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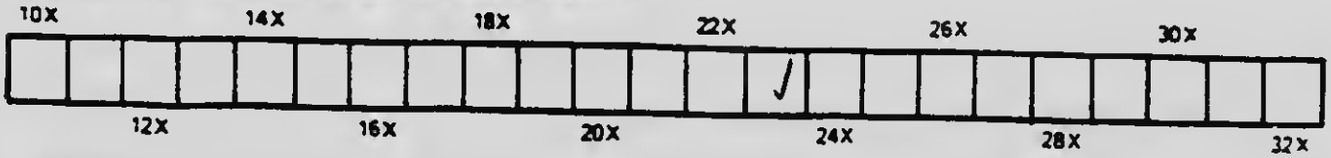

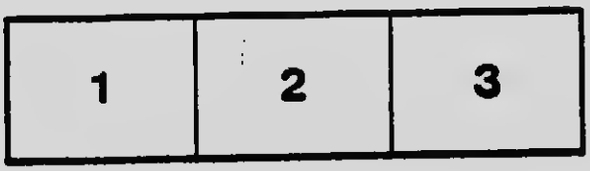

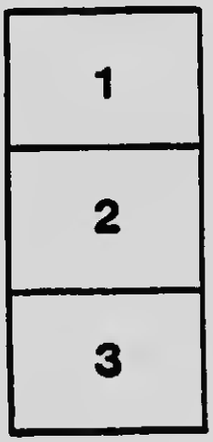

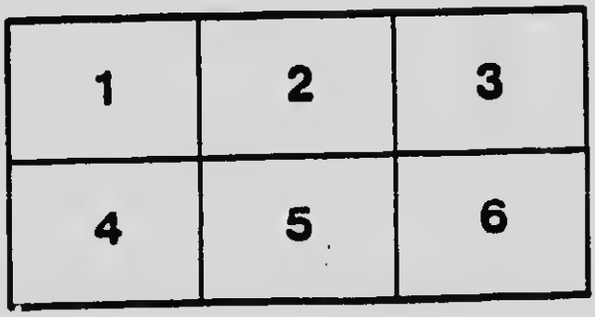

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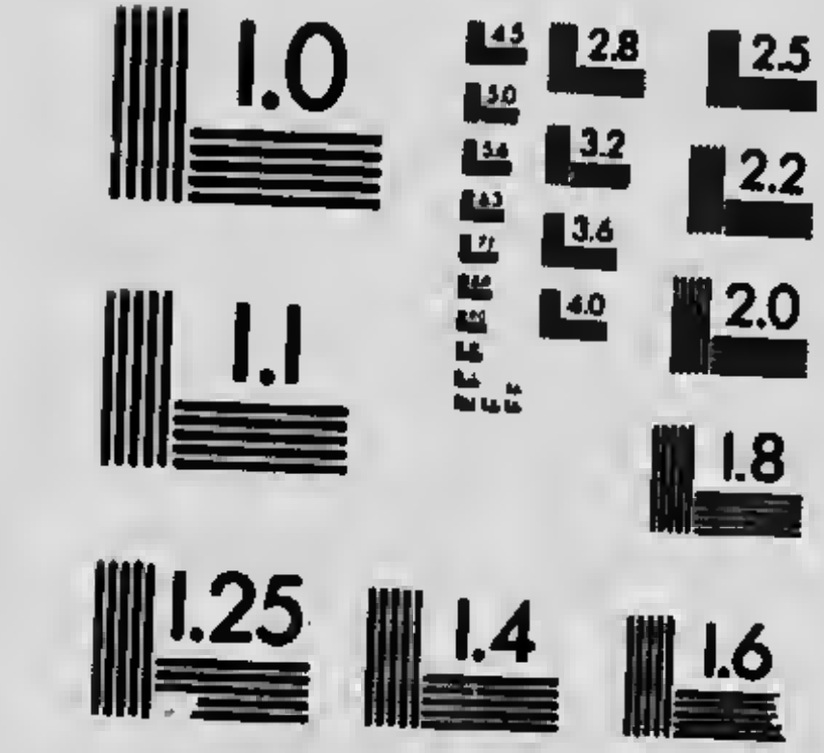

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SUPREME COURT

PRACTICE

THE SUPREME COURT ACT

PRACTICE AND RULES

SUPPLEMENT TO VOL. II.

CONTAINING THE AMENDMENTS TO THE ACT MADE BY 10-11 GEO. V. CAP. 32 (1920) WITH NOTES THEREON, TOGETHER WITH ALL PRACTICE DECISIONS SINCE THE PUBLICATION OF VOL. II.

BY

EDWARD ROBERT CAMERON

REGISTRAR OF THE COURT

TORONTO:

THE CARSWELL COMPANY LIMITED

1920

TABLE OF CASES IN SUPPLEMENT (1920)

CHAP. 32.

An Act to amend the Supreme Court Act.

[*Assented to 16th June, 1920.*]

HIS Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:— R. S. C. 135, s. 2 amended. Ss. 35-49A repealed.

1. Section two of the *Supreme Court Act*, Revised Statutes of Canada, 1906, chapter one hundred and thirty-nine, is amended,—

(*a*) by striking out paragraph (*e*) thereof, as enacted by chapter fifty-one of the statutes of 1913, and amended by chapter fifteen of the statutes of 1914, and substituting therefor the following:—

"(*e*) 'final judgment' means any judgment, rule, order or decision which determines in whole or in part any substantive right of any of the parties in controversy in any judicial proceeding;"

(*b*) by adding thereto the following paragraph:—

"(i) 'judicial proceeding' means and includes any action, suit, cause, matter or other proceeding in disposing of which the court appealed from has not exercised merely a regulative, administrative, or executive jurisdiction."

2. Sections thirty-five, thirty-six, thirty-seven, thirty-eight, thirty-nine, forty, forty-one, forty-two, forty-three, forty-four, forty-five, forty-six, forty-seven, forty-eight, forty-nine and forty-nine A of the said *Supreme Court Act*, as amended by chapter fifty-one of the statutes of 1913, and chapter seven of the statutes of 1918, are repealed, and the following are substituted therefor:—

"APPELLATE JURISDICTION.

New sec. 35, appellate jurisdiction.

"**35.** The Supreme Court shall have, hold and exercise an appellate, civil and criminal jurisdiction within and throughout Canada. R. S. c. 139, s. 35.

"**36.** Subject to sections thirty-eight and thirty-nine an appeal shall lie to the Supreme Court from any judgment of the highest court of final resort now or hereafter established in any province of Canada pronounced in a judicial proceeding, whether such court is a court of appeal or of original jurisdiction (except in criminal causes and in proceedings for or upon a writ of *habeas corpus, certiorari* or prohibition arising out of a criminal charge, or in any case of proceedings for or upon a writ of *habeas corpus* arising out of any claim for extradition made under any treaty) where such judgment is,—

"(*a*) a final judgment; or,

"(*b*) a judgment upon a motion for a non-suit or directing a new trial. R. S. c. 139, ss. 36 and 38 amended.

"**37.** Subject to sections thirty-eight and thirty-nine, an appeal shall lie directly to the Supreme Court from any final judgment of a provincial court, whether of appellate or original jurisdiction, other than the highest court of final resort in the province, pronounced in a judicial proceeding which is not one of those specifically excepted in section thirty-six,—

"(*a*) in any case by leave of the highest court of final resort having jurisdiction in the province in which the proceeding was originally instituted; provided that except in cases in which such highest court of final resort has concurrent jurisdiction with the court from which it is sought to appeal, special leave shall not be granted in any case which is not appealable to such highest court of last resort and which has not been heretofore appealable to the Supreme Court; and,

"(*b*) where the amount or value of the matter in controversy in the appeal exceeds the sum of two thousand dollars without leave but by consent in writing

of the parties or their solicitors verified by affidavit and filed with the Registrar of the Supreme Court and with the Registrar, Clerk or Prothonotary of the court to be appealed from: New sec. 38. Judicial discretion.

but otherwise, subject to section forty-three, no appeal shall lie to the Supreme Court other than from the highest court of last resort having jurisdiction in the province in which the proceeding was originally instituted, whether the judgment or decision in such proceeding was or was not a proper subject of appeal to such highest court of last resort. R. S. c. 139, s. 42 amended.

"**38.** No appeal shall lie to the Supreme Court from any judgment or order made in the exercise of judicial discretion except in proceedings in the nature of a suit or proceeding in equity originating elsewhere than in the province of Quebec. R. S. c. 139, s. 45 amended.

"**39.** Except as otherwise provided by sections thirty-seven and forty-three, notwithstanding anything in this Act contained, no appeal shall lie to the Supreme Court from a judgment rendered in any provincial court in any proceeding unless,—

"(*a*) the amount or value of the matter in controversy in the appeal exceeds the sum of two thousand dollars; or,

"(*b*) special leave to appeal is obtained as hereinafter provided. R. S. c. 139, ss. 46, 48 and 49 in part.

"**40.** Where the right to appeal or to apply for special leave to appeal is dependent on the amount or value of the matter in controversy such amount or value may be proved by affidavit, and it shall not include interest subsequent to the date on which the judgment to be appealed from was pronounced or any costs. 3 & 4 Geo. V. c. 51, s. 3 amended.

"**41.** (1) Special leave to appeal may be granted in any case within section thirty-six by the highest court of final resort having jurisdiction in the province in which the judicial proceeding was originally instituted:

"Provided that in any case whatever where the matter in controversy on the appeal will involve,—

New sec. 41, special leave.

"(*a*) the validity of an Act of the Parliament of Canada or of the Legislature of any province of Canada or of an Ordinance or Act of the Council or legislative body of any territory of Canada; or,

"(*b*) any fee of office, duty, rent or revenue, or any sum of money payable to His Majesty; or,

"(*c*) the taking of any annual rent, customary or other fee, or, other matters by which rights in future of the parties may be affected; or,

"(*d*) the title to real estate or some interest therein; or,

"(*e*) the validity of a patent; and,

"(*f*) in cases which originated in a court of which the judges are appointed by the Governor-General and in which the amount or value of the matter in controversy in the appeal will exceed the sum of one thousand dollars:

if special leave to appeal has been refused by the highest court of final resort in the province, the Supreme Court may nevertheless grant such leave during the period fixed by section sixty-nine or within thirty days thereafter. New: but see ss. 46, 48 and 49.

"**42.** Nothing in the three sections last preceding shall affect appeals in cases of *mandamus* and *habeas corpus*. R. S. c. 139, s. 47 amended.

"**43.** Notwithstanding anything in this Act contained, the court shall also have jurisdiction as provided in any other Act conferring jurisdiction." R. S. c. 139, s. 43.

3. Section sixty-nine of the said *Supreme Court Act* is amended by adding thereto the following:—

"Provided that the months of July and August shall be excluded in the computation of the said sixty days."

4. This Act shall come into effect on the first day of July, 1920; but, in regard to appeals in proceedings which shall have been begun in the court or before the body having original jurisdiction therein before that day, the Supreme Court shall nevertheless continue to possess and exercise the jurisdiction conferred by the sections hereinbefore repealed.

