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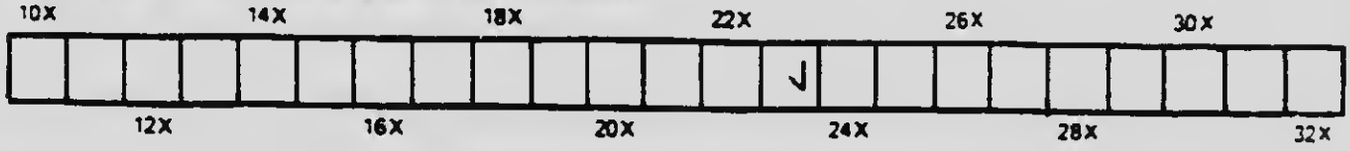

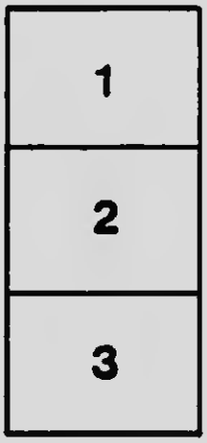

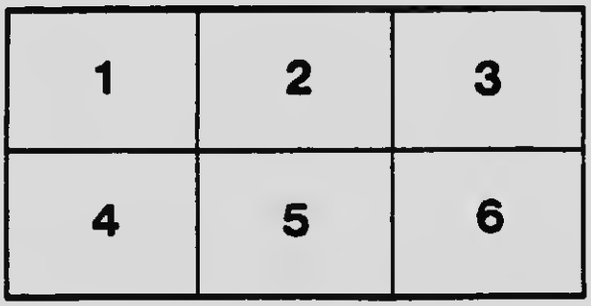

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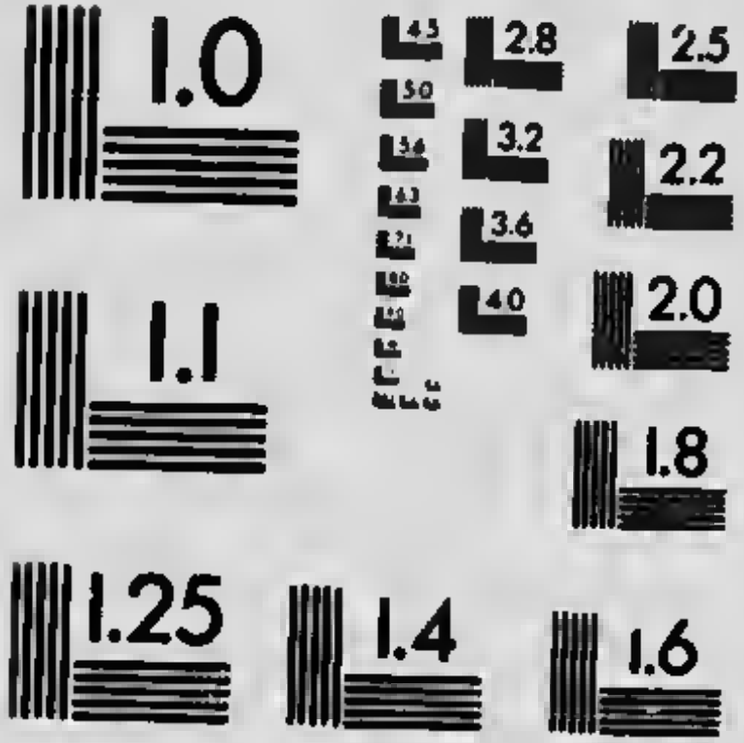

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THE SUPREME COURT ACT

R.S. c. 139 (1906)

PRACTICE

AND

RULES

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

BY

EDWARD ROBERT CAMERON

ONE OF HIS MAJESTY'S COUNSEL

AND

REGISTRAR OF THE COURT

2ND EDITION

TORONTO:
ARTHUR POOLE & CO.
1913

TO

THE HONOURABLE CHARLES FITZPATRICK,

CHIEF JUSTICE OF CANADA

TO WHOSE CORDIAL SYMPATHY AS

MINISTER OF JUSTICE

ANY IMPROVEMENT IN THE FORM AND LANGUAGE OF THE PRESENT

SUPREME COURT ACT

IS DUE,

THIS WORK

WITH HIS PERMISSION

IS

MOST RESPECTFULLY DEDICATED.

(DEDICATION FIRST EDITION OF PRACTICE.)

PREFACE TO FIRST EDITION.

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

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

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

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

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

"The matter having been brought to the attention of the Honourable the Minister of Justice, he has instructed the

writer to draft a Bill containing the proposed amendments and submit it to the Attorneys-General and the Bar Associations of the different Provinces of Canada, for their consideration.

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

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

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

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

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

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

"The reason for this is obvious, when we examine critically the sections of the Act dealing with jurisdiction. We find there a great lack of precision in the expression of the mind of Parliament, and the sections are so ill-arranged that even after a very careful and minute examination it is often difficult to determine whether the case is appealable or not.

"In the decisions we frequently find the judges themselves divided in opinion with respect to the jurisdiction of

the Court in the case before them for consideration; and if there is room for members of the Court to disagree, it is not to be wondered at, that we frequently find the Bar hopelessly at sea in this matter."

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

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

E. R. CAMERON.

OTTAWA, November 16th, 1906.

PREFACE TO SECOND EDITION.

The present work contains all the material to be found in the first edition of my volumes on the Practice of the Supreme Court (1906), and the Rules of the Supreme Court (1907), with all the reported decisions of the Court since these editions were published dealing with practice and procedure, and in addition contains a large number of decisions, including some in the Privy Council, not elsewhere reported, but which it is believed will prove of assistance, particularly where the jurisdiction of the Court is in question.

In the Provinces of Ontario and Quebec, and in the Yukon Territory, statutory provisions have been made by the Supreme Court Act for preventing any further appeal beyond the highest provincial court. There have been many decisions of the Supreme Court with respect to these limitations which, on their face, are often difficult to reconcile. In the present edition these cases are grouped and the classes differentiated, so as to facilitate the practitioner in his inquiry as to the hearing of the decisions of the Court upon the case he may have in hand.

The writer has also analysed the decisions bearing on the jurisdiction of the Court with respect to final and interlocutory judgments, discretionary judgments, new trials, leave to appeal to the Privy Council, etc., with the same object of elucidating the *ratio decidendi* in each case, and presenting the decisions in a form which will simplify the inquiry to the lawyer desiring information respecting the same.

During the last few years the Judicial Committee of the Privy Council has in correspondence between its Registrar and the writer, some of which is printed in this work, recommended Canadian lawyers to prepare and print their cases, on appeal to the Privy Council, in Canada. I have therefore in the present edition added largely to the text relating to such appeals, with a full set of forms. The Privy Council Rules revised and consolidated are printed as an appendix.

It has recently been held that admiralty cases are now appealable direct to the Privy Council without leave, and the application to allow bail is now made in the Supreme Court. Information and forms are given in this edition.

On the suggestion of some members of the Court, for convenience of reference, the Supreme Court Act is reproduced from the Revised Statutes of Canada, as an appendix.

E. R. CAMERON.

OTTAWA, Nov. 4th, 1912.

ADDENDA ET CORRIGENDA.

(Page 24.)

Bil[illegible]s v. Cassidy, Oct. 7th, 1912.

In this case the plaintiff, respondent, brought an action against the defendant, appellant, claiming damages for negligence. The trial judge dismissed the action holding that the plaintiff's contributory negligence was the cause of the accident. The Court of Appeal reversed this judgment and referred the action back to the trial judge to assess, on the evidence given at the trial, what damages plaintiff had sustained by reason of the matters set out in the statement of claim, and ordered the defendant to pay the plaintiff such sum as the trial judge might find the plaintiff entitled to as damages; and further ordered the defendant to pay the plaintiff the costs of the action including the costs of the reference.

When the case was called in the Supreme Court counsel for the defendant, appellant, admitted that he was unable to distinguish this case in principle from the decisions of the Supreme Court in *Wenger* v. *Lamont* and *Crown Life* v. *Skinner*, and the appeal was accordingly quashed for want of jurisdiction.

Vide Dunn v. *Eaton*, Oct. 22nd, 1912; and *Kilmer* v. *Beach*, Nov. 6th, 1912; *Hesseltine* v. *Nellis*, Nov. 11, 1912 (reported in part *sub nom Windsor, etc.* v. *Nellis, infra*, p. 24), not reported at this date.

(Page 43.)

Roberts v. Piper, Oct. 6th, 1910.

A motion was made to quash appeal for want of jurisdiction. The papers filed showed that Mr. Justice Clement sitting in chambers made an interpleader order in the usual form, directing the parties to proceed to trial of an issue in the Supreme Court of British Columbia, and reserving further directions and costs. The issue was tried before Morrison, J. It was held that the property in question was not the property of the plaintiffs as against the defendants, and the court directed how money in court should be paid out. On

appeal to the full court this judgment was set aside and judgment directed to be entered for the appellants in that court. Also the court adjudged that the property in question belonged to the plaintiff C. T. W. Piper and was exigible under the execution in the sheriff's hands. From this judgment an appeal was taken to the Supreme Court and respondent moved to quash on the ground that judgment in interpleader issue was not final.

The motion was dismissed with costs.

(Page 235.)

Lapointe v. Montreal Police Society, 35 Can. S.C.R. 5.

The action was for $62.50, the first monthly instalment of a life pension at the rate of $750 per annum, and for a declaration that plaintiff was entitled to such annual pension during the remainder of his life. On a motion to quash an appeal to the Supreme Court, affidavits were filed to shew by actuary tables that the pension was worth $7,000. Held, that the amount in controversy was the monthly instalment of $62.50, and the motion was allowed.

(Page 238.)

Winteler v. Davidson, 34 Can. S.C.R. 274..

The plaintiff had a judgment, payable in quarterly instalments, for $1,500 per annum for alimony against her husband. Upon his death his executors and universal legatees refused to continue the payment. Three months after the husband's death a case was stated for the opinion of the Superior Court under article 509, Code of Procedure (Quebec), in which the facts were admitted, and the question to be determined was the right of the appellant to be paid the annuity after her husband's death. The appellant succeeded in the Superior Court, but this judgment was reversed by the Court of King's Bench. An appeal to the Supreme Court was quashed, the Court holding that the matter in controversy was the amount due when the case was stated, and was under $2,000; that the abstract right to the annuity alone was in question, and that the future payments to which appellant would have been entitled had she succeeded, was not "future rights" within the meaning of the statute.

(Page 260.)

Clement v. La Banque Nationale, 33 Can. S.C.R. 343.

On a contestation of a statement of an insolvent trader by a creditor claiming a sum exceeding $2,000, the judgment appealed from condemned appellant under article 888 C.P. (Quebec) to three months' imprisonment.

It was held that there was no sum of money in controversy, and no appeal would lie to the Supreme Court.

(Page 296.)

In re Sprague, May 15th, 1911.

The following consent judgment was approved and made by the Court:

"And this Court doth further order and adjudge that paragraph 1 of the Minutes of Judgment of the Court of Appeal for Ontario, bearing date the 31st day of December, A.D. 1909, be reversed and set aside and that the costs of all parties in this Court and in the Court of Appeal for Ontario should be paid out of the fund in question, and that the costs of the Executors so to be paid should be taxed as between solicitor and client."

Vide also *in re Rispin,* Nov. 18th, 1912, not yet reported.

(Page 341.)

In re Placide Richard, 38 Can. S.C.R. 394.

On an application to a judge of the Supreme Court for a writ of *habeas corpus,* it was held by the majority of the court that he could refer it to the Court which would then have jurisdiction to hear and dispose of it.

(Page 441.)

Brown v. Gugy, 2 Moo. N.S. 341.

Lord Kingsdown said:

"Two of the judges have sent some long and very elaborate arguments supported by a citation of numerous authorities against the decision of the majority of the Court. It was asserted by the respondent, without any contradiction on the part of the appellant, that these arguments were not delivered by the dissenting judges at the hearing of the cause but were first made known to the parties by being printed as

part of the record before us. If the statement thus made be accurate, we must say with all respect for these learned persons, that the course so pursued by them appears to us open to objection. We think that their reasons for dissenting from their colleagues should have been stated publicly at the hearing below, and should not have been reserved to influence the decision in the Court of Appeal. We have thought it due to the general interests of the suitors in the colony to make these remarks, in order to prevent what has been done from growing into a practice, though it may not have produced any mischief in this particular case."

(Page 441.)

Dufresne v. Desforges, Nov. 4th, 1912.

Counsel moves to have the notes of Mr. Justice Tellier filed as part of the case removed from the record on the ground that they had been prepared and delivered long after the judgment of the court below and since the present appeal to this Court had been launched. The Court said:

"Appeals are by the statute, and rules to be heard on a case settled in the court below, and no additional material in ordinary cases will be looked at. At the same time the Court will not preclude itself in a proper case and upon a proper application, from receiving reasons for judgment which have been handed down after the appeal has been launched. In the present case, the appellant is given leave to make such an application supported by affidavit."

(Pages 467, 536.)

The practice in the Registrar's office is to finally arrange the order in which the cases will appear in the printed list on the last day for inscription (*vide* Rule 37), and lawyers desirous of grouping their cases so that they may be heard together should instruct their agents in advance. This particularly applies to cases coming from the Western Provinces, where the time occupied in travelling makes it specially important to counsel not to be detained in Ottawa longer than is necessary.

(Page 496.)

Rule 12. A case printed on both sides of the paper as required by the Rules of the Court of Appeal for Ontario, but otherwise complying with the Supreme Court Rules, will be accepted in the Supreme Court.

(Page 541.)

S.S. Tordenskjold v. Horn Joint Stock Co., Oct. 13th, 1908.

In this appeal counsel, with consent of all parties, having applied to have case put at foot of Ontario list owing to fact that Mr. L. P. Pelletier, K.C., of counsel for respondent is a candidate at the Dominion election approaching, order was granted as asked.

(Pages 567 and 784.)

Re Halifax Election, 39 Can. S.C.R. 401.

The Acting Chief Justice said:

"I observe that these appeals have been placed at the foot of the Maritime List, and understand from the registrar that it was done by consent of counsel. Since I have had the honor of a seat on this bench, election cases have invariably been placed by the registrar at the top of the list. In such cases the convenience of counsel alone is not to be considered. The electorate is also interested, and this very case shews that counsel for the parties, even for the petitioner, care very little for the public. Speaking for the court, and with the sanction of the Chief Justice, I wish it understood that in the future, as in the past, no election appeal is to be placed anywhere except at the top of the whole list unless otherwise specially ordered by the court or a judge."

(Page 795.)

Halifax Board of Trade v. Grand Trunk Rly. Co., 44 Can. S.C.R. 298.

A judge of the Supreme Court will not grant leave to appeal from the decision of the Board of Railway Commissioners on a question of jurisdiction if he has no doubt that such decision was correct.

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REVISED STATUTES OF CANADA

(1906.)

CHAPTER 139.

AN ACT RESPECTING THE SUPREME COURT OF CANADA.

SHORT TITLE.

1. This Act may he cited as the Snpreme Conrt Act. R.S., c. 135, e. 1.

INTERPRETATION.

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

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

(b) 'jndge' means a jndge of the Supreme Court of Canada and inclndes the Chief Justice;

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

(d) 'jndgment,' when nsed with reference to the Court appealed from, inclndes any jndgment, rule, order, decision, decree, decretal order or sentence thereof; and when nsed with reference to the Snpreme Court, inclndes any jndgment or order of that court;

Meaning of expression "judgment."

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

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

Power of Court to vary its own judgment.

"Every court has an inherent jurisdiction to put its records in correct form on application or *ex mero motû* in default of application, and the parties are not at liberty, either by consent express or implied, or by waiver or acquiescence to bind a court to accept as its judgment any-

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thing else but that which the court intended to be its judgment." Per Taschereau, C.J., *C.P.R.* v. *Blain*, 36 Can. S.C.R. 159.

Penrose v. Knight, 25th June, 1879.

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

Ritchie, C.J., in Chambers.

Reeves v. Gerriken, Cont. Dig. 1122, 10th April, 1880.

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

Soulanges Election Case, 28th March, 1885.

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

Smith v. Goldie, Cout. Dig. 1123, 9th December, 1885.

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

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

Motion to amend final judgment in appeal. The Court when delivering judgment during the previous session, stated that a sum of $2,399 should be awarded to plaintiff. The order in appeal providing for the payment of that sum was

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

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

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

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

The judgment on appeal (31 Can. S.C.R. 196) ordered a variation of the decree appealed from so that appellant should be entitled to immediate specific performance, but that respondent should have his costs in the orginal action. On motion before the full Court to vary the minutes of judgment as settled by the Registrar it was ordered that a clause should be inserted as follows. "That the appellant should not be obliged to pay the costs of the original action unless and until the respondent delivers to him a good and sufficient conveyance in fee simple of the property mentioned." No costs were allowed on the motion.

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

The Supreme Court had refused a writ of prohibition to prevent the taxation of respondent's costs by the county

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

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

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

Chambly Manufacturing Co. v. Willet, 34 Can. S.C.R. 502.

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

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

Judgment.

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

Jackson v. Drake, Jackson & Helmcken, Cont. S. C. Cas. 384.

Appeal from the Supreme Court of British Columbia.

Motion on behalf of the appellant to vary the minutes of the judgment allowing the appeal, made on special leave obtained on 29th May, 1906, by providing that the said appellant should recover the amount sued for with costs "against the said respondents," instead of "against H. Dallas Helmeken, the surviving defendant."

The action was against a partnership, and on the appeal by the plaintiff, they were represented by the surviving partner only. In allowing the appeal (37 Can. S.C.R. 315, at pages 319-320) the court inadvertently directed that judgment should be entered for the plaintiff against the surviving defendant only.

After hearing counsel for the parties, respectively, the Court ordered that the amendment should be allowed as applied for, without costs.

Rutledge v. United States Savings & Loan Co., 38 Can. S.C.R. 103.

The plaintiffs' action was maintained with costs in the courts below, but on appeal, it was dismissed with costs by the Supreme Court of Canada (37 Can. S.C.R. 546), no reference being made to certain costs incurred by the plaintiffs in respect of several defences which the defendant had abandoned in the trial court. On motion to vary the minutes, the matter was referred to the judge of the trial court to dispose of the question of the costs on the abandoned defences.

Rehearing—Privy Council.

The practice as to re-hearing in the Privy Council is thus expressed by Lord Brougham, *Rajundernarain Rae* v. ***Bijai Govind Sing***, 1 Moo. P.C. 117.

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"It is unquestionably the strict rule, and ought to be distinctly understood as such, that no cause in this Court can be re-heard, and that an order once made, that is, a report submitted to His Majesty and adopted, by being made an order in Council, is final, and cannot be altered. . . . Whatever, therefore, has really been determined in this Court must stand, there being no power of re-hearing for the purpose of changing the judgment pronounced; nevertheless, if by misprison in embodying the judgments, errors have been introduced these Courts possess, by common law, the same power which the Courts of Record and Statute have of rectifying the mistakes which have crept in. . . .

"The House of Lords exercises a similar power of rectifying mistakes made in drawing up its own judgments, and this Court must possess the same authority. The Lords have, however, gone a step further, and have corrected mistakes introduced through inadvertence in the details of judgments; or have supplied manifest defects in order to enable the decrees to be enforced, or have added explanatory matter, or have reconciled inconsistencies. But with the exception of one case in 1669 (Dumaresq v. Le Hardy), of doubtful authority here, and another in Parliament of still less weigh in 1642) (which was an appeal from the Privy Council to Parliament, and at a time when the Government was in an unsettled state), no instance, it is believed, can be produced of a re-hearing upon the whole cause, and an entire alteration of the judgment once pronounced."

That the House of Lords has power to correct an error in a decree of order arising from a slip or accidental omission, whether there is or is not a general order to that effect, has been held in *Hatton* v. *Harris* (1892) A.C. 547. *Milson* v. *Carter* (1893) A.C. 638.

Binding effect of decisions—Stare Decisis.

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

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

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

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

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Formal judgment as entered—effect to be given to.

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

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

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

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

B., a passenger on a railway train, was thrice assaulted by a fellow passenger during the passage. The verdict at the trial was maintained by the Court of Appeal, but the Supreme Court ordered a new trial unless B. would consent to his damages being reduced (34 Can. S.C.R. 74). In the reasons for judgment it was said that the damages could only be recovered for the third assault, but the formal judgment of the Court ordered a new trial generally unless the plaintiff accepted the reduced amount of damages. The plaintiff having refused to accept such amount, the new trial was had and B. again obtained a verdict, the damages

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being apportioned between the second and third assaults. On appeal to the Supreme Court of Canada from the judgment of the Court of Appeal maintaining this verdict, *Held*, that the formal judgment of the Supreme Court in the first appeal, as entered, was not at variance with the written memorandum read in open court as the judgment of the Court, and that the reasons of judgment were mere opinions which might be considered as part of the judgment in so far as they disclosed the grounds upon which it was rendered, but they could not vary the text or *dispositif* of the formal judgment, and that the appellants had only themselves to blame if they were deprived of the benefit of the former judgment of the Supreme Court as they raised no objection to the judgment as settled, although they were duly notified and appeared before the Registrar, and did not move to have the minutes varied before they were transmitted to the court below.

Stare decisis.

The subject of *stare decisis* is exhaustively discussed by Mr. Justice Anglin in *Stuart* v. *Bank of Montreal*, 41 Can. S.C.R. 516 at page 541 *et seq.*, where after reviewing all the Canadian and English authorities applies the principle of *stare decisis*, and holds himself bound to follow a previous decision of the Supreme Court.

Vide also *Shawinigan* v. *Shawinigan*, 43 Can. S.C.R. 650.

Constitution of Court giving judgment.

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

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

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

The Supreme Court of Nova Scotia, by the Nova Scotia Judicature Act, is composed of seven judges of whom four constitute a quorum. *Held*, that a quorum of four judges had jurisdiction to hear criminal as well as civil appeals.

Vide Booth v. *Ratté*, *supra*, p. 7.

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

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

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

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

In **Svensson v. Bateman, 42 Can. S.C.R. 146**, Duff, J., with whom Anglin, J., concurred, says:

"A proceeding thus incidental to the principal action, and not touching the rights of the parties in respect of the matters in controversy in that action, cannot be treated as a 'matter or other judicial proceeding' within the enactment under consideration. . . .

"There is, perhaps, some reason to think that this view is in conflict with the view of Strong, J., as indicated in his observation in Danjou v. Marquis (3 Can. S.C.R. 251, at p. 258), that the phrase 'final judgment' as used in the Supreme Court Act comprehends any order or judgment which is 'final as regards the particular motion or application and not necessarily final and conclusive of the whole litigation.' I do not think the learned judge could have meant to say that every order disposing of an interlocutory proceeding in the course of an action is, as such, a final judgment and appealable under the Supreme Court Act; if so, I must, with respect, dissent from that view."

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

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

"I do not hesitate to say that it is difficult to define what is a final and what is an interlocutory order, and I shall not

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attempt to give any definition. The Court of Appeal has not attempted to give an exhaustive definition, and the Legislature in the Judicature Act of 1875, sec. 12, has not given such a definition."

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

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

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

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

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

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

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

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

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

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

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

Sir F. H. Jeune concurred.

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

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

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

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On appeal the Supreme Court held that although in form this judgment was in one sense interlocutory and only upon a side issue, the controversy between the parties had been, as far as could be in a provincial court, determined and concluded, and although the judgment as to the will would not bind the Supreme Court on the subsequent appeal from a judgment in the action to set aside the deed it would remain in force as *res judicata* between the parties upon the validity of the will. The judgment, therefore, was final and the Supreme Court had jurisdiction.

Belcher & McDonald (1904), A.C. 429.

In this case the plaintiff brought an action to recover, first, the payment of the sum of $50,000 with interest thereon due on a note made by defendant McDonald to the plaintiff's testator, dated September, 19th, 1898, and secondly, the sum of $879.80, being for an unpaid balance.

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

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

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

City of Toronto v. The Metallic Roofing Co., Supreme Court. Aprtl 4th, 1906.

This was an action brought against the appellants claiming for loss and damage under a building contract, the sum of $7,137 and costs. The trial judge held that the plaintiffs were entitled to be paid for the work done, and that there should be a reference to the Master to take accounts on the footing of a *quantum meruit.* Before the accounts were

taken the defendants appealed from this judgment, but the appeal was dismissed. On a further appeal taken to the Supreme Court of Canada the respondents moved to quash for want of jurisdiction. S. 2, s.s. (e). Final Judgment.

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

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

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

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

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

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

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

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proceed to establish the line according to the *pretentions* of the defendants. The plaintiffs thereupon appealed to the Supreme Court, and the defendants moved to quash on the ground that the judgment appealed from was interlocutory and not final. After argument the motion to quash was refused.

In re Cushing Sulphide Fibre Co., 37 Can. S.C.R. 173.

A judgment setting aside an order made under the Winding-up Act for the postponement of foreclosure proceedings and directing that such proceedings should be continued, is not a final judgment within the meaning of the Supreme Court Act, and does not involve any controversy as to a pecuniary amount.

Final judgment—reference.

There is another class of cases in which very considerable difficulty may be found in determining whether or not the decision is final or interlocutory, namely, those cases in which a judgment has been given in a court below finally determining some legal principle involved in the action, but refers certain questions such as the damages sustained or the taking of accounts, etc., to some officer of the court and reserves the ultimate judgment until after the referee has made his report. In such a case three classes of appeals may arise; first, an appeal from the trial judge; second, an appeal from the referee; third, an appeal from the judgment of the court upon further directions after the referee has made his report. In the same cause, therefore, is this class of cases, there may be three separate and independent appeals to the Court of Appeal. The question arises, are these judgments of the Court of Appeal, or any of them, appealable to the Supreme Court. The conclusion to be drawn from the cases will be found, *infra*, p. 24.

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

In this case the plaintiff sued for a balance due on a building contract. Defendant denied the claim and by an incidental demand (counterclaim) claimed from the plaintiff damages for defective work. The Superior Court in 1877 gave judgment for the plaintiff and dismissed the incidental demand. In 1880 the Court of Queen's Bench on appeal found for the plaintiff, but held the defendant entitled to have the plaintiff's claim reduced by the cost

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of rebuilding the defective work, and remitted the case to the Superior Court to have this ascertained. Upon a report of experts, the Superior Court in 1881 gave judgment for the balance due to the plaintiff and this judgment was affirmed by the Court of Queen's Bench in 1882. On appeal to the Supreme Court of Canada from the last judgment of the Court of Queen's Bench, it was contended by the respondent that the present appellant not having appealed from the judgment of the Court of Queen's Bench in 1880, that judgment was *chose jugée*, and the correctness of it could not be raised upon the appeal from the judgment of the same court in 1882.

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

Taschereau, J., who gave the judgment of the majority of the Court, declined to express an opinion as to whether or not an appeal lay from the judgment of 1880, saying:—

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

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

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

The plaintiff, an employee, sued the defendant company for damages resulting from negligence of a co-employee. To this the company pleaded denying plaintiff's allegations

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generally and specially denying that the plaintiff ever was employed by the company; denying also the damages and any indebtedness, but not claiming that the action was prescribed. The trial judge dismissed the action because over one year had elapsed between the date of the accident and the bringing of the suit. The Superior Court in review reversed the judgment below, holding that prescription had not been pleaded and in any event had been waived by the conduct of the company; and proceeding to deliver the judgment which the court of first instance should have rendered, declared that the plaintiff was entitled to recover damages from the defendants, and ordered the cause to be remitted to the court of first instance for the purpose of determining the amount of such damages. The defendants appealed to the Court of Queen's Bench, and the plaintiff moved to quash the appeal.

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

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

Referring to *Shaw* v. *St. Louis* (*supra*, page 14), the appellant argued that he might eventually find himself precluded from appealing to the Supreme Court from the final judgment in the cause. As to this the Court said:—

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

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

The respondents had a contract with the Crown for public printing and supplying of stationery, but the contract did not expressly provide that the Crown should be bound to have all the work performed and material supplied solely by the respondents. The Public Printing Act, 32-33 V. c. 7, required that contracts for such work and material must be upon tender. The respondents alone had a contract with

the Crown arising out of a tender and made pursuant to such statute. The petition of the respondents alleged that the Crown had purchased large quantities from other persons without public notice of tender therefor, and without order in council, and in violation of the statute, to the loss and damage of the suppliants. To this the Crown pleaded, first, denying that it had purchased stationery from other parties as alleged, and also that the suppliants were not under the tender and contract entitled to supply all the paper required by the Crown.

S. 2, s.s. (c). **Final Judgment.**

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

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

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

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

In an action by a firm of solicitors to recover from their clients the amount of certain bills of costs, an order was made referring the bills to the taxing officer for taxation, who ruled that the plaintiffs must give defendants credit for a certain sum paid to one of the plaintiffs.

S. 2, s.s. (e). Final Judgment.

Statement of case—p. 3 of case says: Three actions to recover amounts claimed to be due on bills of costs were begun by writs issued on 6th July, 1881, by order made by these courts, p. 4 of case, the court ordered that all bills of costs rendered by the plaintiffs be referred to taxing officer in his capacity, with usual right of appeal, to certify and report results of his taxation. Costs of reference to be reserved to be disposed of by the court. Court orders plaintiff may recover amount due on said bills. The order was made on consent.

The plaintiffs' appeal to the Divisional Court from the report of the taxing officer was allowed, and this judgment affirmed by the Court of Appeal. On appeal to the Supreme Court, *Held*, per Strong, Gwynne and Patterson, J.J., that there was a great doubt respecting the jurisdiction of the Court to hear the appeal. Per Taschereau, J., the judgment appealed from was not final.

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

In an action by V. against a municipality for damages from injury to property by the negligent construction of a drain, a reference was ordered to an official referee "for inquiry and report pursuant to section 101, Judicature Act, and Rule 552 of the High Court of Justice." The referee reported that the drain was improperly constructed, and that V. was entitled to $600 damages. The Divisional Court held that an appeal was too late, no notice having been given within the time required by Cons. Rule 848, and refused to extend the time for appealing. On motion for judgment on the report by V. it was claimed on behalf of the municipality that the whole case should be gone into upon the evidence, which the Court refused to do. *Held*, affirming the decision appealed from, that the appeal not having been brought within one month from the date of the report as required by Cons. Rule 848, it was too late: that the report had to be filed by the party appealing before the appeal could be brought, but the time could not be enlarged by his delay in filing it; and that the refusal to extend the time was an exercise of judicial discretion with which an appellate court would not interfere. It was held also, Gwynne, J., dissenting, that the report having been confirmed by lapse of time and not appealed against, the Court on the motion for judgment was not at liberty to go into the whole case upon the evidence, but was bound to adopt the referee's findings and to give the judgment which

those findings called for. *Freeborn* v. *Vandusen*, 15 Ont. P.R. 264, approved of and followed.

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Union Bank of Halifax v. Dickie, 41 Can. S.C.R. 13.

In 1903 the United Lumber Co. executed a contract for sale to D. of all its lumber lands and interests therein, the price to be payable in three instalments at fixed dates. By a contemporaneous agreement the company undertook to get out logs for D., who was to make advances for the purpose. The agreement for sale was carried out and two instalments of the purchase money paid. At the time these contracts were executed the Union Bank had advanced money to the company and shortly after the contract for sale was assigned to the bank as security for such and for future advances. The company having assigned in insolvency the bank brought action against D. for the last instalment of the purchase money, to which he pleaded that he had paid in advance to the company and the bank more than the sum claimed. The trial judge held that the bank had no notice of the second agreement under which D. claimed to have advanced the money and gave judgment for the bank with a reference to ascertain the amount due. The full court set aside this judgment and ordered a reference to ascertain the amount due the bank and, if anything was found to be due, to ascertain the amount due to D. from the company. The bank sought to appeal from the latter decision.

The court quashed the appeal, saying:

"The effect of the judgment of record now appealed from setting aside and varying the trial judgment is a matter of procedure, and simply to substitute a clear and explicit judgment purely and simply of reference for a judgment that is by no means clear, but claimed to be one for costs with a reference therein virtually to find out whether it was right or wrong. Obviously all the court has done is to enable the parties to have every phrase of their case presented properly for a final adjudication and upon that being arrived at and passed upon by the appellate court of Nova Scotia, the case will be ripe for an appeal here if either of the parties desire then to come here.

"Whatever final judgment is given upon the referee's findings will be appealable here if worth while."

Grieve v. Tasker, (1906), A.C. 132.

Here a judgment was given in October, 1897, declaring the liability of the appellant, and on April 6th, 1898, the Supreme Court of Newfoundland made a final decree for

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payment by the appellant of $22,000. The Judicial Committee held that the order of October, 1897, was not final but interlocutory.

North Eastern Banking Co. v. Royal Trust Co., 41 Can. S.C.R. 1.

Where no appeal was taken from the referee's report as provided by the Exchequer Court Rules, and this report to become binding had to be confirmed by the Exchequer judge, it was held that a party not having appealed from the report was nevertheless entitled to appeal from the judgment of the Exchequer judge confirming the report.

Rules 213 of the Exchequer Court Rules provides for an appeal from the referee's report within 14 days, and Rule 214 provides that the report shall become absolute if not appealed against within the 14 days, but further provides that unless otherwise directed by the order of reference, judgment on such report will not be entered without an order thereon obtained upon motion for judgment.

Sinclair v. Coulthard, Feby. 15th, 1910, (not reported).

The statement of claim alleged that the defendant had assigned to plaintiff one-third share or interest in certain moneys due from the Dominion Government to the defendant in respect of a quarry; that the defendant received $13,590.00, and plaintiff claimed $4,530. Various defences were set up and a counterclaim asking to have the assignment delivered up to be cancelled, and damages, or that the assignment be rectified and action dismissed as premature.

The trial judge gave judgment for plaintiff for $4,530.97, interest from a certain date at 5 per cent., amounting in all to $4,776.19, and costs; counterclaim dismissed.

In the full court it was ordered that the appeal be allowed with costs to be debited against plaintiff on taking of accounts, and declared that the agreement in question did apply to the $13,590.00, and that plaintiff was entitled to one-third interest in same, but subject to a contribution by the plaintiff of one-third of the money properly expended by defendants in prosecuting the claims to the land and money covered by the said documents. It was further ordered that it be referred to the District Registrar to take an account and make inquiry of what moneys had been properly expended by the defendant in prosecuting the claims. Further directions and costs were reserved.

An appeal having been taken to the Supreme Court, the respondent moved to quash for want of jurisdiction, relying

on *Union Bank* v. *Dickie* (*supra*, 19), but the motion was refused. S. 2, s.s. (e). Final Judgment.

Wenger v. Lamont, 41 Can. S.C.R. 603. May 7th, 1909.

The plaintiffs' action was for rescission of contract to purchase certain cheese factories on the ground of misrepresentations, the plaintiffs tendering a reconveyance and asking repayment of moneys expended by them and interest. The defendant denied all false or fraudulent misrepresentation. The trial judge dismissed the action, holding that no misrepresentation had been established.

The notice of motion to the Divisional Court asked to have the judgment at trial set aside and for judgment in favour of plaintiffs with a reference as to damages, but the appeal was dismissed. An appeal was taken to the Court of Appeal.

In the reasons for appeal the appellants asked not only for rescission of the contract but also damages for the fraud practised upon them.

The judgment of the Court of Appeal adjudged that the appeal should be allowed with costs, and that it be referred to the local master at Woodstock to ascertain and state what damages, if any, the plaintiffs have sustained by reason of the fraud referred to in the pleadings, and that further directions and costs be reserved until the master shall have made his report.

It was held in the Supreme Court that there was no amount of $1,000 shewn to be involved, nor any order to pay what should be found to be the damage; that the judgment was not final. A motion to quash for want of jurisdiction was allowed.

Clarke v. Goodall, 44 Can. S.C.R. 284.

The pleading concluded by the plaintiff claiming, "1st, that it be declared that under the agreement of the 14th day of December, 1908, the plaintiff was entitled to receive from the defendant 20,000 non-assessable shares of stock of the Lawson Mine, Limited, or a 250th interest in the Lawson Mine, as the absolute purchaser and owner thereof."

2nd. That it may be declared that the plaintiff is entitled to receive payment out of court of the said sum of $5,000 and accrued interest and that the said sum with accrued interest may be paid out to him."

To this the defendant pleaded, amongst other things, that the agreement above mentioned was given on the under-

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standing on the part of both that it should only become operative when assented to by one Thomas Crawford, and that the said Thomas Crawford never assented to the agreement, and the same thereby became inoperative.

Upon this issue the action went down for trial before the Hon. Mr. Justice Riddell, who gave judgment on the 26th October, 1909, whereby he declared the agreement valid and subsisting and referred the cause to the official referee of the court to assess the damages which the plaintiff had sustained by reason of the breach of the contract, and reserved further directions and costs until the referee should have made his report. The referee made his report on the 8th April, 1910, assessing the damages at $8,000. From this an appeal was taken by the defendant before the Chief Justice of the Common Pleas, who reduced the damages from $8,000 to $5,200. The plaintiff then appealed to the Divisional Court where the damages were increased to $6,700, and subject to this variation the report was confirmed. The judgment of the Divisional Court was affirmed by the Court of Appeal.

A motion was then made to the Registrar of the Supreme Court sitting as a judge in Chambers to affirm the jurisdiction of the court to hear an appeal which was granted. On appeal to the full court one of the questions to be determined was whether the judgment was final or interlocutory, and on this point the court was unanimous that the judgment was not final, and reversed the order of the Registrar.

Crown Life v. Skinner, 44 Can. S.C.R. 617.

Motion to quash an appeal from a decision of the Court of Appeal for Ontario affirming the judgment at the trial in favour of the plaintiff.

The plaintiff as executrix of her husband, who had been an insurance agent, sued the Crown Life Insurance Co. for commissions on policies and renewals alleged to have been earned by said agent. The company denied liability and counterclaimed for money claimed to be due them from the agent. The trial judge gave judgment for the plaintiff, ordered a reference to take an account and reserved further directions and costs. The Court of Appeal having sustained this judgment the company sought to appeal to the Supreme Court. The respondent, plaintiff, moved to quash the appeal. The majority of the court held that the judgment was not final. The case of *Sinclair* v. *Coulthard*, *supra*, 20, was not referred to.

Windsor & Essex, &c., Rly. Co. v. Nelles, 1 D.L.R. 156. S. 2, s.s. (e).

Final Judgment.

In this case the plaintiff sued certain individuals as well as the Windsor, Essex and Lake Shore Rapid Railway Company, claiming specific performance of an agreement, or damages for the breach thereof. The action was heard by the Hon. Mr. Justice Clute and judgment pronounced on the 16th March, 1907, in favour of the plaintiffs. In the said judgment, the Court directed that in a certain event there should be a reference to the local Master at Sandwich to ascertain the value of certain stocks and bonds. An appeal was taken from this judgment to the Court of Appeal where judgment was pronounced on the 21st of April, 1908, allowing the appeal so far as it condemned the defendants personally, and varying, in other respects, the judgment of the Court below. No appeal was taken from this judgment.

The proceedings then went on before the Master, who made his report on the 7th April, 1909. From this report an appeal was taken which was heard by the Chief Justice of the Common Pleas Division, and judgment was pronounced on the 23rd January, 1911, varying the report of the Master.

The next proceeding shewn in the appeal book is an order made by the Chancellor, dated 8th March, 1911, which recites as follows:—

Upon motion made unto the Court, etc., by way of further directions, and to dispose of the question of costs, and for judgment against the above named defendants, etc., and proceeds to order the defendants to pay the plaintiffs certain sums of money and the costs incidental to the references and of the motion.

On the 29th of May, 1911, Mr. Justice Garrow, of the Court of Appeal, after reciting that the defendants had given notice of appeal to the Court of Appeal from the judgment of the Chief Justice of the Common Pleas Division, dated 23rd January, 1911, and also from the judgment of the Chancellor of the 8th March, 1911, and further reciting that it appeared that an appeal would lie from the Court of Appeal to the Supreme Court of Canada, granted leave to appeal direct to the Court of Appeal from both judgments and consolidated the two appeals. These appeals came on for hearing before the Court of Appeal and judgment was pronounced on the 28th September, 1911, whereby they were dismissed.

An application was then made under Rule 1 of the Supreme Court Rules for an order affirming the jurisdiction of the Court to hear an appeal not only from the judgment of the Court of Appeal of the 28th September, 1911, but also from the judgment of that court of the 21st April, 1908, dismissing an appeal from the judgment of the Hon. Mr. Justice Clute. The Registrar held first, that no appeal lay from the judgment of the 21st April, 1908, because the appeal had not been brought within sixty days from the time of the judgment as required by s. 69; secondly, he held, following Clark v. Goodall, that no appeal lay to the Supreme Court from so much of the judgment of the Court of Appeal dated 28th September, 1911, as affirmed the judgment of Meredith, C.J., of the 23rd January,

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1911, varying the report of the Master; and thirdly, he held that an appeal did lie from so much of the judgment of the Court of Appeal dated the 28th September, 1911, as affirmed the judgment of the Chancellor on further directions, dated 8th March, 1911.

An appeal was taken by the appellants from so much of the order of the Registrar as disallowed the appeal from the judgment of the Court of Appeal of the 28th September, 1911, affirming the judgment of Meredith, C.J., and from the judgment of the Court of Appeal of the 21st April, 1908, dismissing the appeal from the judgment of Mr. Justice Clute.

