it is further ordered that the costs of this application be costs (in the cause, *or* to the appellant, *or* to the respondent, *as the case may be*).

(Signed)

Judge.

NOTICE OF MOTION TO QUASH APPEAL FOR WANT OF JURISDICTION.

IN THE SUPREME COURT OF CANADA.

Between :

A. B., (Plaintiff or Defendant) Appellant;

AND

C. D., (Defendant or Plaintiff) Respondent.

Take notice that the Court will be moved in the Supreme Court Building, at the City of Ottawa, on the day of A. D. 19 , at the hour of 11 o'clock in the forenoon or so soon thereafter as counsel can be heard, for an order that the appeal of the above named appellant from the judgment of (*name of the court appealed from*) made on the day of A. D. 19 , in a certain cause in which was appellant and was respondent, be quashed for want of jurisdiction.

And take notice that in support of said motion will be read (*set out the material necessary to raise the question of jurisdiction.*)

Dated at this day of A. D. 19

To E. F., of

Appellant's Solicitor.

(Signed) G. H.,

Respondent's Solicitor.

CERTIFICATE AS TO SETTLEMENT OF CASE, AS TO SECURITY, AND AS TO REASONS FOR JUDGMENT.

I, the undersigned Registrar (*or* Prothonotary, *or* Clerk) of the (*name of court*) do hereby certify that the foregoing printed document from page oo to page oo, 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., appellant, and C. D., respondent.

And I do further certify that the said A. B. has given proper security to the satisfaction of the Honourable Mr. Justice as required by the 75th section of the Supreme Court Act, being a Bond to the amount of $500 (*or* by the payment into Court of the sum of $500 to the credit of this cause, *as the case may be*), a copy of which security and a copy of the order of the Honourable Mr. Justice allowing the same is (or are *as the case may be*) hereto annexed (or may be found on pages ooo of the annexed case—*as the case may be*.)

And I do further certify that I have applied to the Judges of the (*court appealed from*) for their opinions or reasons for judgment in this case, and the only reasons delivered to me by the said Judges are those of the Honourable Mr. Justice (*or*, that reasons have been delivered by none of the said Judges in response to my said application, *as the case may be*).

And I do further certify that I have received a certificate from the Clerk of the (*name of the court below*) to the effect that he had applied to the Judges of the said Court for their opinions or reasons for judgment and that the only reasons delivered to him were those of the Honourable Mr. Justice (*or*, that reasons have been delivered by none of the said Judges in response to his said application, *as the case may be*).

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said (*name of court*) this (*date*).

CERTIFICATE AS TO REASONS FOR JUDGMENT, IN THE SUPERIOR COURT.

IN THE HIGH COURT OF JUSTICE
(*or*, in the Superior Court, *as the case may be*).

Between :

A. B., Plaintiff;

AND

C. D., Defendant.

I, E. F., Clerk (*or* Registrar, *as the case may be*), of the High Court of Justice (*or* Superior Court, *as the case may be*), hereby certify to the Registrar of the Court of Appeal (*or* Court of King's Bench, appeal side, *as the case may be*), that I have applied to the Judge (*or* Judges, *as the case may be*), of this Court for his (*or* their, *as the case may be*) opinions or reasons for judgment in this case, and that the only reasons delivered to me were those of the Honourable Mr. Justice
(*or* that reasons have been delivered by none of the said Judges in response to my said application, *as the case may be*).

Dated at this day of A. D. 19 .

(Signed) G. H.,
Clerk (*or* Registrar, *as the case may be*).

BOND FOR SECURITY FOR COSTS.

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 Division of the High Court of Justice for Ontario (*or as the case may be*) 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 (*or as the case may be*). 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 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 (*or as the case may be*) 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).

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 .
(Signed)

X. Y.

A Commissioner, etc.

AFFIDAVIT OF JUSTIFICATION BY SURETIES.

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 at the of at the County of , this day of A. D. 19 .

(Signed)

A Commissioner, etc.

NOTE.—Although it was held (Wheeler vs. Black, M.L.R. 2 Q.B. 159) in the Court of Appeal, Quebec, that the sureties need not justify on real estate, the question has never been adjudicated upon in the Supreme Court.

ORDER ALLOWING SECURITY FOR COSTS.

IN THE SUPREME COURT OF CANADA.

the day of A.D. 19 .

The Registrar in Chambers.