HISTORY OF SUPREME COURT LEGISLATION.

Supreme Court legislation.

In the Supreme Court Act as enacted by the Parliament of Canada in 1875 (38 V. c. II), three factors were necessary to permit of an appeal to the Supreme Court of Canada, namely, the judgment had to be final; it had to come from the highest Court of final resort in the province; and it must have had its origin in a Superior Court. If it had these features, an appeal lay as of right throughout Canada with one exception only, that in the Province of Quebec it was required that the value of the subject-matter in dispute should amount to $2,000. The original Act also made a special provision for appeals in cases of motions for non-suit, new trial, *mandamus, habeas corpus,* municipal by-laws, election and criminal appeals.

This simplicity was not long retained. Innovations were soon grafted on the original Act. In some cases an appeal was given where the judgment was interlocutory and not final. Appeals in certain cases were allowed where the judgment was not that of the highest Court in the province, and in some the provision that the action must have originated in a Superior Court was done away with. To add to the complexity it was provided that these amendments should only apply to particular provinces specially designated in the Act. The result was that it soon became a matter of much difficulty to determine just what the jurisdiction of the Supreme Court might be in any but the simplest cases, and lawyers seldom undertook to appeal without obtaining the advice of counsel specially skilled in the practice of the Court. No attempt was made in the revision of the public statutes of Canada in 1886 to remedy those defects in the Act. The first serious effort was in the revision of 1906, when, amongst other things, by section 36, a general right of appeal was declared to exist when the judgment was final; was the decision of the highest Court of final resort in the province, and arose in a Superior Court, subject to certain limitations in Quebec, Ontario and the Yukon; while by section 37 the only cases in which an appeal was given where the judgment was not final were precisely defined, and by section 38 the cases in which appeals would lie from interlocutory judgments were specifically stated.

There have been a number of amendments to the Act in recent years, but the Statute of 1920 is the most important legislation regarding the Supreme Court that has been passed since the revision of 1906.

LEGISLATION OF 1920.

New legislation, sec. 1.

It was stated in Parliament by the Minister of Justice when he introduced the Bill to amend the Supreme Court Act on the 6th of May, 1920, which became the Statute, 10-11 Geo. V. c. 32, and which is set out at the heading of this chapter, that "the purpose of the proposed change is to bring about a simplification and uniformity in the jurisdiction of the Supreme Court, and also to prevent appeals being brought to it in matters of trifling importance on the plea that title to lands or future rights are involved. To accomplish the purpose intended it is proposed that appeals as of right to the Supreme Court should be restricted to cases in which the amount or value of the matter in controversy in the appeal, whatever its nature, exceeds the sum of $2,000 exclusive of costs, and that in all other cases an appeal shall lie ordinarily by special leave of the highest Court of last resort in the province."

"The principal purpose of the bill is to bring about uniformity in the jurisdiction of the Supreme Court, doing away with the present existing distinctions in that jurisdiction depending upon the province from which the appeal comes."

It is proposed now to set out each section of the new Act, and discuss the same in a general way. Later on each section repealed of the old legslation will be set out, and the effect fully discussed.

SECTION 1.—Section two of the Supreme Court Act, Revised Statutes of Canada, 1906, chapter one hundred and thirty-nine, is amended:—

(a) By striking out paragraph (e) thereof, as enacted by chapter fifty-one of the statutes of 1913, and amended by chapter fifteen of the statutes of 1914, and substituting therefor the following:—

"(e) 'Final judgment' means any judgment, rule, order or decision which determines in whole or in part any substantive right of any of the parties in controversy in any judicial proceeding."

(b) By adding thereto the following paragraph:—

"(i) 'Judicial proceediug' means and includes any action, suit, cause, matter or other proceeding in disposing of which the Court appealed from has not exercised merely a regulative, administrative, or executive jurisdiction."

THE NEW LEGISLATION.

Section 1 (a) affects the interpretation clause of the Supreme Court Act, R. S. C. c. 139, s. 2 (e), as amended by 3-4 Geo. V. c. 51 2 (e), and which read as follows:— New sec. 1.

"(e) Save as regards appeals from the Province of Quebec 'final judgment' means any judgment, rule, order or decision which determines in whole or in part any substantive right of any of the parties in controversy in any action, suit, cause, matter or other judicial proceeding; and as regards appeals from the Province of Quebec 'final judgment' means as heretofore any judgment, rule, order or decision whereby the action, suit, cause, matter or other judicial proceeding is finally determined and concluded."

The new Act substitutes for this the following:—

2. (e) 'Final judgment' means any judgment, rule, order or decision which determines in whole or in part any substantive right of any of the parties in controversy in any judicial proceeding and by adding thereto the following paragraph:—

2. (i) 'Judicial proceeding' means and includes any action, suit, cause, matter or other proceeding in disposing of which the Court appealed from has not exercised merely a regulative, administrative or executive jurisdiction."

COURTS DEFINED.

The important part of the amendment is to be found at the end of sub-section 2 (i), 'the Court appealed from has not exercised merely a regulative, administrative or executive jurisdiction.' In the first place it is to be pointed out that the expression 'Court' is not limited to the ordinary tribunals of justice in the country, but includes certain municipal or provincial tribunals exercising extensive powers of a judicial or quasi-judicial character, in addition to their other functions. For example, in the Province of Ontario we have a 'Railway and Municipal Board' composed of three members appointed by the Lieutenant-Governor-in-Council, which is declared by its Act of Incorporation (R. S. O. 1914, c. 186), to have all the powers of a Court of Record. Amongst other items of jurisdiction the Board may inquire, hear and determine any application in which it is alleged that some municipal corporation or company operating a railway, telegraph, telephone or other public utility has failed to perform its duty, and to enforce its orders, may take possession of the property of the municipal corporation or company, and operate it. By the Assessment Act

"Courts" defined.

(R. S. O. c. 195, s. 80), in certain assessment cases an appeal is given from the County Judge to this Board, with a further appeal to the highest Court of final resort in the province.

Similarly in the Province of Quebec, R. S. Q. Art. 718, establishes the Quebec Public Utilities Commission which has general supervision (Art. 742 as amended by I Geo. V. c. 14), over all public utilities, subject to the legislative authority of the province, and may make orders regarding equipment, expansions, convenience of the public, etc. An appeal lies to the Court of King's Bench from any final decision of the Commission on a question of law or jurisdiction.

In the Province of Alberta there is a tribunal called the Board of Public Utility Commissioners, established by R. S. A. c. 6, which is given control over all public utility corporations, and refusal to comply with its orders subjects the offender to a penalty of $100.00 a day, and also to a fine, and in default of payment to imprisonment.

The same Act provides that an appeal shall lie to the Supreme Court of Alberta *en banc* from any final decision of the Board upon any question involving the jurisdiction of the Board, but such appeal can only lie by leave of the Supreme Court *en banc*. Tribunals such as the above are included in the expression Court, and judicial proceedings instituted before them have been adjudicated upon in appeal, by the Supreme Court of Canada (*vide* Cameron's Supreme Court Practice, Vol. II., pp. 43-45).

It will be perceived that these tribunals exercise jurisdiction in matters which are purely regulative, administrative, and executive as well as others which are judicial in their nature. The latter part of the amendment precludes appeals in the former class of cases.

It is pointed out later, in dealing with new section 41 (*f*), that the power given to the Supreme Court of Canada in certain cases to grant an appeal where the Court or tribunal in which the action arose was appointed by the Governor-General, does not include these tribunals, which are the creatures solely of the provincial legislatures.

The importance to be assigned to the interpretation of the expression 'Judicial Proceeding' is further discussed in connection with section 41.

It may be noted that the saving clause in old sub-section 2 (e), which excepted from the interpretation given to the expression 'final judgment' all appeals from the Province of Quebec is done away with. There never was any good reason why the expression 'final judgment' should have a more limited meaning, when

applied to appeals from the Province of Quebec, than when the appeals came from the other provinces of Canada. "Courts" defined.

(The following case has been decided since the publication of Vol. II.)

The Northern Alberta Natural Gas Co. v. City of Edmonton, Feb. 16th, 1920.

In this case the proceedings originated in an application made by the appellant to the Board of Public Utilities Commissioners of the province of Alberta for an order allowing the Company to increase its rates for natural gas supplied to its consumers within the City of Edmonton. Objection was taken by the Attorney-General of the province to the jurisdiction of the Board to entertain the application. The Board held it had jurisdiction and the Attorney-General appealed to the Appellate Division of the Supreme Court of Alberta, which reversed the judgment below, and held that the Board had no jurisdiction to entertain the application. Appellants thereupon applied to the Supreme Court of Canada for leave to appeal, which was granted.

KEY TO THE JURISDICTION OF THE COURT.

Key to jurisdiction.

An appeal lies to the Supreme Court of Canada, except in a criminal case, or where the judgment is in the judicial discretion of the Court, or is a case in which the Court, although having jurisdiction, will refuse to exercise it because the matter in dispute involves only the practice and procedure of the Court below, or only relates to costs, or the Court below is *curia designata*, or where the judgment is not in a "judicial proceeding" as defined in the interpretation section of the Act.

I. Where the amount or value of the matter in controversy in the appeal exceeds $2,000.

A. Where the judgment is that of the highest Court of final resort in the province,

(a) And is a final judgment, or

(b) Where the judgment, whether final or not, is a judgment upon a motion for a non-suit or directing a new trial.

B. Where the judgment is not that of the highest Court of final resort in the province,

(a) Where the parties consent to a direct appeal to the Supreme Court;

(b) By leave of the highest Court of final resort in the province;

(1) Where the case was formerly appealable to the highest Court of final resort in the province, and to the Supreme Court of Canada.

(2) Where the case was not formerly appealable to the highest Court of final resort in the province, and to the Supreme Court of Canada, but the Court from which it is sought to appeal has concurrent jurisdiction with the highest Court of final resort in the province.

II. Where the amount or value of the matter in controversy in the appeal does not exceed $2,000.

A. By special leave of the highest Court of final resort in the province —when the judgment is one of the highest Court of final resort in the province, and is either a final judgment, or a judgment upon a motion for a non-suit, or directing a new trial.

B. By special leave of the Supreme Court of Canada, when leave has been refused by the highest Court of final resort in the province, and where the judgment is one of the highest Court of final resort in the province and is a final judgment, or a judgment upon a motion for a non-suit, or directing a new trial, and where the matter in controversy on the appeal will involve,—

(a) The validity of an Act of the Parliament of Canada or of the legislature of any province of Canada or of an Ordinance or Act of the Council or legislative body of any territory of Canada; or

(b) Any fee of office, duty, rent or revenue, or any sum of money payable to His Majesty; or

(c) The taking of any annual rent, customary or other fee, or other matters by which rights in future of the parties may be affected; or

(d) The title to real estate or some interest therein; or

(e) The validity of a patent, and

(f) In cases which originated in a Court of which the Judges are appointed by the Governor-General, and in which the amount or value of the matter in controversy in the appeal will exceed the sum of one thousand dollars.