The motion was dismissed and the Registrar's order affirmed. In the reasons of the Court given by Mr. Justice Idington, an intimation was given that on the present appeal it was doubtful whether the judgment of the Court of Appeal of the 21st April, 1908, could be reviewed.

Conclusion.

By the case of *Crown Life* v. *Skinner* the court has finally decided that a judgment determining the matters in dispute between the parties, except as to the amount which the plaintiff is entitled to recover, which is made the subject of a reference, is not a final judgment and therefore not appealable to the Supreme Court.

In *Clarke* v. *Goodall* the court has also determined that on such a reference, if the report of the referee is appealed from to the Court of Appeal, no further appeal lies in the Supreme Court.

In *Windsor & Essex Rly Co.* v. *Nelles*, the Supreme Court has held that an appeal does lie from the Court of Appeal when an appeal is taken from the ultimate judgment on further directions. To what extent on such an appeal the court can or will give relief with respect to the earlier judgments of the Court of Appeal which it has held to have been interlocutory and not final, may be determined before this book is published, and in such case will appear in the addenda.

Final judgment—demurrers.

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

Action to recover damages for maliciously causing to be issued a writ of attachment. The county judge granted the defendant's petition for a writ and after same had been executed the order was set aside by the Supreme Court of British Columbia. The declaration contained eight counts, to six of which the jury found a verdict for plaintiff, but judgment was not entered then by the trial judge until the demurrers had been argued before the full court and overruled. The 7th

and 8th counts of the declaration were so framed that a verdict thereon in favour of the plaintiff, if supported by the evidence, would stand whatever might be the decision of the Court upon the demurrers. S. 2, s.s. (e). Final Judgment.

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

Reid v. Ramsay, Cout. Dig. 86.

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

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

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

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

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

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

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

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

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

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

"In the case of Chevalier v. Cuvillier it was determined that an appeal was well brought where the judgment in the court of original jurisdiction was not final, but was, as in the present case, a judgment on a demurrer to part of the action only; and this decision proceeded upon the ground that the ground that the judgment of the provincial court of Appeal from which the appeal to this Court was immediately brought, was a final judgment in a judicial proceeding within the meaning of the third section of the Act of 1879, now section 28 of the Supreme & Exchequer Courts Act."

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

Article 269 C.C. provides as follows:—

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

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

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

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

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

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

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

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

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

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

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

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

In an action for a breach of contract by a railway company to carry the plaintiff's goods in safety, the defendant set up a special contract limiting its liability to $100, to which the plaintiff made two replications, one of which was that the special contract could not avail against the provisions of sec-

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tion 25 of the Railway Act of 1879. The defendant demurred to this replication on the ground that it was a departure from the declaration which was in contract, while the replication was in tort. The demurrer was allowed in the courts below and an appeal to the Supreme Court was quashed on the ground that the judgment was not final.

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

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

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

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

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

Lacroix v. Morean, 15 L.C.R. 485.

This was an action *au pétitoire*, the plaintiff alleging that he had acquired the lands in question with others from one G., who had bought them from A.R. and M.R., the latter being proprietors in virtue of a judgment which rescinded a sale made to one P., M. was made *mis-en-cause* by R., the defendant, who purchased from him the lands in question, and who pleaded that A.R. and M.R. had sold to one L. everything acquired by them from P. and that the judgment rescinding the sale to P. had been obtained by L. for his own use and benefit and that he had taken possession of the lands affected by the said judgment; that L. had affected a commutation of the tenure; that A.R. and M.R. had ratified and confirmed the sale to L.; that subsequently, in an action brought by one D. the lands in question had been sold and purchased by M., who registered his title and subsequently sold it to one Davidson, from whom the defendant R. had purchased. By a second exception the *mis-en-cause* alleged that the purchase by the plaintiff from G. was fraudulent and that long before this conveyance R. had sold to one J. By a third exception, while denying that G. had acquired any right in the land, defendant

claimed to be reimbursed for her improvements made on the land. The plaintiff replied to these exceptions by an allegation of fraud on the part of L. The *mis-en-cause* demurred to this reply on four grounds: first, because the plaintiff did not allege that the fraudulent conveyance had been declared null and that the conclusions of the reply could not arise before such decision or annulling; secondly, because the conveyances in question could not be attacked by a simple reply, but only by a direct action against all the parties; thirdly, because L. had not acquired a right to plead the nullity of the conveyances in question, and fourthly, because more than ten years had elapsed since the conveyances in question and prescription had arisen against any demand for rescission.

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

Carleton Woollen Co. v. Woodstock, 38 Can. S.C.R. 411.

The plaintiffs, the Carleton Woollen Co., filed a bill in equity to restrain defendants from selling certain property seized for taxes, alleging exemption, to which the defendants demurred. After argument the demurrer was allowed, but on grounds not taken by the defendants that the resolution for exemption passed by the Council discriminated between companies establishing a woollen mill, and individuals doing the same. The judgment was affirmed by the full court and subsequently by the Supreme Court of Canada, no question of jurisdiction having been raised.

La Ville de St. Jean v. Molleur, 40 Can. S.C.R. 139.

The declaration in an action by a municipality claiming forfeiture of a franchise for nonfulfilment of the obligations imposed in respect thereof alleged in five counts as many different grounds for such forfeiture. The defendant demurred generally to the declaration and specifically to each count. The demurrer was sustained as to three counts and dismissed as to the other two. On appeal from the decision of the registrar refusing an order to affirm the jurisdiction of the Supreme Court to entertain an appeal from the judgment maintaining the demurrer.

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Final Judgment. Demurrers.

It was held, that each count contained a distinct ground on which forfeiture could be granted and a judgment depriving the municipality of its right to rely on any such ground was a final judgment in respect thereof which could be appealed to the Supreme Court of Canada.

Simard v. Townsend, 6 L.C.R. 147.

It was held, that an appeal does not lie to Her Majesty in Her Privy Council from a judgment of the Court of Appeals, reversing a judgment of the court below by which the appellant's action was dismissed on a *défense en droit* to the declaration for the following reasons, per,

Aylwin, J. In this case a motion is made by the respondent for an appeal to Her Majesty in Her Privy Council, from a judgment of this Court maintaining an appeal from an interlocutory judgment by which the action of the appellant, plaintiff in the court below, was dismissed on demurrer. The statute is silent as to appeals to Her Majesty in cases like this. In the case of Ermatinger and Gugy, in which a judgment in appeal confirmed a judgment of the court below, ordering the defendant to account, it was only after much doubt and discussion that an appeal to Her Majesty was granted. But that case was not like the present. Here the respondent is deprived of no right. The judgment of this court dismissed the demurrer and ordered the record back to the court below for proof of the facts in issue. If judgment below is rendered against the defendant, he can then appeal. The motion is without precedent, and this, in my opinion, would be sufficient of itself to make this court reject it; but it would on many accounts be most unwise to grant it.

Duval, J.—By this decision, we protect the true interests of parties. Suppose damages were granted on the hearing on the merits to the extent of 1s. could it be the interest of the respondents to appeal to this court and to Her Majesty in Privy Council? Besides, if an appeal lies from one interlocutory judgment, it must lie from every such judgment which would be ruinous to suitors, and the statute being silent, the motion ought not to be granted.

Final judgment—chamber order.

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

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

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

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

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Final Judgment. Chamber Order.

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

Gladwin v. Cummings, Cout. Dig. 88.

Action of replevin to recover 125 barrels of flour. Plaintiffs were indorsees of a bill of lading of the goods, which were held by the defendant as freight agent of the I.C.R. at Truro. The action was begun and the goods were replevied and the writ was served on 9th April, 1881. A default was marked on 25th April, 1881. On 10th September, 1881, plaintiffs' attorney issued a writ of inquiry under which damages were assessed under R.S.N.S. (4 ser. ch. 94, sec. 56). An order *nisi* to remove the default and let in defendant to defend was taken out on 11th October, 1881, and discharged with costs. The judgment being affirmed on appeal (4 Russ. & Geld. 168). R.S.N.S. (4 ser.) ch. 24, sec. 75, enacts that it shall be lawful for the Court or a judge at any time within one year after final judgment to let in defendant to defend upon application supported by satisfactory affidavits accounting for his non-appearance and disclosing a defence upon the merits, etc. *Held*, that the judgment appealed from was not a final judgment within the meaning of section 3 of the Supreme Court Amendment Act of 1879, and was not appealable. *Held*, also, that if the Court could entertain the appeal, the matter was one of procedure and entirely within the discretion of the court below and this Court would not interfere. Appeal dismissed with costs.

Stanton v. Canada Atlantic Rly. Co., Cont. Dig. 89.

On motion to quash an interim injunction, Mathieu, J., suspended its operations until final adjudication on the merits. Both parties appealed to the Queen's Bench, which quashed the injunction absolutely. An application to one of the judges of Queen's Bench for leave to appeal was refused on the ground that the judgment quashing the writ was not a final judgment, and "notwithstanding the offer and sufficiency of the security." Appellants served notice of further application to a judge of the Supreme Court to be allowed to give proper security to the satisfaction of that Court, or of a judge

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thereof, for the prosecution of an appeal to that Court, notwithstanding the refusal in the court below, and the lapse of thirty days from the rendering of the judgment from which they desired to appeal, and further to obtain an extension of time for settling the case in appeal. Henry, J., in Chambers, enlarged the motion for hearing in court where it was argued at length, and it was held, that the judgment of the Court of Queen's Bench (21 C.L.J. 355) quashing the interim injunction was not final judgment from which an appeal would lie. Motion refused.

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

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

Schroeder v. Rooney, Nov., 1885.

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

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

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

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

Plisson v. Duncan. 36 Can. S.C.R. 647.

The plaintiff (appellant) brought an action for dissolution of a partnership, an account, and the appointment of a

receiver. By an order of the court the respondent, Duncan, was appointed as such receiver to collect, get in and receive the debts and other assets, property and effects belonging to the partnership business, and to carry on and manage the hotel business at Francis. S. 2, s.s. (e). Final Judgment. Chamber Order.

The receiver entered into possession of the hotel business and put an agent in charge to manage the same. The parties to the action settled it, and the receiver proceeded to have his accounts as such passed, when it appeared that the management of the hotel business by the receiver had not proved financially successful, and that there was a deficit of $1,367.16. The plaintiff and the defendant, who appeared by counsel on the passing of the receiver's accounts before Mr. Justice Newlands, claimed that the deficit was due to the neglect of his duties by the receiver and that the latter should be held responsible for and charged with this deficit, but the court made an order holding that the receiver was not responsible for the deficit.

On appeal this judgment was affirmed. An appeal having been taken to the Supreme Court, a motion to quash was dismissed with costs.

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

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

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

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

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

Where the Master in Chambers set aside his own order renewing a writ of summons, and this order was affirmed by a judge in Chambers, the Divisional Court and the Court of Appeal, the Supreme Court dismissed the appeal for the reasons given by one of the judges of the court

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below. In this case it would appear that no question of jurisdiction was raised and no motion to quash made.

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

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

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

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

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

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

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

Under the charter of the city of Halifax, if a building is erected close to the street line, the corporation could petition the Supreme Court of the province or a judge thereof and obtain a summons directing the defendant to

shew cause why the building should not be removed if erected without a certificate of the city engineer. Proceedings were instituted in this way before the Honourable Mr. Justice Townshend in Chambers, where evidence was taken and judgment given for the corporation. This judgment was reversed by the Supreme Court of the province and an appeal taken by the Supreme Court of Canada. A motion to quash the appeal in the latter Court was dismissed.

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

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

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

Pursuant to this order the prothonotary summoned a jury who made their appraisement. On the 1st March, 1879, on the application of Daniel Hockin, the custos of the county of Pictou, a rule *nisi* was granted by the Supreme Court of Nova Scotia to quash and set aside the order of the Chief Justice on the ground that the lands were not taken under the statutes hereinbefore mentioned, and on

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other grounds; and on the 27th March, 1880, after argument, the rule *nisi* was discharged, the Court holding that the county was stopped by the action of the custos and of the Legislature, and could not dispute the validity of the appraisements. The custos thereupon appealed to the Supreme Court of Canada, and by his factum the respondent, the Railway & Coal Co., claimed that the Supreme Court had no jurisdiction. After argument a motion to quash was granted, the Court holding that the order of the Chief Justice which this appeal sought to set aside, was not a final order.

Cass v. Couture; Cass v. McCutcheon, Cout. Cas. 386.

Where no injustice has been done in the refusal of leave to amend pleadings, the court refused to interfere with the orders made by the court below in the exercise of judicial discretion and quashed the appeals.

The appeals were from judgments of the Court of King's Bench for Manitoba (14 Man. Rep. 458), reversing the judgment of Perdue, J., by which the orders of the referee in Chambers, permitting amendments to the pleadings, had been affirmed.

The appeals involved the same question, namely, whether a trustee may in an action founded on breach of contract, made between him and a third party, to recover, on behalf of the *cestui qui trust*, damages which the *cestui qui trust* may have sustained where the *cestui qui trust*, a contemplated joint stock company, was not in existence at the time of the contract, but had been incorporated before the breach occurred. The statements of claim were considered defective as filed, and motions to amend were made and allowed by the referee in Chambers, whose orders were affirmed, on appeal by a judge in Chambers.

On further appeal, the full court reversed the orders by the judgments appealed from.

Motions to quash were made in both cases on the grounds that such motions were not final and, consequently, could not be appealed from, and that they affected matters of procedure only in the courts below, and were made in the exercise of judicial discretion which could not be reviewed.

The only reasons for judgment delivered were as follows:

Idington, J. These cases involve nothing that has finally determined the rights of anybody.

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They raise merely the question of whether or not the court below have exercised a proper discretion in relation to an amendment of the pleadings, where the court were not bound by any rule of law or statute to amend, and I see no refusal of natural justice such as might entitle us to entertain these appeals.

I think, therefore, that they ought to be quashed with costs of appeals.

Miller v. Bent, Oct. 21st, 1908 (not reported).

In this case lands were sold under a mortgage and a balance remained in court, to which the present appellant claimed to be entitled as second mortgagee, and presented an application to a judge in Chambers for payment out to him of the said surplus. His application was disputed by the present respondent. The appellant's application was granted, but this order was reversed by the full court. A further appeal taken to the Supreme Court was dismissed. The jurisdiction was not questioned.

Final judgment—Master or referee's report in an Equity action.

The following cases may be supported on the ground that the relief asked was equitable in its nature and therefore appealable whether the judgment was final or not under section 38 *infra p.*

Bickford v. Grand Junction Rly. Co., 1 Can. S.C.R. 696.

In an equity proceeding a consent decree was made referring the taking of mortgage accounts to the Master. His report was affirmed by the Vice-Chancellor, and on appeal, by the Court of Appeal. Upon appeal to the Supreme Court the latter decision was reversed.

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

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

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

The Supreme Court of Canada, on appeal from a decision affirming the report of a referee in a suit to remove executors and trustees which report disallowed items in accounts

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previously passed by the Probate Court, will not reconsider the items so dealt with, two courts having previously exercised a judicial discretion as to the amounts, and no question of principle being involved.

Booth v. Ratte, 21 Can. S.C.R. 637.

In an action against several mill owners for obstructing the Ottawa river by throwing sawdust and refuse into it from their mills a reference was made to the Master to ascertain the amount of damages.

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

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

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

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

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

Clarke v. Geodall, 44 Can. S.C.R. 284.

Where a statement of claim discloses only a common law cause of action and the cause was so dealt with at the trial the fact that the indorsement on the writ indicates a claim for equitable relief and that the trial judge, in ordering a

reference to assess the damages, reserved further directions, do not make it a judicial proceeding in the nature of a suit in equity within the meaning of sec. 38 (c) of the Supreme Court Act.

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Final judgment—interlocutory in form.

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

The facts of that case were as follows:—

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

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

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

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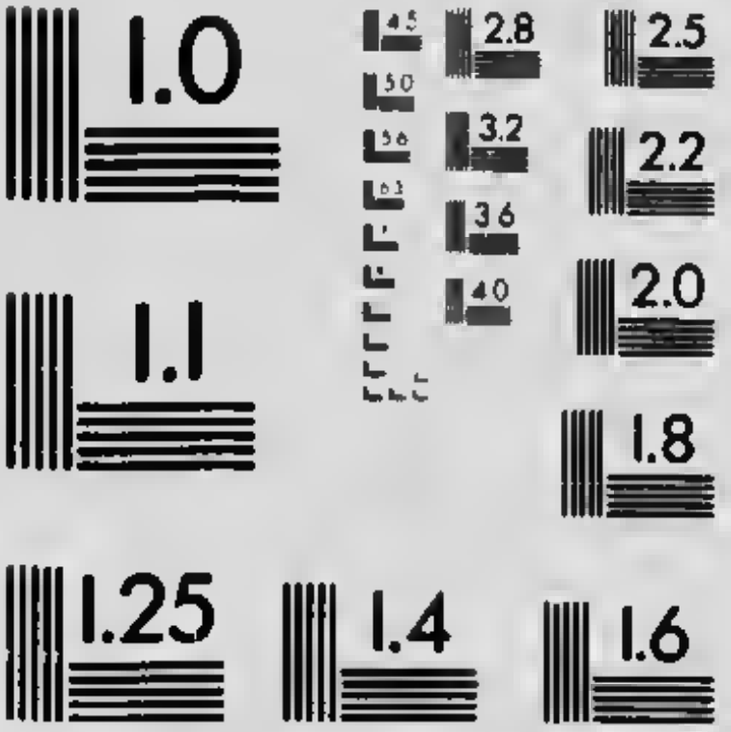

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S. 2, s.s. (c). *English Cases.*

Final and Interlocutory Judgments.

The decisions in England with respect to final and interlocutory orders under the Court of Appeal Rules may be usefully considered here.

Order 58 of the English Court of Appeal Rules is as follows:

Order 58, Rule 3: "Notice of appeal from any judgment whether final or interlocutory, or from a final order, shall be a fourteen days' notice, and notice of appeal from any interlocutory order shall be a four days' notice."

Order 58, Rule 15: "No appeal to the Court of Appeal from any interlocutory order or from any order whether final or interlocutory in any matter not being an action, shall be brought after the expiration of 14 days and no other appeal shall be brought after the expiration of three months."

"The rules appear to contemplate two classes of orders: final orders which determine the rights of the parties, and orders which do not determine the rights;" (per Jessel, M.R., Re Stockton &c., Co., 10 C.D. p. 349).

"Any doubt which may arise as to what decrees, orders or judgments are final and what are interlocutory, shall be determined by the Court of Appeal." (J.A. 1875, s. 12, Vol. II., p. 687).

"No order, judgment or other proceeding can be final which does not at once affect the status of the parties, for whichever side the decision may be given; so that if it is given for the plaintiff it is conclusive against the defendant, and if it is given for the defendant it is conclusive against the plaintiff (per Brett, L.J., Standard Discount Co. v. La Grange, 3 C.P.D. p. 71).

"Any Interlocutory Order, &c. If an order finally determines the rights of the parties it is final; if, on the other hand, it only gives directions for working out the rights of the parties it is interlocutory (Norton v. Norton, (1909) 99 L.T. 709, applying Blakey v. Latham (1890) 43 C.D. 23; Re Croasdell, Cammell Laird & Co. (1906) 2 K.B. 569. In Shubrook v. Tufnell (1882) 9 Q.B.D. 621, it was held that an appeal in which, in the event of the court differing from the court below, final judgment would be entered, was a final judgment. In Salaman v. Warner (1891) 1 Q.B. 734, it was held that a decision was only final if, whichever way it was given, it finally disposed of the matter in dispute. In Bozson v. Altrincham U.D.C. (1903) 1 K.B. 547, the Earl of Halsbury, L.C., said that he preferred the earlier of these authorities, and Lord Alverstone, C.J., said that the question ought to be this: 'Does the judgment or order, as made, finally dispose of the rights of the parties?' An order dismissing an action as frivolous and vexatious is interlocutory for the purpose of appeal (In re Page (1910), 1 Ch. 489), thus apparently following the rule laid down in Salaman v. Warner.

"Where any step is necessary to perfect a judgment or order it is not final but interlocutory" (per Baggally, L.J., Collins v. Vestry of Paddington, 5 Q.B.D. p. 370).

Final Orders. (See R. 3, (n). "Final—Interlocutory," supra). Upon these principles an order overruling a demurrer (Trowell v. Shenton 8 C.D. 318); orders on further consideration (Cummins v. Heron, 4 C.D. 787; but see remarks of Kay, J. in Re Johnson, 42 C.D. p. 509); judgments obtained on motion on admission in the pleadings (Emmet v. Emmet, 13 C.D. p. 489; Att. Gen. v. G. E. Ry. Co. 27 W.R. 759; and see cases cited under O. 32, r. 6); an order confirming a master's certificate assessing the amount payable as damages sustained by reason of a trespass (Att. Gen. v. Tomline, 15 C.D. p. 152); an order for foreclosure under O. 15, even though the order has meantimo been made absolute (Smith v. Davies, 31 C.D. 595); the judgment of a Divisional Court affirming the judgment of a County Court on an interpleader issue (Hughes v. Little, 18 Q.B.D. 32, but this case is a decision on r. 3, supra; per Bowen, L.J., McNair v. Audenshaw Paint Co. (1891), 2 Q.B., p. 505); an order dismissing an action (International Financial Soc. v. Moscow Gas Co., 7 C.D. 241; see also Armour v. Bate, (1891) 2 Q.B. 233; and see, as to orders for dismissal for want of prosecution, Whistler v. Hancock, 3 Q.B.D. 83): are final orders. And an order at a trial by jury depriving a successful party of his costs is final, being part of the judgment (Marsden v. Lancashire and Yorkshire Ry. Co., 7 Q.B.D. 641). See the Vulcan, (1898) P. 222. An order made on an application for delivery and taxation of a solicitor's bill of costs, whether the application be allowed or refused is a final order (Re Reeves (1902), 1 Ch. 29; Haydon v. Cartwright, W. N. (02) 163). S. 2, s.s. (e). Final Judgment. Interpleader.

Final judgment—interpleader.

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

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

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

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

S. 2, s.s. (e). Final Judgment. Interpleader.

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

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

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

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

D. purchased land and had the conveyance made to his wife, who paid the price and obtained a certificate of ownership. D. having transferred all his interest to her. She sold the land to M. and executed a transfer acksowledging payment of the purchase money, which transfer in some way came into the possession of M.'s solicitor's, who had it registered and a new certificate of title issued in favour of M., though the purchase money was not in fact paid. M.'s solicitors were also solicitors of judgment creditors of D., and judgment having been obtained on their debts the purchase money of said transfer was garnished in the hands of M. An issue was directed as between the judgment credi-

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

S. 2, s.s. (e). Final Judgment. Opposition.

Greer v. Faulkner, 40 Can. S.C.R. 399.

In this case the local judge in Chambers at Port Arthur made an interpleader order in an action between Faulkner, plaintiff, and Greer and the Barnett McQueen Co., Ltd., defendants, on the application of the defendant, the Barnett McQueen Co., directing plaintiff and defendant Greer to proceed on trial of an issue as to the ownership of certain goods and chattels; and further ordered that the question of costs and all further directions should be reserved to be disposed of by the trial judge.

The judge who tried the issue directed the money in court to be paid out to plaintiff, and defendant to pay plaintiff's costs. The Divisional Court reduced amount payable to plaintiff. Court of Appeal reversed Divisional Court and restored judgment of trial judge. A further appeal to the Supreme Court of Canada was heard, no question of jurisdiction being raised.

Vide Roberts v. *Piper*—Addenda et corrigenda.

Final judgment—oppositions.

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

Dawson v. Macdonald, Cout. Dig. 124[illegible], June, 1880.

A writ of execution was issued against the appellant in an action upon a promissory note. Appellant alleged that the first he knew of any action was a letter from the sheriff

S. 2, s.s. (e). Final Judgment. Opposition.

informing him that the judgment had been placed in his hands for execution, and filed an opposition *afin d'annuler* in the proceedings under which the execution had been obtained. The opposition was dismissed by the Superior Court and this judgment affirmed by the Court of Queen's Bench. On appeal to the Supreme Court it was held that the only way the appellant could get rid of the appearance filed by his solicitor was by a regular disavowal according to the articles of the Code of Civil Procedure, and dismissed the appeal. Appellant thereupon took regular proceedings in disavowal against the attorney, and while the proceedings were pending a new writ of execution was issued. To this the appellant filed an opposition and petition to stay the proceedings pending the decision of the proceedings on disavowal. The Superior Court dismissed the opposition on the ground that there was *res judicata*, and this judgment was affirmed by the Court of Queen's Bench on the same ground. On appeal to the Supreme Court of Canada, *Held*, reversing the judgment appealed from, Ritchie, C.J., and Strong, J., dissenting, that there was no *res judicata*, and that all proceedings in the cause and on the writ mentioned in the opposition should be stayed until the decision of the proceedings in disavowal, and of the action in revocation of judgment.

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

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

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

In this case, in an action by the W.N. Co. against the L. & K. Rly. Co., the latter company was sold for $192,000 to the Q.C. Rly Co. The Q.C. Rly. Co. filed an opposition claiming $272,537, being the amount of certain bonds of the L. & K. Ry. Co. held by them. The city of Quebec also filed an opposition upon a number of other bonds alleged to

be held by them. The opposition of the city of Quebec was contested by the Q.C. Rly Co. on the ground that the bonds were illegally issued and this contestation was maintained by the Superior Court, and this judgment was affirmed by the Court of Queen's Bench, but reversed by the Supreme Court of Canada.

S. 2, s.s. (e). Final Judgment. Opposition.

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

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

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

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

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

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

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

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

S. 2, s.s. (e). Final Judgment. Opposition.

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

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

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

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

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

"The judgment appealed from does not dispose of the whole case but merely an incident raised by a declinatory exception which was maintained by the trial court and rejected by the Court of Appeal. Of course in both the trial court and the Court of Appeal the question cannot be raised again. It is there *chose jugee*, but it can be raised here if, after being disposed of on the merits, the case comes up again before this Court." S. 2, ss. (e). Final Judgment. Intervention

Final judgment—intervention.

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

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

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

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

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

s. 2, s.s. (c). *Nullité de decret Recusation.*

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

The respondent applied by petition to the Superior Court for leave to intervene to protect his rights in a suit then pending. The petition was refused by the Superior Court but this judgment was reversed by the Court of King's Bench. A motion to quash an appeal to the Supreme Court was allowed on the ground that the judgment was purely interlocutory, following *Hamel* v. *Hamel*, 26 Can. S.C.R. 17. *Vide Macfarlane* v. *Leclaire*, *supra*, p. 39.

Demande en nullite de decret.

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

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

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

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

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

Ross v. Ross, 25 Can. S.C.R. 307.

In an action to set aside a will, petitions for intervention were filed by various parties and allowed.

Recusation.

Article 237 of the Code of Civil Procedure of Quebec provides that a judge may be disqualified from acting in a

proceeding if he has an interest in favouring any of the parties and on other grounds, and a proceeding to disqualify him is intituled a "recusation."

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

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

s. 24 (c). Final Judgment. Incidental Demand.

Incidental demand.

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

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

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

Jurisdiction of Court over its own officers.

Wilkins v. Geddes, Cout. Dig. 80.

An order by a Superior Court exercising its summary jurisdiction over its own immediate officers, on an application by a third party to obtain an order for the payment over of interest received by such officer on moneys held by him on deposit as an officer of the court, is a final order from which an appeal will lie to the Supreme Court of Canada, under 38 Viet. ch. 11, sec. 11. (Fournier, J., dissenting; Taschereau, J., dubitante.)

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

The Ontario courts have held that a person acquitted on a criminal charge can only obtain a copy of the record on

S. 2, s.s. (e). Final Judgment. Contempt.

the fiat of the Attorney-General. S. having been refused such fiat applied for a writ of mandamus, which the Divisional Court granted, and this judgment was affirmed by the Court of Appeal. *Held*, that the question raised by the proposed appeal if not one of practice, was a question of the control of provincial courts over their own records and officers with which the Supreme Court should not interfere.

Order relating to standing of counsel or attorney.

Lenoir v. Ritchie, Cout. Dig. 80.

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

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

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

Contempt.

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

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

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

The decision of a provincial court in a case of constructive contempt is not a matter of discretion in which an

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

S. 2, s.s. (e). Final Judgment. Entry Deferred.

Svensson v. Bateman, 42 Can. S.C.R. 146.

An order of committal against a judgment debtor, under the Manitoba King's Bench rule 755, for contempt in refusing to make satisfactory answers on examination for discovery is not a "matter" or "judicial proceeding" within the meaning of sub-section (e) of section 2 of the Supreme Court Act but merely an ancillary proceeding by which the judgment creditor is authorized to obtain execution of his judgment and no appeal lies in respect thereof to the Supreme Court of Canada. *Danjou* v. *Marquis*, 3 Can. S.C.R. 251, referred to.

Entry of judgment deferred.

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

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

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

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

Order to furnish security.

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

An order requiring opposants *afin de charge* to furnish security that land seized in execution, if sold by the sheriff

S. 2, s.s. (e). Final Judgment. Interim Injunction.

subject to the charge claimed, should realize sufficient to satisfy the claim of the execution creditor, is merely as interlocutory judgment from which no appeal lies to the Supreme Court.

Kirkpatrick v. Birks, 37 Can. S.C.R. 512.

An application for the approval of security on an appeal to the Supreme Court of Canada from an order directing that a beneficiary should furnish the security required by article 663 of the Civil Code of Lower Canada was refused on the ground that it was interlocutory and could not affect the rights of the parties interested.

Order refusing trial by jury.

Demers v. The Bank of Montreal, 27 Can. S.C.R. 197.

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

Virtue v. Hayes, In re Clark, Cont. Dig. 83, 9th April, 1889.

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

Interim injunction.

Kearney v. Dickson, Cass. Dig. 431.

Plaintiff brought an action of trespass claiming damages and an injunction restraining the defendant from proceeding with the digging of trenches and laying of pipes on her land. Upon the *ex parte* application of the plaintiff

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

S. 2, s.s. (e). Final Judgment. Attachments.

Attachments.

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

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

In this case the plaintiff, claiming a solicitor's lien upon certain monies in court, issued a writ of attachment (*saisie conservatoire*) attacking monies in the hands of the prothonotary of the Supreme Court. The defendant petitioned to have the writ set aside, alleging that it was illegal, null and void, and that the affidavit upon which the writ issued did not disclose any legal ground for the attachment. By his declaration attached to his affidavit, the plaintiff claimed $3,923.17 for services as solicitor to protect, for the defendant, the money in court. The Superior Court quashed the writ of attachment, but this judgment was reversed by the Court of Queen's Bench, and it was ordered that the hearing of the petition should be proceeded with at the same time as the hearing of the main action, and that the two proceedings be joined. Upon appeal by the defendant to the Supreme Court of Canada, it was *held*, Strong, J. dissenting, that the judgment was interlocutory and not final.

Capias.

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

A judgment of the Court of Queen's Bench (Quebec) affirming the judgment of the Superior Court, which rejected the appellant's petition that a certain writ of ca. re.

S. 2, s.s. (f), (g), (h).

issued against him under articles 798 and 801 C.C.P. might be set aside, is not a final judgment within the meaning of article 1178, now article 68, which reads as follows:—

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

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

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

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

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

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

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

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

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

(g) 'the court appealed from' means the court from which the appeal is brought directly to the Supreme Court, whether such court is one of original jurisdiction or a court of appeal;

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

3. The court of common law and equity in and for Canada, now existing under the name of The Supreme Court of Canada, is hereby continued under that name, as a general court of appeal

for Canada, and as an additional court for the better administration of the laws of Canada, and shall continue to be a court of record. 6 Edw. VII. c. 50, s.

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

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

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

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

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

In the case of the *Credit Valley Rly. Co.* v. *Grand Trunk Rly. Co.*, 27 Gr. 232 (Ont.), an application was made to Taschereau, J., in Chambers on the 6th February, 1880, for leave to appeal from a judgment of the Court of Chancery of Ontario without any intermediate appeal to the Ontario Court of Appeal. The application was refused on the ground that under section 101 of the B.N.A. Act, the Federal authority had power to grant an appeal only from the provincial courts of last resort and that the provision of the Supreme Court Amendment Act, 1879 (42 V. c. 39, s. 6), which permitted of an appeal *per saltum* without any appeal to any intermediate court of appeal in the province, was *ultra vires* of the Dominion Parliament. (Dontre, Constitution of Canada, p. 337).

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

In *L'Association St. Jean Baptiste de Montreal* v. *Brault*, 31 Can. S.C.R. 172, an appeal from the Court of

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Review to the Supreme Court of Canada, it was contended by counsel that the provision made by 64-65 V. c. 25, s. 3, for an appeal from the Superior Court in Review in cases which were not appealable to the Court of Queen's Bench, was *ultra vires* of the Parliament of Canada, and that the appeal should be quashed. The motion was refused, the Court pointing out that the respondent's contention must be that all appeals heard in the Supreme Court from all over the Dominion, since its creation in 1875 in cases not governed by the Federal laws were determined without jurisdiction, and that if Parliament had not the power to authorize an appeal in such cases from the Court of Review in Quebec, it had not the power to authorize it from the Courts of final jurisdiction in the other provinces.

Crown Grain Co. v. Day (1908), **A.C. 504; C.R. [1908] A.C. 150.**

Held, by the Judicial Committee of the Privy Council, July 9th, 1908, that an appeal lay to the Supreme Court of Canada from the Court of Appeal for Manitoba, notwithstanding that the provincial statute expressly declared that there should be no appeal from the said Court of Appeal.

Privy Council appeals from provincial courts.

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

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

The Constitutional Act, 1791, 31 Geo. III. c. 31, provides that the Governor, Lieutenant-Governor, or person administering the Government of each of the provinces of Canada, together with the Executive Council, should be a court of civil jurisdiction for hearing and determining

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appeals, subject to such appeal therefrom as such appeals might before the passing of that Act have been heard and determined by the Governor and Council of the Province of Quebec; but subject nevertheless to such further or other provisions as may be made in this behalf by any Act of the Legislative Council and Assembly of either of the said provinces respectively, assented to by His Majesty, his heirs or successors.

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

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

And by the 43rd section of this Act, it is provided that nothing therein contained shall be construed in any manner to derogate from any other right or prerogative of the Crown whatsoever.

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

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

"Their Lordships are not satisfied that the subject received (in Cuvillier v. Aylwin) that full and deliberate consideration which the great importance of it demanded. The report of the judgment of the Master of the Rolls is contained in a few lines, and he does not appear to have directly adverted to the effect of the proviso contained in the 43rd section of the Act on the prerogative of the Crown. Their Lordships must not be considered as intimating any opinion whether this decision can be sustained or not, but they desire not to be precluded by it from a further consideration of the serious and

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important question which it involves. The petitioner must understand that the prayer of his petition (for leave to appeal) will be granted, but at the risk of a petition being hereafter presented from the opposite party, upon which his appeal may be dismissed as incompetent."

In *Cushing* v. *Dupuy*, 5 App. Cas. 409, it is said of Cuvillier v. Aylwin "this case if not expressly overruled has not been followed and later divisions are opposed to it."

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

"Whereas by the laws now in force in certain of Her Majesty's colonies and possessions abroad no appeals can be brought to Her Majesty in Council for the reversal of the judgments, sentences, decrees and orders of any courts of justice within such colonies, save only of the courts of error or courts of appeal within the same, and it is expedient that Her Majesty in Council should be authorized to provide for the admission of appeals from other courts of justice within such colonies or possessions. Be it therefore enacted by the Queen's most excellent Majesty by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that it shall be competent to Her Majesty, by any order or orders to be from time to time for that purpose made with the advice of her Privy Council to provide for the admission of any appeal or appeals to Her Majesty in Council, from any judgment, sentences, decrees or orders of any court of justice within any British colony or possession abroad, although such court shall not be a court of error or a court of appeal within such colony or possession; and it shall also be competent to Her Majesty, by any such orders as aforesaid, to make all such provisions as to Her Majesty in Council shall seem meet for the instituting and prosecuting any such appeals, and for carrying into effect any such decisions or sentences as Her Majesty in Council shall pronounce thereon."

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

In the Province of Ontario, therefore, it would appear that an appeal will lie by leave of the Privy Council from the High Court of Justice of that province; and similarly, in the Province of Quebec, with leave, an appeal will lie from the Superior Court, and in such cases leave may be granted although the case is one in which, had it been carried to the Court of Appeal in either province, any further appeal to the Privy Council could not be taken *de plano* by reason of the case not being one falling within the limitations placed upon appeals to the Privy Council by the Provincial Legislatures respectively.

The conclusion to be drawn from *Cushing* v. *Dupuy*, *supra*, p. 58, would appear to be that where a case is not appealable as of right from the Court of Appeal to the Judicial Committee because the judgment is not of the amount required by the provincial statute or the judgment is interlocutory, the power to grant special leave still subsists, although in such a case special circumstances must be shewn before leave will be granted. *Vide*, *infra*, p. 322.

Where the Court of Appeals (Lower Canada) refused leave to appeal on the ground that the judgment was below the appealable amount, the Judicial Committee granted leave. *Boswell* v. *Kilborn*, 12 Moo. 467.

Attorney-General of Canada v. Cain (1906), A.C. 542. C.R. [1906] A.C. 92.

In this case an appeal was heard by special leave from an order of Anglin, J., one of the judges of the High Court of Justice for Ontario, discharging the respondent from custody.

United States of America v. Gaynor (1905), A.C. 128.

In this case an appeal, by special leave, was heard from the judgment of Caron, J., Superior Court Quebec, dismissing motion made on behalf of the appellants to quash writ of habeas corpus granted to the respondents, and ordering their liberation.

Extending Time.

"The Court below is generally absolutely bound by the rules of the order in council or other instrument which governs the admission of the appeal, and unless specially authorized is unable to extend any of the periods mentioned therein. When the appeal enactment is the provision of the local legis-

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lature, the Court often has the power to extend the time limited for the conditions of appeal being performed. It is, therefore, advisable to ask the Court below to extend the time." *Safford & Wheeler P.C. Practice*, p. 215.

Gillett & Co. v. Lumsden (1905), A.C. 001.

It was held that under the Revised Statutes of Ontario, 1897, c. 48, s. 1, it is essential that an appeal to the King in Council should be admitted by the Court of Appeal. The Court is bound to exercise its judgment whether any particular case is appealable or not; and where it appears by its order that it has left that question open, the appeal is incompetent.

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

The provisions for appeal differ in the different provinces.

Privy Council appeals—Ontario.

In Ontario the right of appeal is regulated by 10 Edw. VII. c. 24, which reads as follows:—

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

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

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

"4. Subject to rules to be made by the judges of the Supreme Court, the practice applicable to staying executions upon appeals to the Court of Appeal shall apply to an appeal to His Majesty in His Privy Council.

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

"6. The preceding sections shall not apply to an appeal to His Majesty in His Privy Council from a judgment of any court on a reference under the Constitutional Questions Act.

"7. Costs awarded by His Majesty in His Privy Council upon an appeal shall be recoverable by the same process as costs awarded by the Court of Appeal." S. 3, Provincial Appeals to P.C.

Privy Council appeals—Quebec.

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

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

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

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

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

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

Privy Council appeals—Alberta and Saskatchewan.

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

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

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

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

"1. Any person or persons may appeal to Her Majesty, her heirs and successors in her or their Privy Council, from any

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final judgment, decree, order, or sentence of the said Supreme Court of the North-West Territories in such manner, within such time and under and subject to such rules, regulations and limitations as are hereinafter mentioned; that is to say:

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

"In case such leave to appeal shall be prayed by the party or parties who is or are directed to pay any such sum of money or perform any duty, the said court may either direct that the judgment, decree, order or sentence appealed from shall be carried into execution, or that the execution thereof shall be suspended pending the said appeal as to the said court may appear to be most consistent with real and substantial justice;

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

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

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

"3. Nothing herein contained doth or shall extend or be construed to extend to take away or abridge the undoubted right and authority of Her Majesty, her heirs and successors, upon the humble petition of any person or persons aggrieved by any judgment or determination of the said court at any time to admit his, her, or their appeal therefrom, upon such terms as Her Majesty, her heirs or successors, shall think fit, and to reverse, correct or vary such judgment, or determination in such manner as to Her Majesty, her heirs and successors shall seem meet. S. 3. Provincial Appeals to P.C.

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

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

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

Privy Council appeals—British Columbia.

In the Province of British Columbia, the appeals are regulated by 12-13 Vict. (Imp.), ch. 48 (for original statute see Safford & Wheeler's Privy Council Practice, p. 375); and the Imperial Order in Council dated 12th July, 1887. The terms of this Order in Council are, *mutatis mutandis*, the same as those contained in the Order in Council regulating appeals from the Northwest Territories, *supra*.

Privy Council appeals—Manitoba.

In the Province of Manitoba, the right of appeal to the Privy Council is governed by Imperial Order in Council dated 26th November, 1892. The terms of the order are the

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same as those for the Northwest Territories. For preamble, *vide* Safford & Wheeler's Privy Council Practice, p. 378.

Privy Council appeals—New Brunswick.

In the Province of New Brunswick, the appeal to the Privy Council is regulated by an Order in Council dated 24th November 1852, practically identical with the order governing appeals from the Northwest Territories and the Province of Manitoba. For preamble, *vide* Safford & Wheeler's Privy Council Practice, p. 380.

Privy Council appeals—Nova Scotia.

An appeal from the Supreme Court of Nova Scotia lies to the Judicial Committee of the Privy Council under the Order in Council of the 20th March, 1851. The terms of this order are also substantially identical with those of the Northwest Territories, *supra*. For the preamble, *vide* Safford & Wheeler's Privy Council Practice, p. 391.