Between :

A. B., (defendant or plaintiff) Appellant;

AND

C. D., (plaintiff or defendant) Respondent.

Upon the application of the above named appellant, 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 its certificate duly filed (*or*, it is ordered that a certain bond bearing date the day of 19 , in which are obligors and obligee 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.

CERTIFICATE AS TO CASE AND SECURITY IN ELECTION CASES.

I, , Clerk (of the Court with whom the petition was lodged and the security paid) do hereby certify that the foregoing documents from page oo to page oo, inclusive, constitute the record of the case provided by s. 66 of the Dominion Controverted Elections Act, on the appeal taken by the petitioner (*or* respondent , *as the case may be*) against the decision (order *or* judgment *as the case may be*) of the Honourable Mr. Justice , dismissing the petition on the preliminary objections (*or* dismissing the preliminary objections to the petition, *as the case may be*), (*or* against the judgment of the Honourable Mr. Justice and the Honourable Mr. Justice , allowing *or* dismissing, *as the case may be*, the petition, &c.) in a certain Election petition depending in the said court between , petitioner, and , respondent.

And I do further certify that the said , the

above named petitioner (*or* respondent *as the case may be*) has given proper security for his appeal by paying into court to the credit of this cause the sum of $, and has also paid the further sum of $ as a fee for making up and transmitting the record pursuant to the provisions of the said Act.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said court this day of A. D. 19 .

(Signed)
Clerk of the (*name of the Court*).

TITLE PAGE.

IN THE SUPREME COURT OF CANADA.

Between :

A. B., (plaintiff *or* defendant, *as the case may be*), Appellant;

AND

C. D., (defendant *or* plaintiff, *as the case may be*), Respondent.

APPEAL CASE.

E. F.,
Solicitor for the Appellant.

G. H.,
Solicitor for the Respondent.

J. K.,
Ottawa Agents for Appellant.

L. M.,
Ottawa Agents for Respondent.

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IN THE SUPREME COURT OF CANADA.

BETWEEN

THE SYNDICAT LYONNAIS DU KLONDIKE (Plaintiff) *Appellant*;

AND

THE CANADIAN BANK OF COMMERCE (Defendant);

AND

JOSEPH BARRETTE . . . . (Defendant) *Respondent.*

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PART I. PLEADINGS, &c.

PETITION FOR SPECIAL LEAVE TO APPEAL TO PRIVY COUNCIL.

IN THE PRIVY COUNCIL.

FROM THE SUPREME COURT OF CANADA.

BETWEEN

THE MONTREAL GAS COMPANY (Defendant) Appellant,

AND

HECTOR G. CADIEUX . . . (Plaintiff) Respondent.

TO THE KING'S MOST EXCELLENT MAJESTY IN COUNCIL.

The Humble Petition of the Montreal Gas Company for Special Leave to Appeal.

Sheweth,—

(1) That your petitioner is a Corporation incorporated in 1847 by Statute of Canada, 10 & 11 Vict., cap. 79, under the name of The New City Gas Company of Montreal, which name was afterwards changed to that of The Montreal Gas Company by 42 & 43 Vict., cap. 81, sec. 10, and it is, under a contract with the City of Montreal, the only gas company manufacturing and selling gas in that city.

(2) That on the 4th May, 1887, the Respondent Hector G. Cadieux agreed with your Petitioner "to consume gas by meter at his residence or place of business in the city, or where he might remove to," and under this agreement gas was supplied to the Respondent on the 8th November, 1894, at 282 St. Charles Borromée Street, and on the 8th July, 1895, the Respondent signed an order to your Petitioner to supply him with gas at another house, being 1125 Notre Dame Street, and he was supplied accordingly.

(3) That on the 19th September, 1895, the gas at the house in Notre Dame Street was cut off for non-payment of $21.34,

being the amount due to your Petitioner for gas consumed by the Respondent at that house, and after several notices from your Petitioner to the Respondent who still neglected to pay the said account, more than 24 hours' notice having been given, the gas at the house in St. Charles Borromée Street was on the 22nd December, 1895, also cut off, the default being the failure to pay the account for gas supplied to the house in Notre Dame Street.

(4) That the said sum of $21.34 due to your Petitioner has never been paid, and the Respondent, in December, 1895, without tendering payment thereof, instituted in the Superior Court of Quebec proceedings in a mandamus to compel your Petitioners to supply him with gas at the house in St. Charles Barromée Street.