An appeal will also lie in cases of *mandamus* and *habeas corpus* as provided in section 43 of the Act, and in all cases where jurisdiction is conferred by some other Act of the Parliament of Canada.

EXPLANATION OF THE KEY.

Key—Explanation.

In applying the key, it will be perceived that the first step is to eliminate from consideration all the cases mentioned in the exceptions, the first of which is a 'criminal case.' This includes everything of a criminal nature referred to in new section 36. The second exception is a 'judgment in the judicial discretion of the Court' other than certain equity cases set out in new section 38. The third exception consists of a group in which the Court, although having jurisdiction, will not exercise it, and the fourth excludes any case where the Court below is *curia designata* or the judgment is in a matter which is not a 'judicial proceeding' as defined in the interpretation clause of the new Act, and which is discussed, *ante*, p. 7.

Having found that the case in question is not amongst the exceptions, the next inquiry is, I: What is the amount or value of the matter in controversy? If it is $2,000 or less we proceed to division II. If it exceeds $2,000 the next inquiry is A.: Is it a judgment of the highest Court of final resort in the province? If the answer is in the negative we drop to sub-division B. If the answer is in the affirmative we proceed to sub-divisions (a) and (b), and inquire: Is the judgment final? If the answer is in the affirmative the Court has jurisdiction. If the answer is in the negative there is no jurisdiction unless it is a judgment upon a motion for a non-suit or directing a new trial. Similarly if the answer to A. is in the negative we proceed to sub-division B., where the judgment is not that of the highest Court of final resort in the province, and inquire: (a) Do the parties consent to a direct appeal to the Supreme Court instead of an intermediate appeal to the Court of Appeal for the province? If the answer is in the affirmative an appeal will lie. If it is not a case of consent, then we inquire: (b) (1) Was the case formerly appealable to the highest Court of final resort in the province, and to the Supreme Court of Canada? If so an appeal will lie by leave of such highest Court of final resort. If not so, we next inquire has the Court from which an appeal is sought concurrent judisdiction with the highest Court of final resort in the province? If the answer is in the affirmative leave to appeal may be granted by the highest Court of final resort.

Again, if on our first inquiry respecting the amount involved, the answer is, that the sum involved is $2,000 or under, we then proceed to division II., sub-division A., and inquire is the judgment one of the highest Court of final resort in the province, and is it either a final judgment or a judgment upon a motion for a non-suit or directing a new trial, in which event an appeal will lie by leave of the highest Court of final resort in the province. If, however, such

New sec. 2. Old sections repealed.

highest Court of final resort refuses to grant leave, then we proceed to subdivision B. which sets out the conditions or circumstances under which the Supreme Court of Canada may grant leave notwithstanding the refusal of the provincial Court.

APPELLATE JURISDICTION.

Section 2 of the new statute first repeals all the old sections which conferred appellate jurisdiction upon the Supreme Court. These sections are: 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 49 (a), and substitutes therefor new sections 35 to 43, so that in the notation of the Act as amended there will be an hiatus between sections 44-49, both inclusive.

GENERAL APPELLATE JURISDICTION.

NEW SECTION 35: "The Supreme Court shall have, hold and exercise an appellate, civil and criminal judisdiction within and throughout Canada. R. S. c. 139, s. 35."

This section repeats *ipsissimis verbis* the language of old section 35.

APPEALS FROM JUDGMENTS OF THE HIGHEST COURT IN THE PROVINCE.

NEW SECTION 36: "Subject to sections thirty-eight and thirty-nine, an appeal shall lie to the Supreme Court from any judgment of the highest Court of final resort now or hereafter established in any province of Canada pronounced in a judicial proceeding, whether such Court is a Court of appeal or of original jurisdiction (except in criminal causes and in proceedings for or upon a writ of *habeas corpus, certiorari* or prohibition arising out of a criminal charge, or in any case of proceedings for or upon a writ of *habeas corpus* arising out of any claim for extradition made under any treaty), where such judgment is,—

"(a) A final judgment; or

"(b) A judgment upon a motion for a non-suit or directing a new trial. R. S. s. 139, s.-s. 36 and 38 amended."

This section is intended to provide in general terms, for all the cases in which there is an appeal from judgments of the highest Court of final resort in any province. It is wider in its scope than old section 36, in that it does not require that the judgment appealed from should be in an action commenced in a Superior Court. It is narrower than the old section, in that it debars appeals, where the matter in controversy does not amount in value to $2,000; but the extensive power given to the highest Court of final resort to grant leave to appeal, more than compensates for any restriction on the former jurisdiction of the Court.

APPEALS FROM JUDGMENTS NOT OF THE HIGHEST COURT IN THE PROVINCE.

NEW SECTION 37: "Subject to sections thirty-eight and thirty-nine, an appeal shall lie directly to the Supreme Court from any final judgment of a provincial Court, whether of appellate or original jurisdiction, other than the highest Court of final resort in the province, pronounced in a judicial proceeding which is not one of those specifically excepted in section thirty-six,— New sec. 37, judgment not of highest Court of final resort.

"(a) In any case by leave of the highest Court of final resort having jurisdiction in the province in which the proceeding was originally instituted; provided that except in cases in which such highest Court of final resort has concurrent jurisdiction with the Court from which it is sought to appeal, special leave shall not be granted in any case which is not appealable to such highest Court of last resort and which has not been heretofore appealable to the Supreme Court; and

"(b) Where the amount or value of the matter in controversy in the appeal exceeds the sum of two thousand dollars, without leave, but by consent in writing of the parties or their solicitors, verified by affidavit and filed with the Registrar of the Supreme Court, and with the Registrar, Clerk or Prothonotary of the Court to be appealed from:

"But otherwise, subject to section forty-three, no appeal shall lie to the Supreme Court other than from the highest Court of last resort having jurisdiction in the province in which the proceeding was originally instituted, whether the judgment or decision in such proceeding was or was not a proper subject of appeal to such highest Court of last resort. R. S. c. 139, s. 42 amended."

This section is intended to provide for appeals where the judgment it is proposed to appeal from is not that of the highest Court of final resort. The criminal cases excluded in old section 36, are also excluded here. This section replaces old section 42. It very considerably extends the right of appeal in such cases. Under the old section the right of appeal was extremely limited, namely, by consent of parties which is still retained, or by leave of the Supreme Court. By the new section the power to grant leave is taken away from the Supreme Court and given to the highest Court of final resort in the province. This section is also subject to the provisions of 38 and 39. By virtue of 39 it is required that the amount in controversy shall exceed $2,000. Sub-section 39 (b) has no application here, as it is limited to appeals under section 36. This matter is more fully discussed, *infra*, p. 22. New section 37 (a) is fully discussed, *infra*, p. 30.

JUDICIAL DISCRETION.

New sec. 38. Judicial discretion.

NEW SECTION 38: "No appeal shall lie to the Supreme Court from any judgment or order made in the exercise of judicial discretion, except in proceedings in the nature of a suit or proceeding in equity originating elsewhere than in the Province of Quebec." R. S. c. 139, s. 45, amended.

This section is substantially a reproduction of old section 45.

AMOUNT IN CONTROVERSY.

NEW SECTION 39: "Except as otherwise provided by sections thirty-seven and forty-three, notwithstanding anything in this Act contained, no appeal shall lie to the Supreme Court from a judgment rendered in any provincial Court in any proceeding unless,—

"(a) The amount or value of the matter in controversy in the appeal exceeds the sum of two thousand dollars; or

"(b) Special leave is obtained as hereinafter provided. R. S. c. 139, ss. 46, 48 and 49 in part."

This section is probably the most important feature of the new legislation, as it applies to all appeals, and requires that the amount in controversy should exceed $2,000—with a provision for an appeal by leave, in a case in which the judgment is that of the highest Court of final resort in the province. This is more fully discussed under new section 41.

AMOUNT IN CONTROVERSY.

NEW SECTION 40: "Where the right to appeal or to apply for special leave to appeal is dependent on the amount or value of the matter in controversy such amount or value may be proved by affidavit, and it shall not include interest subsequent to the date on which the judgment to be appealed from was pronounced or any costs. 3 & 4 Geo. V. c. 51, s. 3, amended."

This section reproduces an amendment of the Act made by 3-4 Geo. V. c. 51, s. 5, but gives statutory sanction to the former jurisprudence of the Court, which held that in determining the amount in controversy neither interest nor costs could be included.

SPECIAL LEAVE TO APPEAL.

NEW SECTION 41: "(1) Special leave to appeal may be granted in any case within section thirty-six by the highest Court

of final resort having jurisdiction in the province in which the judicial proceeding was originally instituted: New sec. 41. Special leave to appeal.

"Provided that in any case whatever where the matter in controversy on the appeal will involve,—

"(a) The validity of an Act of the Parliament of Canada or of the legislature of any province of Canada or of an Ordinance or Act of the Council or legislative body of any territory of Canada; or

"(b) Any fee of office, duty, rent or revenue, or any sum of money payable to His Majesty; or

"(c) The taking of any annual rent, customary or other fee, or other matters by which rights in future of the parties may be affected; or

"(d) The title to real estate or some interest therein; or

"(e) The validity of a patent; and

"(f) In cases which originated in a court of which the Judges are appointed by the Governor-General, and in which the amount or value of the matter in controversy in the appeal will exceed the sum of one thousand dollars:

if special leave to appeal has been refused by the highest Court of final resort in the province, the Supreme Court may nevertheless grant such leave during the period fixed by section sixty-nine, or within thirty days thereafter."

This section is supplementary to section 39 (a), which required that the amount in controversy in the appeal should exceed $2,000, and gives the fullest power to the highest Court of final resort in the province to grant leave to appeal from its own judgments however small the amount involved. Inasmuch as there had been for more than one hundred years special significance attached to certain classes of actions, in appeals from the British Colonies to the Judicial Committee of the Privy Council, and from Superior Courts in the Colonies to the Courts of appeal therein, it was deemed desirable to retain to some extent this anomaly, and in such cases when leave to appeal is refused by the highest Court of final resort in the province the appellant may obtain leave from the Supreme Court of Canada. This section is more fully discussed, *post*, p. 38.

MANDAMUS AND HABEAS CORPUS.

New Section 42: "Nothing in the three sections last preceding shall affect appeals in cases of *mandamus* and *habeas corpus*. R. S. c. 139, s. 47, amended."

This section excludes cases of *mandamus* and *habeas corpus* from the limiting provisions of sections 39, 40 and 41. To some extent it continues the exceptions in favour of these two classes

New sec.42, mandamus and habeas corpus.

of cases, which are given to them and also to Exchequer appeals, new trials and municipal by-laws by old section 47. The privileges formerly given to these latter cases now disappear, and they stand in the same position as all other cases in appeal. The effect of this section is to give a right of appeal in cases of *mandamus* and *habeas corpus*, however small the matter in controversy may be, if the judgment is not in the exercise of the judicial discretion of the Court.

JURISDICTION CONFERRED BY OTHER STATUTES.

NEW SECTION 43: "Notwithstanding anything in this Act contained the Court shall also have jurisdiction as provided in any other Act conferring jurisdiction." R. S. c. 139, s. 43.