Privy Council appeals—Prince Edward Island.

In the Royal instructions issued to the early Governors of Prince Edward Island, provision was made for an appeal from the Supreme Court to the Governor in Council and the same instructions provided that where a party was dissatisfied with the decision of the Governor in Council, an appeal should be allowed to the King in Council subject to certain limitations. These Royal instructions were discontinued after the passing of the Statute 3 & 4 Wm. IV, ch. 41, being an Act for the better Administration of Justice in His Majesty's Privy Council. Up to the present time no Imperial Order in Council has been passed providing for a direct appeal from the Supreme Court of this province. Appeals now can only be taken after leave has been granted by the Judicial Committee.

For Practice on appeals to His Majesty's Privy Council, *vide*, p. 319, *infra*.

THE JUDGES.

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

By the Imperial Act 58-59 Vict. ch. 44, it is provided as follows:— Ss. 5, 6, 7, 8, 9.

Judges.

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

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

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

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

Pursuant to this Act the late Chief Justices Sir Henry Strong and Sir Elzear Taschereau, and the present Chief Justice Sir Charles Fitzpatrick were sworn in as members of the Privy Council.

5. Any person may be appointed a judge who is or has been a judge of a superior court of any of the provinces of Canada, or a barrister or advocate of at least ten years' standing at the bar of any of the said provinces. R.S., c. 135, s. 4.

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

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

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

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

Ss. 10, 11, 12, 13.

Judges. Registrar.

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

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

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

Sections 7 and 8 of the Supreme & Exchequer Courts Act, R.S.C. ch. 135, provided for the salaries of the judges of the Supreme Court, and their superannuation. These provisions are now found in the Judges Act, R.S. c. 138.

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

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

REGISTRAR AND OTHER OFFICERS.

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

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

Ss. 14, 15, 16, 17, 18, 19.

Registrar.

14. The Rsgistrar shall have ths rank of a Deputy Head of a Department and shall he paid a salary heginning on his appointment at thres thousand fivs hundred dollars per annum with an annual increase of one hundred dollars until a maximum salary is reached of four thousand dollars. 3 E. VII., c. 69, s. 1.

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

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

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

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

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

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

General Order No. 83, now Rules 82-89, *infra*, p. 578, made in pursuance of section 109, confers upon the Registrar all the authority and jurisdiction which may be exercised by a judge sitting in Chambers except.

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

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

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

Ss. 21, 22, 23, 24.

Officers, Barristers, Solicitors.

21. Ths Governor in Conncil may, from tims to time, appoint snch other clerks and eervants of the Conrt as are neceseary, all of whom shall hold office during pleaenre. R.S., c. 135, s. 11; 50-51 V., c. 16, e. 57.

22. The provisions of the Civil Servics Act and of ths Civil Service Superannuation and Retiremsnt Act shall so far as applicable extend and apply to snch officere, clerks and servants at the ssat of Govsrnment. R.S., c. 135, s. 14.

In the first edition of this work it was said that sections 21 and 22, *supra*, have been construed by the Department of Justice to authorize the Governor in Council to appoint clerks and servants of the Court independently of the provisions of the Civil Service Act, bnt upon the appointment beiug made the Civil Service Act and the Civil Service Superannuation aud Retirement Act become applicable. Although there has been no ruling to that effect it will probably be held that now by 7-8 Edw. VII. c. 15 the Supreme Court officers have been brought within the terms of the Civil Service Act.

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

BARRISTERS AND SOLICITORS.

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

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

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

granted the application and counsel was called within the bar and took part in the argument of the appeal on behalf of the respondent.

Ss. 25, 26.

Counsel, Barristers, Solicitors.

Admissions of Counsel.

Randall v. Ahearn & Soper, 34 Can. S.C.R. at p. 702.

In the judgment of the Court of Appeal it was stated that appellant's counsel had admitted that certain work had been done by an electric company and that the respondents had nothing to do with. This was controverted by appellant's counsel in his argument before the Supreme Court. Davies, J., said that a careful perusal of the evidence had satisfied him of the correctness of counsel's contention, and as a result the supposed admission was ignored by the Court in pronouncing judgment.

Fleming v. McLeod, Supreme Court, May 10th, 1907.

At the opening of his argument, counsel for appellant pointed out that the trial judge had in his reasons for judgment stated that appellant's counsel had made an admission that no proper notice of dishonour had been given as to certain notes in issue. This statement did not appear in the record nor in the stenographer's notes, and was controverted by the appellant's counsel. Counsel then proceeding to argue against his being bound under the circumstances by the judge's reasons, the Court stopped him, stating that as there was nothing on the record establishing the admission, and no evidence of any entry in the judge's minute book appearing, the appellant could not be held bound by the statement in the judge's reasons delivered some time after the conclusion of the trial, as it was quite possible he had misunderstood the position taken by counsel.

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

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

Ss. 27, 28, 29, 30.

Sessions, Quorum.

SESSIONS AND QUORUM.

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

28. It shall not be neceesary for all ths judges who have heard the argument in any cass to bs present in ordsr to constituts the Court for delivery of judgment in euch case, bnt in the absence of any judge, from illness or any othsr causs, judgment may be delivered hy a majority of the jndgee who were present at the hearing. 51 V., c. 37, s. 1.

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

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

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

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

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

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

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

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

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

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

Rule 73 provides that:—

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

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

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

Ss. 33, 34, 35.

Sessions, Appellate Jurisdiction.

3. Each of the said seecions shall he continued until the hnsiness hefore the court ie disposed of. R.S., c. 135, e. 20;—54-55 V., c. 25, s. 1.

33. The Snpreme Court may adjourn any seesion from time to time and meet again at the time appointed for the transaction of hnsiness.

2. Notice of snch adjonrnment and of the day fixed for the continnance of each session shall be given by the Registrar in the Canada Gazette. R.S., c. 135, s. 21.

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

Rule 16 provides as follows:—

"The notice convening the court for the purpose of hearing election or criminal appeals, or appeals in matters of habeas corpus, or for other purposes under the provisions of the Act in that behalf shall, pursuant to the directions of the chief justice or senior puisne judge as the case may be, be published by the Registrar in the Canada Gazette, and shall be inserted therein for such time before the day appointed for such special session as the said chief justice or senior puisne judge may direct, and may he in the form given in Schedule A. to the Schedule to these Rules.

35. The Supreme Court shall bave, bold and exercise an appellate, civil and criminal jurisdiction within and througbout Canada. R.S., c. 135, s. 23.

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 below.*

Section 45, *infra*, p. 196, provides as follows:—

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

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

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

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

The Lieutenant-Governor of British Columbia in Council made a reference to the Supreme Court of British Columbia pursuant to the provisions of 54 V. c. 5 (B.C.) (now R.S.B.C. 1897, c. 56, ss. 98-103), intituled "An Act for expediting the decision of constitutional and other provincial questions," for hearing and consideration of a case submitted to ascertain whether in the opinion of that court the legislature of the province had jurisdiction to pass the Act 53 V. c. 33 (B.C.) intituled "An Act to amend the Coal Mines Regulation Act."

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

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

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

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

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

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

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

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

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

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

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

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

In this case an application was made on consent for leave to appeal from the judgment of the Court of Appeal for Ontario in a reference by the Lieutenant-Governor in Council.

The motion was refused, the Court holding that it had no jurisdiction and was bound by its decision in the *Union Colliery Co.* v. *The Attorney-General of British Columbia.* Subsequently an appeal was taken directly to the Judicial Committee of the Privy Council (1907), A.C. 69.

For the jurisdiction of the Supreme Court in disputed matters of jurisdiction between the Dominion of Canada and any province, *vide* notes to section 67, *infra*, p. 348.

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

Attorney-General of Nova Scotia v. Gregory, 11 App. Cas. 229.

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

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

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

The suppliant McGreevy being dissatisfied with the amount awarded him by arbitrators appointed to settle a disputed claim between him and the Government of the Province of Quebec, instituted proceedings by way of petition of right to set aside the award. The judgment of the Superior Court in his favour was reversed by the Court of Queen's Bench, appeal side. An appeal being taken to the Supreme Court, counsel for the government moved to quash the appeal on the ground that the remedy by petition of

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right was a statutory remedy and that the statute having provided for an appeal only to the Court of Queen's Bench no further appeal lay to the Supreme Court. This pretension was rejected by the Court and the motion to quash dismissed.

Canadian Pacific Rly. Co. v. St. Therese, 16 Can. S.C.R. 600.

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

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

St. Hilaire v. Lambert, 42 Can. S.C.R. 264.

On an application for the cancellation of a liquor license issued under the "Liquor License Act" of the Province of Alberta, a judge of the Supreme Court of Alberta, in chambers, granted an originating summons ordering all parties concerned to attend before him in Chambers, and, after hearing the parties who appeared in answer to the summons, refused the appplication. The full court reversed this order and cancelled the license. On an appeal by the licensee to the Supreme Court of Canada,

Held, that the case came within the principle decided in *The Canadian Pacific Rly. Co.* v. *The Little Seminary of Ste. Thérèse*, (16 Can. S.C.R. 606), and, consequently, the Supreme Court of Canada had no jurisdiction to entertain the appeal.

Fiaseth v. Ryley Hotel Co., 43 Can. S.C.R. 646.

Proceedings on an originating summons issued by a judge of the Supreme Court of Alberta on an application for cancellation of a license under section 57 of the "Liquor License Ordinance," are judicial proceedings within the meaning of section 37 of the "Supreme Court Act," R.S.C. 1906, ch. 139, and, consequently, the Supreme Court of Canada has jurisdiction to entertain an application for leave to appeal from the judgment of the Supreme Court of Alberta thereon.

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

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

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

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

In *Ottawa Electric* v. *Brennan*, 31 Can. S.C.R. 311, an application was made for leave to appeal direct to the Supreme Court *per saltum* from the judgment of Mr. Justice MacMahon with respect to the amount awarded by arbitrators as to the value of lands expropriated, and counsel for the applicant cited the above case of *Birely* v. *Toronto & Hamilton Rly Co.*, and contended that the deci-

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sion was wrong, and asked that if the motion could not be granted because of it, that the decision be overruled. In pronouncing judgment orally, the Chief Justice said:—

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

The James Bay Rly. Co. v. Armstrong, 38 Can. S.C.R. 511.

By s. 168 of 3 Edw. VII., c. 58, amending the Railway Act, 1903, (R.S.C. (1906), c. 37, s. 209), if an award by arbitrators on expropriation of land by a railway company exceeds $600 any dissatisfied party may appeal therefrom to a Superior Court, which in Ontario means the High Court or the Court of Appeal, (Interpretation Act, R.S. (1906), c. 1, s. 34, ss. 26).

Held, that if an appeal from an award is taken to the High Court there can be no further appeal to the Supreme Court of Canada which cannot even give special leave.

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

3 Edw. VII. c. 21, s. 1, confers jurisdiction upon the Exchequer Court in connection with the sale or foreclosure of railways, and by 4 & 5 Edw. VII. c. 158, after reciting that certain railways were in the hands of a receiver and that it was desirable that they should be sold under the order of the Exchequer Court, it is provided that the Exchequer Court might order the sale of the railways and that they might be sold separately or together as in the opinion of the Exchequer Court would be for the best interests of the creditors, and that the sale should have the same effect as a sheriff's sale of immovables under the laws of the Province of Quebec, and that the buyer should have, under such sale, clear title, free from all charges, hypothecs, privileges and incumbrances whatever.

The judge of the Exchequer Court having accepted a certain tender for the combined railways, although having separate tenders which together amounted to more than the tender accepted, parties who were creditors appealed from his order to the Supreme Court objecting to the discretion exercised by him in accepting the tender in question. The respondents moved to quash on the ground that the Exchequer Court was *curia designata*, and that no appeal lay from the order of the Exchequer Court judge. The

Supreme Court, without determining the motion to quash, give judgment dismissing the appeals with costs.

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

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

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

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

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

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

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

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

Action of replevin to recover 125 barrels of flour. Plaintiffs were indorsees of a bill of lading of the goods, which were held by the defendant as freight agent of the I.C.R. at Truro. The action was begun and the goods were replevied and the writ was served on 9th April, 1881. A default was marked in 25th April, 1881. On 10th Sept., 1881, plaintiffs' attorney issued a writ of inquiry, under which damages were assessed under R.S.N.S. (4 Ser.) c. 94, s. 56. An order *nisi* to remove the default and let in defendant to defend was taken out, on 11th October, 1881, and discharged with costs. The judgment being affirmed on appeal (4 Russ. & Geld. 168). R.S.N.S. (4 ser.) c. 94, s. 75, enacts that it shall be lawful for the court or a judge at any time within one year after final judgment, to let in defendant to defend upon application supported by satis-

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factory affidavits accounting for his non-appearance, and disclosing a defence upon the merits, etc. *Held*, that if the judgment appealed from was a final judgment within the meaning of section 3 of the Supreme Court Amendment Act of 1879, that the matter was one of proeedure and entirely within the discretion of the court below, and this Court would not interfere. Appeal dismissed with costs.

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

Defendant applied by motion for permission to file new pleas, which was refused by the Superior Court on account of insufficiency of the affidavit in support thereof, and, therefore, defendant served notice of intention to appeal from this interlocutory judgment to the Court of Queen's Bench. Notwithstanding this notice plaintiff moved for and obtained judgment in the Superior Court and this judgment was affirmed by the Court of Queen's Bench. On appeal to the Supreme Court of Canada, *Held*, per Ritchie, C.J., and Strong and Taschereau, JJ., that on a question of proeedure an appellate court should not interfere. Per Fournier and Henry, JJ., that the affidavit filed by the appellant in support of his amended plea was insufficient, not being sufficiently positive and precise. Per Taschereau, J., only a rule for leave to appeal would have the effect of staying proceedings, not a mere service of a motion for leave to appeal. Appeal dismissed with costs.

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

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

Baker v. La Societe de Construction Metropolitaine, 22 S.C.R. 364.

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

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

Ferrier v. Trepannier, 24 Can. S.C.R. 86.

In this case the appellants took exception *in limine* to an amendment made by leave of the court below, whereby they were sued in a different capacity from that set up in the writ. The Court said: "The amendment in question consisted in adding them to the case in their quality of trustees. Their objection to this proceeding cannot prevail. It rests upon a mere question of procedure and upon such questions the decisions of the provincial courts according to a well-established jurisprudence of this court cannot be interfered with except under special circumstances, none of which appear in this case. The Court of Queen's Bench has sanctioned the act of the Superior Court in the matter and we cannot be asked to reverse the concurrent decisions of the two courts on a question of this nature even were we inclined to doubt its legality."

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

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

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

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

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

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

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

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

Dueber Watch Case Co. v. Taggart, Cont. Dig. 127, 24th April, 1900.

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

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

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

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

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

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

An action for annulment of a will, the execution of which was procured when, as alleged, the testator was not capable of making it, it was dismissed because all necessary

parties had not been summoned. The Court of Queen's Bench (Q.R. 3 Q.B. 552) reversed this decision, and holding that the execution of the will had been procured by undue influence, annulled it.

The Supreme Court of Canada, affirmed the decision of the Court of Queen's Bench, as to parties, holding that the Superior Court should itself have summoned the parties deemed necessary. It also affirmed the judgment as to the will on the ground that the onus was on the party procuring the execution to prove capacity, and that he had not only failed to do so, but the evidence was overwhelming against him. The appeal was dismissed with costs.

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

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

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

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

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

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

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

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

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Williams v. Leonard, 26 Can. S.C.R. 406.

The question in issue in this case was the possession of a certain chattel. The plaintiff made title as well by a chattel mortgage as by purchase from the manufacturer. The defendants simply claimed to be a *bonâ fide* purchaser for value, and did not attack in their plea the validity of the chattel mortgage. At the trial the defendants applied to amend by alleging that the chattel mortgage was void under a section of the Bills of Sale Act, but the amendment was refused. On appeal the Divisional Court allowed the amendment and their judgment was affirmed by the Court of Appeal. On appeal to the Supreme Court it was held that the order granting leave to amend would not be interfered with whatever opinion the Court might have as to the propriety of amendment, such an order being a matter of procedure within the discretion of the court below.

Hamilton Brass Mfg. Co. v. Barr Cash & Package Carrier Co., 38 **Can. S.C.R. 216.**

By agreement between them the Hamilton Brass Mfg. Co. was appointed agent of the Barr Cash Co. for sale and lease of the carriers in Canada at a price named for manufacture; net profits to be equally divided and quarterly returns to be furnished, either party having liberty to annul the contract for non-fulfilment of conditions. The agreement was in force for three years when the Barr Co. sued for an account, alleging failure to make proper returns and payments.

On a reference to the Master the taking of the accounts was brought down to a time at which defendants claimed that the contract was terminated by notice. The Court of Appeal ordered that they should be taken down to the date of the Master's report.

Held, that this was a matter of practice and procedure as to which the Supreme Court would not entertain an appeal.

MacIlreith v. Hart, (Nov. 26, 1907), 39 Can. S.C.R. 657.

The plaintiff, claiming on behalf of himself and all other ratepayers of Halifax sued the Mayor and Engineer of Halifax and the city that the Mayor and Engineer should repay to the city certain moneys paid to them illegally to cover their expenses attending a convention of Canadian municipalities at Winnipeg. The plaintiff succeeded in the courts below. The Legislature of Nova Scotia, after judgment in

favor of plaintiff, by 6 Edw. VII., c. 61, s. 17, validated the payment to the Mayor and Engineer, and authorized the city of Halifax to pay, if it saw fit, "any sums for principal, interest and costs incurred by the defendants in this action in the event of judgment being finally recovered by the plaintiff. On the 16th May, 1907, the Halifax Council passed a resolution approving and adopting a report of a committee of the Council which recommended that the city solicitor be instructed to appeal this case to the Supreme Court of Canada. These facts being brought to the attention of the Supreme Court of Canada on affidavits at the hearing counsel for respondent took a preliminary objection that the appeal should not be heard as only a question of costs was involved. After argument the Court directed the appeal to be heard on the merits.

Green v. George, 42 Can. S.C.R. 219.

Writ issued endorsed to recover the price of goods sold and delivered amounting to $2,384. A default judgment for non-appearance was entered up. Plaintiff having died, action was revived and leave given to issue execution. Order made appointing Sheriff of Nipissing receiver to collect the money coming to defendant in respect of his interest in certain lands. Subsequently motion made to set aside writ of execution. Receiving order and order of Revivor and the judgment on ground that writ of summons was never served; judgment never signed; judgment obtained by misrepresentation as to service of writ, etc. On this motion the Master in Chambers directed an issue to be tried in which Green should be plaintiff and administratrix of George defendant, and the issue to be whether the plaintiff was entitled to have the alleged judgment set aside and vacated. Issue was tried, when trial judge held the writ of summons was personally served on defendant, but also held that plaintiff was entitled to have the judgment set aside and vacated upon certain terms and conditions, and in default of acceptance of such terms judgment should be entered for the defendant with costs. From this judgment an appeal was taken by the defendant to the Divisional Court against the terms imposed, which was dismissed, as also was a further appeal to the Court of Appeal.

The Divisional Court held there was question as to the propriety of the Master directing the issue in the first place, but his order had not been appealed against; also dealt at length with the question as to whether a final judgment could

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be entered or not, and whether the judgment entered was a nullity or not, a question of practice and procedure.

The judgment of the Court of Appeal says that at the trial the plaintiff took the objection not set up in the notice of motion, that the writ had not been specially endorsed so as to entitle plaintiff to sign judgment on default of appearance.

On these facts respondent moved to quash and judgment was pronounced dismissing the appeal with costs on the ground that, although having jurisdiction, the matter was one of practice and procedure of the courts below in which no substantial injustice has been done to the appellant.

Emperor of Russia v. Proskouriakoff, 42 Can. S.C.R. 226.

Appeal from judgments of the Court of Appeal for Manitoba, 18 Man. R. 56, affirming by equal division of opinion the judgment of Mathers, J., 18 Man. R. at p. 59, setting aside two orders of the Referee in Chambers, one for an attachment and the other for substitutional service of the statement of claim.

After the judgment of the Court of Appeal, Richards, J.A., in Chambers, made an order consolidating the two appeals to the Supreme Court of Canada (18 Man. R. 11).

Motion on behalf of the respondent was made to quash the appeal for want of jurisdiction. After hearing counsel for the parties the court reserved judgment, and, upon a subsequent day, the motion was granted and the appeal was quashed with costs.

The judgment of the court was delivered by the Chief Justice:

"This is an appeal involving the consideration of questions of practice and procedure and this court has invariably refused to interfere in such cases. See *Williams* v. *Leonard*, (26 Can. S.C.R. 406), per Strong, C.J., at page 410; and *Green* v. *George*, (42 Can. S.C.R. 219), decided by this court on the 13th of November, 1907.

"The motion is granted with costs." *Vide Cass* v. *Couture*, *supra*, p. 36.

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

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

In an appeal from a judgment of the Court of Appeal for Ontario arising out of the taxation of a solicitor's bill of

costs, the Court expressed doubt if a matter of this kind relating to practice and procedure of the High Court was a proper subject of appeal to the Supreme Court.

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

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

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

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

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

The plaintiff claimed to have a building contract for $1,900 rescinded, damages $1,000 and material $545. The Superior Court dismissed claim for damages from which plaintiff did not appeal, but acquiesced, and reserved to plaintiff his rights to the building material. Since the institution of the action the building in question had been completed, so that there was no question before the Supreme

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Court of annulling the contract, the only question being one of costs and $545 for bricks for which the judgment of the Court of Queen's Bench reserved the appellant's recourse. On these facts, a motion to quash an appeal to the Supreme Court was granted.

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

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

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

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

One Cotté was the bookkeeper for two estates represented in the action by the plaintiffs Archbald, and the defendants Delisle, respectively. The bookeeper having defaulted the plaintiff brought an action to obtain contributions from the defendants towards the loss sustained by them by the defalcation. The defendants besides pleading to the principal action, brought an action in warranty against the estate represented by Baker. The judgment below dismissed the principal action and in the proceedings in warranty held that the defendants were rightly sued and maintained that action, but concludes that as the principal action had been dismissed the court could only condemn the defendants to the costs of the action. The defendants in both actions appealed to the Supreme Court and the respondent in warranty action moved to quash the appeal on the ground that this was only an appeal as to costs. The motion was rejected, the Court holding that the case was distinguishable from *Moir* v. *Huntingdon*, 19 Can. S.C.R. 363; *McKay* v. *Hinchinbrooke*, 24 Can. S.C.R. 55, as here the plaintiffs in the original action were appealing to the Supreme Court, and if they succeeded and the defendants in warranty had not appealed, the judgment of the court below against them being *res judicata*, they were exposed to the risk of suffering from the consequences of the judgment which declared them to be warrantors of the plaintiffs in warranty and were con-

sequently entitled to be heard upon their appeal asking to be relieved from that judgment. S. 35.

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

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

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

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

In this case there was *acquiescement* by the appellant in the judgment sought to be appealed from. *Held*, that there being nothing but a question of costs involved in the appeal, the Court would decline to entertain jurisdiction though not incompetent to do so, and that a motion to quash the appeal was the proper procedure in such a case.

Angers v. Duggan, February 19th, 1907. (Not reported.)

This appeal was quashed on the ground that since the judgment against the appellant in the Superior Court, his interest in the lands in question under a deed of sale *à réméré* had ceased, by payment and by a deed of retrocession, executed by him to the party entitled to redeem. It was further held that, following *Schlomann* v. *Dowker*, 30 Can. S.C.R. 323, a motion to quash was a convenient way of disposing of the appeal before further costs had been incurred.

Martley v. Carson, 20 Can. S.C.R. 634.

An appeal from the judgment of the Supreme Court of Canada in this case to the Judicial Committee of the Privy

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Council was dismissed without consideration of the merits of the case, on it appearing that the appellant had parted with his interest in the property in question.

King v. Buchanan, February 21, 1910, (not reported).

A motion to quash for want of jurisdiction was made on the grounds that the case was a criminal one; that the rules applicable made by judges of Nova Scotia were under their powers to make rules in criminal cases. It also was contended the order made was a discretionary one; that the period of office of defendants had expired, and therefore only a question of costs was involved in which there was no appeal. The Court held, there being only costs involved, it would not hear the appeal.

Delta v. Vancouver Rly. Co., Oct. 11th, 1909. (Not reported.)

In this case the court having withdrawn from the Bench to consider whether more than a question of costs was involved, subsequently pronounced judgment in the terms of *Archbald* v. *Delisle*, 25 Can. S.C.R. at p. 14, as follows:

"The case is quite distinguishable from those of *Moir* v. *Huntingdon*, 19 Can. S.C.R. 363; and *McKay* v. *The Township of Hinchinbrooke*, (24 Can. S.C.R. 55). What we held in those cases was that where the state of facts upon which a litigation went through the lower courts has ceased to exist, so that the party appealing has no actual interest whatsoever upon the appeal, but an interest as to costs, and where the judgment upon the appeal, whatever it may be, cannot be executed or have any effect between the parties except as to costs, this court will not decide abstract propositions of law merely to determine the liability as to costs."

McLean, Hope & Co. v. North Pacific Lumber Co., Oct. 14, 1910. (Not reported.)

In an oral judgment the Chief Justice says the appeal is quashed because the Court's judgment would be purely academic as no order it could make in these proceedings for prohibition would be effective.

Beauchemin v. Armstrong, 34 Can. S.C.R. 285.

Where the Court of King's Bench affirmed the judgment of the Superior Court dismissing the action but varied it by ordering the defendant to pay a portion of the costs:—

It was held, that, though $2,217 was demanded by the action, the defendant had no appeal to the Supreme Court

of Canada as the amount of the costs which he was ordered to pay was less than $2,000. *Allan* v. *Pratt*, (13 App. Cas. 780), and *Monette* v. *Lefebvre*, (16 Can. S.C.R. 387) followed.

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Appellate Jurisdiction. Key.

Key for determining jurisdiction of the Court.

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

If the appeal is not eliminated by the preliminary exceptions enumerated in the notes to the preceding section, the first inquiry will be, Is the judgment final or not? If in doubt as to whether the judgment is final or interlocutory, *vide*, *supra*, p. 9. If this question is answered in the negative, the practitioner will proceed to B and its subdivisions.

If the answer is in the affirmative, he will proceed to sub-division I. of A. and inquire, Is it an appeal from the highest court of final resort? For the courts of final resort in each province, *vide*, p. 97, *infra*. If the answer to this latter inquiry is in the negative, he will drop to II. and its sub-divisions.

If the answer is in the afirmative, he will proceed to the next sub-division (1) and inquire, Was the court of original jurisdiction a superior court? The courts of superior jurisdiction in each province are set out p. 109, *infra*. If the answer to this inquiry is in the negative he will proceed to (2) and apply its sub-divisions to the case in hand.

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

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

With respect to appeals under sections 39 and 46, *infra*, *vide* notes to these sections.

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KEY

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

A. Final judgments

I. Of the highest Court of final resort,

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

In Quebec

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

In Ontario

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

In the Yukon Territory

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

In the other Provinces of Canada

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

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

(a) In the Province of Quebec if the matter in controversy involves a question of or relates to any fee of office, duty

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

II. Not of the highest Court of final resort.

(1) In Quebec;

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

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

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

B. Interlocutory judgments

I. Of the highest Court of final resort.

(1) Court of original jurisdiction a superior Court.

(a) Upon any motion to enter a verdict or nonsuit upon a point reserved at the trial,
(b) Upon any motion for a new trial,
(c) In any action, suit, cause, matter or other judicial proceeding originally instituted in any superior court of equity in any Province of Canada other than the Province of Quebec, and from any judgment in any action, suit, cause, matter or judicial proceeding, in the nature of a suit or proceeding in equity, originally instituted in any superior court in any Province of Canada other than the Province of Quebec. Provided that, "in the Province of Quebec the case is one of those covered by section 46 and 47, and in the Province of Ontario the case is one of those mentioned in section 48," and in the Yukon Territory the case is one of those mentioned in section 49 of the Supreme Court Act.

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

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

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

The expression "except as hereinafter otherwise provided" refers to the limitation placed upon appeals in the Provinces of Ontario, Quebec and the Yukon Territory by sections 46, 48 and 49, *infra*, and discretionary judgments provided for by section 45.

An appeal will lie to the Supreme Court from the Court of King's Bench, appeal side, Quebec, when that court has erroneously held it was without jurisdiction. *Chicoutimi* v. *Price*, 39 Can. S.C.R. 81. But no appeal will lie if the court below has properly held that it is without jurisdiction. *Hull Electric Co.* v. *Clement*, 41 Can. S.C.R. 419.

The legislature of any province may refuse an appeal to the Court of Appeal or other highest court of last resort in the province, and in such a case no appeal will lie to the Supreme Court of Canada. *St. Cunégonde* v. *Gougeon*, 25 Can. S.C.R. 83. But the legislature cannot limit appeals from the Court of Appeal or other highest court of last resort to the Supreme Court. *Clarkson* v. *Ryan*, 17 Can. S.C.R. 251; *Halifax* v. *McLaughlin Carriage Co.*, 39 Can. S.C.R. 174; *Day* v. *Crown Grain Co.*, 39 Can. S.C.R. 258; (1908) A.C. 504; C.R. [1908] A.C. 150.

The first part of s. 36 gives a general appeal in every province of Canada from the *final* judgment of the *highest* court of final resort where the court of original jurisdiction is a *superior* court. This provision has its immediate origin in R.S.C. 1886, c. 135, ss. 24 (*a*), where it is associated with the provisions now contained in ss. 38 and 39. Sec. 24 is a section which consolidates certain sections of the original

Supreme and Exchequer Court Acts, 38 V., c. 11, and 42 V., c. 39. 24 (*a*) is contained in 38 V., c. 11, first part of s. 17; 24 (*b*), (*c*) and (*d*) are reproductions of ss. 18, 19 and 20 of the same act. 24 (*e*) is a reproduction of 42 V., c. 39, s. 1; 24 (*f*) of 42 V., c. 39, s. 4; while 24 (*g*) is derived from 38 V., c. 11, s. 23.

24 (a), if viewed irrespective of its origin is open to the construction that although it gives a general appeal in all cases, it must be construed as excluding the right of appeal given by the other subsections (*b*) to (*g*) inclusive; and that seems to have been the view taken by the court in some cases. *Sherbrooke* v. *McManamy*, 18 S.C.R. 594; *Verchères* v. *Varennes*, 19 Can. S.C.R. 365; *Bell Telephone Co.* v. *Quebec*, 20 Can. S.C.R. 230. It would have been better in the revision of 1886 if s. 24 (*a*) had been made an independent section as it is in the original act, 38 V., c. 11, s. 17, where it reads as follows:

"17. Subject to the limitations and provisions hereinafter made, an appeal shall lie to the Supreme Court from all final judgments of the highest Court of final resort, whether such Court be a Court of Appeal or of original jurisdiction, now or hereafter established in any Province of Canada, in cases in which the Court of original jurisdiction is a Superior Court: Provided that no appeal shall be allowed from any judgment rendered in the Province of Quebec, in any case where the sum or value of the matter in dispute does not amount to two thousand dollars; and the right to appeal in civil cases given by this Act, shall be understood to be given in such cases only as are mentioned in this section, except Exchequer cases, and cases of mandamus, habeas corpus, or municipal by-laws, as hereinafter provided."

There is no doubt, looking at the provisions of this section, that the intention of Parliament was to give a general right of appeal to the Supreme Court from every Province of Canada, where the judgment was of the character therein mentioned, subject only, in the Province of Quebec, to the proviso therein contained.

This was the view adopted by the writer in drafting the sections dealing with the appellate jurisdiction of the court in the revision of 1906. Whatever question there may have been under the Revised Statutes of 1886, there can be, and is none now as to the construction to be placed upon s. 24 (a), now s. 36, namely, that it gives a general right of appeal applicable to all the provinces of Canada, including the Province of Quebec. See the judgment of the present Chief Justice in *Canada Carriage Co.* v. *Lea*, 37 Can. S.C.R. 672, and in *Desormeaux* v. *Ste. Therese*, 43 Can. S.C.R. 82, where he says:

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"That section 39 of the Supreme Court Act applies to the whole Dominion is perfectly true, but the general jurisdiction conferred by that section is limited in so far as appeals from the Province of Quebec are concerned by the provisions of section 46. In other words, section 39 would seem to be a general section, like sections 36 and 38, which, notwithstanding the generality of their provisions, are subject to the special limitations provided by section 46, in Quebec, and by section 48 as to Ontario.

More recently, Mr. Justice Anglin, in Shawinigan v. Shawinigan, 43 Can. S.C.R. at p. 662, says:

"The special jurisdiction conferred by s. 39 (e), (formerly s. 24 (g), is supplementary. It does not exclude the general appellate jurisdiction conferred by s. 36 in a case otherwise appealable, although the validity of a municipal by-law may be brought in question in the action."

Power of provincial legislature to limit appeals.

Clarkson v. Ryan, 17 Can. S.C.R. 251.

Held, the section of the Ontario Judicature Act, 1881, s. 43, which provides that in cases where the amount in controversy is under $1,000 no appeal shall lie from the decision of the Court of Appeal to the Supreme Court of Canada except by leave of a judge of the former court, is *ultra vires* of the legislature of Ontario, and not binding on this Court.

This decision was followed in *Halifax* v. *McLaughlin*, 39 Can. S.C.R. 283.

In *Day* v. *Crown Grain Co.*, 39 Can. S.C.R. 258, the Supreme Court refused to quash an appeal on the ground that the right of appeal had been taken away by Mechanics Lien Act, R.S.M. c. 110, s. 36, which provided that the judgment of the Court of Queen's Bench should be final.

This was afterwards affirmed in the Privy Council (1908) A.C. 504; C.R. [1908] A.C. 150, the question being whether the provincial legislature could limit appeals to the Supreme Court from the highest provincial courts.

Final judgment.

For definition and distinction between final and interlocutory judgments, *vide supra*, p. 9.

Highest court of final resort.

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Highest Court of final resort.

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

Province of Ontario:—

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

Province of Quebec:—

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

Province of New Brunswick:—

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

Province of Nova Scotia:—

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

Province of Prince Edward Island:—

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

Province of Manitoba:—

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

Province of Alberta:—

" The Supreme Court of Alberta " (1907 E. VII., c. 3 s. 3).

Province of Saskatchewan:—

" The Supreme Court of Saskatchewan " (7 E. VII., c. 8, s. 4).

Province of British Columbia:—

" The Court of Appeal " (7 E. VII., c. 10, s. 2).

Yukon Territory:—

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

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Highest Court of final resort.

It is to be borne in mind that in some of the provinces and territories, where there is no court of appeal a judge of the Supreme or Territorial Court, while sitting alone, has all the powers of the court, and his judgment may properly be styled a judgment of the court. Such a judgment is not appealable *de plano* to the Supreme Court. The court whose judgment is meant by this section is the judgment of the full Court, or court sitting *in banco*, or *in banc* as it is variously styled.

In 1879 the Supreme Court was called upon to interpret the words "highest court of last or final resort" in the case of *Danjou* v. *Marquis*, 3 Can. S.C.R. 251. It was there contended that inasmuch as the case in question was not appealable to the Court of Queen's Bench by reason of the provisions of article 1033 of the Code of Civil Procedure, the judgment of the Superior Court was a judgment of the court of *last* resort *quoad* the appellant. The Supreme Court rejected this contention and held that the only court in the Province of Quebec from which an appeal would lie to the Supreme Court was the Court of Queen's Bench. This was followed in *Macdonald* v. *Abbott*, 3 Can. S.C.R. 278. In 1891 (54 & 55 V. c. 25, s. 3) the Supreme Court Act was amended giving an appeal from the Superior Court in Review "in cases where, and so long as no appeal lies from the judgment of that court, when it confirms the judgment rendered in the court appealed from, which by the law of the Province of Quebec are appealable to the Judicial Committee of the Privy Council."

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

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

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Highest Court of final resort.

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

In Ontario Mining Co. v. Seybold, 31 Can. S.C.R. 125, Mr. Justice Girouard says:—

"In the report of *Farquharson* v. *Imperial Oil Co.* (30 Can. S.C.R. 188), which I saw for the first time when this application was made, I am said to have concurred in the dismissal of the appeal from the order made in Chambers. I presume that this means that I would not interfere with the discretion exercised by the learned judge who granted leave to appeal. I am supposed to have expressed no views upon the question of jurisdiction of the court to hear the appeal. But as I concurred in the judgment disposing of the merits of the case, I must be taken to have concurred with the view of the Chief Justice and Mr. Justice Gwynne that there was jurisdiction in the Supreme Court to grant an appeal per saltum to this court from the Divisional Court of Ontario, notwithstanding the limitations placed by the Legislature of Ontario upon appeals from the Divisional Court, where the party desiring a further appeal had failed both in the Divisional Court and in the court below."

This decision must be taken as overruled by *Ottawa Electric Co.* v. *Brennan*, 31 Can. S.C.R. 311, where the Chief Justice says:

"We are all of opinion that this application must be refused. It is not a case in which leave to appeal per saltum can be granted. It has not been shown that there was any right of appeal to the Court of Appeal which is necessary to give us jurisdiction; on the contrary it appears that there is no such right of appeal. The motion is refused with costs."

The same view was expressed in *James Bay Rly. Co* v. *Armstrong*, 38 Can. S.C.R. 511. By s. 168 of 3 Edw. VII., c. 58, amending the Railway Act, 1903 (R.S.C., 1906, c. 37, s. 209), if an award by arbitrators on expropriation of land by a railway company exceeds $600 any dissatisfied party may appeal therefrom to a Superior Court, which in Ontario means the High Court or the Court of Appeal (Interpretation Act, R.S., 1906, c. 1, s. 34, ss. 26).

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Appellate Jurisdiction. Superior Court.

The Supreme Court held that if an appeal from an award is taken to the High Court there can be no further appeal to the Supreme Court of Canada which cannot even give special leave.

On a further appeal of this case to the Privy Council (1909) A.C. 624, C.R. [1909] A.C. 285, it was held that according to the true construction of s. 168 of the Canada Railway Act, 1903, the appeal given thereby to a superior court from an award under that Act lies in the Province of Ontario to either the Court of Appeal or the High Court of Justice therein at the option of an appellant; but that in case of appeal to the High Court, inasmuch as it is not the Court of last resort in the province within the meaning of the Supreme and Exchequer Courts Act, R.S.C. 1886, c. 135, s. 26, there is no appeal therefrom to the Supreme Court of Canada.

"Court of Appeal or of original jurisdiction."

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

"The Court of original jurisdiction a superior court."

The following are superior courts (R.S. 1906, c. 1, s. 34, sub-s. 26):

Province of Ontario:—

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

Province of Quebec:—

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

Province of New Brunswick:—

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

Province of Nova Scotia:—

The Supreme Court of Nova Scotia.

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Province of Prince Edward Island:—

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

Province of Manitoba:—

Hia Majesty's Court of King's Bench for Manitoba and the Court of Appeal.

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

Province of Alberta:—

The Supreme Court of Alberta.

Province of Saskatchewan:—

The Supreme Court of Saskatchewan.

Province of British Columbia:—

The Supreme Court of British Columbia and the Court of Appeal.

Yakon Territory:—

The Territorial Court.

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

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

North British Canadian Investment Co. v. Trustees St. John School District, 35 Can. S.C.R. 461.

Held, that a confirmation of a tax sale transfer by a judge of the Supreme Court of the North-West Territories

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Criminal and Hab. Corp. Cases.

under section 97 of the Land Titles Act, 1894, is a matter or proceeding originating in a court of superior jurisdiction and an appeal will lie from the final judgment of the full Court affirming the same.

Criminal appeals.

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

Habeas Corpus appeals.

By section 62, *infra*, p. 340, a judge of the Supreme Court has concurrent jurisdiction to issue a writ of *habeas corpus* in a criminal case with judges of the provincial courts, and there is an appeal from his decision to the full Court.

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

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

Prohibition.

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

A motion for a writ of prohibition to restrain an extradition commissioner from investigating a charge of a criminal nature upon which an application for extradition has been made, is a proceeding arising out of a criminal charge within the meaning of section 24 (*g*) of the Supreme Court Act, as amended by 54 & 55 V. c. 25, s. 2, and, in such a case no appeal lies to the Supreme Court of Canada. *In re Woodhall* (20 Q.B.D. 832), and *Hunt* v. *The United States* (16 U.S.R. 424) referred to.

Blaine v. Jamieson, 41 Can. S.C.R. 25.

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Appellate Jurisdiction. Arising in an Inferior Court.

An information was laid before the police magistrate of St. John, N.B., charging the License Commissioners with a violation of the Liquor License Act by the issue of more licenses in Prince Ward than the Act authorized. The informant and the Commissioners agreed to a special case being stated for the opinion of the Supreme Court of New Brunswick on the construction of the Act and that court, after hearing counsel for both parties, ordered that "the Board of License Commissioners for the City of Saint John be, and they are hereby, advised that the said Board of License Commissioners can issue eleven tavern licenses for Prince Ward in the said City of St. John and no more" (38 N.B. Rep. 508). On appeal by the Commissioners to the Supreme Court of Canada it was held that the proceedings did not originate in a superior court, and were not within the exceptions mentioned in sec. 37 of the Supreme Court Act: that they were *extra cursum curiæ*: and that the order of the court below was not a final judgment within the meaning of s. 36; the appeal, therefore, did not lie and should be quashed.