(5) That the Superior Court by Matthieu, J., delivered judgment on the 4th May, 1896, granting a peremptory Mandamus compelling your Petitioners to supply the gas to the Respondent at the St. Charles Barromée house.

(6) That your Petitioner appealed to the Court of Queen's Bench, and that court, composed of Lacoste, C. J., Bossé, Blanchet, Hall and Wurtelle, JJ., gave judgment on the 29th October, 1896, unanimously quashing the writ of Mandamus, and dismissing the Respondent's action with costs.

(7) That the Respondent H. G. Cadieux, appealed to the Supreme Court of Canada, and the appeal was argued on the 28th February, 1898, before Taschereau, Gwynne, Sedgewick, King and Girouard, five of the justices of the said Court, and on the 16th May, 1898, judgment was delivered (Taschereau, J., dissenting), reversing the judgment of the Court of Queen's Bench, and restoring the judgment of the Superior Court with costs before all the Courts.

(8) It thus appears that six out of eleven Judges have decided in favour of your Petitioner.

(9) There is no dispute as to the fact, the only question being one of law, namely, whether under the provisions of 12 Vict., cap. 183, your Petitioner is compelled to supply gas to a person in one place, when he neglects and refuses to pay the sum due by him for gas supplied to him in another place.

(Paragraphs 10 to 13 recite the sections of the Acts, above referred to and the text of the judgment).

(14) That the Petitioner submits that the unanimous judgment of the Court of Queen's Bench, and the views expressed by Hall, J., in that Court, and by Taschereau, J., in the Supreme Court are correct.

(15) That the authorizations of the company to cut off the supply of gas from a consumer in default is not in principle a special or extraordinary statutory power conferred only upon your Petitioner, and as Hall, J., points out in his judgment, the same principle has been applied generally in charters incorporating gas and water companies and in the general Act respecting incorporated Joint Stock Companies for supplying cities and villages with gas or water.

(16) That the question is of general importance, affecting as it does not only a very large number of the gas consumers in the City of Montreal and the rights and obligations of your Petitioner with reference to that large number of persons, but also those consumers and companies in a like position throughout the Province, and it is to the public interest that the question be finally settled :—

Your Petitioner, therefore, humbly prays that your Most Gracious Majesty in Council will be pleased to order that your Petitioner shall have special leave to appeal from the said judgment of the Supreme Court of Canada of the 6th May, 1898, and that the certified transcript of the proceedings prod ced on the hearing of this petition may be used upon the hearing of the appeal; and that Your Majesty may be graciously pleased to make such further or other order as to your Majesty in Council may appear fit and proper.

And your Petitioner will ever pray, etc., etc.

AFFIDAVIT LODGED WITH PETITION FOR SPECIAL LEAVE TO APPEAL.

IN THE PRIVY COUNCIL.

FROM THE SUPREME COURT, CANADA.

In the matter of—

HECTOR G. CADIEUX,

v.

THE MONTREAL GAS COMPANY.

I, (*name of Petitioners' Solicitor*), of (*address*), solicitor for the above named Montreal Gas Company, make oath and say that :

I received from Canada certain packets of papers relating to a suit between the parties above named, with instructions to present a petition for special leave to appeal to Her Majesty in Council from the decree of the Supreme Court of Canada dated the 6th May, 1898.

That to the best of my knowledge, information, and belief the allegations and statements contained in the petition for special leave to appeal, which I lodge herewith, are true, and all extracts therein from such papers are true extracts.

Sworn at the Privy Council Office, Whitehall, this 8th July, 1898.

Before me,

Registrar, P. C.

CAVEAT AGAINST GRANTING SPECIAL LEAVE TO APPEAL.

IN THE PRIVY COUNCIL.

In the matter of a proposed petition of the Montreal Gas Company for Special Leave to appeal from a judgment or decree of the Supreme Court of Canada, dated the 6th day of May, 1898, in the suit of

HECTOR G. CADIEUX,

v.

THE MONTREAL GAS COMPANY,

from Quebec.

Caveat lodged on behalf of Hector G. Cadieux.

Let nothing be done in reference to the petition for special leave to appeal in this matter, without notice to the undersigned.

Dated the 11th day of July, 1898.

(Signed) B. B. and Co.

Solicitors for Caveator.

(*Address.*)

To the Registrar of Her Majesty's Privy Council.

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A.

E.

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P.