This section is a verbatim reproduction of old section 43.

TIME.

SECTION 3: Section sixty-nine of the said Supreme Court Act is amended by adding thereto the following:—

"Provided that the months of July and August shall be excluded in the computation of the said sixty days."

This section of the New Act is an amendment to old section 69, which read as follows:—

"Except as otherwise provided, every appeal shall be brought within sixty days from the signing or entry or pronouncing of the judgment appealed from."

By the old section, if the judgment was pronounced in May or June, it was necessary that the security should be allowed during vacation, or the appellant's right of appeal was lost, unless time was extended under section 71 by the Court below. The Supreme Court had no power to do so. As under the rules, no proceedings are required to be taken during long vacation, practitioners often were misled in assuming that the rules modified the provision of section 69 of the statute, which required the appeal to be brought in 60 days. By the amendment long vacation is eliminated from the computation of time in bringing appeals to the Supreme Court.

WHEN NEW ACT COMES INTO FORCE.

SECTION 4: "This Act shall come into effect on the first day of July, 1920; but, in regard to appeals in proceedings which shall have begun in the Court or before the body having original jurisdiction therein before that day, the Supreme Court shall never-

theless continue to possess and exercise the jurisdiction conferred by the sections hereinbefore repealed."

When Act comes into force.

This section brings the new Act into force on July 1st, 1920, but only as to appeals where the proceedings have commenced after that date. From now onward for some years it will be necessary, as the first consideration in connection with a proposed appeal to the Supreme Court, to investigate the date at which the proceedings commenced in the Court of first instance, so as to know whether the appeal is to be governed by the old statute or the new.

OLD SECTIONS REPEALED.

It is proposed now to reproduce each of the repealed sections, and point out the substituted sections when there are any, adding such comments on the old and new sections as may seem to thow light upon the effect of each amendment.

GENERAL APPELLATE JURISDICTION.

OLD SECTION 35: "The Supreme Court shall have, hold and exercise an appellate, civil and criminal jurisdiction throughout Canada." The new section re-enacts the old, *ipsissimis verbis*. The grant of jurisdiction is, of course, subject to all the limitations to be found in subsequent sections. It has been pointed out (Vol. I., p. 72 and Vol. II., p. 21, *et seq.*, of the Practice), that the generality of this section is qualified as follows: (a) No appeal lies from a judgment made in the exercise of the judicial discretion of the Court; (b) No appeal lies from a reference to the Court below by the Lieutenant-Governor in Council, and (c) There is no appeal where the Court below is *curia designata*."

APPEALS FROM JUDGMENTS OF THE HIGHEST COURT IN THE PROVINCE.

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

"(a) There shall be no appeal from a judgment in any case of proceedings for or upon a writ of *habeas corpus, certiorari* or prohibition arising out of a criminal charge or in any case of proceed-

Old sec. 36, effect of new legislation.

ings for or upon a writ of *habeas corpus*, arising out of any claim for extradition made under any treaty; and

"(b) There shall be no appeal in a criminal case except as provided in the Criminal Code."

OLD SECTION 36—EXCEPTIONS.

For the purpose of determining how far old section 36 is reproduced in the new legislation, it is desirable to analyse closely its provisions. Leaving out of consideration for the moment sub-sections (a) and (b), we find section 36 has four characteristics: First, the exception with which it opens; second, the judgment must be final; third, it must be a judgment of the highest Court of final resort, and fourth, it must have originated in a Superior Court.

The expression 'except as hereinafter otherwise provided' has reference to two classes of cases: First, judgment wherein the Court exercised its judicial discretion (old section 45), and second, judgments of the Courts in certain provinces, where there were limitations upon appeals with respect to the amount involved or the nature of the action, *e.g.* in Quebec, the provisions of section 46, in Ontario, the provisions of section 48, in the Yukon, the provisions of section 49. In 1918, by 8-9 Geo. V. c. 7 (see Cameron's Practice, Vol. II., p. 54), these limitations in section 48 were extended to all the provinces of Canada. By the new legislation, the limitations are continued, but are made still more restrictive.

The opening paragraph of new section 36 says: "Subject to sections 38 and 39 an appeal shall lie, &c." Section 38 is a reproduction of old section 45, which prevented appeals, in cases where the Court had exercised its judicial discretion, and section 39 limits appeals to cases which involve more than $2,000, unless special leave to appeal is given. In the result therefore we find that the expression "except as hereinafter otherwise provided" in the old section which limited the general right of appeal conferred by the language that followed by making the action subject to certain limitations in Quebec (section 46), Ontario (section 48), is replaced in the new legislation by the introductory words 'subject to sections 38 and 39.' And this now applies to all the provinces of Canada.

OLD SECTION 36—JUDGMENT MUST BE FINAL.

The second characteristic of old section 36 we said was the provision that the judgment in appeal must be a final one. That feature is reproduced in new section 36, sub-section (a).

OLD SECTION 36—JUDGMENT MUST BE OF HIGHEST COURT IN PROVINCE.

The third characteristic was, the judgment in appeal must be the judgment of the highest Court of final resort in the province; that provision is also contained in new section 36. Old sec. 36, effect of new legislation.

OLD SECTION 36—JUDGMENT MUST BE IN AN ACTION ARISING IN A SUPERIOR COURT.

The fourth characteristic was, 'the judgment must be in an action which arose in a Superior Court.' In the old legislation, the only cases in which an appeal would lie to the Supreme Court where the judgment was in an action which arose in an Inferior Court, were all contained in section 37. The distinction between actions arising in a Superior Court and those arising in an Inferior Court is eliminated in the new legislation. If otherwise appealable an action arising in an Inferior Court can be taken to the Supreme Court, and this includes tribunals which are either not judicial, or are only quasi-judicial in their nature, such as Public Utility Boards (discussed, *ante*, at p. 7), where the judgments or decisions are not merely regulative, administrative or executive. A new limitation is however now made generally applicable to all appeals, namely, either the matter in controversy must exceed $2,000 or leave to appeal must be obtained (see new sections 36, 37, 41). The question is further discussed under section 46, *post*.

OLD SECTION 36 (a) AND (b)—CRIMINAL CASES.

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

"(b) There shall be no appeal in a criminal case except as provided in the Criminal Code."

Section 36 (a) is reproduced *verbatim* in new section 36. In the new section, however, the language of 36 (b) is altered. Whereas the old section read 'there shall be no appeal in a criminal case except as provided in the Criminal Code,' the new section 36 says 'an appeal shall lie, &c., except in criminal cases.' The language of the exception in old section 36 (b) was taken from section 1013 of the Criminal Code. In the appeals of *Re McNutt*, 47 S. C. R. 259 (Cameron, Sup. Ct. Pr., Vol. II., p. 66), and *Mitchell*

Old sec. 36, criminal cases.

v. *Tracey*, 58 S. C. R. 640, there was much discussion as to whether this expression should be construed in a restricted sense. *Mitchell* v. *Tracey* was decided since the publication of Vol. II. of the Practice. The head note says: "Section 39 (c) allows an appeal from the judgment in any case of proceedings for or upon a writ of prohibition 'not arising out of a criminal charge.'

"*Held, per* Davies, C.J. and Anglin and Mignault, JJ., that application for a writ of prohibition to restrain a magistrate from proceedings on a prosecution for violating the provisions of the 'Nova Scotia Temperance Act' arises out of a criminal charge, and no appeal lies from the judgment thereon."

This case was followed in

The King v. Jeu Jang How (50 S. C. R. 175.)

In this case it was *held, per* Duff and Anglin, JJ.: "The words 'criminal charge' in section 39 (c) of the Supreme Court Act means a charge preferred before a tribunal authorized to hear such a charge either finally or by way of preliminary investigation, and the Board of Enquiry under the 'Immigration Act' is not a tribunal by which the respondent could have been convicted of a criminal offence.

Petropolis v. The King (Feb. 25th, 1902).

In this case the appellant became security before a magistrate for the appearance of another party who was committed for trial before the next criminal Court upon a charge of indecent assault. The Grand Jury at the next sittings changed the indictment to the more serious one of rape. The surety failed to appear and the recognizance was estreated. The estreat roll was handed to the sheriff, and the goods of the appellant were seized. The roll was returned at the next session of the assize, when the appellant moved before the Judge to have the estreat order set aside. The trial Judge referred the application to the Court *en banc*, where the motion was refused, and from this judgment an appeal was taken to the Supreme Court of Canada. The respondent moved to quash for want of jurisdiction. The majority of the Court in a judgment pronounced by Mr. Justice Anglin held that this was an appeal in a criminal case within section 36, s.-s. (b): *Mitchell* v. *Tracey*, 58 S. C. R. 640.

APPEALS FROM JUDGMENTS NOT OF THE HIGHEST COURT IN THE PROVINCE.

Old Section 37: "Except as hereinafter otherwise provided, an appeal shall lie to the Supreme Court from any final judgment

of the highest Court of final resort now or hereafter established in any province of Canada, whether such Court is a Court of Appeal or of original jurisdiction, where the action, suit, cause, matter or other judicial proceeding has not originated in a Superior Court, in the following cases:— Old sec. 37. action not arising in Superior Court.

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

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

"(c) In the Provinces of Saskatchewan and Alberta by leave of the Supreme Court of Canada or a Judge thereof;

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

"(e) In the Yukon Territory in the case of any judgment upon appeal from the Gold Commissioner."

The original Supreme and Exchequer Court Act did not provide for an appeal in any action which did not arise in a Superior Court of Justice. This shut out all appeals from County, District and Circuit Courts, however important the interest involved might be. The first break in this rule was made by Parliament in 1887, by schedule to 50-51 V. c. 16, where an appeal was given from inferior courts in the Provinces of Nova Scotia, New Brunswick and Prince Edward Island, if the sum or value of the matter in dispute amounted to $250.00 and the Court of first instance had concurrent jurisdiction with a Superior Court. In 1888 this jurisdiction was also extended to the Inferior Courts of British Columbia and to the North-West Territories (now Alberta and Saskatchewan), by leave of the Supreme Court or a Judge thereof (51 V. c. 37, s. 5).

PROBATE AND SURROGATE COURTS.

In 1889 by 52 V. c. 37, provision was made for an appeal to the Supreme Court, in actions instituted in Courts of Probate. This legislation was the outcome of the decision of the Court in *Beamish* v. *Kaulbach*, 3 S. C. R. 704, which denied an appeal where

Old sec. 37, action not arising in a Superior Court.

the action originated in the Probate Court for the County of Lunenburg in Nova Scotia. In *Standard Trusts* v. *Manitoba*, 51 S. C. R. 428, which originated in a Surrogate Court of Manitoba, two of the Judges of the Supreme Court expressed doubt as to the jurisdiction of the Supreme Court to hear the appeal, but in *Trusts and Guarantee* v. *Rundle*, 52 S. C. R. 114, the Registrar affirmed the jurisdiction of the Supreme Court to entertain an appeal, where the action originated in a Surrogate Court of the Province of Ontario, holding that such Court was included in the language of the Statute which allowed an appeal, when the action arose in a Probate Court, and his judgment was affirmed on appeal by the Supreme Court.