St. Hilaire v. Lambert, 42 Can. S.C.R. 264.

On an application for the cancellation of a liquor license issued under the Liquor License Act of the Province of Alberta, a judge of the Supreme Court of Alberta, in Chambers, granted an originating summons ordering all parties concerned to attend before him, in Chambers, and, after hearing the parties who appeared in answer to the summons, refused the application. The full court reversed this order and cancelled the license. On an appeal by the licensee to the Supreme Court of Canada it was hed that the case came within the principle decided in *The Canadian Pacific Rly. Co. v. The Little Seminary of Ste. Thérèse* (16 Can. S.C.R. 606), and consequently, the Supreme Court of Canada had no jurisdiction to entertain the appeal.

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

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Appellate Jurisdiction. Arising in an Inferior Court.

other jndicial proceeding has not originated in a snperior court, in the following casss:—

(a.) In the Province of Qnehec if the matter in controvsrsy involvss the qnsstion of or relates to any fes of office, duty, rent, revenue, sum of money payahle to His Majesty, or to any titles to lands or tenements, annnal rents and other matters or things where rights in fnture might he honnd; or amounts to or sxceeds the eum or value of two thonsand dollars;

(h.) In ths Provinces of Nova Scotia, New Brunswick, British Columhia and Princs Edward Island, if the sum or valne of the matter in dispnte amounts to two hundrsd and fifty dollars or upwards, and in which ths conrt of first instance possesses concurrsnt jnrisdiction with a superior conrt;

(c.) In ths Provinces of Alherta and Sarkatchswan hy leave of the Supreme Conrt of Canada or a jndge thereof;

(d.) From any judgment on appeal in a case or proceeding institnted in any conrt of prohate in any province of Canada other than the Province of Qnehsc, nnless ths matter in controversy does not exceed five hnndred dollars;

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

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

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

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

This section deals with appeala lacking one of the three characteristics, namely, that the action originate in s superior court, and states the only cases in which an action

arising in an inferior court can be carried in appeal to the Supreme Court of Canada. S. 37.

37 (a). Appellate Jurisdiction. Arising in an Inferior Court.

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

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

Appeal from the Court of Queen's Bench, Three Rivers, setting aside a seizure for a tax of $10 imposed by by-law of the City of Three Rivers on strangers and non-residents selling goods by samples. The case was settled and agreed to by both parties, who took no objection to the jurisdiction. *Held*, that an appeal will not lie to the Supreme Court of Canada in cases where the court of original jurisdiction is the Circuit Court for the Province of Quebec. Appeal quashed with costs, the objection having been taken by the Court.

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

The action was brought in the Circuit Court, District of Terrebonne, for $125 and interest for taxes imposed upon real estate. The respondents moved to quash appeal for want of jurisdiction, relying on section 3 of the Supreme Court Amendment Act of 1879. Appellants contended that in Montreal and some other districts in the Province of Quebec such an action, in which future rights would be bound, would be brought in the Superior Court, and only by virtue of a special statute was it brought in the Circuit Court of Terrebonne; that such statute was applicable to only some of the districts of the province, and that if the contention of the counsel for appellants was correct, the anomaly would arise that in such a case if the action were brought in one district there would be no appeal, while if brought in another district there would be an appeal, and argued that, in this case, the Circuit Court must be considered as substituted for and in lieu of the Superior Court. *Held*, that the statute was clear, and in no case would an appeal lie in an action which originated in a Circuit Court.

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Appellate Jurisdiction. Arising in an Inferior Court.

Major v. *Corporation of Three Rivers* (Cout. Dig. 71) followed. Motion granted and appeal quashed with costs. The objection to the jurisdiction was taken by the respondents in the factum.

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

As to the meaning to be attached to the expressions "fee of office," "title to lands," "future rights," etc., contained in this sub-section, *vide infra*, p. 211, *et seq.*

37 (b).

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

37 (c).

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

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

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

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

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

Lafferty v. Lincoln, 38 Can. S.C.R. 625.

In this case the respondent was convicted by the Police Magistrate of Calgary for practising medicine for gain without having registered in accordance with the provisions of c. 28 of the Statutes of Alberta, 1906, and a case was stated by the magistrate for the opinion of the Supreme Court of the North-West Territories under s. 900 of the Criminal Code (1892). The Supreme Court of the North-West Territories held that the provincial statute was *ultra vires* and quashed the conviction, one judge dissenting. Counsel for appellant alleged that a local Act provided that the procedure in appeals from magistrates, in offences against local Acts, should be the same as that provided in the Criminal Code for criminal appeals. The plaintiff applied to a judge of the Supreme Court of Canada in Chambers under s. 37, ss. (c) for leave to appeal, and the motion was by him referred to the full court, it not being clear upon the material filed that the present appeal was not launched under the provisions for criminal appeals contained in s. 1024 of the Criminal Code (1906). After argument, leave was granted, and the case directed to be set down for hearing at the then present session of the Court.

Finseth v. Ryley Hotel Co., 43 Can. S.C.R. 646.

Proceedings on an originating summons issued by a judge of the Supreme Court of Alberta on an application for cancellation of a license under section 57 of the "Liquor License Ordinance," are judicial proceedings within the meaning of s. 37 of the "Supreme Court Act," R.S.C. 1906, c. 139, and, consequently, the Supreme Court of Canada has jurisdiction to entertain an application for leave to appeal from the judgment of the Supreme Court of Alberta thereon.

Where the decisions of the provincial court shew that the judges of that court are equally divided in opinion as to the proper construction of a statute in force in the province, and it appears to be desirable in the public interest that the question should be finally settled it is proper for the Supreme Court of Canada to exercise the discretion vested in it for the granting of special leave to appeal under the provisions of s. 37 of the "Supreme Court Act." Girouard, J., dissented on the ground that the proceedings in question were intended to be summary and that, in these circumstances, the case was not one in which special leave to appeal should be granted. *Vide Blaine* v. *Jamieson*, 41 Can. S.C.R. 25; *St. Hilaire* v. *Lambert*, 42 Can. S.C.R. 264, *supra*, p. 103.

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Calgary & Edmonton Land Co. v. Atty. Gen. of Alberta. 45 Can. S.C.R. 170.

The Chief Justice said—"This application was made before the Registrar as judge in Chambers, under the provisions of section 37 (e) of the "Supreme Court Act," for leave to appeal. The motion was enlarged by him into court.

The application arises in the following manner:—The local statute of Alberta, chapter 11, of 1907, sections 90 *et seq.*, provides that the secretary of every district shall make a return of the assessable lands and also of arrears of taxes. Section 92 authorizes a judge of the Supreme Court of Alberta, in Chambers, on the application of the Attorney-General of the province, to appoint a time for the holding of a court for the confirmation of the return; and section 95 provides that, any time after the expiration of a year, the Attorney-General may obtain an order from a judge, in Chambers, directing that the title to the lands in arrears for taxes be vested in the Crown. In the statutes of 1908, chapter 7 (Alta.), it is provided that where jurisdiction is given to a judge, as *persona designata*, he should be deemed to have the jurisdiction of a judge of the court to which he belongs, and that his orders shall be enforced as other orders of the court. By the same Act an appeal is given to the full court from his judgment, after leave has been obtained.

In the present case the lands of the Calgary and Edmonton Land Company were returned by the secretary of the district as in arrears for taxes, and this return was confirmed by the Chief Justice of Alberta, and, upon an appeal from his order of confirmation, the appeal was dismissed and his order was affirmed by the unanimous judgment of the full court. The land company now apply for leave to appeal under section 37 (e) of the "Supreme Court Act," where an appeal is taken by leave of the Supreme Court of Canada or a judge thereof, although the case may not have originated in a court of superior jurisdiction.

Without expressing any opinion as to whether, in the circumstances, it was necessary to move for leave, we think it is a proper case in which to grant the motion, *quantum valeat*, because of the magnitude of the interests involved. The motion is granted without costs."

For the grounds upon which leave to appeal will be granted *vide infra*, p. 275.

37 (d).

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

Since the amendment there have been appeals to the Supreme Court in cases originating in the Court of Probate in the Province of Nova Scotia. *Lambe* v. *Cleveland*, 19 Can. S.C.R. 78; *British and Foreign Bible Society* v. *Tupper*, 37 Can. S.C.R. 100; *Daly* v. *Brown*, 39 S.C.R. 122.

37 (e).

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

By an ordinance of the Governor-General in Council passed on the 18th March, 1901, pursuant to section 8 of the Yukon Territory Act, 61 V. c. 6, the Gold Commissioner has jurisdiction to hear and determine various disputes relating to mining claims, and an appeal is given from his judgment to the Territorial Court. The same ordinance declares that the judgment of the Territorial Court should be final and conclusive.

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

Klondyke Government Concession v. McDonald, 38 Can. S.C.R. 79.

An hydraulic mining lease, granted in 1900, under the Dominion Mining Regulations, for a location extending along both banks of Hunker Creek, in the Yukon Territory, included a point at which, in 1904, the plaintiff acquired the right to divert a portion of the waters of the creek, subject to then existing rights, for working his placer mining claims adjacent thereto.

Held, that under a proper construction of the tenth clause of the hydraulic mining regulations, waters flowing through or past the location were subject to be dealt with

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under the regulations of August, 1898; that the hydraulic grant conferred no prior privileges or paramount riparian rights upon the lessee, and that the grant to the plaintiff was of a substantial user of the waters which was not subject to the common law rights of riparian owners and entitled him, by all reasonable means necessary for the purpose of working his placer claims, to divert the portion of the flowing waters so acquired by him without interference on the part of the lessee of the hydraulic privileges. The judgment of the Territorial Court affirming the decision of the Gold Commissioner was affirmed by the Supreme Court.

Other cases.

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

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

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

Action originating in County Court (Ontario).

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

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

Action originating in the Recorder's Court.

Montreal Street Rly. Co. v. City of Montreal, 41 Can. S.C.R. 427.

Under the provisions of the Montreal City Charter, 62 Viet. c. 58, s. 481 (Que.), an action was brought by the city in the Recorder's Court to recover taxes on an assessment of the company's property in the city. Judgment was recovered for $39,691.80, and an appeal to the Superior Court.

sitting in review, under the provisions of the Quebec statute, 57 V. c. 49, as amended by 2 Edw. VII. c 42, was dismissed. On an application by the company to affirm the jurisdiction of the Supreme Court of Canada to hear an appeal from the judgment of the Court of Review, it was held that the Superior Court, when exercising its special appellate jurisdiction in reviewing this case, was not a court of last resort created under provincial legislation to adjudicate concerning the assessment of property for provincial or municipal purposes within the meaning of s. 41 of the Supreme Court Act, R.S. (1906), c. 139, and, consequently, there could be no jurisdiction to entertain the appeal.

S. 38. Appellate Jurisdiction. Interlocutory Judgments.

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 nonsuit upon a point reserved at the trial;

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

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

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

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

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Appellate Jurisdiction. Interlocutory Judgments.

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

38 (a).

Trustees St. John Y.M.C.A. v. Hutchinson 24th Feb., 1880 (Cout. Dig. 998).

A rule for nonsuit pursuaat to leave reserved at trial was made absolute on the grouad that damages and injury must concur to afford a right of action, and the evideace shewed only an ordinary and legitimate use of the defeadants' own land, which did not constitute an injury, and therefore they were not liable. *Held*, affirming the judgment appealed from (2 Pugs. & Bur. 523), that the declaration did not cover the appellant's case, and therefore the nonsuit was correct.

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

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

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

The action was tried three times, each trial resulting in a nonsuit, which was set aside and a new trial ordered. From the judgment ordering the third new trial A. appealed, and the judges being equally divided, the order stood. On this last trial it was shewn that A. had requested the inspector for the divisioa in which M.'s house was situate to iaquire about it, and that, after the information, the inspector reported that there were frequent rows in the house, but he

thought there was nothing in the charge. The trial judge held that want of reasonable and probable cause was not shewn and withdrew the case from the jury. The Divisional Court held that he should have asked the jury to find on the fact of A.'s belief in the statement on which he acted in bringing the charge. *Held*, Taschereau, J., dissenting, that A. was justified in acting on the statement, and, the facts not being in dispute, there was nothing to leave to the jury and the trial judge rightly held that no want of reasonable and probable cause had been shewn. *Lister* v. *Perryman*, L.R. 4 H.L. 521, followed; *Abrath* v. *North Eastern Rly. Co.*, 11 App. Cas. 247, considered.

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

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

C. P. R. v. Wood, May 15, 1911 (unreported).

This was a negligence action claiming $25,000 damages. The defence was contributory negligence or negligence of a fellow servant, and *volens*. A motion for nonsuit was made at the close of the plaintiff's case, which was reserved.

At the close of the case the following took place:

Mr. Justice Perdue: As I reserved the whole question of a non-suit till the end of the case, so as to see what evidence would be adduced in the progress of the defence, I can, at all events, look at the evidence offered by the defendants for this purpose to ascertain whether this question should be submitted to the jury, in view of the evidence that the defence has brought as to the ringing of the bell and the sounding of the whistle. I think I may look at the evidence of the defence

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for that purpose, and where I find the plaintiff's evidence, either establishing that the whistle was sounded, or simply going to the extent of showing that the witnesses did not hear the sound, I find the clearest possible evidence, the evidence of two persons, and the engineer and the foreman corroborated by the evidence of the conductor and the baggageman, that the whistle was blown and the bell was sounded before coming to McPhillips Street, and the bell was kept ringing until the plaintiff was struck.

Now, if I were to submit this case to the jury, there is, upon that evidence, only one conclusion, it appears to me to which the jury could properly come, and that is to find in favour of the defendants.

I think, therefore, that I should withdraw this case from the jury and should enter a non-suit, with leave, of course, and the plaintiff can have the usual time in which to move against my judgment.

The plaintiff moved for a new trial on the grounds, amongst others, that the judge had no authority (1) to enter a nonsuit against the wishes of plaintiff's counsel; (2) no power to direct the jury to make a finding in favour of the defendants without having first submitted the evidence to them; (3) no power to direct a judgment to be entered for the defendants without having findings of the jury.

The Court of Appeal granted a new trial on the ground that there was evidence which ought to have been submitted to the jury, saying: "It is clear on the authorities that if either of the defences of contributory negligence or *volenti non fit* is to be established, it must be established by the defence satisfactorily to the jury who 'are the tribunal entrusted by law with the determination of issues of fact.'" citing *Toronto Ry. Co.* v. *The King* (1908), A.C. 260.

The judgment of the Court of Appeal was reversed by the Supreme Court, Idington and Duff, JJ., diss., and the trial judgment restored.

Mr. Justice Anglin, with whom Mr. Justice Davies concurred, said:

"As a matter of trial practice, where, after motion for non-suit, evidence for the defence has been head, it is, as a general rule, desirable that findings of the jury should be taken subject to a reservation of the defendant's motion. But it is quite within the power of the trial judge at any subsequent stage of the proceedings to withdraw the case from the jury upon the reserved motion for a non-suit, or to direct a verdict for the defendant. Where either of these courses has been taken, to support the judgment of dismissal the defendant must satisfy the appellate court that there was no reasonable evidence of negligence, for which the should be held responsible, to submit to the jury."

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

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

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

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

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

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

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

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

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

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

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

This was an action upon a policy of life insurance and a verdict entered by the trial judge upon the findings of the

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

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

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

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

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

New trial generally.

Domville v. Cameron, Cout. Dig. 122 (1880).

Appeal from a judgment of the Supreme Court of New Brunswick, making absolute a rule to set aside a verdict for the defendants, and for a new trial, on the several grounds of improper reception of evidence, misdirection, and because the verdict was against the weight of evidence. It was *held*, that the court below having proceeded as well on the ground that the verdict was against the preponderance of the evidence as on the law, the appeal came within section 22 of the Supreme Court Act, and would not lie. Appeal quashed for want of jurisdiction, but without costs, the appeal having been heard *ex parte*, the respondent not appearing.

Jones v. De Wolff, Cout. Dig. 995 (1884).

Where the rule had been taken out for a new trial only, the Supreme Court refused to make an order for nonsuit or that verdict for the defendant should be entered, but merely affirmed the rule.

C. P. R. v. Lawson, Cout. Dig. 74 (1885).

A rule was discharged so far as it asked a nonsuit, but was made absolute for a new trial. *Held*, on an appeal by defendant that although the plaintiff was entitled to recover, yet, as he had not appealed from the order for a new trial, the rule should be affirmed and the appeal dismissed with costs.

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

The court below in ordering a new trial considered the evidence greatly preponderated in favour of plaintiffs. *Held*, that the Supreme Court would not encourage appeals in such cases and that where the court below has ordered new trial on the ground that the verdict is against the weight of evidence the Supreme Court will not interfere.

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

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

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

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

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

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

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

Held, that section 24 (*d*) of R.S.C. c. 135, now section 38 (*b*), allowing appeals to the Supreme Court "from the judgment on a motion for a new trial upon the ground that the judge has not ruled according to law," applies to jury cases only.

Scott v. The Bank of New Brunswick, 21 Can. S.C.R. 30.

Appeal from a decision of the Supreme Court of New Brunswick setting aside a verdict for the plaintiff and ordering a new trial.

The action was brought to recover from the Bank of New Brunswick the amount of a special deposit by the plaintiff, and the defence was that such amount had been already paid to an agent of the plaintiff who had endorsed plaintiff's name upon and given up the deposit receipt. As against this defence it was contended that no such authority was given to the agent and that plaintiff's name had been forged on the receipt. The jury found the facts in favour of this contention, and plaintiff obtained a verdict which was set aside by the full Court and a new trial ordered. Plaintiff sought to appeal.

The Court held that a new trial having been ordered to try certain questions of fact in the case, such order should not be interfered with by any appellate court.

C. P. R. v. Cobban, 22 Can. S.C.R. 132.

This action was brought on for trial before Mr. Justice Street and a jury. The only question left to the jury was that of negligence upon which they failed to agree, the learned judge stating that if there were any other questions to be decided he would decide them himself. There was a general understanding before the jury returned their verdict that other questions in the case would be argued before the trial judge at a subsequent time. During the trial counsel for the defendants made a motion for a nonsuit which was informally dismissed. No further argument took place before the trial judge and the defendants moved before the Divisional Court by way of appeal from Mr. Justice Street's decision refusing a nonsuit, and for an order that the action be dismissed on the grounds principally that there was no evidence of negligence and that the relief pleaded was of itself a complete bar to the action. Before the hearing of the appeal the pleadings were amended by an order made in Chambers. The Divisional Court ordered the action dismissed upon the sole ground that there was no evidence of negligence to go to the jury. Upon appeal to the Court of Appeal it was held that the Divisional Court went too far in disposing of the case as they did before the issues had been passed upon and considered by the trial judge or the jury.

Upon appeal to the Supreme Court, *Held*, that the case had never been tried and that the issues of fact had never been passed upon either by the jury or the judge and that the appeal should be dismissed.

Held, further, that the judgment appealed from was not a final judgment and it was questionable whether an appeal lay to the Supreme Court on the facts of the case from the judgment of the Court of Appeal.

By 54-55 V. c. 25, s. 2 (Sept., 1891), the grounds upon which an appeal would lie upon a motion for a new trial were changed, and the expression "upon the ground that the judge has not ruled according to law," in old section 22, *supra*, and at that time being 24 (*d*) of R.S. c. 135, was eliminated, and from that date the statute with respect to motions for a new trial has remained as now appears in the text 38 (*b*).

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Hesse v. Saint John Railway, 30 Can. S.C.R. 218.

In this case plaintiff recovered a verdict for $25,000 damages and appealed to the Supreme Court from an order of the Supreme Court of New Brunswick granting a new trial. This Court dismissed the appeal, but limited the new trial to the assessment of damages, the finding as to liability of defendants not to be interfered with.

Green v. Miller, 33 Can. S.C.R. 193.

Held, that as the defendant had asked for a new trial only, in the court below, the Supreme Court could not under the Nova Scotia Act order judgment to be entered for him in the action, but could only direct that a new trial be had between the parties.

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

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

Temiskaming & Northern Ontario Rly. Commission v. Wallace, 37 Can. S.C.R. 696.

Appeal from the decision of the Court of Appeal for Ontario (12 Ont. L.R. 126), reversing the judgment at the trial and granting a new trial.

The action was for the price of ties supplied by the plaintiff under a contract providing for payment on the certificate of the chief engineer in charge of construction of defendants' railway. The engineer refused to certify for the ties not paid for on the ground that new commissioners appointed had objected to the quality and ordered another inspection. At the trial plaintiff was nonsuited, the judge holding that there was no coercion of the engineer, and the want of the certificate was a bar to the action. A new trial was ordered by the Court of Appeal on the ground that there was some evidence of coercion for the jury. The defendants appealed.

The Chief Justice pronounced judgment for the court as follows:—"Without expressing any opinion on the merits, and especially without adopting the reasons of the Court of Appeal, we are of opinion that this appeal from a judgment granting a new trial, should be dismissed, and said judgment confirmed, with costs."

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Corporation of Delta v. Wilson, March, 1905.

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

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

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

The full Court of British Columbia ordered a new trial, and the plaintiff thereupon appealed to the Supreme Court of Canada. When the case came on for hearing counsel for the respondent moved to quash for want of jurisdiction, and following the decision in *Mutual Reserve* v. *Dillon*, the appeal was quashed accordingly (*supra*, p. 120).

Central Vermont v. Franchere, 35 Can. S.C.R. 68.

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

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

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

Upon appeal to the Supreme Court of Canada the respondent moved to quash for want of jurisdiction on the ground that there was no final judgment of the court below, but the

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majority of the Court held that it had jurisdiction as, if the judgment was not final, it was a judgment upon a motion for a new trial within the meaning of section 24 (*d*), now section 38 (*b*).

Temiscouata Rly. Co. v. Clair, 38 Can. S.C.R. 230.

Appeal from the judgment of the Supreme Court of New Brunswick (1 East. L.R. 524), refusing to set aside a verdict for the plaintiff and enter a nonsuit or make an order for a new trial.

The action was for trespass by the railway company in constructing and operating their railway across lands in the Parish of St. Hilaire in the County of Madawaska, N.B., without taking proceedings for its expropriation and making compensation for the land taken by the company for their line of railway. The company denied the plaintiff's title and also contended that, even if he was in possession of the land in question at the time of their entry and the construction of the railway thereon, he had acquiesced and stood by without objecting for fifteen years before action, and that he could not, at so late a date, bring an action for trespass or claim damages.

Upon the answers of the jury to questions put to them at the trial, Mr. Justice Landry entered judgment in favour of the plaintiff and gave him damages assessed at the rate of ten dollars per annum for the six years preceding the institution of the action.

By the judgment appealed from the Supreme Court of New Brunswick, *in banc*, refused to set the verdict aside and enter a judgment of nonsuit or to order a new trial. In the Supreme Court the judgment appealed from was reversed on the ground that the finding of the jury was not one which reasonable men could fairly have come to under the evidence.

Ainslie Mining & Rly. Co. v. McDougall, 40 Can. S.C.R. 270.

The Court followed *Mutual Reserve* v. *Dillon*, *supra* p. 120, and as no notice to quash had been given, the appeal was quashed without costs.

Grand Trunk Rly. Co. v. Gilchrist, Oct. 6th, 1909.

In this case the order for new trial was made by the Divisional Court instead of by the Court of Appeal as in the above case, and counsel for appellant attempted to distinguish it on that ground, but the appeal was quashed.

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Dumphy v. Martineau, 42 Can. S.C.R. 224.

Appeal from the judgment of the Court of King's Bench, appeal side (Q.R. 17 K.B. 471), affirming the judgment of the Superior Court, sitting in review at Montreal, which dismissed the plaintiff's (appellant's) motion for a verdict *non obstante veredicto*, or, alternatively, for a new trial, and dismissed her action, upon the findings of the jury at the trial.

After hearing counsel on behalf of the parties, the Supreme Court of Canada allowed the appeal with costs in the Supreme Court of Canada and in the Court of King's Bench and ordered a new trial, the costs of the first trial in the Superior Court, District of Montreal, to abide the result.

Canadian Pacific Railway Co. v. Lloyd-Brown. Not reported.

This was an action for damages which the plaintiff claimed to have suffered by reason of being compelled to jump from the defendants' train while in motion. At the close of the plaintiff's case a motion for non-suit was refused. The case went to the jury, and the following questions and answers were given:—

"1. Was the injury occasioned by accident (without blame to anyone)? A. No.

"2. If blame attaches:

"(a) Who is to blame, the plaintiff or the company, or both? A. Company.

"(b) What blameworthy thing or things occasioned the accident? A. Conductor; because he had no right to put them off the train while moving.

"3. If the plaintiff should recover damages, how much? A. Damages for plaintiff, $2,000. Your jury finds the plaintiff entitled to $2,000 damages."

Judgment was entered for $2,000.

The defendants appealed to the Court of Appeal, and in their reasons for appeal simply asked that the judgment in favour of the plaintiff be reversed, and a judgment entered dismissing plaintiff's action. The Court of Appeal refused the defendants' application to set aside the verdict and enter judgment for the defendants, but granted a new trial on the ground that the verdict was against the weight of evidence, and it was not clear what the jury had intended by their answer to Question 2 (b).

A motion to affirm the jurisdiction of the Supreme Court was granted by the registrar, who said:

"I think it is open to the defendant to contend in the present case that the only finding of the jury upon which the verdict can be sustained, viz., No. 3, in which the jury in answer to the question, 'What blameworthy thing occasioned the accident?' answered 'Conductor; because he had no right to put them off the train while moving,' is a statement of law rather than of fact, and therefore cannot stand; if this question

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and answer in favour of the defendant are eliminated, there would be nothing to prevent this Court giving judgment in favour of the defendant if satiafied that it has all the material before it necessary to finally determine the question in dispute. I therefore grant the motion to affirm the jurisdiction, costs to be costs in the cause."

The case was heard on the merits, and the appeal dismissed with costs. In his reasons for judgment the Chief Justice said:

"In the Toronto Rly. Co. v. McKay (infra, p. 199), which on the facts is not distinguishable from the present case, we held that where the court below, upon a motion to set aside the verdict and judgment and dismiss the action, had suo motu granted a new trial because the answers of the jury were unsatisfactory, this was an exercise of judicial discretion within s. 45 of the Supreme Court Act and from which there is no appeal."

Sir Louis Davies, who dissented, said:

"The jury having declined to find the company guilty of any specific negligence which would make them liable for the plaintiff's injuries, and in fact having really by their findings exonerated them from such negligence, and the Court of Appeal not having granted the new trial in the exercise of their discretion, I think the appeal should be allowed with costs and judgment entered for the defendant."

The other members of the Court thought the appeal should be dismissed because they were satisfied with the correctness of the judgment of the Court of Appeal.

Anglin, J. exhaustively discussed the grounds upon which the Supreme Court should reverse a judgment of the Court of Appeal ordering a new trial; he there says:

"But should the Court of Appeal have directed judgment for the defendants under Rule No. 817? And that court having refused to exercise this power, should we now do so?

"In Paquin v. Beauclerk (1906) A. C. 148, Lord Loreburn, L.C., says at p. 161:

"'Obviously a Court of Appeal is not at liberty to usurp the province of a jury. Yet if the evidence be such that only one conclusion can properly be drawn, I agree that the Court may enter judgment. The distinction between cases where there is no evidence and those where there is some evidence, though not enough to be properly acted upon by a jury, is a fine distinction and the power is not unattended by danger.'

"His Lordship was here speaking of the power conferred by the English Order LVIII., r. 4, which differs materially from the Ontario Rule No. 817. The English Rule permits the Court of Appeal to 'draw inferences of fact," while the Ontario Rule, which is in terms similar to the English Order XL., r. 10 (1883), restricts the Court to drawing 'inferences of fact not inconsistent with the findings of the jury.'

"Where the evidence as to the facts is not conflicting and a court having such powers as the English Order LVIII., r. 4 confers is merely asked to draw inferences from admitted or conclusively proven facts, it may undoubtedly act upon the

rule. But it may not then draw inferences inconsistent with findings of the jury which have not been set aside. Ogilvie v. West Australian M. & A. Corp. (1896) A.C. 257. Whether, where its power is limited to drawing 'inferences of fact not inconsistent with the findings of the jury' and there is some evidence to go to the jury, a Court of Appeal may first set aside a finding and then proceed to draw inferences inconsistent with the finding so set aside would seem at least questionable.

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"Under Order XL., r. 10, which, as originally framed in 1875, was the same as the Ontario Rule No. 615, it has been held in England that judgment should be entered only where the Court is of opinion that there was no evidence to go to the jury. Melissich v. Lloyds (1875), 36 L.T. 423; Brewster v. Durrand (1880), W.N. 27; Bryant v. North Metropolitan, &c. (1890), 6 T.L.R. 397. The judgments in Hamilton v. Johnston, 5 Q.B.D. 263 and in Yorkshire Banking Co. v. Beatson and Mycock, 5 C.P.D. 109, are perhaps not easily reconcilable with Melissich v. Lloyds and Brewster v. Durrand; but the latter are explicit decisions which have never been overruled and in no English case that I can find has Order XL., r. 10, since the introduction of the words 'may draw inferences of fact not inconsistent with the verdict of the jury,' been held to warrant the entry of a judgment contrary to a finding of the jury though set aside, unless the court thought that the case should have been withdrawn from the jury at the trial. In Millar v. Toulmin, 17 Q.B.D. 603, and in Allcock v. Hall (1891), 1 Q.B. 444, the Court of Appeal dwelt upon the marked differences above alluded to between the English Order LVIII., r. 4, and the Order XL., r. 10, and apparently rested upon that difference its right to make orders for judgment under the former rule where Divisional courts acting under the latter had directed new trials.

"In Rowan v. Toronto Railway Company, 29 S.C.R. 717, and in Jackson v. Grand Trunk Railway Company, 32 S.C.R. 245, this court was of the opinion that there was no evidence for the jury in the former case of contributory negligence and in the latter of negligence of the defendants.

"Ontario Rule No. 615 (formerly No. 755) does not contain the words which Strong, J. refers to in Rogers v. Duncan, Cameron's Sup. Ct. Cas. 352, 363, as 'restrictive' and a 'qualification,' viz.: 'The Court may draw inferences of fact not inconsistent with the findings of the jury.' These words appear in the English Order XL., r. 10, as revised in 1883 and were inserted in the Ontario Court of Appeal Rule No. 817 adopted in 1897. The Ontario Rule No. 615 has received a wider construction in some cases than has been given in England to Order XL., r. 19, as passed in 1875. Rogers v. Duncan, sup.; Clayton v. Patterson, 32 O.R. 435-6; Sheppard v. Press Publishing Company, 10 O.L.R. 243, 252 et. seq.; Smith v. Canadian Express Company, 12 O.L.R. 84, 88; Crown Bank v. Brash, 8 O.W.R. 400, 402-3; but see the dissenting view of Burton, J. A. in Sibbald v Grand Trunk Railway Company, 18 Ont. A.R. at p. 207, and Garland v. Thompson, 9 O.R. 376, 383. It will be found that in most

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of the cases cited in these authorities in which, upon setting aside verdicts, judgments were ordered to be entered—notably in Stewart v. Rounds, 7 A.R. 515, which may be regarded as the foundation case—the Appellate Court has reached the conclusion that there was no evidence to go to the jury.

"A rule in its terms similar to XL., r. 10 (1883) having been adopted in Ontario for the purposes of the Court of Appeal, apparently with deliberation and in the light of the English decisions and the views expressed in this Court in Rogers v. Duncan, I am of opinion that the Ontario Court of Appeal upon setting aside the verdict of a jury should, under the present rules, direct judgment to be entered only where it is satisfied that the trial judge should have ordered judgment to be entered and should not have submitted the case to a jury. I am with great respect unable to agree in the view expressed by Moss, C.J.O., in Cavanagh v. Glendenning, 10 O.W.R. 475, 482, that the Ontario Rule No. 817 confers wider power than the English Rules. The learned Chief Justice quite probably meant to refer to Rule 615 under which an appellate court in Ontario may be held to have wider powers than are possessed by a divisional court in England, but not wider powers than are enjoyed by the English Court of Appeal.

"Whatever power the appellate court may have to draw inferences of fact from facts admitted or conclusively proven, where the facts themselves are in issue and there is a conflict of evidence as to them, would it not be a usurpation of the functions of a jury if the court should first find the facts, should then draw necessary or reasonable inferences and should thereupon direct the entry of judgment? In my opinion it would and I cannot think that under any of the rules which have been discussed it was intended that an appellate court should have this power in jury cases. 'A great difference exists between a finding by the judge and a finding by a jury. Where the jury finds the facts the court cannot be substituted for them, because the parties have agreed that the facts shall be decided by a jury.' Jones v. Hough, 5 Ex. Div. 115, 122, per Bramwell, L.J.; Coghlan v. Cumberland (1898), 1 Ch. 672. But see Lodge Holes Colliery v. Wednesbury Corporation (1908), A.C. 323, 326. In a jury case, in the absence of a finding upon a material question of fact on which there is conflicting evidence the court has not before it 'all the material necessary for finally determining the question.'

"In the present case the evidence as to the rate of speed, which is a material fact in issue is distinctly conflicting. The inference as to whether the order of the conductor was proper or improper, safe or dangerous depends largely upon this disputed fact. The evidence is not, in my opinion, such that upon the question of rate of speed only one conclusion can properly be drawn.'

"That there are cases in which, although the verdict should be set aside as against the weight of evidence, it is proper to order a new trial rather than to direct that judgment should be entered in incontrovertible. Paquin v. Beauclerk (1906), A.C. 148, and Clouston v. Corry, ib. 122.

"The present case seems to me not one in which the powers conferred by Rules Nos. 615 and 817 should be exercised. S. 38.

"In Clouston v. Corry the Judicial Committee indicates how greatly an ultimate appellate tribunal should respect the view taken in the first appellate court upon the question whether, when a verdict for the plaintiff has been set aside as against the weight of evidence, there should be a new trial or judgment for the defendant. Appellate Jurisdiction. Interlocutory Judgments.

"In the present case, in concluding his judgment, Mr. Justice Osler said:—'For these reasons, the verdict being against the weight of evidence, and the uncertainty as to the meaning of the answer, which seems rather to be the assertion of a proposition of law than a finding of fact, there must be a new trial. . . . The damages, it must be said, are in the circumstances most unreasonably large, much larger than, in the view most favourable to the plaintiff, he deserves to have.' These allusions to the indefinite character of the jury's answer and to the unreasonableness of the damage, indicate that the Court of Appeal in setting aside the verdict was to some extent influenced by consideration of a discretionary character and did not entirely rest its judgment on the ground that the verdict was against the weight of evidence.

"The power to direct that judgment be entered conferred by Rules Nos. 615 and 817 is discretionary, and when the Court of Appeal has declined to exercise it, if we should in any case interfere, we should do so, in my opinion, only in a very extreme case.

"Moreover, as pointed out by my lord the Chief Justice, where, as here, on a motion for judgment, a new trial has been granted by the Court, it would appear either that the order is to be deemed discretionary or that it is to be regarded as not made 'upon a motion for a new trial' within the meaning of section 38 of the Supreme Court Act, and an appeal to this Court will not be entertained. Toronto Railway Company v. McKay, Coutlee's Sup. Ct. Cas. p. 419.

"For these reasons I would dismiss this appeal with costs."

Warren v. Forst, Oct. 7th, 1911.

Judgment of the Registrar.

This is an application to the registrar sitting as a judge in Chambers, to affirm the jurisdiction of the court; Arnoldi, K.C., for the motion; W. L. Scott contra.

The facts of the case shortly are that at the trial of the action evidence was tendered on behalf of the defendant of a stenographer who claimed to have been in a room with her employer and overheard a conversation by telephone. The trial judge refused the evidence on the ground that the witness could not swear that it was the plaintiff who was at the other end of the line, or that he had heard what the defendant had spoken into the telephone. The divisional court overruled the trial judge and ordered a new trial on the ground that the evidence so refused was admissible, and this judgment was affirmed by the Court of Appeal. It is from the judgment of the Court of Appeal that the present appellant now proposes to prosecute an appeal to the Supreme Court.

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The Supreme Court Act, sec. 38, ss. (d) provides that there shall be an appeal 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; (b) upon any motion for a new trial."

There can be no doubt that this section is intended to give an appeal from judgment directing a new trial, subject to the limitations placed upon the general language of the section by secs. 45 and 48 of the Supreme Court Act. S. 45 provides that there shall be no appeal from an order made in the exercise of the judicial discretion of the court making the same. Mr. Scott's first objection was that the present order was a discretionary one; but I cannot accede to his argument. I do not see how it is possible to suggest a stronger case for holding that a new trial was granted not in the exercise of discretion but on the question of law. Here the trial judge had ruled on the admissibility of certain evidence. He is told by the appellate courts that his ruling was incorrect, and that the evidence refused should have been received.

Mr. Scott also contended that since the amendment of the Supreme Court now contained in s. 48, limiting appeals to the Supreme Court from the Court of Appeal for Ontario, no appeal lies in cases of new trial. It is admitted that the amount involved in the present appeal exceeds $1,000 and the case therefore, so far as the pecuniary amount involved is concerned, is within ss. (c) of s. 48. If Mr. Scott's contention be sound, all appeals which have been heard and disposed of on the merits by the Supreme Court in cases of new trial since the legislation in question, have been without jurisdiction. I have no doubt that the records of the court will show that a number of cases have come to the Supreme Court on appeal from orders granting or refusing a new trial since the legislation in question, although they may not have been reported. I can cite one at least, namely, Can. Pacific Rly. Co. v. Lloyd-Brown, which was heard on the 14th day of December, 1909, and judgment pronounced on the 24th December dismissing the appeal with costs. The reasoning of the court in the various cases in which appeals in cases of new trials were quashed because the new trial had been granted in the exercise of the judicial discretion of the court below, shows that there is a class of new trial cases in which an appeal to the Supreme Court does lie. In the case of Canada Carriage Co. v. [illegible], 37 S.C.R. 672, it was held that there was an exercise of judicial discretion because the court below had expressly stated that the new trial was granted in the exercise of the court's discretion. Again, in the case of Toronto Rly. Co. v. McKay, Cout. S.C. Cas. 419, the Supreme Court quashed the appeal because the Court of Appeal had granted a new trial suo motu, this relief not being asked by the notice of motion by way of appeal to that Court, and the Court of Appeal stating that they granted it because the verdict of the jury was unsatisfactory.

In the case of Can. Pacific Rly. Co. v. Lloyd-Brown above mentioned, an application was made to the registrar to affirm

the jurisdiction of the court, which was granted, and no appeal taken from his decision. The Chief Justice in his reasons, delivered when judgment was pronounced, held that the case was not distinguishable from Toronto Ry. Co. v. McKay, and the appeal should be quashed for want of jurisdiction, but as the respondent had not appealed from the order of the registrar as he should have done, there should be no costs. Mr. Justice Davies, who dissented, however, said that "if the new trial had been ordered in the exercise of the discretion of the court, we, of course, would not interfere. It was not, however, so granted, but is based expressly upon the ground that the verdict was against the weight of evidence and the construction put upon the answer of the jury to one of the questions." The other judges do not deal with the question of the jurisdiction of the court.

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If there were no appeal in cases of new trial, all these motions to quash for want of jurisdiction would have been disposed of by the simple statement that the appeal was one in which a new trial had been ordered or refused by the court below, and that in all such cases the granting or refusing of a new trial is in the judicial discretion of the court, and therefore no appeal lies from such an order by virtue of s. 45 of the Supreme Court Act.

My conception of the law with respect to new trials under the Supreme Court Act in appeals from the Province of Ontario is that a right to appeal lies in cases of new trial under s. 38 unless the judgment appealed from is in the exercise of the judicial discretion of the court, or the right of appeal is taken away by reason of the fact that the case does not fall within one or other of the subsections of s. 48. In other words, that if the Court of Appeal grant or refuse a new trial, or affirm or reverse an order granting or refusing a new trial by the divisional court, and this is not in the exercise of its judicial discretion, an appeal lies from such judgment to the Supreme Court of Canada if:

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

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

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

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

"(e) special leave of the Court of Appeal for Ontario or of the Supreme Court of Canada to appeal to such last mentioned Court is granted."

The motion to affirm the jurisdiction therefore is granted with costs.

Discretion of court below in cases of new trial, vide p. 196, infra. Misdirection in cases of new trials, vide infra, p. 371.

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38 (c).

Equity Cases.

Not only was it conceded in Parliament when the original of this section was under consideration that decrees in equity were appealable whether final or not, but the Court has so determined on many occasions. *Vide* Attorney-General Sir John Macdonald in the House of Commons, 1879, Hansard Reports. *Langevin* v. *St. Marc*, 18 Can. S.C.R. 599. It has been pointed out, *supra*, p. 37, that in certain decisions where appeals were heard, arising out of some order or report of a referee, jurisdiction could be supported on the ground that the cases were such as under the old procedure were cognizable only in a Court of Equity.

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

Injunction.

The remedy by injunction was unknown in the Province of Quebec until 1878, 41 V. c. 14 (Que.), when provision was made for the issue of a writ of injunction. In 1897 the new code brought the remedy by injunction into conformity with the practice which obtained in the Province of Ontario and the writ of injunction was done away with, but provision was made for the granting of an order of injunction as a remedy incidental to an action instituted by writ of summons. Since the amendment of 60-61 V. c. 34, which placed a limitation upon appeals to the Supreme Court from judgments of the Court of Appeal for Ontario, *infra*, section 48, the jurisdiction of the Supreme Court in matters of injunction in the Provinces of Ontario and Quebec has been assimilated, and now unless the matter in controversy falls within the class of cases provided for by sections 46 and 48, *infra*, no appeal from a judgment or order awarding an injunction will lie as of right to the Supreme Court of Canada. *Vide Emerald Phosphate Co.* v. *Anglo-Continental*, 21 Can. S.C.R. 422, *infra*, p. 135; *Delisle* v. *Arcand*, 36 Can. S.C.R. 24, *infra*, p. 136; *Chicoutimi Pulp Co.* v. *Price*, 39 Can. S.C.R. 81, *infra*, p. 136; *Price* v. *Tanguay*, 42 Can. S.C.R., 133, *infra*, p. 137.

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

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

Toussignant v. Nicolet, 32 Can. S.C.R. 353.

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

"The constant jurisprudence of the court is against our right to entertain the appeal. The fact that the proces-verbal attacked by the appellants' action may have the result to put upon them the cost of the work in question, alleged to be over two thousand dollars, does not make the controversy to be one of two thousand dollars. It is settled law that neither the collateral effects nor any contingent loss that a party may suffer by reason of a judgment are to be taken into consideration when the jurisdiction depends upon the pecuniary amount or upon any of the subjects mentioned in section 29 (now section 46).

Injunction—generally.

The following decisions, although arising in the Province of Quebec, have now, by virtue of the provisions contained in section 48, application to appeals from the Province of Ontario.

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

Article 68, C.C.P., provides for an appeal to the Judicial Committee of the Privy Council from the Court of

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Queen's Bench subject substantially to the same provisions as regulate appeals to the Supreme Court of Canada under section 46, except that the amount involved must exceed £500 sterling.

In this case the appellant had obtained an injunction against the respondent in a matter involving the possession of a railway of the value of over $1,000,000. The Court of Queen's Bench, appeal side, set aside this injunction, and the respondent applied to the same court to allow his security on an appeal to the Privy Council. Sir A. A. Dorion, C.J., made an order allowing the security stating that "whether the case were considered as relating to the possession of real estate or as involving an amount of $1,000,000, the respondent had a right to go to the Privy Council."

In *Dubie* v. *Board of Temporalities*, 3 Legal News 305 (Sept., 1880), an application was made to the Court of Queen's Bench, appeal side, to allow security upon an appeal to Her Majesty's Privy Council. In giving judgment the Court said:—

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

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

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

In this case the paintiffs, appellants, presented a petition for a writ of injunction to Mr. Justice Torrance of the Superior Court of the Province of Quebec, pursuant to the

provisions of the Injunction Act, 41 V. c. 14, and the writ of injunction, enjoining the respondents *until otherwise ordered by the said judge or the court*, issued and was duly served with a declaration embodying the plaintiffs' claim which was to prevent the completing, issuing or negotiating of certain bonds by the company.

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

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

The judge denied his right to quash the same.

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

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

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

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

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

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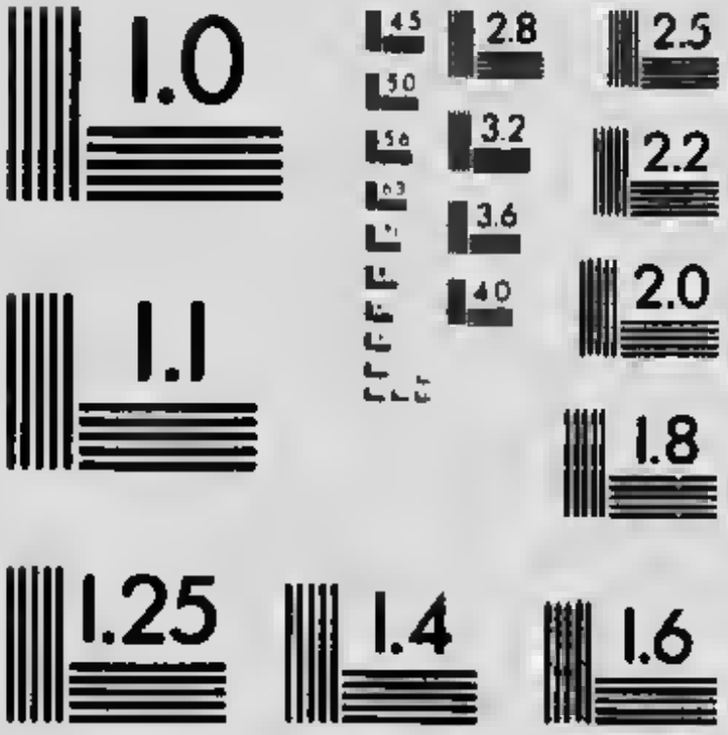

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sions then in force equivalent to present section, was raised. Leave to appeal in this case was granted by the Privy Council, but the appeal was never prosecuted.

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

In this case the Superior Court made perpetual an injunction against the defendants restraining the corporation of Levis from proceeding further to carry out a by-law in favour of the Quebec Central Railway upon the ground that the by-law of the municipality was *ultra vires*. This judgment was reversed by the Court of Queen's Bench, appeal side, but reinstated by the Supreme Court. The proceedings were instituted under the old practice and a writ of injunction granted after pleadings filed which involved no question of a money demand. The jurisdiction of the Supreme Court in this appeal can only be supported on the ground that it was a case of a municipal by-law, which by section 30 (now section 47) is excluded from the limitation with respect to appeals from the Province of Quebec under section 8 of the Supreme Court Amendment Act, 42 V. c. 39, 1879 (now section 46), of the Act.

Chicoutimi v. Legare, 27 Can. S.C.R. 329.

In this case the appellants petitioned the Superior Court in November, 1895 (previous to the adopting of the new Code), for a writ of injunction against the respondent to restrain him from carrying on certain works and excavations upon certain streets in the town of Chicoutimi of a nature to obstruct the highways, to the great damage and nuisance of the general public, and without the permission of the plaintiffs, until the final judgment should be given in the action; and also asked that a final judgment should be rendered making the interlocutory judgment final and perpetual. The answer of the defendant to the injunction was that the plaintiffs' counsel had granted permission to the defendant to construct an aqueduct in the town of Chicoutimi according to certain conditions which appeared in the resolution of the council, and that in conforming to this resolution he had constructed the aqueduct and he had done nothing beyond what he was authorized by resolution of the council to do.

The writ issued, and a petition to suspend its operation was refused. By the final judgment on the merits the Superior Court made the injunction perpetual on the ground that the resolution of the council was illegal, but this was

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reversed by the Court of Queen's Bench. An appeal to the Supreme Court was heard, no exception to the jurisdiction being taken, and the judgment of the Court of Queen's Bench was set aside and that of the Superior Court reinstated.

It is not at all clear what provision of section 29 (now section 46) of the Act gave jurisdiction to the Supreme Court to entertain this appeal. No question being raised as to its jurisdiction, it may not be deemed a binding authority in another case where the facts are similar.

Came v. Consolidated Car Heating Co., 11 R.J.Q. K.B. 114.

The action of the company respondent was for $15,000, but the respondent subsequently consented that judgment should go for $25. In the course of the suit the respondent obtained a writ of injunction against the appellant to restrain any infringement of the respondent's rights under a patent. This injunction was maintained by the final judgment of the Superior Court, but the judgment was reversed in appeal. The respondent then moved for leave to appeal to His Majesty's Privy Council.

Held, that the "matter in dispute" being the damages which the appellant would suffer if the respondent acted contrary to the order of the Court, and these damages being contingent and not susceptible of determination, it was impossible to say that the matter in dispute exceeded the sum or value of £500 sterling and the case did not fall within the terms of article 68, sub-section 3 of the Code of Civil Procedure, Quebec.

Article 68 reads in part as follows:—

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

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

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

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

Emerald Phosphate Co. v. Anglo-Continental, 21 Can. S.C.R. 422.

In this case the appellants and respondents were owners of adjoining lots numbered 19 and 18 respectively. The appellants alleging that the respondents had trespassed on

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their lot 19, took proceedings (changed now by the new Code) by petition to obtain a writ of injunction restraining the respondents from trespassing and mining upon lot 19. The respondents opposed the proceedings, alleging that all their work was done on their own lot 18. Upon issue joined and evidence taken, the Superior Court maintained the writ of injunction. The Court of Appeal held the proper proceedings should have been by an action *en bornage*, and an injunction did not lie, and set aside the judgment below. On motion to quash an appeal to the Supreme Court, it was held that there was no controversy between the parties as to their respective titles. The cause of litigation was the boundary between their lots, and that under the laws of the Province of Quebec, the right to the title to this lot or to the possession thereof could not be determined in proceedings for a writ of injunction; that no judgment either *au possessoir* or *au petitoire* could be given in such an action; that no title to land was in issue and no appeal would lie.

This case was explained in *Delisle* v. *Arcand*, 36 Can. S.C.R. 24, where the Court said:

"Mr. Belcourt has referred us to the *Emerald Phosphate Co.* v. *Anglo-Continental*, but I fail to see how he can find any comfort in that decision. First, it was not a case of a possessory action, but one of injunction, which is always purely personal."

Chicoutimi Pulp Co. v. Price, 39 Can. S.C.R. 81.

The respondent, plaintiff in the court below, brought a possessory action in the Superior Court at Chicoutimi against the appellants, in respect of interferences with his rights, alleging that he and his predecessors had been for a great number of years in possession as proprietors of a water-power on the Chicoutimi River; that the defendants, now appellants, owned and operated a large pulp-mill situated a short distance above the same river in connection with which they used several machines known as barking mills; that the refuse from these machines, consisting of bark, sawdust, etc., was dumped into the river and thence carried by the current into the flume and cistern of his mill thereby injuring the power, mill, and machinery, and generally causing the plaintiff damages, for which he claims an injunction and in compensation $2,000. The trial judge ordered the defendant to cease his interference with the plaintiff's rights to enjoy his water-power, made a perpetual injunction reserving to the plaintiff his recourse for damages which he suffered by reason

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of the facts of which he complained. Price appealed to the Court of Review while the company appealed to the Court of King's Bench. The appeal to the Court of Review was first disposed of, when the judgment at the trial was affirmed. The company nevertheless proceeded with their appeal to the Court of King's Bench, but their appeal was dismissed on the ground that they should have appealed from the judgment of the Court of Review and not the judgment at the trial.

The Court held that an appeal from the judgment of the Superior Court, rendered on the trial of a cause, will lie to the Court of King's Bench, appeal side, if taken within the time limited by article 1209 of the Code of Civil Procedure of Quebec, notwithstanding that, in the meantime, on an appeal by the opposite party, the Court of Review may have rendered a judgment affirming the judgment appealed from.

Although the granting of an order for injunction, under article 957 of the Code of Civil Procedure of Quebec, is an act depending on the exercise of judicial discretion, the Supreme Court of Canada, on an appeal, reversed the order on the ground that it had been improperly made upon evidence which shewed that the plaintiff could, otherwise, have obtained such full and complete remedy as he was entitled to under the circumstances of the case. Davies and Idington, JJ., dissenting, were of opinion that the order had been properly granted.

A possessory action will not lie in a case where the *trouble de possession* did not occur in consequence of the exercise of an adverse claim of right or title to the lands in question, and is not of a permanent or recurrent nature.

Price v. Tanguay, 42 Can. S.C.R. 133.

The plaintiffs complained that they were impeded in the right to drive logs down the course of a river and brought suit for a declaration of their right to do so, for an injunction and an order for the removal of a movable boom placed across the river by the defendants. No claim was made for damages. The Court said:

"The only question for us to decide is whether or not, on these facts, we have jurisdiction to hear this case. There is no question of future rights or of title to property at issue in my opinion. The right of the riparian owner to use the water which passes by or crosses over his property for the purposes mentioned in art. 503 C.C. [illegible] involved either in this appeal. Appellants' counsel in answer to the objections made by the court put forward the contention that this is a possessory

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action and that we have jurisdiction to hear it and Delisle v. Arcand (36 Can. S.C.R. 23) was referred to. It was held in that case that we have jurisdiction to hear a possessory action because in such an action titles are in issue in a secondary manner. In the same case it was decided, when the case was finally disposed of on the merits (37 Can. S.C.R. 668), that the possessory action lies only in favour of persons in exclusive possession 'a titre de proprietaire.'

"This is not a possessory action: it is merely an action on the case for a nuisance infringing plaintiffs' rights and there is no claim made for actual ascertained damages." Vide Clarke v. Goodall, 43 Can. S.C.R. 284, supra, p.

39. Except as hereinafter otherwise provided, an appeal shall lie to the Supreme Court,—

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

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

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

(d.) in any case or proceeding for or upon a writ of mandamus; and,

(e.) in any case in which a by-law of a municipal corporation has been quashed by a rule or order of court or the rule or order to quash has been refused after argument. R.S., c. 135, s. 24;—54-55 V., c. 25, s. 2.

39 (a).

It is not clear, in view of the fact that section 24 of the Supreme & Exchequer Courts Act gave in general terms an appeal from final judgments of the highest court of last resort where the court of original jurisdiction was a superior court, why it was considered necessary to make special provision in that Act for the class of cases contained in this section, unless it were deemed advisable *ex abundanti cautela*.

It might have been argued that without the provisions of (*a*) and (*b*) the original tribunal was *persona designata*, and that no appeal would lie from a judgment in cases such as are therein provided. Appeals under this Act are governed by sections 42, 44, 46, 47, 48 and 49, *infra*.

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Vide also notes to section 36, *supra*, and *Désormeaux* v. *Ste. Thérèse*, 43 Can. S.C.R. 82, *infra*, p. 162.

Draper v. Radenhurst, 14 Ont. P.R. 376.

In this case it was contended on behalf of the respondents that every appeal to the Supreme Court was upon a special case and therefore a notice was required to be given under section 41 of the Supreme & Exchequer Courts Act, now section 70, and if not so given the appeal would not lie. In pronouncing judgment Maclennan, J.A., said:—

"Under the old common law practice, both in England and in Ontario, a special case was something well known and which had a precise and definite meaning. It is thus described in the third edition of Chitty's Archbold's Practice (1836), at page 383: 'Where a difficulty in point of law arises, the jury may, instead of finding a special verdict, find a general verdict for the plaintiff, subject to the opinion of the judge or the court above, or a special case stated by counsel on both sides with regard to the matter of law; which has this advantage of a special verdict, that it is attended with much less expense and obtains a much speedier decision. On the other hand, however, as nothing appears upon the record but the general verdict, the parties are thereby precluded from the benefit of a writ of error, if dissatisfied with the judgment of the court or judge upon the point of law.'

By section 154 and following sections of the C.L.P. Act of Upper Canada, provision was made for stating questions of law, and also for stating the facts of the case, by consent and by order of a judge, in the form of a special case for the opinion of the court, and for judgment thereon. Under the old practice before the C.L.P. Act, it will be observed that error could not be brought upon a judgment on a special case without express provision being made therefor; so under the C.L.P. Act, the proceeding being by consent of parties, the like result would follow, and there could be no appeal from the judgment without an enactment to that effect. For that reason, doubtless, we find in the Act relating to the Court of Error and Appeal, 20 V. c. 5, s. 13, a section declaring that an appeal shall lie from a judgment on a special case in the same manner as from a judgment upon a special verdict, unless the parties agree to the contrary, and that the court shall draw any inference of fact from the facts stated in the special case, which the court by which the case was originally decided ought to have drawn.

"Such being the well known nature of a special case, and of a judgment thereon, and one of the features of such a judg-

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ment being that it was not appealable without express enactment. I cannot have any doubt that the judgment upon a special case intended in section 41 (now sec. 70) of the Supreme Court Act is a judgment on the kind of case well known by that name and that it has no reference to the case which, by the practice of this Court, is prepared for the purpose of the appeal.

"I am, therefore, of opinion that no notice of appeal under section 41 was required in this case, and there being no objection to the allowance of the bond, it must be allowed."

Smyth v. McDougall, 1 Can. S.C.R. 114.

"Where a case has, by consent of parties, been turned into a special case, and the judge's minutes of the evidence taken at the trial agreed to be considered as part of the said special case, the Court has no power to add anything, except with the like consent, and has no power to order any further evidence to be taken."

Halifax & Cape Breton Coal & Rly. Co. v. Gregory, Cass. Prac. 29.

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

Blackburn v. McCallum, 33 Can. S.C.R. 65.

The question in this case to be determined was whether a restraint on alienation contained in a will was valid. The cause was heard by Meredith, C.J., upon a stated case prepared by the parties pursuant to the Judicature Act and Rules. The trial judge felt himself bound by a decision of the Court of Appeal in *Earls* v. *McAlpine*, 6 A.R. 145. The parties thereupon signed a consent pursuant to section 26, sub-section 2 (now 42(*a*)), that an appeal should lie taken direct to the Supreme Court of Canada from the judgment of Meredith, C.J., and the case was accordingly heard, although no intermediate appeal had been taken to the Court of Appeal for Ontario.

City of Halifax v. McLaughlin Carriage Co., 39 Can. S.C.R. 174. May 8th, 1907.

S. 39, s.s. (a).

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A case was stated for the opinion of the court below as to the liability of the respondent to pay a municipal tax. Under the city charter the Assessment Court of Appeal may, at the request of a ratepayer who has appealed, state a case in writing for the opinion of a judge of the Supreme Court of the Province, and the party appealing shall cause the same to be heard before a judge in Chambers in Halifax, and the decision of the judge *shall be final*. The stated case was signed only by the solicitors for the respective parties and concluded by saying:—"The question for the Court is: Is the company liable under any Act or ordinance to pay it?" (the special tax referred to). Upon reaching the Supreme Court of Canada the respondent moved to quash for want of jurisdiction and contended that the court below sat as and for the judge in Chambers under the clause of the city charter, and no appeal would lie. The appellant on the contrary contended that the Supreme Court of Nova Scotia exercised jurisdiction, not under the clause of the city charter, but under the provisions of the order 33, Rule 1 of the Rules of the Supreme Court of Nova Scotia, which read as follows:

"The parties to any cause or matter at any stage of the cause or matter, or without any previous proceeding having been instituted, may concur in stating the question of law arising therein in the form of a *special case* for the opinion of the Court."

Counsel contended that the special case having been signed by the solicitors for the parties and not by the Assessment Court of Appeal as required by the city charter, this showed that the court below acted under the order and not under the charter. The majority of the Court held that the Supreme Court had jurisdiction and the appeal proceeded on the merits.

Canadian Pacific Railway Co. v. The King, 38 Can. S.C.R. 137.

A stated case was referred to the Exchequer Court by the Minister of Railways and Canals, under section 23 of the Exchequer Court Act. It recited the Act 3 Edw. VII, c. 57; certain orders in council in respect of the Pheasant Hills branch of the company's railway mentioned in sub-section 72 of the second section of the Act and the agreement for its construction and operation.

S. 39, s.s. (b).

Appellate Jurisdiction. Awards.

The question to be decided was whether or not, on the proper construction of the said Act, contract and documents mentioned, the cost of the necessary rolling stock and equipment of the line should be included in estimating the subsidy payable to the company under the Act. The Court expressed grave doubts as to its jurisdiction, but being of opinion that in any event the appeal must be dismissed, disposed of the case on the merits.

Arbitration under order in a pending action.

St. George's Parish v. King, 2 Can. S.C.R. 143.

After causes at issue under a rule of reference, all matters in difference were referred to arbitration, and it was provided that the award of the arbitrators or of any two of them was to be final. Two of the arbitrators having made an award in favour of the plaintiff, the defendant obtained a rule *nisi* in the Supreme Court of Nova Scotia to set aside the award, and after argument the rule was made absolute. Upon appeal to the Supreme Court of Canada, the Court said that "As to that part of the award which directs the defendant to pay the cost of the reference and award, it was admitted on the argument that it was bad, and there is no doubt the plaintiffs may abandon it as they offered to do, and they can be restrained from enforcing that part of it if they attempt to do so," but allowed the appeal with costs and discharged the rule *nisi* in the court below to set aside the award.

Oakes v. City of Halifax, 4 Can. S.C.R. 640.

After action was at issue the matters in dispute were by a rue of the Supreme Court of Nova Scotia referred to arbitration. After the making of the award and before the amount found due by the arbitrators had become a judgment in the pending action, a rule *nisi* was obtained by the respondent from a judge in Chambers returnable before the court *en banc* to set aside the reference and award. After argument the rule was made absolute and the award set aside. From this judgment the appellant appealed to the Supreme Court. The respondent moved to quash on the ground that the rule appealed from was not a final judgment within the meaning of the Supreme & Exchequer Courts Act, but his motion was refused. The decision was apparently given upon the Act as it stood prior to the Supreme Court Amend-

ment Act of 1879, which by section 4 gave an appeal to the Supreme Court in matters of *awards*, and by section 9 placed an interpretation upon the words *final judgment*.

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Awards in municipal drainage cases.

Chatham v. Dover, 12 Can. S.C.R. 321.

The Municipal Act of Ontario contains provisions whereby in the event of it being necessary to continue drainage works beyond the limits of the municipality in which the same were instituted, and in the event of the two municipalities being unable to agree with respect to the cost for the said work respectively to be borne by them, arbitrators might be appointed. In this case an award of arbitrators was made under the above Act in a drainage dispute between the municipalities of Dover and Chatham. The former being dissatisfied, moved the court to set aside the award on the ground that a majority of the arbitrators had no authority to sign it in the absence of the third arbitrator, and on other grounds. The award was set aside and an appeal taken to the Court of Appeal for Ontario which affirmed the judgment below, the court being equally divided. A further appeal to the Supreme Court of Canada was dismissed with costs.

Ellis v. Hiles; Ellis v. Crooks, 23 Can. S.C.R. 429.

These were actions brought by the plaintiffs against the municipality for injuries sustained by reason of certain drainage works. The Drainage Trials Act, 54 V. c. 51, provided for the appointment of a referee who should be an officer of the High Court, and have all the power of arbitrators under the Municipal Act, and that his decisions be subject to an appeal to the court. By section 11 of the same Act, actions for damages for the construction and operation of drainage works might at any time after the issue of a writ be referred to the referee by the court or a judge thereof. This was done in the present actions, and the referee gave his judgment holding certain by-laws invalid, and awarded damages to the plaintiffs. An appeal was taken to the Court of Appeal for Ontario where the judgments of the referee were maintained, and a further appeal was taken to the Supreme Court, where the appeal in *Hiles's case* was allowed in part, and in *Crook's case* the judgment was varied.

Harwich v. Raleigh, 18th May, 1895.

This was also a case under the Drainage Trials Act referred to in the preceding case. Sections 580 and 581 of

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the Municipal Act of 1887, ch. 184, provided for an appeal from a report of an engineer with respect to drainage works to arbitrators, and by virtue of the Act 54 Viet. an appeal lay from the report of the engineer to the referee. In this case Harwich being dissatisfied with the report of the engineer, appealed to the referee, who dismissed the appeal and confirmed the report. From his decision an appeal was taken to the Court of Appeal where the appeal was dismissed with costs. A further appeal was taken by Harwich to the Supreme Court of Canada, where it was held that the award of the referee under the provisions of "The Drainage Trials Act of 1891" was not appealable to the Supreme Court of Canada under sub-section (*f*) of section 24 (now sub-section (*b*) of section 39), Gwynne, J., dissenting. The question as to jurisdiction having been taken by the Court the appeal was dismissed without costs.

Awards in municipal matters generally.

Toronto Junction v. Christie, 25 Can. S.C.R. 551.

The Consolidated Municipal Act of Ontario, 55 V. c. 42, provides for arbitration in the event of a town altering the grade of a street and injuriously affecting the property of a private individual. Section 403 provides that the award should be subject to the jurisdiction of the court where it might be reviewed on the merits, and should also be subject to the jurisdiction of the court as if made on a submission by a bond containing an agreement for making the submission a rule or order of such court. The claimant moved before Rose, J., to set aside the award, but his motion was dismissed. On appeal to the Court of Appeal this judgment was affirmed upon an equal division of opinion. An appeal taken to the Supreme Court of Canada was dismissed with costs.

Langley v. Duffy, 30th May, 1899.

The corporation of the township of Langley, pursuant to the provisions of the Municipal Clauses Act, B.C., passed a by-law for the opening up of a certain roadway through the property of the respondent Duffy, and served a notice calling upon him to appoint an arbitrator to act with the appellant's arbitrator for the purpose of deciding upon what compensation the respondent was entitled to by reason of the expropriation of his property. The arbitrators made an award which was set aside by the court, and the matters in question

referred back to the arbitrators for reconsideration and re-determination. The arbitrators reconsidered the matters and awarded the respondent Duffy $400 and the costs of the arbitration, amounting to $286.40. The respondent Duffy served a notice upon the municipality that unless they complied with his terms, an application would be made to the court for liberty to enforce the award. The municipality having ignored the notice the respondent Duffy moved the court for leave to enforce the award, and the appellant gave notice of motion to set aside the award. The two motions were heard by the court when an order was made refusing for the present the application of the respondent to enforce the award, and at the same time referring the award back to the arbitrators for further consideration. An appeal was taken from this order to the full Court when an order was made allowing the respondent Duffy to enter up judgment for the amount of the award. From this order an appeal was taken to the Supreme Court of Canada when a motion to quash was made on behalf of the respondent on the ground that the judgment appealed from was not a judgment upon a motion to set aside an award, nor a judgment upon a motion by way of an appeal from an award, and after argument the appeal was quashed accordingly.

Osgoode v. York, 24 Can. S.C.R. 282.

This action was brought for a declaration that an award under the ditches and Water Courses Act, R.S.O. 1897, c. 20, was made without jurisdiction because the requisition filed was not accompanied by the preliminaries referred to in section 6 of the Act, and for an injunction. The interim injunction was granted and upon motion to continue the same the motion was refused. At the trial the action was dismissed and an appeal taken to the Divisional Court was also dismissed. On appeal, the Court of Appeal reversed the Divisional Court and gave judgment for the plaintiff, and this judgment was affirmed by the Supreme Court of Canada.

Awards in railway cases.

Bickford v. The Can. Southern Rly., 14 Can. S.C.R. 743.

By consent of parties in the action all matters in dispute were by order of the court referred to the arbitration of a county judge with a provision in the submission that there should be an appeal from the award as is given by the 189th section of the C.L.P. Act, R.S.O. c. 50, which provides that

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an appeal shall lie from the award in the same way as an appeal from a Master's report. The award having been upheld by the Superior Court and the judgment affirmed by the Court of Appeal, an appeal to the Supreme Court was dismissed, affirming the judgment of the Court of Appeal.

Judah v. Atlantic & North-West Rly. Co. (unreported).

On the 9th of April, 1887, the respondent railway company served upon the appellant Judah a notice under the Railway Act of certain lands which it required for the purposes of the railway, and offered the sum of $15,000 as compensation for the land and damages, at the same time appointing the company's arbitrator. The appellant Judah protested the railway company on the 22nd April, 1887, alleging that the notice was illegal, null and void, but under reserve of the protest appointed an arbitrator.

The arbitrators met and took evidence, and an award was made by a majority of them on the 17th July, 1888, awarding to the appellant the sum of $30,575. Thereupon the appellant Judah presented a petition, dated the 14th August, 1888, to the Superior Court wherein he prayed that a writ of appeal might be ordered to issue requiring the arbitrators to transmit to the Superior Court the award and papers filed on the arbitration, and praying that the arbitrators might be summoned to appear before the court for the purpose of having it declared and adjudged that the award should have been rendered for a sum of $94,817.75. From this petition an order was made by Mr. Justice Taschereau on the 16th August, 1888, directing the writ of appeal to issue, and thereupon, pursuant to the practice of the Province of Quebec, the respondent company filed an answer to the petition setting up that the Superior Court had no power to revise the award; that the proceedings before the arbitrators were legal and binding upon the proprietor; that the proprietor could not appeal from an award of the arbitrators upon matters not apparent on the face of the record of proceedings before the arbitrators, nor upon matters of fact but upon questions of law only, and prayed that the award might be declared legal and binding and the petition dismissed.

The respondent company further answered to the petition by alleging that the petitioner was not entitled by law or by the evidence to a larger compensation than that awarded by the arbitrators.

The petition was heard by Mr. Justice Gill of the Superior Court on the 1st of April, 1889, and judgment given on the 25th.

The Railway Act of 1888, 51 V. c. 29, came into force on the 22nd May, 1888, and section 161 provides that there should be an appeal on questions of law or fact to the Superior Court, and that upon the hearing the court should decide the same upon the evidence taken before the arbitrators, and that the practice and proceedings should be as nearly as possible the same as upon an appeal from the decision of an inferior court to such Superior Court.

In his judgment Mr. Justice Gill says: "Seeing that the company opposed the said appeal alleging that the said arbitrators having proceeded with the arbitration before the coming into force of the Railway Act of 1888, were not able to appeal upon the facts"; and in his *considerants* he says that the court is in possession of all the facts of the case, and that the award having been rendered under the provisions of the Railway Act of 1888, the court was entitled to apply the law with respect to appeals as provided in section 161 of that Act, and proceeded to increase the indemnity awarded by the arbitrators to the sum of $52,500, with interest. S. 39, s.s. (b). Appellate Jurisdiction. Awards.

On appeal the Court of Queen's Bench held that the court below had not proceeded on a proper principle in fixing the valuation of the lands and reduced the damages to $30,575, homologating the award of the arbitrators made on the 17th July, 1888.

From this judgment an appeal was taken to the Supreme Court, and when the case came on for hearing, of its own motion, the Court took objection to its jurisdiction, and after argument of counsel the appeal was quashed without costs for want of jurisdiction.

It does not appear in what respect the Supreme Court considered it had no jurisdiction to hear this appeal, whether it was because the proceedings were instituted previous to the coming into force of the Railway Act of 1888, which for the first time gave an appeal from the arbitrators, or because the Court considered the judgment of the Superior Court interlocutory and not final, or because the court of first instance was curia designata.

The same case came before the Court (23 Can. S.C.R. 232) on an appeal by the railway company from an order subsequently made by the Superior Court requiring the appellants to pay interest on the sum of $30,575, and ordering them to proceed to the confirmation of title in order to the distribution of the money. No question of the jurisdiction of the Court was raised upon this appeal and the same was heard on the merits and the appeal allowed with costs.

Quebec, Montmorency, etc., Rly. Co. v. Mathieu, 19 Can. S.C.R. 426.

In a railway expropriation case the respondent in naming his arbitrator declared that he only appointed him to watch over the arbitrator of the company, but the company recognized him officially and subsequently an award of $1,974.25 damages and costs for land expropriated was made under article 5164 R.S.Q. The demand for expropriation as formulated in their notice to arbitrate by the appellants was for the width of their track, but the award granted damages for three feet outside of the fences on each side as being valueless. In an action to set aside the award, *Held*,

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affirming the judgment of the courts below that the appointment of the respondent's arbitrator was valid under the statute and bound both parties, and that in awarding damages for three feet of land injuriously affected on each side of the track, the arbitrators had not exceeded their jurisdiction.

Strong and Taschereau, JJ., doubted if the amount in controversy was sufficient to give the Court jurisdiction to hear the appeal.

Benning v. Atlantic & North-West Rly. Co., 20 Can. S.C.R. 177.

In this case an award made pursuant to the expropriation clauses of the Railway Act was attacked by action instituted in the Superior Court, when the award was upheld and the judgment affirmed by the Court of King's Bench. An appeal to the Supreme Court was heard; no question of jurisdiction was raised, although the award was made prior to the Railway Act of 1888, which gave an appeal from the award of arbitrators made under the Railway Act.

Grand Trunk Rly. v. Coupal, 28 Can. S.C.R. 531.

An award of arbitrators under the Railway Act of 1888 was set aside by the Superior Court, but was reinstated by the Court of Queen's Bench. The Supreme Court reversed the latter judgment, saying that although respect was to be paid to awards made under the Railway Act, yet when the arbitrators grossly err in the principle adopted by them in fixing the compensation to be allowed the landowner, the Court is called upon to set them right. *Vide C.P.R. v. Ste. Thérèse*, 16 Can. S.C.R. 606, *supra*, p. 76.

Ottawa Electric v. Brennan, 31 Can. S.C.R. 311.

Held, that leave to appeal direct to the Supreme Court cannot be granted from a judgment of a judge of the High Court of Justice for Ontario sitting in appeal from an award of arbitrators under the Railway Act from which no appeal lies to the Court of Appeal.

Birely v. Toronto Rly. Co., 25 Ont. App. Rep. 88, followed, that the judge under the Railway Act acts *persona designata* and no appeal lies from his judgment.

James Bay Rly. Co. v. Armstrong, 38 Can. S.C.R. 511.

The arbitrators awarded the plaintiff $1,170 which he considered insufficient, and appealed to the High Court.

where it was increased to $2,250. The Railway Company then took an appeal to the Supreme Court of Canada asking to have the original award of $1,170 restored. The plaintiff by cross-appeal claimed that the increase allowed by the High Court was insufficient and that he was entitled to a much larger sum.

By s. 168 of 7 Edw. VII. c. 58, amending the Railway Act, 1903 (R.S.C. 1906, c. 37, s. 209), if an award by arbitrators on expropriation of land by a railway company exceeds $600 any dissatisfied party may appeal therefrom to a Superior Court, which in Ontario means the High Court or the Court of Appeal (Interpretation Act, R.S. 1906, c. 1, s. 34, ss. 26).

Held, that if an appeal from an award is taken to the High Court there can be no further appeal to the Supreme Court of Canada, which cannot even give special leave.

Calgary and Edmonton Rly. Co. v. MacKinnon, 43 Can. S.C.R. 379.

In expropriation proceedings under the Railway Act, the arbitrators in making their award stated that they had not found the expert evidence a valuable factor in assisting them in their conclusions and that, after viewing the property in question, they had reached their conclusions by "reasoning from their own judgment and a few actual facts submitted in evidence." On appeal from the judgment of the Supreme Court of Alberta setting aside the award and increasing the damages, it was held that it did not appear from the language used that the arbitrators had proceeded without proper consideration of the evidence adduced or upon what was not properly evidence and, therefore, the award should not have been interfered with.

Arbitration under special Act of Parliament.

Province of Ontario v. Province of Quebec, Re Common School Fund, 30 Can. S.C.R. 306.

A reference to arbitration provided that the arbitrators should not be bound to decide according to strict rules of law or evidence but might decide upon equitable principles, and when they did proceed on their view of a disputed question of law the award shall set forth the same at the instance of either or any party, and any award on a disputed question of law should be subject of appeal to the Supreme Court. At the time of rendering the award the arbitrators did not

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Appellate Jurisdiction. Habeas Corpus.

declare, but refused to declare that in rendering the said award they had proceeded as on a disputed question of law. An appeal being taken to the Supreme Court and a motion having been made to quash, the Court quashed the appeal on the ground that the award did not on its face shew that the arbitrators had proceeded on a disputed question of law.

39 (c).—*Habeas corpus not arising out of a criminal charge.*

Habeas corpus proceedings not arising out of a criminal charge include cases where parties have been convicted of offences against what are treated as police regulations rather than crimes, and cases of imprisonment for debt.

Section 47, *infra*, expressly provides that the limitations placed upon appeals from the Province of Quebec do not apply to cases of *habeas corpus*.

Section 75, sub-section 2, *infra*, provides that no security for costs shall be required in proceedings for or upon a writ of *habeas corpus*.

Fraser v. Tupper, Cass. Dig. (2nd ed.) 421.

The prisoner was convicted before the stipendiary magistrate of Truro, N.S., of violating the license laws in force in the town and fined $40 and costs as for a third offence. Execution issued in the form given in the R.S.N.S. (4 ser.), ch. 76, under which F. was committed to jail. While there he was convicted of a fourth offence and fined $80 and costs, and was detained under an execution in the same form. The Supreme Court (N.S.) on motion to make absolute a rule *nisi* granted under R.S.N.S. (4 ser.), ch. 99, discharged the rule. Before the institution of the appeal to the Supreme Court of Canada, the time for which the appellant had been imprisoned had expired and he was at large. On motion to dismiss for want of jurisdiction, *Held*, that an appeal will not lie in any case of proceedings for or upon a writ of *habeas corpus* when at the time of bringing the appeal the appellant is at large.

In re George R. Johnson, 20th February, 1886.

J. was in custody on an execution for debt, and applied to a judge of the County Court under chapter 1[illegible], R.S. (N.S.), 5th series, to be examined as to his affairs with a view to obtaining his discharge. The examination was held by the County Court judge, who, on January 23rd, 1886, made an order to the effect that J. was adjudged guilty of

fraud in respect to the delay of payment of his debt to the execution creditors, and in regard to the disposal of his property, and by such order remanded J. to jail, without privilege of jail limits, for a further period of six months from date of remand. When the order was drawn up it was dated 24th of January, 1886, which was Sunday, and directed that J. be confined in the county jail for six months from that date.

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J. was taken back to jail, the order dated on Sunday being delivered to the jailer, and the counsel for the execution creditors on Monday, January the 25th, procured from the County Court judge another order dated the 25th, ordering J. to be imprisoned for six months from January 23d.

Application was made to the Supreme Court of Nova Scotia for the discharge of the prisoner on *habeas corpus*, which was refused, the majority of the court holding that he was rightly held in custody, if not on the order of the County Court judge, then on the original cause of his detention, the writ of execution.

On appeal to the Supreme Court of Canada, *Held*, that the appeal must be dismissed. Appeal dismissed without costs.

In re Smart, 16 Can. S.C.R. 396.

The writ was issued to obtain possession of children from their mother. After the case had been opened Ferguson, J., made an order directing that no further proceedings be taken on the writ, but that the matter should be brought before the court by way of petition by the applicant. On appeal from this order the Divisional Court varied it by directing that the writ of *habeas corpus* should remain in force and that the questions for trial under the return thereto should be tried at the same time and place as the questions under the petition directed by the said order to be filed. The judgment of the Divisional Court was affirmed by the Court of Appeal. The mother of the infant children then appealed to the Supreme Court of Canada, seeking to have the original order of Ferguson, J., restored. Notice of intention to appeal to the Supreme Court was given, but nothing further was done until more than sixty days had elapsed from the pronouncement of the judgment of the Court of Appeal. Upon motion to quash for want of jurisdiction, *Held*, that "In appeals in *habeas corpus* proceedings no security being required, the first proceeding must necessarily be the filing of the case in the Supreme Court, and that step

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must be taken within sixty days from the date on which the judgment appealed from was pronounced." The appeal was therefore quashed.

Seid Sing Kaw v. Bowes, 17th May, 1898; Cout. Dig. 105.

Upon the calling for hearing of the appeal (which was from a judgment of the Supreme Court of British Columbia, refusing a writ of *habeas corpus*, for the possession of Quai Sing, a Chinese female under age), counsel for the respondent produced to the Court an order of the Supreme Court of British Columbia dated subsequently to the judgment appealed from, by which it appeared that the respondent, the matron of a rescue home, had been appointed by that court as guardian to the infant in question, whereupon the Chief Justice intimated that, under the circumstances, it was useless to proceed with the hearing of the appeal, it being impossible that any order could be made thereon respecting the possession of the infant being given to the appellant. The appeal was consequently dismissed with costs.

The adjudication upon *habeas corpus* matters is expressly excluded from the jurisdiction of the Registrar, General Order 83.

The Rules applicable to *habeas corpus* appeals are 46, 47, 48 and 49, *infra*.

Rule 12 provides that a special session of the Supreme Court under the powers conferred by section 34, *supra*, may be called for the hearing of appeals in matters of *habeas corpus*.

Certiorari.

The Supreme Court has original jurisdiction to issue a writ of *certiorari* under section 66, *infra*. The *certiorari* proceedings referred to in this section are those which have originated in the court below.

The practice in *certiorari* in criminal matters, and the same practice appears to prevail in the provinces of Canada where this procedure is applied in civil proceedings, is stated in Paley on Convictions as follows:—

"If a rule *nisi* only be granted in the first instance the argument on such rule generally decides the case, and if it be made absolute after argument, the conviction is quashed almost as a matter of course, when it is afterwards brought up on the *certiorari*."

The Queen v. Troop, 29 Can. S.C.R. 662, infra, p. 154. S. 39, ss. (c).

Mr. Justice King for the Court here said:—

"It is settled in cases where no restraint is imposed by the Legislature upon a review by certiorari that an adjudication by a tribunal having jurisdiction over the subject matter is, if no defect appears on the face of it, to be taken as conclusive of the facts stated therein and that the court will not on certiorari quash such an adjudication on the ground that any such fact, however, essential, has been erroneously found, but where the right is taken away by statute it is to be deemed as still existing in cases of want or excess of jurisdiction, or fraud." Appellate Jurisdiction. Certiorari.

Section 24(*g*) of the Supreme & Exchequer Courts Act, containing the original of this sub-section in the first place only applied to *habeas corpus* proceedings, but in 1891 Sir John Thompson introduced a bill amending the section and making it applicable to prohibition and *certiorari* proceedings. In stating to the House his reasons for the amendment, the Minister of Justice said:—

"In some provinces, especially New Brunswick, the courts have power to review on certiorari a great many matters in which the superior courts have no original jurisdiction. For example questions of assessment are reviewed by the Supreme Court of the province under certiorari, although the suit did not begin in a superior court."

The provision relating to quashing assessments by *certiorari* proceedings in the Statutes of New Brunswick at the time the amendment was made, are contained in the Consolidated Statutes of New Brunswick, 1877, ch. 100. Section 111 provides "No such rate or any proceeding touching any such rate shall in any case be quashed for defect either in form or substance unless and until in the event of the court being unable to give the relief or make the order or orders hereinafter mentioned."