In 1891 by 54-55 V. c. 25, jurisdiction was extended to the Inferior Courts of Quebec, when the cause of action was within the provisions necessary to give an appeal to the Supreme Court from the Court of King's Bench under section 46. (See old section 37 (a)).

Only a very limited number of cases under this section were appealable, and all Circuit or Superior Court cases, which were excluded from appeal by the language of old 37 (a) are still excluded by virtue of the saving clause in the last paragraph of new section 37 (a).

Appeals under old section 37 of the Supreme Court Act are set out on pages 104 and following of Vol. I., and pp. 28 and following of Vol. II. of the Supreme Court Practice.

The following decisions have been pronounced since the publication of Vol. II. of the Practice.

Hildebrand v. The King, Feb. 20th, 1920—Doerksin v. The King.

Under the School Attendance Act of Manitoba, 1916, c. 67, s. 20, if a parent, &c., neglects or refuses to cause a child to attend school the Police Magistrate or Justice of the Peace having jurisdiction in the school district upon conviction could impose a fine and imprisonment on default of payment thereof.

Section 31 provides that such a conviction could not be quashed for want of form nor removed by *certiorari* except for the purpose of hearing and determination of a stated case. By section 28 the procedure under the Act was declared to be governed by the Manitoba Summary Convictions Act, which makes provision for a stated case by a magistrate to the Superior Court.

In this case the magistrate stated a case for the Court of Appeal for Manitoba, and it was contended that the proceedings must be taken as having their inception in that Court: but the Supreme Court held that the proceedings originated before the magistrate, and as the case did not fall under section 37 the

Supreme Court had no jurisdiction. The appeal was accordingly quashed.

Old sec. 37, action not arising in a Superior Court.

Morrow v. Morrow (Jan. 15th, 1920).

In this case the Registrar held that this section which allowed an appeal where the matter in controversy exceeded $500, was impliedly repealed by the subsequent legislation contained in section 48, which requires that the amount in controversy should exceed $1,000. He also held that the jurisdiction of the Court must be taken as now settled that sections 36, 37, 38 and 39 are governed by section 48, as amended.

It has been held that if the action originate in an Inferior Court and all proceedings are subsequently removed into a Superior Court in which the judgment is pronounced, if this judgment is carried in appeal to the highest Court of final resort in the province no further appeal will lie to the Supreme Court. (*Tucker* v. *Young*, 30 S. C. R. 185; *Hillman* v. *Imperial Elevator Co.*, 53 S. C. R. 15).

EFFECT OF NEW LEGISLATION ON OLD SECTION 37.

Although section 37 is repealed, its provisions have been indirectly retained by new section 36. The latter section, which is designed to give a general right of appeal, only requires that the judgment should be final, and come from the highest Court of final resort, and it is not required as in old section 36, that the action should have originated in a Superior Court. But a new limitation is substituted, namely, with respect to the amount involved. The judgment is subject to the same limitation as obtained formerly and which still applies to all judgments, namely, that it must not be made in the exercise of judicial discretion, and in addition, by new section 39 the amount or value of the matter in controversy in the appeal must exceed the sum of $2,000, or special leave must be obtained from the highest Court of final resort in in the province. If special leave is refused by the latter Court, leave may be granted by the Supreme Court of Canada in certain cases which are discussed later when we deal with old section 46.

It must be noted that old section 37 only applies to judgments of the highest Court of final resort in the province. Under the old jurisprudence, no appeal lay to the Supreme Court, when the action arose in an Inferior Court, and the judgment below was *not* a judgment of the highest Court of final resort in the province. By new section 37 an appeal will lie in such a case, if leave is obtained from the highest Court of final resort in the

Old sec. 38, interlocutory judgments.

province, or by consent, subject to certain conditions which will be more fully discussed in dealing with old section 42.

AN APPEAL WHERE JUDGMENT IS INTERLOCUTORY.

OLD SECTION 38: "Except as hereinafter otherwise provided, an appeal shall lie to the Supreme Court from the judgment, whether final or not, of the highest Court of final resort now or hereafter established in any province of Canada, whether such Court is a Court of Appeal or of original jurisdiction, where the Court of original jurisdiction is a Superior Court, in the following cases:—

"(a) Upon any motion to enter a verdict or non-suit upon a point reserved at the trial;

"(b) Upon any motion for a new trial;

"(c) In any action, suit, cause, matter or other judicial proceeding originally instituted in any Superior Court of equity in any province of Canada other than the province of Quebec, and from any judgment in any action, suit, cause, matter or judicial proceeding, in the nature of a suit or proceeding in equity, originally instituted in any Superior Court in any province of Canada other than the Province of Quebec."

The object of ths section was to cover the cases where appeals could be taken to the Supreme Court from judgments that were not final. It will be seen: firstly, that it only affects actions instituted in a Superior Court, and secondly, that by (a) and (b) it is limited to motions to enter a verdict of non-suit or for a new trial and thirdly, it is limited to judgment in equity actions or proceedings in the nature of suits in equity. The provision 'motion to enter a verdict' in the old section has been dropped as unnecessary, since the disposition of such a motion results either in a final judgment, or a direction for a new trial. Motions to enter a non-suit and for a new trial are retained in new section 36 (b). It is to be noted that whereas old section 38 (b) gave an appeal 'upon a motion for a new trial' the new section 36 (b) uses the expression 'judgment directing a new trial." The old section covered cases when the judgment appealed from refused a new trial. It is questionable if the language of the new section includes such a case.

How far a judgment granting or refusing a new trial is an exercise of the judicial discretion of the Court, is the subject of much consideration in the cases. If there is an exercise of judicial discretion, the appeal is excluded by section 42, nevertheless it is clear that by granting an appeal in motions for a new trial, Parliament did not conceive that every judgment on such a motion

was of necessity discretionary. (The cases are collected on pages 117 *et seq.*, and 196 Vol. I., Cameron's Supreme Court Practice).

Old sec. 39, effect on of new legislation.

Old section 38 (c) is not retained in the new Act; it was considered unnecessary in view of the extension given to the definition of the expression 'final judgment' introduced in 1918, by 3-4 Geo. V. c. 51 (Cameron's Supreme Court Practice, Vol. II., p. 1.), and the extension of this section by the new legislation to the Province of Quebec.

APPELLATE JURISDICTION IN SPECIAL CASES.

OLD SECTION 39: "Except as hereinafter otherwise provided, an appeal shall lie to the Supreme Court:—

"(a) From the judgment upon a special case, unless the parties agree to the contrary, and the Supreme Court shall draw any inference of fact from the facts stated in the special case which the Court appealed from should have drawn;

"(b) From the judgment upon any motion to set aside an award or upon any motion by way of appeal from an award made in any Superior Court in any of the provinces of Canada other than the Province of Quebec;

"(c) From the judgment in any case of proceedings for or upon a writ of *habeas corpus, certiorari* or prohibition not arising out of a criminal charge;

"In any case or proceeding for or upon a writ of *mandamus;* and

"(e) In any case in which a by-law of a municipal corporation has been quashed by a rule or order of Court or the rule or order to quash has been refused after argument."

The provisions of sections 39 (a), 39 (c), 39 (d), and 39 (e) as respects *habeas corpus* had their origin in the original Act of 1875 (37 V. c. 11, ss. 18, 23), while section 39 (b) comes from 42 V. c. 39, s. 4 (1379).

It will be perceived that nothing is said in this section as to the necessity of the judgment being final, and coming from the highest Court of final resort in the province, and it has been pointed out (Vol. I., p. 136, of the Practice), that it is not clear, in view of the fact that section 17 of the original Act gave a general right of appeal in all cases where the judgment was that of the highest Court of final resort, and was final in its nature, why these special cases should have been mentioned unless it was deemed advisable *ex abundanti cautela.* In the case of *Bouchard* v. *Sergius* (55 S. C. R. 324), it was held that this section which gave an appeal in cases of prohibition was in the Province of Quebec governed by section 46 of the old Act.

Old sec. 39, effect on of new legislation.

In *Mitchell* v. *Tracey*, 58 S. C. R. 640, it was held that except from Quebec an appeal in a case of prohibition under this section would not lie unless the case came within some of the provisions of section 48 as amended by 8-9 Geo. V. c. 7, s. 3. In *The King* v. *Jew Jang How*, 59 S. C. R. 175, the same rule was applied when the proceedings were for a writ of *habeas corpus*, and in *Montreal Abattoirs, Limited* v. *Montreal*, 59 S. C. R. 681, the Supreme Court quashed an appeal from the Court of King's Bench, appeal side, affirming the judgment of the Superior Court which quashed a writ of prohibition issued to the Recorders Court of Montreal.

Ecrement v. Connelly (May 31st, 1920).

The appellant was arrested on a charge of conspiracy to defraud and rob the respondent. The charge was laid before a police magistrate. The appellant applied to a Superior Court for a writ of prohibition to prevent the magistrate proceeding with the case. The petition for a writ was refused by the Superior Court and this was affirmed by the Court of King's Bench. The appellant instituted an appeal to the Supreme Court of Canada. A motion to quash the same was granted with costs.

In *Doherty* v. *Levis* (Vol. II., p. 37, Supreme Court Practice), it was held by Anglin, J., that this section was governed by section 36, and therefore the action had to originate in a Superior Court and be a final judgment of the highest Court of final resort. No portion of this section is reproduced specifically in the new Act, except *mandamus* and *habeas corpus*, but all the cases which could arise under it are provided for by section 36 of the new Act, so long as the amount or value of the matter in controversy in the appeal exceeds the sum of $2,000, or if the amount is less, then by special leave of the highest Court of final resort in the province as provided in section 41 of the new Act. Under the new legislation the right of appeal is extended in that the old limitation requiring that the action should arise in a Superior Court is done away with, and an appeal may be taken from a court which is not the highest Court of final resort in the province by leave as set out in section 37.

Owing to the highly technical grounds upon which some of the decisions of the Supreme Court have been based in the classes of cases mentioned in section 39, it is perhaps desirable to deal with them at a little more length.

OLD SECTION 39 (a): "Deals with a judgment on a special case, and although the section is repealed and not specifically reproduced an appeal in a special case still lies under the general language of new sections 36 and 37. In such a case a notice of appeal has to be given as provided for in section 70 of the Act."

Old sec. 39, effect on of new legislation.

OLD SECTION 39 (h): "Provides for an appeal when the judgment is upon an award. In this case also, although a right of appeal no longer is specifically given in the case of an award, yet the right is preserved under the general language of new sections 36 and 37."

OLD SECTION 39 (c) and (d): "Judgments in matters of *habeas corpus, certiorari* or prohibition not arising out of a criminal charge, and proceedings for or upon a writ of *mandamus*, although no longer specifically declared to be appealable owing to the repeal of this section, still are the subject of appeal by virtue of the general right of appeal given by sections 36 and 37."

Mandamus and *habeas corpus* are specially mentioned in new section 42, and are excepted from the sections 39, 40 and 41. In these cases therefore the question of the amount or value of the matter in controversy is not of any consequence, except when it is proposed to take an appeal by consent under section 37.