"112. On any rule nisi being granted for a certiorari to bring up any rate or any proceeding touching any such rate, with a view to quashing the same, the Court shall have and exercise the following powers in reference thereto." Then follow special provisions.

On this state of the law there arose the case of *Ex parte James D. Lewin*, 11 Can. S.C.R. 484, in which a rule *nisi* was granted calling upon the assessors of rates for the City of St. John to shew cause why a writ of *certiorari* should not issue to remove into the Supreme Court the assessment list, whereby the said James D. Lewin was assessed as President of the Bank of New Brunswick in the sum of $12,760, and

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all proceedings upon which said assessment was based, with a view to the same being quashed. After argument the rule was discharged. An appeal was thereupon taken to the Supreme Court of Canada when the judgment below was reversed and the appeal allowed with costs.

This decision was in 1885 and prior to the amendment, and the fact that the Supreme Court had exercised jurisdiction in matters of *certiorari* does not seem to have come to the knowledge of the Minister of Justice.

Similarly before this amendment and when no express jurisdiction was conferred upon the Supreme Court in matters of prohibition, jurisdiction was exercised in an appeal from a judgment of the Court of Queen's Bench (Quebec), arising out of a writ of prohibition—*Coté* v. *Morgan*, 7 Can. S.C.R. 1—and the amendment was therefore not considered necessary by the Supreme Court to give it jurisdiction in matters of prohibition.

The Queen v. Sailing Ship "Troop," 29 Can. S.C.R. 662.

An action was brought by the Imperial Board of Trade in the name of Her Majesty against the defendant before the police magistrate at St. John to recover the amount paid for hospital fees and board at Hong Kong incurred on behalf of a seaman on board a ship of the defendant, who was injured and left at Hong Kong, and also the expenses of carrying the seaman to London. The Supreme Court of New Brunswick made absolute a rule *nisi* for a *certiorari* to remove the proceedings before the police magistrate, with a view to having the order made therein quashed. On appeal to the Supreme Court of Canada the judgment below was reversed and the appeal allowed with costs. The question of jurisdiction was expressly taken, *vide* judgment of King, J.

Jones v. City of St. John, 30 Can. S.C.R. 122.

This appeal originated by an order *nisi* made by one of the judges of the Supreme Court of New Brunswick in an application by the appellant calling upon the Common Council of the City of St. John, the Board of Assessors of the city, and the appeals committee of the Common Council to shew cause why a writ of *certiorari* should not issue to remove into the Supreme Court of New Brunswick, the assessment against the appellant. The report of the Appeals Committee and the order of the Common Council adopted the report with a view of quashing the assessment report

and order. After argument before the full Court the order *nisi* was discharged. Upon appeal to the Supreme Court the judgment below waa reversed.

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Jones v. City of St. John, 31 Can. S.C.R. 320.

Previous to the proceedings in the next preceding case, the appellant had, under protest, for some years paid assessments similar to that in issue in the appeal to the Supreme Court and in which the rule *nisi* for a writ of *certiorari* was similarly discharged by the Supreme Court of New Brunswick, but no appeal from that decision was taken. After the judgment of the Supreme Court the appellant instituted an action to recover the assessments so previously paid under protest, but the Supreme Court affirmed a judgment of the court below, holding that the judgment in the earlier assessment not having been appealed from, the matter was *res judicata* and could not be recovered now in an action.

Bigelow v. The Queen, 31 Can. S.C.R. 128.

Upon appeal to the Supreme Court of Canada from a judgment of the Supreme Court of Nova Scotia vacating the order of Ritchie, J., for a *certiorari* on a conviction against the appellant, on the ground that the affidavit required by section 117 of the Liquor License Act of 1896 had not been produced on the application for the writ of *certiorari*, the appeal was dismissed with costs.

In re Trecothic Marsh, 37 Can. S.C.R. 79.

Appeal from the judgment of the Supreme Court of Nova Scotia (38 N.S. Rep. 23), setting aside an order made by Mr. Justice Graham, on the application of the appellants, directing that a writ of *certiorari* should issue to remove into the said court the record and proceedings of the Board of Commissioners for the Trecothic March assessing a rate upon the lands of the appellants for expenses incurred in the drainage and dyking of the marsh.

The company applied for an order to have the record and proceedings removed into the Supreme Court, by way of *certiorari*, within the time prescribed, but the judge reserved his judgment upon the application and made the order for the issue of the writ only some days after its expiration. The judgment now appealed from set aside the order upon the merits of the case, holding that the assessment upon the lands of the appellant had been properly imposed.

Appeal dismissed with costs.

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Canadian Pacific Railway Co. v. The King, 39 Can. S.C.R. 476.

Appeals from judgments of the Supreme Court of the North-West Territories, discharging orders *nisi* for writs of *certiorari* to remove and quash convictions against the railway company for unlawfully kindling prairie fires, at or near Mortlach and Ernfold, respectively, in the Province of Saskatchewan, contrary to the provisions of The Prairie Fires Ordinance, as amended.

The principal questions at issue on the appeals were as to the application of the provisions of The Prairie Fires Ordinance, in respect to kindling fires on prairies and the construction of fire-guards, to railways subject to the control of the Parliament of Canada.

The judgments appealed from were reversed.

Rex v. Ing Kon. Nov. 27th, 1907.

The defendant was convicted by the Police Magistrate of Toronto for selling liquor without a license and an order was made for the destruction of the liquor seized. On *certiorari* the High Court confirmed the conviction, but varied the order so far as part of the liquor seized was concerned, on the ground that it was covered by the provisions of 61 V. c. 30, s. 3. This judgment was affirmed by the Court of Appeal (reported Weekly Notes). The private prosecutor applied to the Supreme Court for leave to appeal, which was refused.

Sisters of Charity v. Vancouver, 44 Can. S.C.R. 29.

Upon an application by motion for an order calling upon the Court of Revision to shew cause why an order for a writ of *certiorari* should not issue to remove to the Supreme Court of British Columbia a decision of the said Court of Revision with respect to exemption from taxes of the appellants, the writ was ordered. Upon appeal this order was rescinded. A further appeal to the Supreme Court of Canada was dismissed. The merits of the exemption were discussed and disposed of upon the application for the order and on appeal therefrom. *Vide* also *infra*, p. 186.

Prohibition.—Decisions prior to Amendment of 1891.

As mentioned in the note to *certiorari*, *supra*, the Supreme Court exercised jurisdiction in prohibition proceedings long before the amendment of 1891 expressly conferring jurisdiction.

Cote v. Morgan, 7 Can. S.C.R. 1.

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The municipal corporation of the County of H., in the Province of Quebec, made an assessment roll according to law in 1872. In 1875, a triennial assessment roll was made and the property subject to assessment was assessed at $1,745,588.58. In 1876 without declaring that it was an amendment of the roll of 1875, the corporation made another assessment in which the property was assessed at $3,138,550. Among the properties that contributed towards this augmentation were those of appellants, who by their petition, or *requête libellée*, addressed to the Suprior Court, alleged that the secretary-treasurer of the County of H. was about to sell their real estate for taxes under the provisions of the municipal code for the Province of Quebec, 34 V. c. 68, s. 998, *et seq.*, and prayed to have the assessment roll of 1876, in virtue of which the officer of the municipality was proceeding to sell, declared invalid and null and void, and that a writ of prohibition should issue to prevent the respondents from proceeding to sell. The Superior Court directed the issue of the writ restraining the defendants as prayed, but upon the merits, held the roll of 1876 valid as an amendment of the roll of 1875. The Court of Queen's Bench reversed this judgment on the merits, and held the roll of 1876 to be substantially the new roll, and therefore null and void.

On appeal to the Supreme Court of Canada, the Court being equaly divided, the appeal was dismissed without costs.

Poulin v. Corporation of Quebec, 9 Can. S.C.R. 185.

Under the authority of the Act of the Legislature of Quebec, 42 & 43 V. c. 4, s. 1, a penal suit was, on the 20th of January, 1880, instituted against P. in the name of the corporation of Q., before the Recorder's Court of the City of Q., alleging that "on Sunday the 18th day of January, 1880, the said defendant had not closed during the whole of the day, the house or building in which he the said defendant sells, causes to be sold, or allowed to be sold, spirituous liquors by retail, in quantity less than three half pints at a time, the said house or building situate, etc." P. was convicted.

A writ of prohibition to have the conviction revised by the Superior Court was subsequently issued, and upon the merits was set aside and quashed.

Upon appeal to the Supreme Court of Canada, the members of the Court being equally divided, the appeal was dismissed without costs.

S. 39, ss. (c).

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Molson v. Lambe, 15 Can. S.C.R. 253 (1888).

The inspector of licenses for the revenue district of Montreal charged R., a draymun in the employ of J. H. R. M. & Bros., duly licensed brewers under the Dominion Statute, 43 V. c. 19, before the Court of Special Sessions of the Peace at Montreal, with having sold beer outside the business premises of J. H. R. M. & Bros., but within the said revenue district in contravention of the Quebec License Act, 1878, and its amendments, and asked a condemnation of $95 and costs against R. for said offence. Thereupon J. H. R. M. & Bros. and R., claiming *inter alia* that being licensed brewers under the Dominion Statute, they had a right of selling beer by and through their employees and draymen without a provincial license, and that 41 V. c. 3 (Q.), and its amendments were *ultra vires*, and if constitutional did not authorize the complaint against R., caused a writ of prohibition to be issued out of the Superior Court enjoining the Court of Special Sessions of the Peace from further proceeding with the complaint against R.

Held, per Ritchie, C.J., and Strong, Fournier and Henry, JJ., that the Quebec License Act and its amendments were *intra vires*, and that the Court of Special Sessions of the Peace of Montreal having jurisdiction to try the alleged offence and being the proper tribunal to decide the questions of fact and law involved, a writ of prohibition did not lie.

Wallace v. O'Toole, 16th February, 1885.

An action of trover was brought against defendants in the County Court, at Halifax, N.S., to which they pleaded a number of pleas including one to the jurisdiction of the court. This plea was based on an allegation that the goods for which the action was brought, were of the value of $600, the jurisdiction of the court in actions of tort being limited to $200. The plaintiff demurred to the plea of want of jurisdiction, and after argument the demurrer was overruled. No appeal was taken from the judgment overruling the demurrer, but the plaintiff gave notice of trial, and entered the cause for trial at Chambers before the County Court judge, who announced his intention of trying the same on the remaining pleas. The defendants obtained a rule *nisi* for a writ of prohibition to restrain the judge from trying the cause, on the ground that the judgment on the demurrer disposed of the whole case, and on argument of the said rule *nisi* it was discharged.

On appeal to the Supreme Court of Canada, *Held*, Strong, J., dissenting, that the effect of the judgment on the demurrer was to quash the writ, and the rule *nisi* for a writ of prohibition should be made absolute. S. 39, ss. (c) Appellate Jurisdiction. Prohibition.

Per Strong, J., dissenting, that the judgment of the County Court judge on the demurrer did not dispose of the case, but he had a right to reconsider the same on the trial of the issues raised by the other pleas; that the plea to the jurisdiction by attorney was null and void and if judgment had been entered of record on the demurrer such judgment would have been likewise null and void: and that the amount claimed by the plaintiff's declaration being over $200 the court had jurisdiction.

Appeal allowed with costs.

Attorney-General v. Flint, 16 Can. S.C.R. 707.

Proceedings were taken in the Vice-Admiralty Court at Halifax on the information of the Attorney-General of Canada against the defendant to enforce the payment of penalties for breaches of the Inland Revenue Act. The court held it had jurisdiction, whereupon the defendant Flint applied to the Supreme Court of Nova Scotia for an order for a writ of prohibition to stay further proceedings in the Vice Admiralty Court, which was granted. The Attorney-General thereupon appealed to the Supreme Court of Canada where his appeal was allowed with costs.

Godson v. City of Toronto, 18 Can. S.C.R. 36 (1890).

The city council, under R.S.O. 1887, c. 184, s. 477, passed a resolution directing a County Court judge to inquire into dealings between the city and persons who were or had been contractors for civic works and ascertain if the city had been defrauded in connection with contracts; to inquire into the whole system of tendering, awarding, carrying out, fulfilling and inspecting contracts with the city; and to ascertain in what respect, if any, the system of city business in that respect was defective. G., who had been a contractor and whose name was mentioned in the resolution, attended before the judge and claimed that the inquiry as to his contracts should proceed only on specific charges of malfeasance or misconduct, and the judge refusing to order such charges to be formulated, he applied for a writ of prohibition. *Held*, affirming the judgment appealed from (16 Ont. App. R. 452), Gwynne, J., dissenting, that the County Court judge was not acting judicially in holding this inquiry;

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that he was in no sense a court and had no power to pronounce judgment imposing any legal duty or obligation on any person; and he was not, therefore, subject to control by writ of prohibition from a superior court. *Held*, per Gwynne, J., that the writ of prohibition would lie and in the circumstances shewn it ought to issue.

The cases following arose since the amendment of 1891.

Tremblay v. Bernier, 21 Can. S.C.R. 409.

The Syndic of the Board of Notaries of the Province of Quebec made a complaint before the Board against the appellant charging him with improper conduct. The appellant was summoned to appear before the Committee of Discipline to answer to these charges. He appeared by his attorney and filed a declaration taking exception to the jurisdiction of the Committee. His preliminary objection being overruled, the appellant pleaded that as the charge against him amounted to a felony, the Committee had no power to try him until he had been tried by a competent criminal court. The complaint, however, was proceeded with and the appellant obtained a writ of prohibition from the Superior Court restraining the respondents in their proceedings. This judgment was reversed by the Court of Queen's Bench and an appeal to the Supreme Court of Canada was dismissed with costs.

Shannon v. Montreal Park & Island Railway Co., 28 Can. S.C.R. 374.

The controversy between the parties arose from proceedings upon an arbitration under the Railway Act of 1888. The arbitrators were proceeding to render their award when the railway company obtained from the Superior Court a writ of prohibition enjoining them from receiving evidence or to do any official act in connection with the expropriation. The appellant was *mis-en-cause* in the case and contested the petition. The Superior Court maintained the contestation, dismissed the petition and quashed the writ of prohibition, but the Court of Queen's Bench maintained the writ and granted the conclusions of the company's petition. Upon appeal to the Supreme Court of Canada the respondents objected that there was no appeal from judgments rendered in matters of prohibition in the Province of Quebec, but the Court held that the Act of 1891, 54-55 V. c. 25, s. 2, applies to the whole Dominion and

allowed the appeal with costs. This decision was overruled, *Désormeaux* v. *Ste. Thérèse*, 43 Can. S.C.R. 82, *infra*, p. 162. S. 39, s.s. (c).

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Honan v. Bar of Montreal, 30 Can. S.C.R. 1.

In pursuance of statutory powers, the Bar of Montreal suspended a practising advocate after holding an inquiry into charges against him which, however, had been withdrawn by the private prosecutor before the council had considered the matter. It did not appear that witnesses had been examined upon oath during the inquiry and no notes in writing of the evidence of witnesses adduced had been taken. The effect of such absence of written notes, it was claimed by the appellantt, was that he had been deprived of an opportunity of effectively prosecuting an appeal to the General Council of the Bar of the Province of Quebec. The appellant sued out a writ of prohibition in the Superior Court, but on the argument of the return it was quashed. On appeal to the Superior Court sitting in review, the judgment below was reversed, and the writ maintained, and the Bar of Montreal declared to have acted illegally in suspending the appellant. This judgment was reversed by the Court of Queen's Bench. Upon appeal to the Supreme Court of Canada the appeal was dismissed with costs.

O'Farrell v. Brassard, 4 Q.L.R. 214.

Held, by the Court of Queen's Bench, there is no appeal from a judgment of that court to Her Majesty in Her Privy Council in a matter of prohibition.

Quebec Railway, Light and Power Co. v. Recorder's Court, 41 Can. S.C.R. 145.

On complaint by the City of Quebec that the company had illegally neglected to operate their tramcars at certain stated intervals necessary for the convenience of the general public, upon certain streets in any city, in violation of the city by-laws then in force, the company was summoned before the Recorder's Court for the City of Quebec and, upon conviction of the offence as charged against the by-laws, it was condemned to pay the penalty of $40 provided under the by-laws in question. The company, in pleading to the complaint, denied the jurisdiction of the Recorder's Court to hear and determine the matter in issue on the ground that the obligation, if any, of the company to operate and circulate its cars at certain fixed intervals was contractual and the breach of any such obligation was not a matter which came within the jurisdiction of the tribunal, but was within the exclusive jurisdiction of the Superior Court. Upon conviction, the company sued

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out a writ of prohibition alleging that the Recorder's Court had no jurisdiction to entertain any suit or proceeding in respect of the penalty claimed; that the penalty sought to be recovered was for the alleged breach of contract resulting from the by-laws and a deed of agreement entered into between the city and the company, based on the by-laws; that, for any such breach, the company was not liable to a penalty but for damages only in a suit properly instituted in a court of competent jurisdiction; that the frequency of the service required had not been legally determined prior to the complaint; that the by-laws in question did not impose any penalty in respect of the matters complained of; that the city had no authority to enact by-laws imposing penalties for the breach set out in the complaint or to give the Recorder's Court authority to entertain such a complaint, and the by-laws in question were inconsistent, void, vague and ineffectual for want of certainty.

At the trial, the writ of prohibition was quashed with costs, and this decision was affirmed by the judgment appealed from, Bosse and Cimon, J.J. dissenting. A further appeal to the Supreme Court was dismissed.

Desormeaux v. Ste. Therese, 43 Can. S.C.R. 82.

An order for a writ of prohibition was made by a judge of the Superior Court, which was affirmed by the Court of King's Bench. An appeal having been launched to the Supreme Court of Canada, the respondent moved to quash for want of jurisdiction. The appellant claimed jurisdiction by virtue of the special provisions of s. 39, but the court held this section is governed by s. 46 and the appeal not falling under any of the provisions of that section, quashed the appeal with costs.

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Section 47, *infra*, expressly provides that the limitations placed upon appeals from the Province of Quebec do not apply to cases of mandamus.

In the Province of Ontario there is no appeal from the Court of Appeal in proceedings for or upon a writ of mandamus unless the case is one of those provided for by section 48, *infra*.

Cases from the Province of Quebec.

An appeal to the Supreme Court of Canada in any case or proceeding for or upon a writ of mandamus was granted by section 23 of the original Act constituting the Court, 38 V. c. 11.

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Danjou v. Marquis, 3 Can. S.C.R. 251 (1879).

A municipal council, of which the appellant was the presiding officer, having passed a by-law in which the respondent had an interest, the latter obtained from the Superior Court a writ of mandamus in order to compel the appellant to sign the minutes of the meeting of the council at which the by-law had been passed. After service of the writ, the appellant signed the minutes. The Superior Court or a judge thereof in Chambers, gave judgment adjudging the present appellant to pay the costs. From that judgment the appellant appealed to the Court of Queen's Bench for the Province of Quebec, but that court rejected the appeal for want of jurisdiction, holding that the judgment of the Superior Court was final and in last resort. The appellant thereupon appealed to the Supreme Court of Canada from the judgment of the Superior Court and not from the Court of Queen's Bench, when the appeal was quashed, the Court holding that no appeal lay from the Province of Quebec to the Supreme Court of Canada except from the Court of Queen's Bench.

Subsequently, by 54-55 V. c. 25, s. 3, an appeal was expressly given from the Superior Court in Review to the Supreme Court of Canada subject to certain limitations. *Infra*, section 40.

Sulte v. Three Rivers, 11 Can. S.C.R. 25.

This was an appeal from the Court of Queen's Bench (Quebec) in a proceeding by petition for a peremptory mandamus directed to the officers of a municipal corporation requiring them to issue a saloon license to petitioner without payment of $200 license fee imposed by the municipality by virtue of a charter granted by the Legislature of the Province of Quebec.

The petition also alleged that the act of the local legislature was *ultra vires* of its powers. The Superior Court granted the petition, but this was reversed by the Court of Queen's Bench. A further appeal o the Supreme Court of Canada was dismissed with costs.

Tremblay v. The Commissioners St. Valentine, 12 Can. S.C.R. 546.

The Superintendent of Education having ordered the division of a school district and the school commissioners having passed a resolution that the district should not be divided, the Superior Court ordered a peremptory writ of

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mandamus to issue. This judgment was reversed by the Court of Queen's Bench, but reinstated by the Supreme Court.

Brady v. Stewart, 15 Can. S.C.R. 82.

The appellant sued respondents, the liquidators of the St. Gabriel Mutual Building Society, claiming a mandamus to compel them to acknowledge him as a shareholder in the society, and to collocate him for dividends on certain shares. The respondents set up a plea of litigious rights which was maintained by the Court of Queen's Bench and the Superior Court and affirmed by the Supreme Court.

Langevin v. St. Marc, 18 Can. S.C.R. 599.

The appellant applied to the Superior Court for a writ of mandamus against respondents. The writ having been granted, returnable before a judge of the Superior Court in Chambers, respondents, according to the practice in Quebec, filed pleas to the petition upon which the writ issued, to which the appellants demurred. The Superior Court maintained the appellants' demurrers, but this judgment was reversed by the Court of Queen's Bench, the court saying that the corporation had the right to proceed to an *enquête* to establish certain alleged irregularities which would invalidate the decree of the Superintendent of Education in question, and finding there was error in the interlocutory judgment of the Superior Court, annulled it and dismissed the demurrers. On appeal to the Supreme Court it was held that under section 24(*g*) (now 39(*d*)) allowing proceedings for or upon a writ of mandamus, the decision sought to be appealed from must be a final judgment, and not being so in this case the appeal was quashed, but when the Superior Court directed a peremptory mandamus to issue and in default condemned the defendant to pay $2,000, the Supreme Court exercised jurisdiction. *Held*, that judgment in this sub-section means final judgment, per Fournier and Taschereau, JJ.

Patterson, J., dissenting, pointed out that the effect of section 30 (section 47, *infra*) was to provide that there should be an appeal in cases of mandamus where the judgment was not final, as that section expressly says that appeals in cases of mandamus were not to be affected by the provisions of section 28 (section 44, *infra*), which provides that an appeal shall only lie from final judgments. The judgments of the majority of the Court do not deal with the effect to be given to section 30.

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Hus v. St. Victoire, 19 Can. S.C.R. 477.

The facts of this case being similar to those existing in *Langevin* v. *St. Marc*, but evidence having been given upon the allegation set up in the pleas filed in answer to the petition for a mandamus, thereupon the Superior Court granted a peremptory mandamus and ordered the school commissioner to obey the order of the Superintendent of Education and in default be condemned to pay $2,000. The Supreme Court exercised jurisdiction and dismissed the appeal on the merits.

St. Charles v. Cordeau, Cout. Dig. 808; 9th Dec., 1895.

"Under the provisions of article 2055 of the Revised Statutes of Quebec, as amended by 55 & 56 V. c. 24, ss. 18 and 19, certain ratepayers of a school district appealed to the Superintendent of Public Instruction for the Province of Quebec, who thereupon rendered a decision and gave orders and directions respecting the erection of a school house, which, however, the School Commissioners neglected to perform. *Held*, affirming the judgment appealed from that in such case the decision of the Superintendent of Public Instruction was final; that no appeal therefrom would lie to the Superior Court, and that the proper remedy to enforce the execution of the orders and directions of the superintendent was by mandamus."

Cadieux v. Montreal Gas Co., 28 Can. S.C.R. 382.

In this case the Supreme Court reversed the judgment of the Court of Queen's Bench which reversed the judgment of the Superior Court ordering a peremptory writ of mandamus to issue against the defendants.

Beach v. Stanstead, 29 Can. S.C.R. 736.

The plaintiff was proprietor of a hotel in the township of Stanstead, where no by-law prohibiting the sale of intoxicating liquors existed, and being desirous of obtaining a license, made the necessary deposit of money and filed a certificate as required under the Quebec License Law. It did not appear that there existed any cause such as is set forth in the statute for the refusal of the confirmation of the certificate, but the municipal council passed a resolution refusing so to do. The plaintiff thereupon took an action for a mandamus to compel the corporation to confirm the certificate, and by a judgment of the Superior Court sitting

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in review it was ordered that a peremptory mandamus should issue enjoining the council to confirm the certificate, which was accordingly done. Plaintiff afterwards brought the present action for damages against the corporation for loss of business caused by the wrongful act, as alleged, of the council. The Superior Court decided in favour of the plaintiff, but its judgment was reversed by the Court of Queen's Bench. On appeal to the Supreme Court, *Held*, that in deciding the present appeal the Supreme Court was not bound by the judgment of the Superior Court in the matter of the mandamus, but even if it were, there were other grounds upon which the Court might hold that the action was not maintainable. The Court was also of the opinion that the municipal council had a discretion in the matter for the exercise of which no action would lie.

Les Syndics de la Paroisse de St. Valier v. Catellier, Cout. Cas. 202.

"Motion by way of appeal from the order of the Registrar, in chambers (11th January, 1900), approving of the deposit of $505 as security for the costs of an appeal from the Court of Queen's Bench, appeal side, Province of Quebec.

The respondent Catallier, applied for a peremptory writ of mandamus ("un bref peremptoire de la nature d'un bref de mandamus") agalnst the appellants to compel them to proceed with the purchase of lands selected for the site of a parish church, and obtained an order, as follows:—

"Vu la requete ci-dessus, il est ordonne d'emaner un bref de mandamus tel que demande."

Upon this order an ordinary writ of summons was issued under art. 993 of the Code of Civil Procedure, indorsed as a writ of mandamus, but the copy served on the Syndics did not contain any indorsement of the nature of the claim as provided by art. 124 C.P.Q. An exception to the form was dismissed, whereupon the Syndics inscribed an appeal de plano, before the Court of Queen's Bench, on the ground that the order was a final judgment, and directed the issue of a peremptory writ of mandamus. The Court of Queen's Bench quashed the appeal for the following reasons:—

"Parceque (1) Les appelants ont inscrit en appel de l'ordonnance du juge permettant l'emission du bref de mandamus en cette cause, sans au prealable obtenir la permission; (2) parceque la dite ordonnance n'est pas un jugement final, mais une interlocutoire."

Upon the motion before the Registrar in Chambers, the respondent contended that the judgment was not appealable, that the case was governed by Langevin v. Les Commissaires d'Ecole de St. Marc (18 Can. S.C.R. 599), and that section 24 (g) of the Supreme and Exchequer Courts Act did not permit of an appeal in such a case unless the order was final in its nature.

The learned Registrar, considering that the order was not simply for the issue of a summons under art. 993 C.P.Q., but a peremptory order for the issue of a writ of mandamus, under art. 996 C.P.Q., held that the judgment was final in its nature and, therefore, appealable.

This decision was reversed on the appeal by Mr. Justice Girouard, in Chambers, and the application for approval of the security for costs was dismissed with costs.

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Ontario cases prior to 60-61 *V. c.* 34. (*Vide also infra, sec.* 48 *notes;*

Ontario & Quebec Rly. Co. v. Philbrick, 12 Can. S.C.R. 288.

A railway company, having taken certain lands for the purposes of their railway, made an offer to the owner in payment of the sar e which offer was not accepted, and the matter was referred to arbitration under the Con. Railway Act, 1879. On the day that the arbitrators met the company executed an agreement for a crossing over the said land, in addition to the money payment, and it appeared that the arbitrators took the matter of the crossing into consideration in making their award. The amount of the award was less than the sum offered by the company, and both parties claimed to be entitled to the costs of the arbitration, the company because the award was less than their offer, and the owner because the value of the crossing was included in the sum awarded which would make it greater than the offer.

The statute under which the claim for costs was made was section 9, sub-section 19 of the Con. Railway Act, which provides as follows:—

"If, in any case, when three arbitrators have been appointed, the sum awarded is not greater than that offered, the costs of the arbitration shall be borne by the opposite party, and be deducted from the compensation: but if otherwise they shall be borne by the company, and, in either case, they may, if not agreed upon, be taxed by the judge."

Application was made to Mr. Justice Galt for a mandamus to compel the judge to tax the company costs, and also for a writ of prohibition to restrain him from taxing costs against them.

The learned judge held that the agreement or offer for the crossing was made by the company before the arbitration, and was included in the sum awarded for damages, and he refused both applications. The Court of Appeal sustained this judgment, holding, as to the mandamus, that as the notice by the company contained no mention of a crossing

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and the award did, the latter was not made upon the basis of the matter contained in the notice; and as to the writ of prohibition, that if the costs against the company were taxed the writ was useless, and if the judge had no power to tax, the taxation would be futile.

Held, affirming the judgment of the Court of Appeal, and the judgment of the Divisional Court (5 O.R. 674), Gwynne, J., dissenting, that under the circumstances neither party was entitled to costs.

Appeal dismissed with costs.

Williams v. Raleigh, 21 Can. S.C.R. 103.

Sub-section 2 of section 583 of R.S.O. 1887 enacts that

"Any such municipality neglecting or refusing so to do (that is, to make the necessary repairs to drainage works within its own limits) upon reasonable notice being given by any party interested therein, and who is injuriously affected by such neglect or refusal, may be compellable by mandamus to be issued by any court of competent jurisdiction to make from time to time the necessary repairs to preserve and maintain the same; and shall be liable to pecuniary damages to any person who or whose property is injuriously affected by reason of such neglect or refusal."

This was an action to recover $2,000 damages and claiming a mandamus in connection with certain drainage works. The trial judge referred the matters in dispute to the County Court judge with all the powers conferred by the rules of court upon a referee or arbitrator, and all costs were reserved until his report had been made. The County Court judge reported that the plaintiff was entitled to a mandamus and damages and upon a motion for judgment the trial judge gave judgment for the plaintiff for $850 and a mandamus. On appeal to the Court of Appeal for Ontario the appeal was allowed and the action dismissed. On a further appeal to the Supreme Court of Canada, *Held*, per Strong and Gwynne, JJ., Ritchie, C.J., and Patterson, J., *contra*, and Taschereau, J., taking no part in the judgment, that the drain causing the injury being wholly within the limits of the municipality in which it was commenced, and not benefiting lands in an adjoining municipality, it did not come under the provisions of section 583 of the Municipal Act and W. was not entitled to a mandamus under that section.

Held, per Strong and Gwynne, JJ., that though W was not entitled to the statutory mandamus, it could be granted under the Ontario Judicature Act (R.S.O. 1887, c. 44).

Sombra v. Chatham, 21 Can. S.C.R. 305.

S. 39, ss. (d). Appellate Jurisdiction. Mandamus.

Under the drainage provisions of the Municipal Act, R.S.O. (1887) c. 184, respondent undertook the construction of a drain along the town line between Chatham and Sombra, but the work was not fully completed according to the plans and specifications, and owing to its imperfect condition the drain overflowed and flooded the adjoining lands of M., who joined in an action against the township, alleging that the effect of the work on the drain was to stop up the outlets to other drains in Sombra, back the waters thereof and flood roads and lands in the township, and they asked an injunction to restrain Chatham from so interfering with existing drains and mandamus to compel the completion of the drain so undertaken as well as damages for injury to M.'s land and other land in Sombra. *Held*, per Ritchie, C.J., Strong and Gwynne, JJ., that section 583 of the Municipal Act providing for mandamus to compel the making of repairs to preserve and maintain a drain does not apply to this case in which the drain was never fully made and completed, but that the Township of Sombra was entitled to a mandamus under Ont. Jud. Act, R.S.O. (1887), c. 44.

Mandamus since 60-61 V. c. 34.

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

The respondent applied to a judge of the High Court of Ontario for a peremptory writ of mandamus to compel the clerk of the peace to furnish him with a copy of the proceedings in a criminal charge on which he had been acquitted, but the application was refused on the ground that the documents in question were held by the clerk of the peace and that a certified copy could not be given without the fiat of the Attorney-General, in whose discretion it lay whether or not the fiat should issue. This judgment was reversed by the Divisional Court, and a further appeal to the Court of Appeal was dismissed. An application was thereupon made to the Supreme Court of Canada for leave to appeal under paragraph (*e*) of section 1, 60-61 V. c. 34. The Supreme Court refused the application with costs.

It was admitted that no appeal would lie in this case except by leave. *Vid. Aurora* v. *Markham*, 32 Can. S.C.R. 457, *infra*, p. 283.

Beck Manufacturing Co. v. Valin, 40 Can. S.C.R. 523.

By R.S.O. (1897), c. 142, s. 15, the owner of improvements in a river or stream used for floating down logs may

S. 30, s.s. (d).

Appellate Jurisdiction. Mandamus.

obtain from a district judge an order fixing the tolls to be paid by other parties using such improvements. On application for a writ of mandamus to compel the judge to make such an order, it was held, affirming the judgment of the Court of Appeal (16 Ont. L.R. 21), Davies, J. *dubitante*, and Idington, J., expressing no opinion, that such an order had effect only in case of logs floated down the river or stream after it was made.

Leave to appeal to the Supreme Court in this case was granted by the Court of Appeal, although not so stated in the report.

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

Leave to appeal was refused in this case, the motion being predicated on the admission that without leave there was no jurisdiction. The Court of Appeal had affirmed an order of MacMahon, J., directing a writ of mandamus to issue.

Rodd v. Essex, 44 Can. S.C.R. 137.

In this case the Court of Appeal reversed the judgment at trial directing a mandamus to compel the defendants to provide the County Attorney with an office. Special leave to appeal to the Supreme Court was granted by the Court of Appeal, although not so stated in the report.

Mandamus—other cases.

Town of Dartmouth v. The Queen, 9 Can. S.C.R. 509.

The proceedings herein commenced by a rule *nisi* taken out at the instance of the sessions for the County of Halifax for a writ of mandamus to compel the municipal officers of Dartmouth to forthwith assess upon property in Dartmouth a sum of $15,000 required for school purposes. This rule was made absolute and the writ of mandamus ordered to issue. An appeal therefrom was dismissed by the Supreme Court, and it was further held the mandamus here ordered was not a peremptory mandamus, and that it was open to Dartmouth, upon the return of the writ to shew cause why the whole amount claimed in these proceedings should not be levied.

The writ which issued pursuant to this judgment in its operative part commanded the wardens and council of Dartmouth to forthwith assess the said sum, etc., "or that you shew us cause to the contrary thereof," etc. The

warden and council at Dartmouth in their return to the writ simply set up the legal defences to the claim, to which action the sessions of Halifax demurred. Two points were raised on argument, one *in limine*, that under the practice in Nova Scotia, there can be no demurrer to a return and secondly, upholding the sufficiency of the return. Judgment was against Dartmouth on both points, and a peremptory mandamus ordered to issue. From this judgment an appeal was taken to the Supreme Court and the same objection was taken by the appellants as in the court below that there could be no demurrer to a return to a writ of mandamus. This objection was overruled and the appeal proceeded on the merits.

S. 39, s.s. (e). Appellate Jurisdiction. Municipal By-laws.

Drysdale v. Dominion Coal Co., 34 Can. S.C.R. 328.

The appellant was a member of the Executive Government of the province, and as such held the office of Commissioner of Public Works and Mines. By statute he was given jurisdiction to inquire into and decide upon applications involving mining rights, and his decision was made the subject of an appeal to the highest court in the province. The Commissioner having refused to investigate an application it was held that the court below had power to order the issue of a writ of mandamus commanding the commissioner to take into consideration an application of the respondent for a lease of certain lands for mining purposes.

39 (e).—Municipal by-laws—Quebec cases.

In considering the general right of appeal given by this sub-section it must be borne in mind that sections 46 and 48, *infra*, place limitations upon appeals in the provinces of Quebec and Ontario respectively, but whereas section 47 provides that in Quebec these limitations shall not apply to cases of Municipal By-laws, there is no such provision with respect to appeals from the Province of Ontario. Decisions such as *Aurora* v. *Markham*, *supra*, p. 283, which deny an appeal in Ontario cases, therefore, have no application in appeals from the Province of Quebec.

Cases in which the validity of Municipal By-laws is in question may be divided into two classes, those which involve the imposition of or exemption from rates or assessments on land, and those which do not. The former class are dealt with in the notes to section 46 under the heading "Title to land and other matters or things where rights in future might be bound."

S. 39, ss. (c).

Appellate Jurisdiction. Municipal By-laws.

The right of appeal given by s. 39(c) applies to both classes of cases, but a case in which the validity of a municipal by-law is attacked may be appealable under s. 46 because title to lands is involved, whereas owing to the restricted construction placed on the words "quashed by rule or order of the Court" no appeal would lie under section 39(c).

Under the present section we will only deal with municipal money by-laws not involving rates or assessments on land.

The cases under this heading may be divided into two classes:

1st. Proceedings by *motion* or *petition* to quash or annul a by-law, and

2nd. Proceedings by *writ* to annul or set aside a by-law, or where the nullity of the by-law is set up as a defence in an action brought to recover money payable thereunder.

Class I.

It will be found on a reference to the decisions about to be cited, that the court has held that section 47, which excludes cases of municipal by-laws from the operation of the restrictive clauses of section 46, only applies to cases where the proceedings were under the first class, namely, a petition or motion to quash or annul a by-law, and therefore will not avail where the validity of a by-law is attacked in an action instituted by a writ of summons. This distinction, however, it will be found, has not always been made and recently has been criticized by the present Chief Justice of the court in the case of *Shawinigan* v. *Shawinigan*, *infra*, p. 175.

Webster v. Sherbrooke, 24 Can. S.C.R. 52 (1894).

This was a case in which proceedings were commenced in the Superior Court, Province of Quebec, by petition to quash a by-law pursuant to s. 4389 R.S.P.Q., which gives the right to petition the Superior Court to annul a municipal by-law. It was held, distinguishing it from *Vercheres* v. *Varennes*, 19 Can. S.C.R. 365, *infra*, p. 241 and *Sherbrooke* v. *McManamy*, 18 Can. S.C.R. 594, *infra*, p. 174, that this was a proceeding taken in the public interest equivalent to the motion or rule to quash under the English practice, and that an appeal lay under s. 24(*g*), now s. 39(*c*).

Ste. Cunegonde v. Gongeon, 25 Can. S.C.R. 78.

S. 39, s.s. (c). Appellate Jurisdiction. Municipal By-laws.

The proceedings in this case were taken by the respondents who presented a petition to the Superior Court, under s. 310 of the charter of the city of Ste. Cunégonde, asking to have a by-law of the city annulled so far as it affected the petitioners. The Superior Court granted the prayer of the petition and the corporation took an appeal to the Court of Queen's Bench, which appeal was quashed by the court, which held that s. 439 of the Town Corporations Act (40 Vic. c. 29, R.S.Q., art. 4614) not having been excluded from the charter of the city must be read as forming a part of it, and such section prohibited an appeal from any judgment of the Superior Court respecting municipal matters.

Sir Henry Strong, Chief Justice, said:

"The appellants thereupon applied to the Registrar in Chambers for leave to give security in appeal under section 46 of the Supreme and Exchequer Courts Act, which application was granted, the Registrar being of opinion that the nature of the proceeding was similar to the one taken in *Webster* v. *Sherbrooke*, 24 Can. S.C.R. 52, and not to be distinguished from it, the petition in that case having been filed under sec. 4389 R.S.P.Q., which is identical in words with the first part of sec. 310 of the Act of incorporation of the appellants, and that therefore, so far as the mere right of appealing to the Supreme Court was concerned, the case came within sec. 24(*g*) of ch. 135 R.S.C. (1886).

"Sec. 4389 R.S.P.Q. is as follows:

"'Any municipal elector may, in his own name, by a petition presented to the Superior Court or to one of the judges thereof, demand and obtain, on the ground if illegality, the annulment of any by-law of the Council, with costs against the corporation.'"

Chicoutimi v. Price, 29 Can. S.C.R. 135 (1898).

This was a petition by the respondent asking for a writ of injunction enjoining the officers of the appellants from issuing bonds of the appellants to the amount of $10,000 to the Chicoutimi Pulp Co., and to have the by-law providing for the issue of said bonds declared null and void. The injunction was finally made absolute and the bonus by-law annulled. An appeal taken to the Supreme Court was dismissed on the merits, no question of jurisdiction being raised.

S. 39, s.s. (e).

Appellate Jurisdiction. Municipal By-laws.

Class 2.

Decisions where municipal money by-laws have been attacked by writ to annul or set aside a by-law, or as a defence to an action to recover money payable thereunder.

Sherbrooke v. McManamy, 13 Can. S.C.R. 594.

The plaintiff sued the defendants to recover the amount of two business taxes of $100 and $50 respectively, under the authority of a municipal by-law. The defendants pleaded that the by-law was illegal and *ultra vires* of the municipal council, and also that the statute conferring power upon the municipal council to tax was *ultra vires* of the legislature of Quebec. The Superior Court held that both statute and by-law were *intra vires* and gave judgment for the municipality. On appeal the Court of Queen's Bench confirmed this judgment as regards the validity of the statute, but set aside the tax of $100 as not being authorized. The Supreme Court quashed an appeal to that Court on the ground that section 24 (*g*) did not apply to this case as no by-law was quashed.

Per Taschereau, J.—"The appellant has attempted to suport his appeal on sub-section (g) of section 24 of the Supreme Court Act, as being in a case in which a by-law of a municipal corporation has been quashed by rule or order of court. But that enactment, probably of no possible application in the Province of Quebec, does not help the appellant. There is no by-law quashed by a rule or order here. In fact there is none quashed at all by the judgment appealed from. We are all agreed on this point I believe, neither could it be contended that the case is appealable because it relates to a tax or duty (vide section 46 (b), infra). The statute gives a right of appeal only in matters relating to a duty payable to Her Majesty where rights in future might be bound, which the tax in controversy could it be called a duty, is clearly not.

"It is contended, however, that the appeal in this case lies because the matter in controversy involves the question of the validity of an Act of the legislature of the Province of Quebec. If that was so, the appeal would undoubtedly lie. But I cannot see that there is anything in controversy on such a point on the appeal to this Court, as the case is presented to us."

Bell Telephone Co. v. Quebec, 20 Can. S.C.R. 230 (1891).

This was an action brought by the Telephone Co. asking to have a by-law declared null and void that imposed upon it an annual tax of $800. The court held, following *Sherbrooke* v. *McManamy* and *Verchères* v. *Varennes*, that no appeal lay, saying:

"There is the greatest difference between an action like the present one to have a by-law declared null and void, and the proceedings under the English system to have a by-law quashed by rule or order. On an action, as this is, the judgment declaring a by-law void is res judicata only between the parties, but under the English system a by-law quashed by order of court is quashed to all intents and purposes whatever." S. 39, s.s. (e). — Appellate Jurisdiction. Municipal By-laws.

Shawinigan v. Shawinigan, 43 Can. S.C.R. 650.

This action was instituted against the Town of Shawinigan and the Shawinigan Hydro-Electric Company by the Shawinigan Water and Power Company and others, ratepayers of the Town of Shawinigan, for the purpose of setting aside a by-law of the town corporation authorizing it to purchase the electric power-house and electric plant of the Hydro-electric Company and certain lands of the company used in connection with these works and installations, for the sum of $40,750, and also for an injunction to prohibit the town corporation carrying into effect the contract in respect thereof made with the Hydro-electric Company. In the Superior Court, the final judgment dissolved the injunction and dismissed the plaintiff's action with costs. On an appeal by the plaintiffs, the Court of King's Bench maintained the conclusions of the action and made the injunction permanent. The Hydro-electric Company then brought an appeal to the Supreme Court of Canada.

The Chief Justice, with whom Girouard, J., agreed, said:—

"The distinction made in Webster v. The City of Sherbrooke (24 Can. S.C.R. 52), by Taschereau, J., between cases in which proceedings to set aside a by-law are commenced by petition and those in which the validity of a by-law is attacked by direct action by any party interested, with respect to the effect of the judgment, is, I respectfully submit, not founded. . . . And whether the proceeding is begun by petition or by writ, the result as to the validity of the by-law is the same. In either case if the action is maintained, the judgment annuls the by-law which ceases to have any force or effect thereafter: (arts. 461-462 Municipal Code). The only difference being that if the proceedings are begun by petition either under the Municipal Code or under the Town Corporations Act, there is no appeal to the Provincial Court of Appeal (art. 1077 Municipal Code and section 4614 Town Corporations Act) and, consequently, no appeal to this court. But in both cases the proceeding is disposed of by a judgment which I hold to be the equivalent of the rule or order mentioned in section 39 (e)." The Judgment, however, of the majority of the Court was based on other grounds.

S. 39, s.s. (e).

Appellate Jurisdiction. Municipal By-laws.

39 (e).—Municipal by-laws—Ontario cases.

Prior to 60-61 V. c. 34, 1897 (*infra*, section 48), appeals lay to the Supreme Court from the Province of Ontario in any case in which a by-law of a municipal corporation had been quashed by a rule or order of court, or the rule or order to quash had been refused after argument. (R.S. c. 135, s. 24.) Since 60-61 V. c. 34, cases of this character cannot be appealed to the Supreme Court unless they fall within its provisions, now sec. 48. *Vide Aurora* v. *Markham*, *infra*, p. 283.

The following cases were decided prior to 60-61 V. c. 34:

Gibson v. North Easthope, 24 Can. S.C.R. 707.

An action to have a drainage by-law quashed and for damages for injury to the plaintiff's property from improper construction and want of repair of a drain made under the by-law attacked.

Broughton v. Gray and Elma, 27 Can. S.C.R. 495.

An action to set aside a drainage by-law and for an injunction.

McKillop v. Logan, 29 Can. S.C.R. 702.

An action in which the township of Logan sought to recover from the defendants a sum of money as a statutory debt of $360.38, by virtue of the provisions of the Ontario Statute, 57 V. c. 55. The by-law involved the validity of an award by the engineer under the Ditches and Watercourses Act of 1894, the award being attacked on the ground that the party initiating the proceedings was not an owner under the Act. The judgment of Armour, C.J., was reversed by the Court of Appeal, but restored by the Supreme Court of Canada.

Cases subsequent to 60-61 V. c. 34.

Sutherland-Innes v. Romney, 30 Can. S.C.R. 495.

This was an action to set aside certain drainage by-laws on the ground that they were *ultra vires* of the municipal corporation passing the same. The plaintiffs' lands were assessed in connection with the by-laws to the amount of $1,130, and they gave notice of their intention to move to have them quashed, but did not proceed with their motion.

The trial judge dismissed the action. On appeal the judgment below was affirmed. On a further appeal to the Supreme Court the appeal was allowed.

S. 39, s.s. (c).

Appellate Jurisdiction. Municipal By-laws.

Elizabethtown v. Augusta, 32 Can. S.C.R. 295.

In this case proceedings were taken under the Municipal Act to determine the cost of certain drainage works extending from one municipality into another. An engineer's report was made finding that the lands of the appellant municipality should be assessed for $4,986, and the respondent municipality for the sum of $764. The respondents refusing to pay the appellants brought an action and the defence raised was that there was no jurisdiction to pass the by-law under which the works were made by reason of the petition not being signed by a majority of the persons in the last revised assessment roll. The trial judge dismissed the action, and on appeal to the Court of Appeal the court being equally divided in opinion the appeal was dismissed. A further appeal having been taken to the Supreme Court of Canada, the appeal was allowed with costs. (No question of jurisdiction was raised.)

Challoner v. Lobo, 32 Can. S.C.R. 505.

The plaintiff's action was brought claiming to have a drainage by-law declared null and void, and restraining defendants from proceeding to carry out certain drainage works provided by the by-law and damages generally. The question in issue was what construction should be placed upon the words "last revised assessment roll" in the Drainage Act. The Supreme Court affirmed the judgment of the Court of Appeal.

The question of jurisdiction was not raised in this appeal. Under the jurisprudence subsequently settled in *Aurora* v. *Markham*, there would be no appeal unless the amount in controversy was at least $1,000.

Aurora v. Markham, 32 Can. S.C.R. 457.

The municipal council of the Town of Aurora passed a by-law granting a bonus to persons who proposed to establish a certain industry in that municipality. The by-law having passed the council was duly assented to by a majority of the ratepayers of the municipality according to the provisions of the Municipal Act. An application was made to the High Court of Justice to quash the by-law, which was refused, but on appeal to the Court of Appeal, the by-law

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was quashed. The Town of Aurora thereupon applied to the Supreme Court of Canada for leave to appeal under 60-61 V. c. 34, par. (*c*), s. 48, *infra*). Upon the argument of the motion it was suggested that leave to appeal was not requisite inasmuch as it was open to the applicants to appeal *de plano*, but as to this the Court said:

"We are of opinion that, as regards the Province of Ontario, there can be no appeal in the case of an application to quash a municipal by-law without leave so to do having been previously granted either by the Court of Appeal or by this Court.

"Under the Act originally constituting this Court it was by section 24 authorized to entertain appeals 'in any case in which a by-law of a municipal corporation has been quashed by a rule or order of court.'

"By this Act no leave to appeal was required.

"Subsequently, by Statute 60 & 61 V. c. 34, Parliament enacted that no appeal should lie to the Supreme Court of Canada from any judgment of the Court of Appeal of Ontario except in certain enumerated cases amongst which proceedings to quash by-laws were not included. It then proceeded to provide that there might be an appeal 'in other cases where the special leave of the Court of Appeal for Ontario, or of the Supreme Court of Canada to appeal to such last-mentioned court is granted.'

"In the face of this provision it is manifest that the unqualified jurisdiction to entertain appeals in this class of cases conferred by the original act is restricted and is by it limited to those in which leave to appeal is first obtained either from the Court of Appeal or from this Court."

The same rule has been applied where the by-law has been attacked in an action instituted by a writ. *Hamilton* v. *Hamilton Distillery Co.*, 38 Can. S.C.R. 239, *infra*, p. 284.

39 (e).—Municipal by-laws elsewhere.

C. P. Ry. Co. v. City of Winnipeg, 30 Can. S.C.R. 558.

By-law No. 148 of the City of Winnipeg, passed in 1881, exempted forever the C.P.R. Co. from "all municipal taxes, rates and levies and assessments of every nature and kind." *Held*, reversing the judgment of the Court of Queen's Bench (12 Man. L.R. 581), that the exemption included school taxes. The by-law also provided for the issue of debentures to the company, and by an Act of the Legislature, 46 & 47 V. c. 64, it was provided that by-law 148 authorizing the issue of debentures granting by way of bonus to the C.P.R. Co. the sum of $200,000 in consideration of certain undertakings on the part of the said company; and by-law 195 amending by-law No. 148 and extending the time for the completion of the undertaking . . . be and the same are hereby declared

legal, binding and valid. . . . *Held*, that notwithstanding the description of the by-law in the Act was confined to the portion relating to the issue of debentures the whole by-law including the exemption from taxation was validated.

S. 40.
Appellate Jurisdiction from Court of Review.

The cases of municipal by-laws from the Province of Quebec will be found *supra*, p. 171.

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. 54-55 V., c. 25, s. 2.

Prior to the Amendment to the Supreme & Exchequer Courts Act, 54-55 V. c. 25,, s. 3 (1891), it had been held (*Danjou* v. *Marquis*, 3 Can. S.C.R. 251; *Macdonald* v. *Abbott*, 3 Can. S.C.R. 278) that in the Province of Quebec no appeal would lie from the Court of Review, but only from the Court of Queen's Bench. The effect of this amendment was to give an appeal to the Supreme Court of Canada from the Court of Review in cases where no appeal lay from the Court of Review to the Court of Queen's Bench, and where the case was one which, by the law of the Province of Quebec, was appealable to the Judicial Committee of the Privy Council.

A similar appeal to His Majesty in Council from the judgment of the Court of Review is given by article 69, C.C.P. The provisions governing appeals to the Privy Council are set out in articles 68 and 69 as follows:—

(68.) An appeal lies to His Majesty in His Privy Council from final judgments rendered in appeal by the Court of King's Bench.

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

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

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

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

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Appellate jurisdiction from Court of Review.

The provision of the Code of Civil Procedure which limits appeals to the Court of King's Bench from the judgment of the Court of Review, referred to in this section, is sub-section 4 of section 43, the said section reading as follows:—

"43. Unless where otherwise provided by statute, an appeal lies to the Court of King's Bench sitting in appeal, from any final judgment rendered by the Superior Court, except:—

"1. In matters of certiorari;

"2. In matters concerning municipal corporations or offices as provided in article 1006;

"3. In matters in which the sum claimed or value of the thing demanded is less than two hundred dollars, and in which judgment has been rendered by the Court of Review;

"4. At the instance of any party who has inscribed in review any cause other than those mentioned in the preceding paragraph, and has proceeded to judgment on such inscription, when such judgment confirms that rendered in first instance."

Section 46, ss. 2 (Supreme Court Act), *infra*, provides that:—

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

Barrington v. City of Montreal, 25 Can. S.C.R. 202.

In this case the appellants petitioned the Superior Court for a writ of mandamus to compel the City of Montreal to proceed with certain works on the streets of the city under the provisions of a statute of the province. The Superior Court ordered a peremptory writ of mandamus to issue which was reversed by the Court of Review. The petitioners having taken an appeal to the Supreme Court from the Court of Review, and the City of Montreal having moved to quash, the Court held it had no jurisdiction as the statute only provided there should be an appeal when the judgment of the court of first instance had been affirmed in review, and where there was no appeal to the Court of Queen's Bench, whereas in the present case the Court of Review had reversed the judgment of the court of first instance.

Simpson v. Palliser, 29 Can. S.C.R. 6.

Held, that where the Superior Court sitting in review has varied a judgment on appeal from the Superior Court by increasing the amount of damages, the judgment rendered in the court of first instance is not thereby confirmed so as to give an appeal direct from the judgment of the Court of Review to the Supreme Court of Canada.

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Appellate Jurisdiction from Court of Review.

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

The appellant's petition to the Superior Court for the recusation of the respondent as a commissioner in expropriation proceedings taken for the improvement of a public street in the City of Montreal was dismissed and this judgment affirmed by the Court of Review. An appeal to the Supreme Court was quashed, the Court holding that there was in the case no appeal *de plano* to the Privy Council and consequently no appeal to this Court.

Hull Electric Co. v. Clement, 41 Can. S.C.R. 419.

It was held there could be no appeal to the Supreme Court of Canada from a judgment of the Court of King's Bench, appeal side, quashing an appeal from the Superior Court, sitting in review, for want of jurisdiction. *City of Ste. Cunégonde* v. *Gougeon* (25 Can. S.C.R. 78) followed, *supra*, p. . It was also held in the same case in an action for damages where the plaintiff obtains a verdict at the trial and the Court of Review reduces the amount awarded thereon the judgment of the Superior Court is confirmed and, therefore, no appeal lies to the Court of King's Bench, but there might be an appeal from the judgment of the Court of Review to the Supreme Court of Canada. *Simpson* v. *Pallister* (29 Can. S.C.R. 6) distinguished.

Dufresne v. Guevremont, 26 Can. S.C.R. 216.

The plaintiff (respondent) sued defendant on a contract to construct an engine for $3,000, and recovered judgment for $2,150 and interest, in all $2,559.96, which judgment was affirmed by Court of Review. The defendant appealed to the Supreme Court. The plaintiff moved to quash on the ground that no appeal lay to the Supreme Court unless an appeal also would lie to the Judicial Committee of the Privy Council, and that an appeal only lay to the Privy Council when the amount in controversy amounted to £500, and that excluding interest the amount involved was under £500. The Court held that although interest would be added to the plaintiff for the purpose of giving jurisdiction under the jurisprudence of the Privy Council, nevertheless, this would not apply to appeals from the Province of Quebec wherein it is expressly enacted (article 2311 R.S.Q.) that "wherever the right to appeal is dependent upon the amount in dispute, such amount shall be understood to be that demanded and not that recovered if they are different." and the appeal was accordingly quashed.

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Previous to this decision the case of *Allan* v. *Pratt*, 11 App. Cas. 780, had been decided by the Privy Council, which dealt with the question of the right to appeal from the Court of Queen's Bench for the Province of Quebec. At the time of that decision the Consolidated Statutes of Lower Canada, C.S.L.C., c. 77 s. 25, provided with respect to appeals to the Court of King's Bench, as follows:

"Whenever, the jurisdiction of the court, or the right to appeal from any judgment of any court is dependent upon the amount in dispute, such amount shall be understood to be that demanded and not that recovered, if they are different."

34 Geo. III., c. 6, c. 30, provided that the judgment of the Court of Appeals in the Province of Lower Canada should be final in all cases where the matter in dispute should not exceed the sum or value of £500 sterling.

The present provisions with respect to appeals from the Province of Quebec to the Privy Council are contained in arts. 68 and 69 C.C.P., *supra*, p. 179.

In *Allen* v. *Pratt*, the court approved of the principle enunciated by Lord Chelmsford in *MacFarlane* v. *Leclaire*, 15 Moo.P.C. 181, that in determining the right of appeal the judgment is to be looked at as it affects the interests of the party who is prejudiced by it, and who seeks to relieve himself from it by appeal, and therefore it is not the amount claimed by the declaration, but the amount actually in controversy which determines the right of appeal.

In *Dufresne* v. *Guévremont*, Mr. Justice Taschereau, speaking for the majority of the court, said:

It is needless to say that we do not lose sight of the ruling of the Privy Council in Allan v. Pratt, and that line of cases, but as remarked by Dorion, C.J., in the case of Stanton v. The Home Insurance Co., 2 L.N. 314, the attention of the Privy Council does not appear to have been drawn to this particular enactment" (viz. C.S.L.C., c. 77, s. 25, now s. 46, ss. 2).

The decision in *Dufresne* v. *Guévremont* was considered by the Court in *The Citizens Light and Power Co.* v. *Parent*, 27 Can. S.C.R. 316, the facts being as follows:

The plaintiff (respondent) sued for $5,000 damages and recovered $2,000 in the Superior Court which was affirmed by the Court of Review. The respondent having moved to quash an appeal to the Supreme Court on the ground that no appeal would lie because the amount involved was not £500, which was necessary to give an appeal to the Privy Council, it was held, following *Dufresne* v. *Guévremont*, 26 Can. S.C.R. 216, that the motion should be refused.

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In giving judgment for the majority, Mr. Justice Taschereau said:

"The respondent moves to quash the appeal on the ground that the judgment being only for $2,000 (and not £500 sterling), the case is not appealable to the Privy Council. That contention cannot prevail. It is settled by this court in Dufresne v. Guevremont (26 Can. S.C.R. 216), that whenever the right to appeal to the Privy Council is dependent upon the amount in dispute, such amount must be understood to be that demanded, and not that recovered, if they are different. In that case the amount given by the judgment appealed from and in controversy on the appeal was sufficient to make the case appealable, but the amount demanded by the declaration was not, and we held that as it is the amount demanded that ruled there was no appeal. Here, the amount given by the judgment appealed from and in controversy on the appeal is not sufficient to make it appealable, but the amount demanded is, and it being the amount demanded that rules the case is appealable. Now here, the amount demanded is over £500 sterling. The case is therefore appealable. We are bound by our previous decision on the point. The motion must be dismissed with costs."

Mr. Justice Gwynne, although holding that he was bound by *Dufresne* v. *Guévremont*, says that he does not think the statutes of Lower Canada above referred to, C.S.L.C. c. 77, s. 25, assumed to prescribe any mode by which it should be determined in any case whether the amount in dispute was sufficient to give jurisdiction to the Privy Council to have entertained an appeal from a judgment of a court in Lower Canada, and that he does not think that the Supreme Court was justified in ignoring the judgment rendered in the case of *Allen* v. *Pratt*, upon the suggestion that that judgment was rendered without due consideration of s. 25 of c. 77, C.S.L.C.

Quite recently in the unreported ase of *Kennedy* v. *Gallagher*, Oct. 6th, 1908, the Supreme Court appears to have adopted the ruling enunciated in *Allan* v. *Pratt*, and to have departed from the decision of *The Citizens Light and Power Co.* v. *Parent*, unless the *considerant* in the Court of Review for dismissing the appeal affords a distinction. The facts of that case were as follows:—The plaintiff brought his action on the 15th March, 1907, for damages for injuries sustained through the negligence of the defendants, claiming $10,400. The trial judge gave judgment for the plaintiff against the defendants for $1,800. The defendants inscribed in review, and after argument, the appeal was dismissed for the following considérant: "Que les appelants n'ont pas produit de factum ni de comparution en révision." The defendants thereupon appealed to the Supreme Court of Canada, and the plaintiff, respondent, moved to quash on

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the grounds, first, that the judgment was not one which was appealable to the Supreme Court under s. 40, and secondly, that the amount involved was under £500. After argument the motion to quash was granted with costs.

Vide Chicoutimi v. *Price*, 39 S.C.R. 81, *supra*, p. 173; *Montreal Street Railway* v. *City of Montreal*, 41 S.C.R. 427, *infra*, p. 186; *Sedgewick* v. *Montreal Light, Heat and Power*, 41 S.C.R. 639, *infra*, p. 431.

41. An appeal shall lie to the Supreme Court from the judgment of any court of last resort created under provincial legislation to adjudicate concerning the assessment of property for provincial or municipal purposes, in cases where the person or persons presiding over such court is or are by provincial or municipal authority authorized to adjudicate, and the judgment appealed from involves the assessment of property at a value of not less than ten thousand dollars. 52 V., c. 37, s. 2.

In 1889 there existed in the Province of British Columbia a Court of Revision and Appeal in each district of the province, having jurisdiction to hear appeals where parties were dissatisfied with the assessment of their property by the local assessors. The members of this court were appointed by the Lieutenant-Governor in Council.

In 1889 an amendment was made whereby an appeal could be taken from the Court of Revision and Appeal to the Supreme Court of the province and these provisions are contained in the Revised Statutes of British Columbia, 1897, c. 179, ss. 64-75.

In 1889 there was also, in the Province of Nova Scotia, provision for an appeal by persons dissatisfied with the assessment of their property to a Board of Revision (51 V. c. 2, ss. 21 and 73), and by section 62 the party dissatisfied with the decision of the Board might appeal to the County Court of the county; and the proceedings both of the Board and County Court were removable by *certiorari* to the Supreme Court of the province. These provisions of the law were consolidated in Nova Scotia. R.S.N.S., 1900, c. 73, ss. 55-59.

Similarly at the same time in the Province of New Brunswick the Act relating to rates and taxes provided for the appointment of three county valuators, to be called the Board of Valuators, who should revise assessments in their counties, and the rates and assessments were subject to be removed by *certiorari* to the Supreme Court of the province.

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It was to permit of appeals in such cases that Sir John Thompson amended 24(*g*) R.S. c. 139 (1886), and made provision for appeals in cases of *certiorari* and *prohibition*.

In 1889, in the Province of Ontario also there was provision in the Assessment Act for an assessment appeal being taken to a Court of Revision in each municipality, and an appeal lay from this Board to the county judge (R.S.O., 1887, c. 193, ss. 68-70), and by section 74 the decision of the county judge was made final and conclusive.

Subsequently the Assessment Act was amended, and in that province an appeal was given to a Board of county judges where the assessment amounted to twenty thousand dollars. By 60 V, c. 45, s. 70, an appeal was given from the decision of the county judges to the Court of Appeal.

Upon this state of the law in the different provinces Sir John Thompson, in March, 1889, introduced an amendment to the Supreme and Exchequer Courts Act, which will be found as 24(*j*) of the old Act, and in so doing he made use of the following words:—

"The facts which led to the framing of this section are these. Courts are actually constituted in various provinces for the purpose of regulating the assessment of property in those provinces, and it has been the practice in two or three of the provinces of late years to give those courts, although they are not in the ordinary sense courts of justice and although sometimes they are not presided over by professional men, very large jurisdiction, indeed. In some cases it has been brought to our notice that adjudications have been made by these courts involving taxation to the amount of tens of thousands of dollars a year. There is no appeal to the Supreme Court by reason of the fact that these courts are not in any sense superior courts, and it is provided that there shall only be an appeal from a superior court."

No case under this section was brought to the Supreme Court until 1897, when an appeal was taken in *Toronto* v. *Toronto Street Railway Company*, 27 Can. S.C.R. 640.

This was an appeal from a judgment of the County Court judges above mentioned, and at this time there was no appeal from the Board of County Court judges to the Court of Appeal.

On this state of facts the appeal was quashed, the court holding that the County Court judges having been appointed by the Federal Government, they did not, within the meaning of this section, constitute a court appointed "by provincial or municipal authority." Mr. Justice King dissented from the judgment of the court, and held that this case was quite within the purview of the amendment giving appellate jurisdiction to the Supreme Court in certain assessment

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cases. The above decision nullified the effect of this section of the Supreme and Exchequer Courts Act, because in all of the provinces the highest court sitting in review on municipal assessments is composed of judges either of the County Court or of the Superior Court.

To give effect to the intention of Parliament the words of the section "appointed by provincial or municipal authority" were altered by the commissioners for the revision of the statutes to read as in the present section, and the objection taken by the Supreme Court in the above case will now no longer apply.

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

In quashing the appeal in this case the Chief Justice in pronouncing the judgment of the Court said that the judgment below did not come within the provisions of section 24(*j*) (now section 41).

Montreal Street Rly. Co. v. City of Montreal, 41 Can. S.C.R. 427.

Under the provisions of the Montreal City Charter, 62 V. c. 58, s. 484 (Que.), an action was brought by the city, in the Recorder's Court, to recover taxes on an assessment of the company's property in the city. Judgment was recovered for $39,691.80, and an appeal to the Superior Court, sitting in review, under the provisions of the Quebec statute, 57 V. c. 49, as amended by 2 Edw. VII., c. 42, was dismissed. On an application by the company to affirm the jurisdiction of the Supreme Court of Canada to hear an appeal from the judgment of the Court of Review, it was held that the Superior Court, when exercising its special appellate jurisdiction in reviewing this case, was not a court of last resort created under provincial legislation to adjudicate concerning the assessment of property for provincial or municipal purposes within the meaning of s. 41 of the Supreme Court Act, R.S. (1906), c. 139, and, consequently, there could be no jurisdiction to entertain the appeal.

Sisters of Charity v. City of Vancouver, 44 Can. S.C.R. 29.

In this case the Court of Revision, exercising the powers conferred on it referred to supra p. 156, declared that certain charitable institutions should be exempt from taxation. Thereupon a judge of the Supreme Court of British Columbia made an order directing that a writ of certiorari should issue directed to the Court of Revision to "certify and remove a decision of the said court whereby it was ordered and declared that all charitable institutions, &c., should be exempt from taxation, &c." An

appeal was taken from this order to the Court of Appeal on various grounds, amongst others, that there was not sufficient material before the judge to grant the order; that no grounds were shown in the order nisi for the writ of certiorari; that the Court of Revision had terminated its office and duties long prior to the application for the writ; that the assessment roll having been revised and confirmed by the Court of Revision, had become valid and binding; that the application for a writ of certiorari was not a proper proceeding; and that decisions of the Court of Revision were not reviewable on certiorari proceedings. S. 42. Per Sailon Appeals.

The order of Mr. Justice Morrison was set aside and rescinded, and this judgment was affirmed by the Supreme Court, where it was held that the functions in respect of the limitations on exemption from taxation vested in the Court of Revision are quasi judicial and must be exercised in each case with respect to that case alone. The record showed that the property in question was assessed at $38,250.

Toronto Rly. Co. v. Toronto (1904), A.C. 809.

Held, that the jurisdiction of the Court of Revision and of the courts exercising the statutory jurisdiction of appeal from the Court of Revision, is confined to the question whether the assessment was too high or too low, and these courts had no jurisdiction to determine the question whether the assessment commissioner had exceeded his powers in assessing property which was not by law assessable. In other words, when the assessment was *ab initio* a nullity, they had no jurisdiction to affirm it or give it validity.

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,

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(c.) by leave of the Supreme Court or a judge thereof from the final judgment of any superior court of any province other than the Province of Quebec in any action, suit, cause, matter or other judicial proceeding originally commenced in such superior court. R.S., c. 135, s. 26.

"Except as otherwise provided in this Act." The exceptions are only appeals from the Court of Review in Quebec, under section 40, *supra;* Assessment appeals under section 41, *supra;* and appeals *per saltum* under this section.

"Or in the Act providing for the appeal." This exception includes criminal appeals, election appeals, admiralty appeals.

"Whether the judgment or decision, etc., was or was not a proper subject of appeal to such highest court of last resort" refers to cases where the court of last resort has assumed jurisdiction and given judgment. *Vide Blachford* v. *McBain*, 19 Can. S.C.R. 42; *St. Cunégonde* v. *Gougeon*, 25 Can. S.C.R. 78.

42 (a).

Severn v. The Queen. 2 Can. S.C.R. 70.

This was an appeal from a judgment of the Court of Queen's Bench for Ontario, overruling the demurrer of the defendant John Severn to the criminal information filed against him by the Attorney-General of the said province on behalf of Her Majesty the Queen in the said court on the 23rd day of January, 1877. The appeal was brought directly to the Supreme Court by consent of parties under section 27 of the original Supreme & Exchequer Courts Act (now section 42(*a*).

Blackburn v. McCallum, 33 Can. S.C.R. 65.

The question in this case to be determined was whether a restraint on alienation contained in a will was valid. The cause was heard by Meredith, C.J., upon a stated case prepared by the parties pursuant to the Judicature Act and Rules. The trial judge felt himself bound by a decision of the Court of Appeal in *Earls* v. *McAlpine*, 6 A.R. 145. The parties thereupon signed a consent pursuant to section 26, sub-section 2 (now 42(*a*), that an appeal should be taken direct to the Supreme Court of Canada from the judgment of Meredith, C.J., and the case was accordingly heard, although no intermediate appeal had been taken to the Court of Appeal for Ontario.

Union Investment Co. v. Wells, 39 Can. S.C.R. 625. S. 42.

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In this case an appeal *per saltum* by consent of parties was taken to the Supreme Court from the judgment of the trial judge, and it was held that where interest is made payable periodically during the currency of a promissory note, payable at a certain time after date, the note does not become overdue within the meaning of ss. 56 and 70 of the Bills of Exchange Act, merely by default in the payment of an instalment of such interest.

The doctrine of constructive notice is not applicable to bills and notes transferred for value.

42 (b).

The appeals provided for by this sub-section are equity cases, and the word "judgment" there includes an interlocutory as well as a final judgment.

42 (c).

Special circumstances must be shewn before the Supreme Court or a judge thereof will grant leave to appeal *per saltum*.

Bank B.N.A. v. Walker, Cout. Dig. 88 (1882).

"On appeal brought from a judgment overruling demurrers to some of the counts of a declaration only, while re-hearing was pending upon an order to enter final judgment on the whole case upon the verdict rendered: *Held*, that as the judgment on the demurrers was not a final judgment the appeal must be quashed for want of jurisdiction, but on the application of the appellant, made at the same time as the motion to quash, leave was given to appeal *per saltum* (after the expiration of the 30 days limited by the Act) on the whole case upon terms, and the deposit already made in court was ordered to remain on deposit to avail as security for this appeal." For full statement of facts, *vide* Cass. Dig. (2 ed.), p. 214.

This decision so far as it is an authority for the Supreme Court extending the time within which an appeal may be brought to the Supreme Court, must be taken as overruled by *Stuart* v. *Skulthorpe*, 1894; *Roberts* v. *Donovan*, 1895, and *Barrett* v. *Syndicat Lionnais du Klondyke*, 33 Can. S.C.R. 667, *infra*, p. 420.

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Schultz v. Wood, 6 Can. S.C.R. 585.

The Chief Justice of the Supreme Court under section 6 of the Supreme Court Amendment Act of 1879, allowed an appeal direct to the Supreme Court of Canada, it being shewn that there were then only two judges on the bench in Manitoba, the plaintiff (Chief Justice) and Dubue, J., from whose decree the appeal was brought.

Sewell v. British Columbia Towing Co., Cont. Dig. 112 (1881).

Upon an application for leave to appeal direct from the judgment of Begbie, C.J., without intermediate appeal, the affidavit set out that in British Columbia the court of final resort consisted of five judges, two of whom had been previously engaged as counsel in the cause, and refused to adjudicate; that another judge was absent and it was uncertain if he ever would resume judicial functions; that a new Administration of Justice Act, 1881 had recently come into operation, but no rules had been made thereunder and section 28 of said Act required three judges to constitute a quorum of the full Court to be held only once in each year. Fournier, J., in Chambers referred the application to the full Court *Held*, that the circumstances disclosed did not warrant the Court in granting the application. Motion refused with $20 costs.

Lewin v. Wilson, 9 Can. S.C.R. 637.

In this case leave to appeal *per saltum* to the Supreme Court of Canada from the Supreme Court in Equity of New Brunswick was granted by the judge of the Supreme Court in Equity of New Brunswick, Hon. A. L. Palmer, without an intermediate appeal to the Supreme Court of New Brunswick. No exception to the validity of this order was taken in the Supreme Court and it is questionable if the attention of the Court was called to the fact that a judge of the court below and not of the Supreme Court had granted leave to appeal *per saltum*. It is stated in *Lewin* v. *Howe*, 14 Can. S.C.R. 722, that this appeal had come to the Supreme Court by consent, but the order of the judge of the Equity Court expressly states that it was made under the Supreme Court Amendment Act of 1879, which contains the provision relating to *per saltum* appeals, while the previous statute allowing appeal direct to the Supreme Court from the court of first instance is contained in the original Supreme & Exchequer Courts Act of 1875.

Lewin v. Howe, 14 Can. S.C.R. 722.

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The judgment of the Supreme Court of Canada in *Lewin* v. *Wilson*, having been reversed by the Judicial Committee of the Privy Council, and the plaintiffs being dissatisfied with the form of the decree made by the judge in equity for the purpose of carrying out the judgment of the Judicial Committee, an application was made to the Registrar of the Supreme Court for leave to appeal *per saltum* from the Supreme Court in Equity to the Supreme Court of Canada, alleging that the time for appealing to the Supreme Court of New Brunswick had elapsed: that the cause had never been before the Supreme Court of New Brunswick; that owing to arrears of business in that court the hearing could not be had for several months and the delay would seriously affect the plaintiff's interests; that the action had been commenced upwards of six years previous to that date, and that owing to the defendant's opposition the plaintiffs had been unable to collect the amount of their debt. The application was referred by the Registrar to the Court, when leave to appeal *per saltum* was granted, Taschereau and Gwynne, JJ., dissenting.

Moffatt v. Merchants Bank, 11 Can. S.C.R. 46.

Leave to appeal *per saltum* from judgment of the Chancery Division of the High Court (Ontario), granted by Gwynne, J., on the ground that the Court of Appeal would be bound by a previous decision of its own, whereas the appellant sought to avoid the effect of that decision in the present action.

Dumoulin v. Langtry, 13 Can. S.C.R. 258.

The plaintiff Langtry having recovered a judgment against the defendant Dumoulin, the rector of St. James' Church, Toronto, which was affirmed by the Chancery Divisional Court, the defendant refused to appeal to the Court of Appeal although requested to do so by his churchwardens. The latter applied to the Court of Appeal for leave to appeal in their own name or in the name of the Rector as their trustee, claiming that they had interests separate from those of the Rector. This application being refused by the Court of Appeal, they applied to the Supreme Court for leave to appeal *per saltum* from the judgment of the Chancery Divisional Court, which was granted upon a proper indemnity being given to Dumoulin.

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Kyle v. The Canada Company, 15 Can. S.C.R. 188.

Upon an application for leave to appeal to the Supreme Court from the judgment of the trial judge without any intermediate appeal to the Divisional Court or the Court of Appeal for Ontario, *Held*, per Strong, J., that this section authorizes an order being made in a proper case as well where the proceeding in the court below is an action at law as where it is a suit in equity. That leave may be granted from the judgment of the trial judge as well as from the judgment of the Divisional Court: that it was not a ground for allowing an appeal *per saltum* because the Court of Appeal had in another case decided the point in dispute, and that this case differed from *Moffatt* v. *Merchants Bank*, 11 Can. S.C.R. 46, in that in the latter case the Court of Appeal had not only decided the same legal question which the proposed appellant sought to raise, but had decided it upon the same actual state of facts, and virtually upon the same evidence, oral and documentary, as that upon which the decision which it was proposed to appeal from had proceeded.

Hislop v. McGillivray, 15 Can. S.C.R. 191.

Per Henry, J.: *Held*, that it was not a ground for granting an appeal *per saltum*, that the Court of Appeal below in another case had decided the same point as arose in the present case.

Attorney-General v. Vaughan Road Co., Cass. Prac. (2 ed.) 37.

Leave to appeal *per saltum* directly from a decision of the Chancellor of Ontario was granted where it appeared that the Court of Appeal had already given a decision upon the merits by its order on an application for an injunction in the case.

Bartram v. London West, 24 Can. S.C.R. 705.

In this case a judgment in favour of the plaintiff corporation was affirmed by the Divisional Court. No appeal lay to the Court of Appeal except by leave of that court, which was refused. An application to the Registrar for leave to appeal *per saltum* was refused and his decision, on appeal to the Court, was affirmed.

Lewis v. City of London, Cass. Prac. (2 ed.) 37.

On January 13th, 1896, an application for leave to appeal *per saltum*, was made to the Registrar sitting as a

judge in Chambers, in a case of *Lewis* v. *The City of London*, based on the ground that it had, in effect, been already decided by the Court of Appeal in another case of *Lewis* (the same appellant) v. *Alexander*. The Registrar refused to make the order inasmuch as, though the two cases might have been identical as to the facts, the questions of law were not the same, and to allow the appeal *per saltum* they must be identical in both respects. S. 42. Per Saltum Appeals.

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

Section 77, sub-section 2, of the Judicature Act (Ontario) provides that a party appealing to the Divisional Court instead of the Court of Appeal in a case in which the appellant has an option as to which court he will select, no appeal is open to such party from the Divisional Court to the Court of Appeal. *Held*, that the Supreme Court under this section can in such case grant leave to appeal *per saltum* from the Divisional Court to the Supreme Court of Canada. Referred to in *Ontario Mining Co* v. *Seybold*, 31 Can. S.C.R. 125, *infra*, but overruled. *Vide Ottawa Electric Co.* v. *Brennan*, *infra*, p. 193; *Armour* v. *Township of Onondaga*, *infra*, p. 193; and *James Bay* v. *Armstrong*, *infra*, p. 195.

Ontario Mining Co. v. Seybold, 31 Can. S.C.R. 125.

Held, that the fact that an important question of constitutional law was involved, and that neither party would be satisfied with the judgment of the Court of Appeal, afforded sufficient ground for granting leave to appeal per *saltum*.

Ottawa Electric v. Brennan, 31 Can. S.C.R. 311.

Held, that the case was not one in which leave to appeal *per saltum* could be granted as it was not shewn that there was any right of appeal to the Court of Appeal which was necessary to give jurisdiction.

Armour v. Township of Onondaga, 42 Can. S.C.R. 218.

Motion for leave to appeal *per saltum* from the judgment of Riddell, J., in the King's Bench Division of the High Court of Justice for Ontario (14 Ont. L.R. 606), refusing to quash a by-law of the municipality.

The objection to the by-law was that it assumed to affect an Indian Reservation over which neither the corporation nor the Legislature of Ontario had any municipal authority.

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The appellant had, through no fault of his own, as he contended, been too late to appeal to a Divisional Court and leave for an extension of time was refused. Counsel supporting the motion admitted that he had no right to appeal to the Court of Appeal for Ontario.

The motion was refused by the Supreme Court of Canada. *Ottawa Electric Co.* v. *Brennan* (31 Can. S.C.R. 311) being followed.

John Dick Co. v. Gordaneer, Cout. Cas. 326.

Since the enactment of the 27th section of c. 11 of the statutes of Ontario, 62 V. (1899), a party appealing to a Divisional Court of the High Court, in a case where an appeal lies to the Court of Appeal for Ontario, has no right to appeal from the judgment of such Divisional Court to the Supreme Court of Canada, without special leave. *Farquharson* v. *The Imperial Oil Co.* (30 Can. S.C.R. 188), distinguished.

Kilner v. Werden, Cont. Cas. 188.

The Registrar said—". . . If this were not the only element to be considered upon the application, I think the plaintiff would have made out a case for grantitng the order asked, but in dealing with an application such as this, in which the applicant does not come to the court as of right, but claiming to have a discretion exercised in his favour, I think I am entitled to look at the facts of the case as disclosed in the uncontradicted evidence in the court below. The cases of *Dumoulin* v. *Langtry* (13 Can. S.C.R. 258) and *Lewin* v. *Howe* (14 Can. S.C.R. 722), in my opinion, are authority for my so doing.

"I have, therefore, to consider whether, on the whole case, without actually adjudicating upon the merits, the plaintiff's claim is not an unmeritorious one"

After discussing the evidence the Registrar added:

"The whole litigation seems to me to have been an abuse of the process of the court, and utterly without merit: and, as the plaintiff comes claiming, not as of right, but appealing to the discretion of the court, I think, for the reasons above set out, ample grounds are afforded for refusing to exercise such discretion in his favour, and for relegating him to the redress which the usual and ordinary practice and procedure of the courts afford to all litigants.

An appeal from the foregoing decision was taken before Mr. Justice King, in Chambers, and an application was also

made, as alternative relief, for an order extending the time limited by the statute for appealing from the Chancellor's judgment *de bene esse*. The appeal was dismissed with costs. His Lordship delivering the following note of reasons for his decision:

"The appeal is dismissed with costs, the appeal not having been taken and prosecuted within the time fixed by the rules, and the circumstances not calling for an extension of time."

James Bay Rly. Co. v. Armstrong, 38 Can. S.C.R. 511. C.R. [1909] A.C. 285.

By s. 168 of 3 Edw. VII., c. 58, amending the Railway Act, 1903 (R.S.C., 1906, c. 37, s. 209), if an award by arbitrators on expropriation of land by a railway company exceeds $600 any dissatisfied party may appeal therefrom to a Superior Court which in Ontario means the High Court or the Court of Appeal (Interpretation Act, R.S., 1906, c. 1, s. 34, ss. 24).

It was held that if an appeal from an award is taken to the High Court there can be no further appeal to the Supreme Court of Canada which cannot even give special leave.

The decision of a judge on an application for leave to appeal *per saltum* is not subject to review by the full Court. *Vide Kay* v. *Briggs*, 22 Q.B.D. 343; *Lane* v. *Esdale*, (1891), A.C. 210; *Ex parte Stevenson*, 1892, 1 Q.B.D. 394; *Farquharson* v. *Imperial Oil Co.*, 30 Can. S.C.R. 188, at p. 201.

Applications for leave to appeal *per saltum* are made in the first place to the Registrar sitting as a judge in Chambers, and his decision is subject to review by a judge of the court sitting in Chambers. *Farquharson* v. *Imperial Oil Co.*, 30 Can. S.C.R. 188.

43. Notwithstanding anything in this Act contained the court shall also have jurisdiction as provided in any other Act conferring jurisdiction. R.S., c. 135, s. 25.

Provision for an appeal to the Supreme Court is given by a number of public and private statutes.