OLD SECTION 39 (e).—*Municipal By-laws*: "In Vols. I. and II. of the Practice very many decisions of the Supreme Court are collected where the question of the judisdiction of the Court has been determined by the construction which was placed upon this section of the old Act. Apparently it was assumed by the Court that cases of this character being specially provided for by this section, did not fall under the general provision for an appeal contained in old section 36, and the sections from which 36 was derived, which were applicable previous to the revision of 1906. Accordingly we find the decisions in Quebec, which differed from Ontario, in that the limitations provided by 46 are by 47 declared not applicable to cases of municipal by-laws, are concerned with the question as to how the proceeding to quash the by-law originated. Was it by petition or by writ? All these artificial distinctions are now swept away. The jurisprudence in Ontario and Quebec is similar. The right of appeal is no longer dependent upon some express provision of the Statute, like old section 39 (e), but is taken to fall under the general right of appeal given by sections 36 and 37. The subject will be further discussed under old section 46.

JUDGMENTS OF THE COURT OF REVIEW IN QUEBEC.

OLD SECTION 40: "In the Province of Quebec an appeal shall lie to the Supreme Court from any judgment of the Superior Court in Review where that Court confirms the judgment of the Court of first instance, and its judgment is not appealable to the Court of King's Bench, but is appealable to His Majesty-in-Council.

Old sec. 41, assessment appeals.

In 1918 by 9 Geo. V. c. 76 of the Statutes of Quebec the Court of Review was abolished. This section therefore is effete and has not been reproduced in the new legislation.

ASSESSMENT APPEALS.

OLD SECTION 41: as amended by 8-9 Geo. V. c. 7, reads, "An appeal shall lie to the Supreme Court from the judgment of any court of last resort created under provincial legislation to adjudicate concerning the assessment of property for provincial or municipal purposes, in cases where the person or persons presiding over such Court is or are by provincial or municipal authority authorized to adjudicate, and the judgment appealed from involves the assessment of property at a value of not less than $10,000.

"Provided that the valuation of the property assessed shall not be varied by the Court unless it is satisfied that in fixing or affirming it, such Court of last resort in the province has proceeded upon an erroneous principle; and, instead of itself fixing the amount of an assessment, which in its opinion should be varied, the Court may remit the case to such Court of last resort in the province, to fix the same in accordance with the principle which the Court declares to be applicable."

This section is derived from an amendment to the Supreme Court Act, introduced in Parliament in 1889, for the purpose of giving an appeal in assessment cases when the appeal involved the assessment of property at value of not less than $10,000. The language of the amendment was inadequate to carry out the intention of Parliament, but was changed by the revision of the Statutes of 1906. Since this latter date such appeals have frequently been heard by the Supreme Court (see Supreme Court Practice, Vol. II., p. 41 *et seq.*), although the tribunal appealed from was in some cases only a municipal body appointed by provincial legislation. In 1918 (8-9 Geo. V. c. 7), Parliament amended this section as it appeared in the Revised Statutes, so that an appeal was denied unless it was based upon some erroneous principle. The present statute has eliminated assessment appeals as such altogether, but these cases may still be appealed under new sections 36 and 37, whether the judgment appealed from is or is not a judgment of the highest Court of final resort in the province. The effect of the new legislation on assessment appeals is as follows. If the highest Court of final resort in the province has jurisdiction conferred upon it in cases of assessment appeals, then an appeal will be to the Supreme Court under section 36, as of right, if the amount in controversy exceeds $2,000; but if the

amount involved is less than $2,000, the Supreme Court will have jurisdiction only if leave is granted by such highest Court of final resort. A further right of appeal is given by section 41 by leave of the Supreme Court, although leave has been refused by the Provincial Court in certain cases therein set out. Old sec. 41, assessment appeals.

If the highest Court of final resort in the province has no jurisdiction under provincial legislation, and the final judgment below is that of some municipal body, Court or Judge of inferior jurisdiction or a Superior Court which is not the highest Court of final resort, in all these cases an appeal will lie under section 37 if more than $2,000 is involved, by leave of the highest Court of final resort.

It will be perceived that the old legislation which required that the judgment appealed from should involve an assessment of $10,000 no longer applies. If the judgment is that of the highest Court of final resort and the amount in controversy exceeds $2,000 an appeal lies of right, and leave may be granted in any case under $2,000 in the discretion of the highest Court of final resort in the province. The provision in the amendment of 1918, which limited assessment appeals to cases where the Court below was alleged to have proceeded upon some erroneous principle, has disappeared. It is not to be overlooked that the expression 'judicial proceeding' in sections 36 and 37, by the interpretation clause excludes proceedings when the Court appealed from has exercised merely a regulative, administrative or executive jurisdiction.

PER SALTUM APPEALS.

Old Section 42: "Except as otherwise provided in this Act, or in the Act providing for the appeal, no appeal shall lie to the Supreme Court, but from the highest Court of last resort having jurisdiction in the province in which the action, suit, cause, matter or other judicial proceeding was originally instituted, whether the judgment or decision in such action, suit, cause, matter or other judicial proceeding was or was not a proper subject of appeal to such highest Court of last resort; provided that an appeal shall lie directly to the Supreme Court without any intermediate appeal being had to any intermediate Court of appeal in the province,—

"(a) From the judgment of the Court of original jurisdiction by consent of parties;

"(b) By leave of the Supreme Court or a Judge thereof from any judgment pronounced by a Superior Court of equity or by any Judge in equity, or by any Superior Court in any action, cause, matter or other judicial proceeding in the nature of a suit or proceeding in equity; and

Old sec. 42, per-saltum appeals.

" (c) By leave of the Supreme Court or a Judge thereof from the final judgment of any Superior Court of any province other than the Province of Quebec in any action, suit, cause, matter or other judicial proceeding originally commenced in such Superior Court."

It has been pointed out (*ante*, p. 5), that in the Supreme Court Act as originally passed it was not contemplated that there should be any appeal to the Supreme Court, from any Court other than the highest Court of final resort in the province, except by consent. Later an appeal was given in equity cases although the judgment was not that of the highest Court of final resort. This legislation was continued through the various revisions of the Act and appears as section 42, above. This right of appeal is preserved by section 37 of the new Act with some modifications, and now extends to the Province of Quebec not heretofore covered. The most material change made is that the leave which formerly had to be obtained from the Supreme Court or a Judge thereof, now can be given only by the highest Court of final resort in the province, and the appeal by consent is limited to cases where the matter in controversy involves more than $2,000. The exception provided by the first paragraph of section 42 in favour of appeals given by other statutes such as criminal appeals, election appeals, admiralty appeals, are still preserved by new section 43.

CONCURRENT JURISDICTION.

The last paragraph of new section 37 (a) requires further consideration, namely, 'cases in which the highest Court of final resort has concurrent jurisdiction with the Court from which it is sought to appeal.' Under the old section there were many cases in which the Superior Court or the High Court had concurrent jurisdiction with the Court of Appeal of the province. In these casea if the judgment was that of the Superior Court or the High Court no appeal lay to the Supreme Court of Canada, although had the judgment been that of the Court of Appeal it would have been susceptible of a further appeal to the Supreme Court (*vide Cedar Rapids* v. *Lacosts*, 1914, A. C. 569). In auch a case the only redress waa an appeal to the Judicial Committee. There is now an appeal in such cases to the Supreme Court of Canada. The last paragraph of sec. 37 (a) continues the jurisprudence which prevailed under the old law, by excluding from appeal to the Supreme Court, judgments of auch inferior Courts as the Circuit Court of Quebec in cases where heretofore there was no appeal to the Court of King's Bench nor to the Supreme Court of Canada. The last paragraph of new aection 37, subject to tbe provisions for leave above set out, excludes, as did old section 42,

. . . appeals except from the highest Court of final resort in the province, unless an appeal is given by some other statute (section 43). New sec. 37. leave to appeal.

LEAVE TO APPEAL.

The cases in which the right of appeal to the Supreme Court is dependent upon leave granted by the highest Court of final resort in the province have become so extensive by the present legislation, and such discretion when exercised not being the subject of appeal, except indirectly, and to a limited extent under new section 41, great importance hereafter will be attached to the circumstances under which the Court should exercise its discretion in granting or refusing leave to appeal.

As the provincial Courts of appeal may feel disposed to adopt the jurisprudence, fairly well established by the Supreme Court of Canada in connection with applications for leave to appeal, it is thought desirable to collect these decisions at this point.

Lake Erie & Detroit River Rly. Co. v. Marsh, 35 S. C. R. 197.

In this case Mr. Justice Nesbitt speaking for the majority of the Court said: "In applications to this Court for special leave, it is bound to apply judicial discretion to the particular facts and circumstances of each case as presented. 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 any attempt to formulate any such rule might, therefore, prove misleading. The Court may indicate certain particulars the absence of which will have a strong influence in inducing it to refuse leave, but it by no means follows that leave will be given in all cases where these features occur. If a case is of great public interest and raises important questions of law and, yet, the judgment is plainly right, no leave should be granted. See *'Daily Telegraph' Newspaper Co.* v. *McLaughlin*, 2 L. T. L. R. 674.

"Where, however, the case involves matter of public interest or some important question of law, or construction of Imperial or Dominion Statutes, or a conflict of provincial and Dominion authority or questions of law applicable to the whole Dominion, leave may well be granted. Such cases, as we understand, came particularly within the purview of this Court which was established, as far as possible, to be a guide to provincial courts in questions likely to arise throughout the Dominion."

The Whyte Packing Co. v. Pringle, 42 S. C. R. 691.

Leave to appeal.

Here the Court said: "In the later case of *Lake Erie & Detroit River Rly. Co.* (35 Can. S. C. R. 197), the Court, after deliberation, determined that leave to appeal under this very sub-section should only be granted where the case involved matters of public interest or some important question of law.

"In the present case, however important the judgment of the Court of Appeal may be to the parties to the action, it only affects the construction to be placed upon a particular by-law of the respondent municipality, and an agreement entered into between it and the appellant, and the matter is, therefore, not one at all within the rule laid down in the case above referred to."

In re Henderson and Missouri (46 S. C. R. 627).

In refusing leave, the report says: "Their Lordships considering that the case raised no question of great public importance and that there was no other ground on which it could be granted."

Upper Canada College v. Toronto (55 S. C. R. 433).

In the report of this case (Supreme Court Practice, Vol. II., p. 58), it is said: "The appellant applied under section 48 of the Supreme Court Act for leave to appeal. The Court considered the case one of public interest and raised important questions of law, and the leave asked was granted."

Riley v. Curtis's & Harvey (59 S. C. R. 206).

In an application for leave to appeal under the Winding-up Act, Mr. Justice Mignault said: "The question as to the sufficiency of the reasons for granting leave to appeal is not now a new one, and certain rules have been laid down which I feel I should follow.

"Thus in *Lake Erie & Detroit River Rly. Co.* v. *Marsh* (35 Can. S. C. R. 197), where special leave to appeal was applied for under section 48, sub-section (e), of the Supreme Court Act—and I conceive that the same rule should be followed in cases arising under section 106 of the Winding-up Act—Mr. Justice Nesbitt stated that:—

"'Where the case involves matter of public interest, or some important question of law, or the application of imperial or domestic statutes, or a conflict of Provincial or Dominion authority, or questions of law applicable to the whole Dominion, leave may well be granted.'

"While the learned Judge disclaimed the intention of laying down any rule which would not be subject to future qualification, I think his statement of the reasons why the discretion to grant

leave should be exercised furnishes a convenient test for the guidance of the Court or of its Judges in a matter like this. And I would also think that where the only importance of a case is on account of the amount at issue, and where, however important the matter may be for the parties to the litigation, the only question to be determined is the construction and effect of a private contract, leave to appeal to this Court from the unanimous judgment of two Courts should not be granted. Leave to appeal.

"Moreover, *In re the Ontario Sugar Co.* (*McKinnon's Case*, 44 Can. S. C. R. 659), Mr. Justice Anglin refused leave to appeal, under section 106 of the Winding-up Act, on the ground that the proposed appeal raised no question of public importance, and that the affirmance or reversal by this Court of the judgment of the Ontario Court of Appeal would not settle any important question of law or dispose of any matter of public interest.

"This is emphatically the case here. The proposed appeal would deal exclusively with the question whether there has been a breach on the part of the company of the obligation it assumed under clause 7 of its agreement with the appellant, entitling the latter to claim the penalty of $50,000, and the affirmance or reversal of the judgment of the Quebec Court of King's Bench would not settle any important question of law or dispose of any matter of public interest.

"I can therefore see no reason why I should exercise the discretion given me by section 106 of the Winding-up Act and grant leave to appeal from the judgment of the Court of King's Bench. The motion of the appellant is dismissed with costs."

APPEALS GIVEN BY OTHER STATUTES.

OLD SECTION 43: "Notwithstanding anything in this Act contained the Court shall also have jurisdiction as provided in any other Act conferring jurisdiction."

This section is re-enacted in the new section 43, and has reference to appeals given by such Statutes as the Criminal Code, the Exchequer Court Act, the Railway Act, the Board of Commerce Act, &c.

FINAL JUDGMENTS ALONE APPEALABLE.

OLD SECTION 44: "Except as provided in this Act or in the Act providing for the appeal, an appeal shall lie only from final judgments in actions, suits, causes, matters and other judicial proceedings originally instituted in a Superior Court of the

Old sec. 44, final judgment.

Province of Quebec, or originally instituted in a Superior Court in any of the provinces of Canada other than the Province of Quebec."

This section, although retained in the revision of 1906 in view of its origin, was really unnecessary as section 38 of the old Act had already expressed the only cases in which an appeal to the Supreme Court could be taken from an interlocutory judgment. The present jurisprudence by virtue of the new Statute has already been discussed under old section 38. (*Ante*, p. 24).

JUDGMENTS IN EXERCISE OF JUDICIAL DISCRETION.

OLD SECTION 45: "No appeal shall lie from an order made in any action, suit, cause, matter or other judicial proceeding made in the exercise of the judicial discretion of the Court or Judge making the same; but this exception shall not include decrees and decretal orders in actions, suits, causes, matters or other judicial proceedings in equity or in actions or suits, causes, matters or other judicial proceedings in the nature of suits or proceedings in equity instituted in any Superior Court."

This section is substantially reproduced in new section 38. This section itself would preclude an appeal to the Supreme Court from a judgment refusing leave to appeal.

NEW TRIALS: The subject of judicial discretion in judgments upon motions for new trial are discussed, *ante*, p. 24).

QUEBEC—LIMITATIONS ON RIGHT OF APPEAL.

It has been pointed out, *ante*, p. 5, that the only limitation on appeals to the Supreme Court, from the judgment of the highest Court of final resort in a province contained in the original Supreme and Exchequer Court Act (38 V. c. II.), was to be found in section 17 ,and only applied to the Province of Quebec, where it was required that the value of the matter in dispute should amount to $2,000. A few years later (42 V. c. 39, s. 8), this language was amended, by giving an appeal also in certain cases which at that time formed the basis of a right of appeal from the Court of Appeals in Quebec to the Judicial Committee of the Privy Council. These added conditions were substantively those found in old section 46 (a), (b). These limitations, at first only applicable to Quebec, were substantially made applicable to Ontario by (60-61 V. c. 34), old section 48, and were extended to the Yukon by 2 Ed. VII. c. 35 (old section 49), and finally extended to all the other provinces of Canada by 8-9 Geo. V. c. 71, by an amendment to old section 48.

Old section 46 will be discussed along with old sections 48 and 49, *post*, 37, but the following cases have been decided since the publication of Vol. II. of the Practice. Old sec. 46, Quebec appeals.

La Ville de La Tuque v. Desbiens (Feb., 1920).

In this case the respondent in her declaration alleged that the appellants had passed a resolution ordering the opening of a new road over the properties of the *mis-en-cause*, and had purchased the property for over $2,000. The respondent alleged that the resolution of the council was illegal, null and void. The action was maintained by the Superior Court and its judgment confirmed by the Court of King's Bench, appeal side. The appellant sought to appeal to the Supreme Court of Canada, and the respondent moved to quash. The Court held that there was more than $2,000 involved. The Court also held that an appeal would lie under section 46 (b), as title to lands where rights in future might be bound was involved.

The City of Montreal v. Morgan (May 4, 1920).

In this case the appellant sought to have the building of the respondent demolished on the ground that it had been erected in contravention of a by-law of the City of Montreal. The respondent contended that the by-law was illegal, null and void. Its validity, however, was upheld by the Court of King's Bench, appeal side. The respondent moved to quash the appellant's appeal to the Supreme Court on the ground that the case did not fall within section 46. The Court held that the matter in controversy related to title to lands in which rights in future would be bound, and the motion to quash was refused with costs.

LIMITATION ON APPEALS.

It is proposed now to reproduce old sections 46, 48 and 49 as they stood previous to the present legislation which repealed them and discuss together *seriatim* the sub-sections of 46 along with the corresponding sub-sections of 48 and 49.

Old Section 46: "No appeal shall lie to the Supreme Court from any judgment rendered in the Province of Quebec in any action, suit, cause, matter or other judicial proceeding unless the matter in controversy,—

"(a) Involves the question of the validity of an Act of the Parliament of Canada, or of the legislature of any of the provinces of Canada, or of an Ordinance or Act of any of the councils or legislative bodies of any of the territories or districts of Canada; or

Old sec. 46, Quebec appeals.

"(b) Relates to any fee of office, duty, rent, revenue, or any sum of money payable to His Majesty, or to any title to lands or tenements, annual rents or other matters or things where rights in future might be bound; or

"(c) Amounts to the sum or value of two thousand dollars.

"2. In the Province of Quebec whenever the right to appeal is dependent upon the amount in dispute, such amount shall be understood to be that demanded and not that recovered, if they are different."

MANDAMUS, HABEAS CORPUS, ETC.

OLD SECTION 47: "Nothing in the three sections last preceding shall in any way affect appeals in Exchequer cases, cases of rules for new trials, and cases of *mandamus, habeas corpus,* and municipal by-laws."

There has been preserved in new section 42 all that was deemed of value in old section number 47. The exceptions made in former legislation in favour of appeals in 'Exchequer Cases' has been dropped as it is already covered by section 43, while the exception in favour of rules for new trials and municipal by-laws are not required in view of the alteration in the jurisdiction effected by section 36, and the extension of the power to grant leave to appeal.

OLD SECTION 48: "No appeal shall lie to the Supreme Court from any judgment of the highest Court of final resort now or hereafter established in any province of Canada, except the Province of Quebec, unless,—

"(a) The title to real estate or some interest therein is in question;

"(b) The validity of a patent is affected;

"(c) The matter in controversy in the appeal exceeds the sum or value of one thousand dollars exclusive of costs;

"(d) The matter in question relates to the taking of an annual or other rent, customary or other duty or fee, or a like demand of a general or public nature affecting future rights; or

"(e) Special leave of such Court of final resort in the province or of the Supreme Court of Canada to appeal to such last mentioned Court is granted.

"2. Whenever the right to appeal is dependent upon the amount in dispute such amount shall be understood to be that demanded and not that recovered, if they are different."

OLD SECTION 49: "No appeal shall lie to the Supreme Court from any final judgment of the Territorial Court of the Yukon

Territory, other than upon an appeal from the Gold Commissioner, unless,— Old sec. 46, Quebec appeals.

"(a) The matter in question relates to the taking of an annual or other rent, customary or other duty or fee, or a like demand of a public or general nature affecting future rights;

"(b) The title to real estate or some interest therein is in question;

"(c) The validity of a patent is affected;

"(d) It is a proceeding for or upon a mandamus, prohibition or injunction; or

"(e) The matter in controversy amounts to the sum or value of two thousand dollars or upwards."

AMOUNT INVOLVED: It will be seen that the limitation as to value of the subject-matter of appeal, is $2,000 in Quebec and the Yukon, while in Ontario under old section 48, and the other provinces of Canada by the amendment to 48 by 8-9 Geo. V. c. 7, the limitation as to value is $1,000. By the new legislation, 39 (a), more than $2,000 is required now to be in controversy, to permit of the general right of appeal given by new section 36. (See 36 and 39).

It is quite apparent from the new legislation, and the fact was expressly stated by the Minister of Justice in introducing it, that the provisions of 46, 48, 49 that were deemed of most consequence were those which fixed a monetary value upon the amount in controversy. Parliament also intended to abolish the anomalous and absurd provision, although it had the high authority which antiquity gives, that it was the amount demanded and not the amount recovered, which governed, when it was necessary to look at the amount involved between the parties, to determine whether or not an appeal lay to the Supreme Court.

The selection of more than $2,000 instead of $1,000 as the minimum sum required to give an appeal as of right to the Supreme Court, was made in view of the reduction of the purchasing power of money, the great increase in the volume of the country's business, the improvements in the provisions made for appeals in most of the provinces, and the increased cost of litigation particularly in the higher Courts.

LEAVE TO APPEAL.

Although when more than $2,000 is in controversy only, is a right of appeal given *de plano* in the new Act (39 (a)), yet as pointed out (*ante*, p. 15), a most extensive power of granting leave to appeal is conferred upon the highest Court of final resort throughout Canada by section 39 (b). The only limitations on this

Leave to appeal.

power of granting leave if the judgment is one of the Court granting leave, are first it must be pronounced in a judicial proceeding, second it must be final or if not final then a judgment upon a motion for a non-suit or directing a new trial. If it is a judgment of some other Court other than the highest Court of final resort it must be rendered in a judicial proceeding as provided in 37 (a), and the amount in controversy must exceed $2,000 under 39 (a). There is no limitation on the power to grant leave based upon the smallness of the amount involved or the nature of the action, where the judgment is one of the highest Court of final resort. It is only where leave is refused that a further opportunity is afforded in certain classes of cases of getting leave from the Supreme Court of Canada. It will be pointed out later that some of the difficulties which formerly arose in determining the jurisdiction of the Court under sections 46, 48 or 49, may still arise, when leave to appeal is applied for to the Supreme Court of Canada in certain cases under new section 41.

LEAVE TO APPEAL BY THE SUPREME COURT.

In deference to the ideas which still prevail in some quarters that the matters dealt with in clauses (a) and (b) of 46, (a), (b) and (d) of section 48, and (a) and (b) of section 49 of the old Act, are worthy of special consideration, provision was made by clauses (a), (b), (c), (d) and (e) of section 41 of the new Act that in such cases there might be an appeal by leave of the Supreme Court of Canada, if leave were refused by the Provincial Court of last resort.

It was thought that there might be exceptional reasons why an appeal should lay to the Supreme Court from the highest Court of final resort in certain other cases where the amount involved was under $2,000, and accordingly section 41 (f) of the new Act gives power to the Supreme Court of Canada to grant leave to appeal, when the same has been refused by the Provincial Court of last resort, where the matter in controversy exceeds $1,000 and the action originated 'in a Court of which the Judges were appointed by the Governor-General.' This last provision is intended to exclude appeals in actions begun in municipal tribunals, such as those discussed, *ante*, at p. 7). It will include, however, all judgments pronounced by County, District and other Courts, as well as Superior Courts where the Judges are appointed by the Dominion Government, and not by provincial authority. It is to be noted that when it is desired to make an application for leave to appeal to the Supreme Court, the applicant has 90 days in which to launch his motion, instead of the 60 provided for in section 69 of the Supreme Court Act.

CONSTITUTIONAL CASES.

Old secs. 46, 48, 49, constitutional cases.

If we analyse old sections 46, 48 and 49, it will be found that the clause which permitted of an appeal to the Supreme Court, when the matter in controversy involved the validity of a statute or ordinance in the Province of Quebec (section 46), was not carried into 48 and 49, but its importance is recognized in the new legislation by carrying it into 41 (a).

FUTURE RIGHTS.

46 (b) of the Supreme Court Act has been construed by the Court, and the words 'where rights in future might be bound' have been held to govern all the different subject matters set out in the sub-sections of that section (*Bank of Toronto* v. *Les Curé, &c.*, 12 S. C. R. 25), but great doubt was cast upon this construction by the Court in *Olivier* v. *Jolin*, 55 S. C. R. 41, and it would seem clear that the subdivision of old sub-section 46 (b) by the new Act whereby fee of office, duty, rent or revenue or any sum of money payable to His Majesty is placed in 41 (b), and the words 'where rights in future of the parties may be affected' is limited by 41 (c) only to 'taking of an annual rent, customary or other fee and other matter' *ejusdem generis* (*vide O'Dell* v. *Gregory*, 24 S. C. R. 661), that all the jurisprudence respecting 'future rights' as applied in Quebec cases to 'title to lands or tenements, annual rents' no longer has any application.

PATENT CASES.

In drawing up new section 41 (d), the draftsman when dealing with actions relating to lands, has adopted for all the provinces the language of section 48, and patent cases which are specially favoured in sections 48 and 49, but not in 46, are now provided for in new section 41 (e).

TITLE TO LANDS, ETC.

In the notes to section 46 in the 1st Vol. of the Supreme Court Practice it is pointed out that no part of the Act has caused more difficulty or called for interpretation more frequently than this section. To a lesser degree this statement applies to the corresponding provisions applicable to the other provinces of Canada (section 48). This difficulty has not been entirely done away with by the new Act, because the same question must arise whenever leave to appeal has been refused by the highest Court of

Old secs. 46, 47, 49, title to lands.

final resort in the province, in the matters set out in new section 41, and the unsuccessful party desires to obtain leave to appeal from the Supreme Court. The jurisdiction of the Supreme Court to grant leave must depend upon the Court first holding that the facts of the case bring it within one or other of the sub-sections of 41. In all such cases, advantage will be gained by consulting the decisions of the Court on the corresponding provisions of the Act. (Supreme Court Practice, Vol. I., pp. 209-249, 276-291, Vol. II., 47-58). Inasmuch as the precise language of old sub-section 46 (b) has not been reproduced in new section 41, it may be advisable to discuss some of the leading cases decided under the old section, and consider how they will apply to the language of the new.

'TITLE TO LANDS OR TENEMENTS.'

The jurisprudence of the Supreme Court is well settled that not only petitory actions, but also certain possessory actions, fall within the language of this sub-section. (*Delisle* v. *Arcand*, 36 S. C. R. 23, and other decisions on p. 217 *et seq.*, Vol. I. Sup. Ct. Prac.). There are however certain possessory actions which strictly do not involve title to lands, *e.g.*, servitudes, bornage, toll roads, and bridges, and these have in certain cases been held to be within the jurisdiction of the Supreme Court, because they were covered by the last part of section 46 (b), namely, 'other matters or things where rights in future might be bound,' which expression has been construed to mean 'matters or things *ejusdem generis* with title to lands and tenements' (*Odell* v. *Gregory*, 24 S. C. R. 663). So far, therefore, as the judgments in these cases were based upon the words 'rights in future might be bound,' they no longer will be authority for the jurisdiction of the Court, as new section 41 (d) does not contain these words. The only reference to 'future rights' in the new section is in sub-section (c), which is mainly copied from the corresponding provision in 48 (d), and which is as follows: "The taking of any annual rent customary or other fee or others matters by which rights in future of the parties may be affected." This gives the expression 'future rights' a very limited application, for 'annual rents' has been construed as limited to 'rentes foncières' or ground rents, and does not include an annuity under a will or like charge or obligation. There has been no decision of the Court construing the expression 'customary or other fee.' Where the word fee has been construed (*Bank of Toronto* v. *Les Curé*, 12 S. C. R. 31, *Odell* v. *Gregory*, 24 S. C. R. 661), it has been limited to a fee payable to His Majesty.

TAXES, ASSESSMENTS.

Old secs. 46, 48, 49, taxes and rates.

Another very important class of cases in which the Supreme Court has exercised jurisdiction under the words of 46 (b) 'title to lands and tenement' and 'other matters or things where rights in future might be bound' are actions relating to taxes, rates and assessments where the amount involved was under $2,000. Had not this jurisprudence been supported by the authority of a long line of decisions of the Supreme Court, it is difficult to discover the grounds for holding that actions of this kind have any relation to title to lands or other matters or things *ejusdem generis* with title to lands where rights in future might be bound. The Supreme Court decisions quite technically and arbitrarily distinguish between actions to annul municipal by-laws affecting the assessment of lands, proceedings to set aside assessment or valuation rolls, and proceedings to recover or prevent the collection of taxes payable under municipal by-laws, while a further distinction has been made between actions regarding these matters, where the proceedings were commenced by writ of summons, and those in which the proceedings began by a motion to quash a by-law. The new legislation, it is hoped, has swept away all these artificial distinctions. In no case of this class unless the amount involved exceeds $2,000 can there be an appeal to the Supreme Court, except by leave of the highest Court of final resort in the province, and the provision of 41 for an appeal by leave of the Supreme Court, would appear not to apply to any of these tax cases, because of the absence of the words 'other matters or things where rights in future might be bound or any similar clause following the words' title to real estate or some interest therein in section 41 (d).

Since the publication of Vol. II. of the Supreme Court Practice the following decisions, with respect to the amount in controversy and the title to lands, have been pronounced.

RETRAXIT.

The Shives Lumber Co. v. Price Brothers (58 S. C. R. 21).

In an action brought to recover $3,616.35, as the value of timber cut on limits of which the boundaries were in dispute, the claim was reduced at the trial by consent to $1,367.45. It was held by a majority of the Court that the proceedings out of which the appeal arose involved a controversy regarding title to lands.

ACTION UNDER 'FATAL ACCIDENTS ACT'—DAMAGES.

Magill v. Moore (59 S. C. R. 9).

Old secs. 46, 48, 49 amount in controversy.

Where a judgment apportioned the damages, $500 to the father and $1,000 to the mother, it was held by the Supreme Court that as the above Act only permitted one action to be brought for the entire damages sustained by a class, and the appeal had to be from the judgment as a whole, the full amount of $1,500 was in controversy and the Court had jurisdiction.

TITLE TO LANDS—TIMBER LIMITS.

Breakey v. Metgermette Nord (60 S. C. R. 302).

In an action to set aside a valuation roll, the appellants alleged that, as to some of the properties assessed, they owned neither the soil nor the right to cut timber, and as to others they had merely the right to cut timber, but the respondents had undertaken to value the right to cut timber, separately from the soil, and to assess them as owners of such right. It was held that the Supreme Court had jurisdiction to hear the appeal.

AMOUNT IN CONTROVERSY.

46 (c) "Unless the matter in controversy amounts to the sum or value of $2,000."

48 (c) "Unless the matter in controversy in the appeal exceeds the sum or value of one thousand dollars exclusive of costs."

New section 39 (a) which is substituted for section 46 (c) and 48 (c) adopts the language of 48 (c).

46 (2): "In the Province of Quebec whenever the right to appeal is dependent upon the amount in dispute, such amount shall be understood to be that demanded and not that recovered, if they are different."

48 (2), which applies to the other provinces of Canada, is to the same effect.

These provisions are not continued in the new Act as pointed out above. The change in language now found in new section 39 (a), and the elimination of old sections 46 (2) and 48 (2) has done away with the anomaly which formerly prevailed of allowing in Quebec an appeal because more than $2,000 was demanded, although the judgment might be for only $100, while in the other provinces it was the amount of the judgment which always governed. The rule is now uniform throughout Canada that it is

tho amount in controversy in the appeal which hereafter governs, not the amount demanded, when they are different. Old secs. 46, 48, 49, amount in controversy.

AMOUNT MAY BE ESTABLISHED BY AFFIDAVIT.

It is pointed out later in dealing with section 49 (a) of the old Act that the amount in controversy may be established by affidavit. This provision is repeated in new section 40.

INTEREST AND COSTS NOT INCLUDED.

Section 40 also specifically provides that interest and costs are not to be included in determining the amount in controversy.

SPECIAL LEAVE TO APPEAL EXCEPT IN QUEBEC.

48 (c) is not reproduced so far as it gives power to grant leave to appeal in all cases to the Supreme Court of Canada. A prominent feature of the new legislation is the increased importance attached to the judgments of the Provincial Courts of appeal, in that they alone, subject to a comparatively slight exception, are empowered to grant leave to appeal to the Supreme Court.

YUKON APPEAL.

Old section 49 was adopted from the Ontario section 48 with respect to tho Yukon by 2 Ed. VII. c. 35, s. 4. The extent to which it differs from the parent section is no longer of importance, as the Yukon is now in the same position as to appeals as the other provinces of Canada.

AMOUNT IN CONTROVERSY—HOW DETERMINED.

49 (a): "Where the right to appeal depends upon the amount or value of the matter in controversy, and no specific sum is claimed, the amount or value of the matter in controversy may be proved by affidavit or affidavits."

This sub-section was added to the old Act by 3-4 Geo. V. c. 51, s. 5, and applied not only to section 49, but to 46 and 48 as well. Its effect is continued by new section 40.

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