In Criminal Cases—The Criminal Code, *infra*, p. 813.

In Exchequer & Admiralty Cases—The Exchequer Court Act, *infra*, p. 749.

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In Election Cases—The Controverted Elections Act, *infra*, p. 763.

In Winding-up Cases—The Winding-up Act, *infra*, p. 806.

The Board of Railway Commissioners—The Railway Act, *infra*, p. 790.

44. Except as provided in this Act or in the Act providing for the appeal, an appeal shall lie only from final judgments in actions, suits, causes, matters and other judicial proceedings originally instituted in the Superior Court of the Province of Quebec, or originally instituted in a superior court in any of the provinces of Canada other than the Province of Quebec. R.S. c. 135, s. 28.

"Except as provided in this Act" refers to the exceptions contained in sections 37 and 38, *supra*.

"Or in the Act providing for the appeal." This applies in Election cases, Admiralty cases, etc.

45. No appeal shall lie from any order made in any action, suit, cause, matter or other judicial proceeding made in the exercise of the judicial discretion of the court or judge making the same, but this exception shall not include decrees and decretal orders in actions, suits, causes, matters or other judicial proceedings in equity, or in actions or suits, causes, matters or other judicial proceedings in the nature of suits or proceedings in equity instituted in any superior court. R.S., c. 135, s. 27.

Discretion in cases of new trials.

Section 22 of the original Supreme & Exchequer Courts Act read as follows:—

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

This section was repealed in 1880 by 43 V. s. 4, and the following substituted therefor:—

"In all cases of appeal the Court may in its discretion order a new trial if the ends of justice may seem to require it, although such a new trial may be deemed necessary upon the ground that the verdict is against the weight of evidence. Now sec. 52, infra, p. 295.

The following cases were decided before the repeal of old section 22:—

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

Under section 22 of the Supreme & Exchequer Courts Act, no appeal lies from the judgment of a court granting a new trial, on the ground that the verdict was against the weight of evidence, that being a matter of discretion.

Vide Moore v. Connecticut Mutual, supra, p. 115.

Vide McGowan v. Mockler, Cout. Dig. 122.

The following cases were decided after the Amendment of 1880 and before the amendment of 54-55 V. c. 25, s. 1, (1891), which gave an appeal without the limitation that the case must be one in which the trial judge had erred in a matter of law. *Vide* notes to section 38, *supra*.

Eureka Woollen Mills Co. v. Moss, 11 Can. S.C.R. 91.

Held, that the Supreme Court will not hear an appeal from a judgment of the court below, in the exercise of its discretion ordering a new trial on the ground that the verdict is against the weight of evidence.

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

Barrington v. Scottish Union, 18 Can. S.C.R. 615.

On the findings of the jury, the Court of Review refused to enter a verdict for either party, but granted a new trial, and were influenced in coming to this conclusion by the belief that the answer to one of the questions was insufficient to enable it to dispose of the interests of the parties on the findings of the jury as a whole. The Court of Queen's Bench affirmed this judgment. An appeal to the Supreme Court of Canada was quashed. *Held*, per Strong, J.: "The Court of Queen's Bench did what it had a perfect right to do in the exercise of its discretion, without subjecting its judgment to be reviewed on appeal to this Court."

Accident Ins. Co. v. McLachlan, 18 Can. S.C.R. 627.

In this case both parties moved before the Court of Review for judgment on the findings of the jury, and the defendant's motion was granted and the action dismissed. On appeal to the Court of Queen's Bench both parties claimed to have judgment entered in their favour on the findings of the jury, but the court rejected both motions, and

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suo motu ordered a new trial. An appeal to the Supreme Court was quashed, the Court holding that the order for a new trial by the court below had been made in the exercise of its discretion for the purpose of eliciting further information as to the facts, and that no appeal would lie to the Supreme Court.

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

The Court of Queen's Bench reversed the judgment of the Superior Court which quashed a seizure before judgment taken by the plaintiff against the defendant on monies in the hands of a third party. The defendant took proceedings to quash the seizure on various grounds, and succeeded in the Superior Court. In reversing the judgment of the Superior Court the Court of Queen's Bench ordered that the hearing of the petition contesting the seizure should be proceeded with at the same time as the hearing of the main action, and for this purpose directed that the petition should be joined to the said action to be decided at the same time as the merits of the action. Upon a motion to quash an appeal to the Supreme Court, *Held*, that the Court of Queen's Bench in reversing the judgment of the Superior Court did so without adjudicating upon the petition or upon the respondent's right to a seizure before judgment, and simply ordered that the merits of the proceeding and of the action should be tried together, and that the case was not appealable.

The following cases were decided after 54-55 V. c. 25, s. 1, which gave an appeal without the limitation that the case must be one in which the trial judge had erred in a matter of law:

Canada Carriage Co. v. Lea, 37 Can. S.C.R. 672.

In this case the Chief Justice said:

"This appeal is clearly covered by the decisions of this court of Barrington v. The Scottish Union and National Ins. Co. (18 Can. S.C.R. 615), and The Accident Insurance Co. of North America v. McLachlan (18 Can. S.C.R. 627). In the latter case it is pointed out that the order for a new trial made in the court below was 'in the exercise of its discretion for the purpose of eliciting further information as to the facts,' and that therefore no appeal would lie. In the present case it is expressly stated in the judgment of the Court of Appeal that, in its opinion, this was a case in which the court should exercise the discretion vested in it to direct a new trial as respects the defendant, Maud C. Lea, inasmuch as a most material point in the case had been left by the evidence in a state of uncertainty."

Toronto Rly. Co. v. McKay, Nov. 29th, 1906 (not reported).

In this case Rose for the respondent in the first place raised the question of jurisdiction, claiming the order for new trial appealed against was discretionary and therefore not appealable under s. 27 (now s. 45), and that there was no motion in the court below for a new trial, the court having granted it *suo motu*. The grounds for granting a new trial given by the Court of Appeal were as follows: "For the reasons stated in the argument, we think the verdict of the jury was unsatisfactory and that it ought not to stand, but it is not a case in which judgment should be directed for the defendants. It appears to us that the proper course is to direct a new trial which we have power to grant under rule 783." The Supreme Court quashed the appeal without costs.

Subsequent to the judgment pronounced by the court in this case counsel for the appellant raised, in a letter to the Registrar, the question of the application of s. 47 to appeals in questions of new trials, to which the following reply was made:—

"Sec. 30 (now 47) is not by any means a new section of the Act, but has its origin at the same time as sec. 27, in 42 V. c. 39, and must be taken therefore to have been in the mind of the Court in all the various judgments which have been given on questions of new trial when the Court has quashed appeals in cases where the court below had exercised its discretion. I would read s. 30 (now 47) as only applying to the well recognized practice in the old days of moving in term for a rule for a new trial, which rule, after argument, was made absolute or not as the circumstances warranted. We have no such case here, but one in which the Court, *suo motu* there being no application therefor, and nothing in the form of a motion or rule for a new trial before it in the exercise of its discretion, orders a new trial. In such a case s. 27 (now 45) would seem applicable, and although there was some difference in the language of 24(*d*) (now 38(*b*)) at the time of the decision of *Barrington* v. *The Scottish Union* and *Accident Insurance Co.* v. *McLachlan*, nevertheless the ground given for the court's decision would still, it appears to me, be applicable to the present case."

Toronto Rly. Co. v. King (March 26th, 1907) (not reported).

This was a case in which judgment was entered for the plaintiff on the findings of the jury. The defendants

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appealed to the Court of Appeal on the ground that the plaintiff should have been non-suited and not asking for a new trial. The Court granted a new trial, two of the judges being in favour of dismissing the action and the other three in favour of a new trial, the grounds stated being as follows:

"The trial judge was of opinion that there was no evidence to go to the jury upon that question (namely, that the driver of the car became aware of the man's danger and notwithstanding the latter's negligence might, by the exercise of ordinary care, have avoided the accident), but submitted it to them, and they have plainly found it in the plaintiff's favour. I am not quite able to agree in that opinion, but the whole of the findings of the jury, including the assessment of damages, satisfy me that the plaintiffs (defendants?) had not a fair and unprejudiced trial and that the judgment and verdict should be set aside and a new trial awarded. The defendants appealed to the Supreme Court and the plaintiff moved to quash for want of jurisdiction, claiming the judgment appealed from was given in the exercise of the court's judicial discretion. The motion was granted and the following oral judgment pronounced by Girouard, J., for the Court:

"This is a case of the exercise of judicial discretion of the Court of Appeal in granting a new trial. We are governed by Canada Carriage Co. v. Lea. As to adjourning the argument in order to give time to the appellant to apply to the Court of Appeal for leave, we believe that this is not a case where we ought to assist them. The point of want of jurisdiction was taken by the respondents several weeks ago and the appellants cannot complain now if his appeal is quashed. The appeal is quashed with costs as of a motion to quash."

Toronto Rly. Co. v. King (1908), A.C. 260.

Appeal having been quashed by the Supreme Court as above, special leave to appeal was granted by the Privy Council, and subsequently the appeal was allowed, the order for new trial set aside, and although the respondent did not cross-appeal, special leave so to do was granted *nunc pro tunc*, and the judgment of the High Court restored with a reduction as to amount, the Committee saying:

"No valid reason has been shown for directing a new trial. The facts in the main are admitted or not disputed. The real matters in controversy are the inferences which it is proper to draw from those facts. It appears to their Lordships that the verdict and judgment must be entered either for the plaintiffs

or for the defendants, and that the middle course of directing a new trial is not open on cross appeal."

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"The respondents in their printed case asked that the judgment of the Court of Appeal might be set aside and the verdict of the jury restored. Some doubts have arisen whether they were competent to do so on this appeal, without having first lodged a cross petition in that behalf, their Lordships, being of opinion that the necessary relief would undoubtedly have been granted to them if they had applied for it at the time when the appellants obtained special leave to appeal, allowed the respondents at the hearing to put in such a petition nunc pro tunc, and they will humbly advise His Majesty to grant this relief."

Street v. C. P. R. 1909 (unreported). Dec. 13, 1909.

This was a negligence action, claiming $15,000 damages. The defence was contributory negligence, or negligence of a fellow workman. Verdict $10,000. A motion to the Court of Appeal was made to set aside the judgment and to enter judgment for the defendants or for a new trial. A new trial was ordered. On appeal to the Supreme Court the appeal was dismissed with costs as of a motion to quash.

The motion to the Court of Appeal for a new trial was based upon the misdirection or non-direction of the trial judge. The following is extracted from the reasons for judgment of the Honourable Mr. Justice Anglin:

As I read the opinions delivered in the Manitoba Court of Appeal, while Mr. Justice Richards appears to base his judgment exclusively on misdirection, Mr. Justice Phippen equally distinctly proceeds upon discretionary grounds. He says: "The expense of rehearing will not be great, and on the whole I am of the opinion it is in the interest of justice that a new trial should be ordered." Mr. Justice Perdue, while of the opinion that there was misdirection in regard to the issue of contributory negligence, says he is "doubtful whether the question and answer (upon this issue) furnish a properly considered and exact finding in regard to contributory negligence." He also thinks the damages excessive; and he concludes, "I agree that there should be a new trial."

Reading his opinion as a whole this learned judge appears to concur in the judgment for a new trial both on the ground of misdirection and on the discretionary ground more clearly stated by Mr. Justice Phippen.

This Court will not entertain an appeal from an order for a new trial granted on discretionary grounds. If, notwithstanding this objection, the present appeals should be considered on the merits, I would not be prepared to say that upon the case as a whole it is not "in the interest of justice that a new trial should be ordered."

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Discretion in other matters.

Gladwin v. Cummings, Cout. Dig. 88.

Action of replevin to recover 125 barrels of flour. Plaintiffs were indorsees of a bill of lading of the goods, which were held by the defendant as freight agent of the I.C.R. at Truro. The action was begun and the goods were replevied and the writ was served on 9th April, 1881. A default was marked on 25th April, 1881. On 10th Sept., 1881, plaintiffs' attorney issued a writ of inquiry under which damages were assessed under R.S.N.S. (4 ser.) c. 94, s. 56. An order *nisi* to remove the default and let in defendant to defend, was taken out on 11th Oct., 1881, and discharged with costs. The judgment being affirmed on appeal (4 Russ. & Geld. 168). R.S.N.S. (4 ser.) c. 94, s. 65, enacts that it shall be lawful for the court or a judge at any time within one year after final judgment to let in defendant to defend upon application supported by satisfactory affidavits accounting for his non-appearance and disclosing a defence upon the merits, etc. *Held*, that the judgment appealed from was not a final judgment within the meaning of section 3 of the Supreme Court Amendment Act of 1879, and was not appealable. *Held*, also, that if the Court could entertain the appeal, the matter was one of procedure and entirely within the discretion of the court below, and this Court would not interfere. Appeal dismissed with costs.

Canadian Northern v. Woolsey, March 18th, 1909.

This was an action brought by the plaintiff, respondent, to recover $20,000 damages for the death of her husband through the negligence of the defendants. The following questions were submitted to the jury, with the answers:

Q. 1. "Under what circumstances do you find that John J. Woolsey came to be run over?" To this the jury answered: The opinion of the jury is that John J. Woolsey, the engineer, came to his death in endeavouring to apply the brake by turning the angle cock on rear end of the tender, in going back to top of tender, it would appear that he lost his balance or tripped and was in some way thrown under wheels at rear end of tender."

Q. 2. "Did he lose his life by reason of any negligence of the company? A. Yes."

Q. 3. "Or was he himself guilty of negligence which was the proximate cause of the accident? A. No."

Q. 4. "Or could John J. Woolsey by the exercise of reasonable care have avoided the accident? A. No."

Q. 5. "If you answer yes to the second question, wherein did such negligence of the company consist? A. In not supplying

the necessary repairs for engine, such as union joint and nut for injector, ratchet on throttle and drive wheel brakes." S. 45.

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Q. 6. "If you find in answer to the last question that defects existed which caused the accident, were those defects known to John J. Woolsey and did he voluntarily incur the risks incidental to them? A. While these defects were known to Woolsey we would say that they were not known to him to the extent that caused the explosion."

Q. 7. "If such defects existed and John J. Woolsey knew of them did he report them in the proper way or did he neglect to do so? A. He did report them repeatedly in the proper way according to the rules of the Company."

Q. 8. "At what sum do you assess the compensation, if any, to be awarded to the plaintiff? A. $8,000."

Upon these findings judgment was reserved and subsequently pronounced, in which the trial judge held that there was evidence which would not permit of the same being withdrawn from the jury. On appeal to the Court of Appeal a new trial was ordered. Garrow, J., said: "The course adopted in not submitting specific questions as to the clamp and its effect, and instead covering it up as was done under the heads of questions as to contributory negligence and volenti no fit injuria simply, I am afraid gave the jury the desired opportunity of practically ignoring the evidence altogether, and was, in my opinion, in effect misdirection. . . . Upon the evidence as it stands and upon a proper charge it seems to me beyond question that had the jury been asked: was there a clamp? did the deceased remove it? And if he had not done so, would the accident have happened? they must have answered the first two in the affirmative and the last in the negative, or their verdict would have been against the great weight of evidence and in fact perverse."

Osler, J., said: "The question, what caused his death, so far as any proof of the fact is concerned, connected with any negligent act or omission of the defendants, has not, that I can see, been answered. I will not however, dissent from the conclusion which the other members of the court have arrived at, that a new trial should be granted."

Moss, C.J., and Maclaren, J., agreed in the result.

When the appeal came to be heard in the Supreme Court, the Court raised the question of jurisdiction and pronounced the following judgment by the Chief Justice: "Speaking for the majority of the Court, the Court will hear this appeal on two points, first that there was no evidence to go to the jury, second, that on the findings of the jury the appellant is entitled to judgment. As to the cross-appeal, we will hear the appellant as to whether he is entitled to judgment on the finding of the jury. We will decline to hear an argument that involves any finding supplementary to the jury's findings or inconsistent therewith."

The Chief Justice for himself hands the Registrar his opinion as follows: "I am of opinion that in this case a new trial having been ordered by the Court of Appeal in the exercise of their discretion we should not hear the appeal."

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Counsel for the appellant said that he preferred accepting the order of the Court of Appeal and the judgment below rather than go on upon the terms offered by the Supreme Court. The respondent asked to have his cross-appeal proceeded with. The Court thereupon refused to hear either the appeal or cross-appeal. No costs to either party, Anglin, J. dissenting as respects the refusal to hear the cross-appeal.

Jones v. Tuck, 11 Can. S.C.R. 197.

The cause was referred by the Supreme Court of New Brunswick at Nisi Prius to arbitration, the award to be entered on the *postea* as a verdict of a jury. After the award the appellants obtained a judge's order for a stay of proceedings, and for the cause to be entered on the motion paper of the court below, to enable the appellants to move to set aside the award and obtain a new trial, on the ground that the arbitrators had improperly taken evidence after the case before them was closed. Before the term in which the motion was to be heard, appellants abandoned that portion of the order directing the cause to be placed on the motion paper, and gave the usual notice of motion to set aside the award and *postea*, and for a new trial, which motion, by the practice of the court, would be entered on the special paper. Defendant, in opposing such motion, took the preliminary objection that the judge's order should be rescinded before plaintiffs could proceed on their notice, and presented affidavits on the merits, and plaintiffs requested leave to read affidavits in reply, claiming that defendant's affidavits disclosed new matter. This the court refused, and dismissed the motion, the majority of the judges holding that plaintiffs were bound by the order of the judge, and could not proceed on the special paper until that order was rescinded, the remainder of the court refusing the application on the merits. 23 N.B.R. 447.

On appeal to the Supreme Court of Canada, *Held*, reversing the judgment of the court below, that the cause was rightly on the special paper, and should have been heard on the merits, and the court should have exercised its discretion as to the reception or rejection of affidavits in reply; Strong, J., dissenting, on the ground that such an appeal should not be heard, and also because on the merits the appeal should fail.

Per Ritchie, C.J.—A court of appeal ought not to differ from a court below on a matter of discretion, unless it is made absolutely clear that such discretion has been wrongly exercised. Con. Stats. (N.B.) c. 37, s. 173, applies as well

to motions for new trials, where the grounds upon which the motion is based are supported by affidavits, as in other cases. It makes no distinction, but applies to all "motions founded on affidavits." S. 45. Discretion generally.

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

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

Virtue v. Hayes, In re Clark, 16 Can. S.C.R. 721.

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

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

Per Patterson, J.—An order allowing judgment to be entered on a specially endorsed writ, is one in the exercise of judicial discretion, and no appeal lies therefrom.

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

An order having been made by a judge of the High Court of Ontario staying proceedings in an action in Ontario, owing to bankruptcy proceedings then pending in England, this order was affirmed by the Divisional Court and the Court of Appeal.

Held, that this order was not a final judgment from which an appeal would lie to the Supreme Court of Canada.

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Held, per Patterson, J., that if it were a final judgment the order plaintiffs wished to get rid of was made in the exercise of judicial discretion as to which section 27 (now section 45) of the Supreme Court Act does not allow an appeal.

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

By R.S.O. (1887) c. 147, s. 42, any person not chargeable as the principal party who is liable to pay or has paid a solicitor's bill of costs may apply to a judge of the High Court or of the County Court for an order of taxation. In an action against school trustees, a ratepayer of the district applied to a judge of the High Court for an order under this section to tax the bill of the solicitor of the plaintiff, who had recovered judgment. The application was refused, but on appeal to the Divisional Court this judgment was reversed (21 O.R. 289). There was no appeal as of right from the latter decision, but on leave to appeal being granted it was reversed and the original judgment restored (19 Ont. App. R. 56). *Held*, per Patterson, J. The making or refusing to make the order applied for is a matter of discretion and the case therefore not appealable.

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

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

Township of Colchester South v. Valad, 24 Can. S.C.R. 622.

In an action by V. against a municipality for damages from injury to property by the negligent construction of a drain, a reference was ordered to an official referee "for inquiry and report pursuant to section 101 of the Judicature Act and rule 552 of the High Court of Justice." The referee reported that the drain was improperly constructed and that V. was entitled to $600 damages. The municipality appealed to the Divisional Court from the report, and the court held that the appeal was too late, no notice having been given within the time required by Con. Rule 848, and refused to extend the time for appealing. A motion for judgment on the report was also made by V. to the court on which it was

claimed on behalf of the municipality that the whole case should be gone into upon the evidence, which the court refused to do. *Held*, affirming the decision of the Court of Appeal, that the appeal not having been brought within one month from the date of the report, as required by Cons. Rule 848, it was too late; that the report had to be filed, by the party appealing before the appeal could be brought, but the time could not be enlarged by his delay in filing it; and that the refusal to extend the time was an exercise of judicial discretion with which the Supreme Court would not interfere.

City of Kingston v. Drennan, 27 Can. S.C.R. 46.

An appellate court should not interfere with the discretion exercised by the trial judge in dispensing with notice of action against a municipal corporation guilty of gross negligence as provided by the Ontario Municipal Act in respect to the condition of winter sidewalks. (23 Ont. App. R. 406, affirmed.)

O'Donohoe v. Bourne, 27 Can. S.C.R. 654.

After judgment has been entered by default in an action in the High Court of Justice, it is in the discretion of the Master in Chambers to grant or refuse an application by the defendant to have the proceedings re-opened. No appeal lies to the Supreme Court from such a discretionary order.

Smith v. St. John City Rly. Co.
Consolidated Electric Co. v. Atlantic Trust Co.
Consolidated Electric Co. v. Pratt, 28 Can. S.C.R. 603.

It is only when some fundamental principle of justice has been ignored or some other gross error appears that the Supreme Court will interfere with the discretion of provincial courts in awarding or withholding costs.

Lord v. The Queen, 31 Can. S.C.R. 165.

This was an appeal from a judgment of the Court of Queen's Bench, Quebec, whereby that court, *ex mero motu*, dismissed the petitioner's appeal from the judgment of the Superior Court, holding that the delay in proceeding with the appeal allowed by law had expired prior to the inscription in appeal and that the court was without jurisdiction to entertain it, and could not acquire any such jurisdiction by consent of parties; and that the order of the Lieutenant-

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Governor in Council waiving the delay and consenting to the appeal being heard was *ultra vires*.

Held, the provisions of articles 1020 and 1209 C.P.Q., limiting the time for inscription and prosecution of appeals to the Court of Queen's Bench, are not conditions precedent to the jurisdiction of the court to hear the appeal and they may therefore be waived by the respondent. *Cimon* v. *The Queen*, 23 Can. S.C.R. 62, referred to. Compare *Park Iron Gate Co.* v. *Coates*, L.R. 5 C.P. 634.

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

Between the hearing of a case and the rendering of the judgment in the trial court, the defendant died. His solicitor by inadvertence inscribed the case for revision in the name of the deceased defendant. The plaintiffs allowed a term of the Court of Review to pass without noticing the irregularity of the inscription, but, when the case was ripe for hearing on the merits, gave notice of motion to reject the inscription. The executors of the deceased defendant then made a motion for permission to amend the inscription by substituting their names *es qualité*. The Court of Review allowed the plaintiffs' motion as to costs only, permitted amendment and subsequently reversed the trial court judgment on the mer The Court of King's Bench (appeal side) reversed the judgment of the Court of Review on the ground that it had no jurisdiction to allow the amendment and hear the case on its merits and that, consequently, all the orders and judgments given were nullities. *Held*, reversing the judgment appealed from (Q.R. 10 K.B. 511), the Chief Justice and Taschereau, J., dissenting, that the Court of Review had jurisdiction to allow the amendment and that, as there had been no abuse of discretion and no parties prejudiced, the Court of King's Bench should not have interfered.

Porter v. Pelton, 33 Can. S.C.R. 449.

The Supreme Court refused to interfere with the discretion of the court below in refusing an amendment to the statement of claim.

And *vide infra*, p. 311. *Fontaine* v. *Payette*, *infra*, p. 407.

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 is controversy,—

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(a) involvee 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

(h) relates to any fee of office, duty, rent, revenue, or any sum of money payahle to His Majesty, or to any title to lande or tenements, annnal rents and other matters or things where rights in future might he hound; or

(c) amounts to the sum or value of two thoueand dollars.

2. In the Province of Quehec whenever the right to appeal is dependent npon the amount in diepute, euch amount shall he understood to he that demanded and not that recovered, if they are different. R.S., c. 135, s. 29:—54-55 V., c. 25, s. 3, 56 V., c. 29, s. 1.

No section of the Supreme & Exchequer Courts Act has caused more difficulty or called for interpretation by the court more frequently than this section, which limits appeals in the Province of Quebec. The section is hoary with age, having its origin in an Act passed by the first Parliament of Lower Canada held at Quebec in 1793, which provides for appeals to His Majesty from the judgments of the Court of Appeals which was then being constituted. These provisions read as follows:—

34 Geo. III., c. 6, s. 30.

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

This was reproduced in the statutes of 1849 (12 V., c. 37, s. 19); 1860 (C.S.L.C. c. 77, s. 52); 1867 (38 V. c. 11), the first Code of Procedure as article 1178 and now is contained in article 68 C.C.P.

The original Supreme and Exchequer Courts Act did not contain this provision; it was introduced in the amendment

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of 1879 (42 V. c. 39, s. 8). The object of the amendment was, no doubt, to place appeals to the Supreme Court on substantially the same footing as appeals to the Judicial Committee of the Privy Council from the Court of Queen's Bench. The present section 46 reproduces section 29 of the Revised Statutes of 1886, c. 135, as regards subsections (*a*), (*b*) and (*c*), except that (*b*) was amended by 56 V. c. 29, s. 1, in 1892, by substituting for the words "such like matter or things" the words "other matters or things." The effect of this amendment will be discussed, *infra*, *p.*

Notwithstanding the generality of the preceding sections conferring appellate jurisdiction upon the Supreme Court of Canada, no appeal lies from the courts in the Province of Quebec unless the case complies with some one or more of the conditions required to give a right of appeal herein provided, subject, however, to the exceptions contained in section 47, *infra*.

46 (a).

Constitutional question involved.

Reed v. Mousseau, 8 Can. S.C.R. 408.

In this case the Supreme Court heard an appeal from the Court of Queen's Bench (Quebec) reversing a judgment of the Superior Court making absolute a rule *nisi* for contempt against the prothonotaries of the Superior Court for the District of Montreal, for refusing to receive and fyle an exhibit unaccompanied by a stamp to the amount of ten cents. The case raised the question of the constitutionality of 43-44 V. c. 9 (Quebec) and the Attorney-General for the province obtained leave to interveue.

L'Association Pharmaceutique v. Livernois, 30 Can. S.C.R. 400.

To an action claiming $325 as penalties for an offence against the Pharmacy Act one plea was that the Act was *ultra vires*. In the courts below the action was dismissed for want of proof of the alleged offence. A motion to quash an appeal to the Supreme Court was refused, the Court holding that if it should be of the opinion that there was error below in the judgment the respondent would still be entitled to a decision on his plea of *ultra vires*, and that an appeal would therefore lie.

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L'Association Pharmaceutique v. Livernois, 31 Can. S.C.R. 43.

After the decision of the Court in this case (30 Can. S.C.R. 400) and when the appeal came on to be heard on the merits, counsel for respondent stated that he abandoned his plea attacking the jurisdiction of the Provincial Legislature, but the Court held that the appellants could not be deprived of their right to appeal by such withdrawal of the plea of *ultra vires*.

Longueuil Navigation Co. v. City of Montreal, 15 Can. S.C.R. 566.

Jurisdiction exercised in a case where the action was to have a by-law of the city of Montreal imposing a tax of $200 on each ferry boat employed by the appellant company between Montreal and Longueuil, set aside and the Provincial Act, 39 V. c. 52, under the authority of which the by-law was passed, declared unconstitutional and *ultra vires*.

46 (b).

The decisions under this subsection naturally fall under two main divisions according as they deal with the construction to be placed on the words:

(I.) "relates to any fee of office, duty, rent, revenue, or any sum of money payable to His Majesty," or other matters or things where rights in future might be bound.

(II.) Title to lands or tenements, annual rents, and other matters or things where rights in future might be bound.

It has been held that the words "where rights in future might be bound," applies to each of the subjects mentioned in Div. I. as well as to the subject matter of Div. II., to which it appears at first sight more immediately to apply. In other words, it is not every case involving a fee of office, duty, etc., that is appealable but only those in which *future rights* are affected. In *Bank of Toronto* v. *Les Curé*, etc., 12 Can. S.C.R. 25, Taschereau, J., said: "From the Province of Quebec four classes of cases only are appealable, 1st, any case wherein the matter in controversy amounts to the sum or value of $2,000; 2nd, any case wherein the matter in controversy involves the question of the validity of an Act of Parliament or of any of the local legislatures; 3rd, any case wherein the matter in controversy relates to any fee of office or any duty or rent or revenue payable to His Majesty, or any sum of money payable to His Majesty where the rights in future

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might be bound. These last words must be read as qualifying all this third class as well as the next. If, for instance, a fee of office is claimed, but the right to it is denied by the defendant, the case is appealable, but if in an action for a fee of office the defendant pleads payment, the case is not appealable if under $2,000; 4th, any case wherein the matter in controversy relates to any title to lands or tenements or title to annual rents or such like matters or things where the rights in future might be bound." This was followed in *Gilbert* v. *Gilman*, 16 Can. S.C.R. 189; *Chagnon* v. *Norman*, 16 Can. S.C.R. 661, and *Larivière* v. *School Commissioners*, 23 Can. S.C.R. 723.

The decision which has most frequently been referred to upon the construction of the first division is *Odell* v. *Gregory*, 24 S.C.R. 661, where Sir Henry Strong, pronouncing the judgment of the court, referring to this entire subsection, says:—

"The first part of the subsection relates to appeals in the case of claims by the Crown."

In the earlier case, *Bank of Toronto* v. *Le Curé*, etc., 12 Can. S.C.R. at p. 31, Fournier, J., speaking of the word "duty" says:

"Cette expression ne peut s'appliquer qu'à droits dûs à Sa Majesté."

Jurisdiction was exercised under this clause in *Darling* v. *Ryan*, Cout. Dig. 57, the case arising under the Customs Act; but in *Chagnon* v. *Normand*, 16 Can. S.C.R. 661, it was held not to apply.

Chagnon v. Normand, 16 Can. S.C.R. 661.

In an action in the Province of Quebec to recover penalties for bribery against a person who was not a candidate, the defendant was condemned to pay $400. *Held*, that even if the effect of the judgment was to disqualify him from holding office under the Crown, it was not a matter relating to a fee of office within this section, in which an appeal to the Supreme Court would lie.

Darling v. Ryan, Cout. Dig. 57.

Motion to quash appeal from the Court of Queen's Bench (Que.) on ground that the amount involved ($222.80) was below $2,000 and that the case did not come within any of the exceptions provided for in 42 V. c. 39, s. 8. Two actions (combined at trial) which constituted the case in appeal, were brought by D., an importer of crockery, against the collector of customs at Montreal for the recovery of difference

between 20 and 30 per cent. *ad valorem* duty on value of importations of "printed ware." The tariff Act of 1879, 42 V. c. 15, Sch. A., imposed 30 per cent. *ad valorem* duty on "earthenware, white granite or iron stoneware, a 'C.C.' or cream-coloured ware," the only enumerated class under which the goods in question could come. At the end of the schedule all unenumerated goods and goods not declared free were subjected to a duty of 20 per cent. The collector insisted upon duty being paid by appellant under the class enumerated as above. D. claimed that they should not be classified, but came under the unenumerated class and should only pay 20 per cent., paid the 30 per cent., and brought the action to recover the difference. The importations in question were in spring and summer of 1883. Judgment was given (Jan., 1884) in favour of defendant and the Queen's Bench dismissed an appeal in May, 1885. In 1884 (47 V. c. 30, s. 2, schedule) Parliament amended the Tariff Act as to earthenware as follows: "Earthenware, decorated, printed or spanged, and all earthenware not elsewhere specified, 30 per cent. *ad valorem*," thus distinctly covering D.'s description of his own importations and declaring such goods subject to 30 per cent., and making it relate back to March, 1884. Counsel contended that if before the Act of 1884 the matter in question was a proper subject of appeal, 42 V. c. 39, s. 8, by reason of its relation to a duty or revenue payable to the Crown in respect of which the decision appealed from might affect appellant's future rights, it ceased to be such case by virtue of the Act of 1884, because that amending Act declared distinctly that from March, 1884, and for the future, the particular class of goods in question was to be subject to a 30 per cent. duty, and that, therefore, appellant's future rights could not be affected. *Held*, 1. That there might have been importations of the same class of goods by D. subsequent to those in question in the appeal and before the amendment of 1884 effected a change, in respect of which the decision in the present cases would bind appellant, and that, therefore, the case in that respect at least would still come within the meaning of 42 Vict. c. 39, s. 8, that is to say, being in respect of a duty payable to the Crown, the decision of which might affect the then future rights of the appellant. 2. That there might be a dispute still as to whether the amending Act of 1884 expressly covered the same class of goods as were in question in this case, in order to decide which the evidence and merits would require to be discussed, and that this should not be discussed on a motion to quash. 3. That if the appellant had a right to appeal, such right could only be taken away by express and clear words, and there was nothing to shew that such right was taken away. Motion refused with $25 costs.

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Quo Warranto.

Walsh v. Heffernan, 14 Can. S.C.R. 738.

This was a petition to the Superior Court, District of Montreal, of Matthew Walsh, who claimed that he was a member

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of the St. Bridget Total Abstinence and Benefit Society, a body politic duly incorporated, having its principal office in the City of Montreal; that he had been elected vice-president of the society by the majority of duly qualified votes, but that against his protest certain votes had been received at an election, whereby the defendant had been declared elected first vice-president in place of the petitioner, and that thereby he had been unduly deprived of his office of vice-president of the society, and concluded by asking that a writ issue calling upon the defendant to establish the authority by virtue of which he occupied the position of vice-president of the said society, and to have it declared that the defendant had no right to exercise the office and that he should be excluded therefrom.

The petition was dated 17th January, 1885. The proceedings were taken under section 1016 of the old Code which provided that a complaint alleging that a person unlawfully usurps an office should be brought before the Superior Court or a judge thereof, who might order the defendant to be ousted from his office and condemned to pay a fine, or dismiss the complaint with costs and contained no provision that the judgment of the Superior Court should be final and conclusive.

In this case the petition was presented to Mr. Justice Caron, of the Superior Court, who ordered that a writ should issue returnable on a day therein fixed.

The Superior Court dismissed the petition, but this judgment was set aside by the Court of Review. On appeal to the Court of Queen's Bench the judgment in review was set aside and the judgment of the Superior Court reinstated. The petitioner thereupon appealed to the Supreme Court of Canada, but the respondent having moved to quash for want of jurisdiction, his motion was allowed.

In the report of this decision (14 Can. S.C.R. 738) it is said that the "appeal was quashed on motion for want of jurisdiction, the proceedings being by *quo warranto* as to which there is no appeal by the statute." If by this is meant that there is no appeal to the Supreme Court in cases of *quo warranto*, this decision is not an authority for so broad a proposition. All that the decision holds is that there is no appeal from the Court of Queen's Bench in the Province of Quebec in *quo warranto* proceedings.

Larin v. Lapointe, 42 Can. S.C.R. 521.

Mr. Justice Anglin, in this case said:

"The action of the appellant was not, in my opinion, primarily or principally in the nature of a proceeding in *quo warranto*. He primarily and principally sought to compel the reimbursement by the respondents, the seven members of the finance committee of the municipal council, to the City of Montreal, of the sum of $3,809.40, the expenditure of which he claims they illegally authorized; and, incident-

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Quebec Appeals. Fee of office.

ally, to have them disqualified. He also sought to have them subjected to a money penalty. His action was brought to enforce against the defendants the special remedies and penalties provided by article 338 of the charter of the City of Montreal in case of such misconduct in office as he charges against the defendants. He has added, improperly, I think, a claim that the defendants be condemned to pay a sum not exceeding $400 each to the Crown, by way of penalty.

"I agree in the view that the provision which excludes the right of appeal in ordinary cases of *quo warranto* beyond the Court of Review, does not apply to this case; and I think the Court of King's Bench therefore had the jurisdiction which it assumed to exercise."

Decisions after amendment of 56 V. c. 29, s. 1, by which the words "such like matters or things" were changed to "other matters or things."

Lariviere v. Three Rivers, 23 Can. S.C.R. 723.

A school mistress by her action claimed $1,243 as fees due to her collected by the School Commissioners of Three Rivers. The action was dismissed in the court below. An application to allow security in the Supreme Court, refused by the Registrar, on appeal to the Court was affirmed, the Court holding that the position of school-mistress was not an office within the meaning of this section, and that the words "where rights in future might be bound" in subsection (*b*) section 29, govern the preceding words "fee of office, etc.," affirming *Chagnon* v. *Normand*, 16 Can. S.C.R. 661, and *Gilbert* v. *Gilman*, 16 Can. S.C.R. 189.

Grimsby Park Co. v. Irving, 41 Can. S.C.R. 35.

Under a by-law of the defendant company every person desiring to enter the park was required to pay a fee for admission. An action was brought for a declaration as to the right of the company to exact payment of such fee from the lessee of land in the park.

It was held that the matter did not relate to the taking of a "customary or other duty or fee" nor to "a like demand of a general or public nature affecting future rights" under subsection (*d*) of sec. 48 R.S.C. (1906), nor was "the title to real estate or some interest therein" in question under ss. (*a*). There was therefore, no appeal to the Supreme Court of Canada from the judgment of the Court of Appeal in such action (16 Ont. L.R. 386).

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Hamilton v. Hamilton Distillery Co., &c., 38 Can. S.C.R. 239.

A by-law providing for special water rate from certain industries does not bring in question "the taking of an annual or other rent, customary or other duty or fee" under s. 1 (*d*) of the Act, (R.S. 1906, c. 149, s. 48 (*d*).

46 (h).

II. "Title to lande or tenemente, annual rents and other mattere or thinge where rights in future might he bonnd."

In considering this subdivision of subsection (*b*) the decisions of the Supreme Court group themselves into two classes:

First, cases which obviously involve title to lands or tenemente.

Second, analogous cases where it was contended the words "other matters or thinge where rights in futnre might he hound" applied.

Titlee to lande or tenements.

The statute of 34 Geo. III., c. 6, set out *supra*, p. 209, is reproduced in precisely the same language in C.S.L.C., c. 77, s. 52 (1860), and the French version accords with that of the old statute.

In the first Code of 1867 we have a change, and the clause providing for an appeal when title to lands it involved reads:—

"*Lorsqu'il s'agit de droits immobiliers, rentes annuelles, etc., etc.*"

Strange to say, the words "title to lands" are given as the equivalent of these words in the English version of the Code, treating "*droits immobiliers*" as synonymous with "*titre de terres*," and in the Code as in force to-day in Quebec the words "title to lands" has in the French version the words "*droits immobiliers*" as its equivalent. That they are by no means synonymous has been held by the Supreme Court in the case of *Wineberg* v. *Hampson*, *infra*, p. 224.

In giving judgment the Court said:—

"That appellant in order to sustain his appeal contended that a question of 'real rights' arose in this suit. I cannot find such an expression in the Supreme Court Act." But see *Chamberland* v. *Fortier*, *infra*, p. 225; *McGoey* v. *Leamy*, *infra*, p. 230.

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In the Province of Quebec there are two classes of actions dealing with rights and interest in real or immoveable property. A *petitory action* is one brought expressly to determine the title of the plaintiff to real property as distinguished from a *possessory action*, where the right of possession and not the mere right of property is in controversy.—(Bouvier's Law Dictionary). No question arises as to the right of appeal in actions of the first class, but difficult questions occasionally come before the court with respect to possessory actions.

Petitory Actions.

Attorney-General v. Scott, 34 Can. S.C.R. 282.

An action *au petitoire* was brought by the City of Hull against the respondents claiming certain real property which the Government of Quebec had sold to the city for the sum of $1,000. The Attorney-General of Quebec was permitted to intervene and take up the *fait et cause* of the plaintiffs. *Held*, that an appeal would lie notwithstanding that the liability of the intervenant might merely be for the return of the $1,000 as the sole point in issue was the title to the lands in question.

Possessory Actions.

A possessory action is thus defined in the Code of Civil Procedure, art. 1064.

"The possessor of any immoveable or real right, other than a farmer on shares, or a holder by sufferance who is disturbed in his possession, may bring an action in disturbance against the person who prevents his enjoyment in order to put an end to the disturbance and be maintained in his possession."

In *Delisle* v. *Arcand*, 36 Can. S.C.R. 23, where the action was brought *au possessoire* to eject the defendant from the possession of a portion of a lot of land, of which the plaintiff alleged that he was owner *à titre de propriétaire*, and for the demolition of a wall constructed thereon by the defendant, and for $500 damages, in giving judgment upon a motion to quash the court said:

"This is a motion to quash an appeal from a judgment rendered in a possessory action. Our uniform jurisprudence has been to entertain such an appeal in numerous cases, and seldom, if ever, has our jurisdiction been questioned. The

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reason is that possessory actions always involve in a secondary manner the title to lands, for the plaintiff must possess *animo domini, à titre de propriétaire* and the defendant may plead, as the respondent did in this instance, that he is not such a proprietor."

The following appeals in possessory actions were heard and determined by the court:

Tanguay v. Canadian Electric Co., 40 Can. S.C.R. 1.

An action was brought to obtain a declaration of the plaintiffs' rights in the bank and bed of a river, alleging that the defendants had disturbed them in their rights by constructing works thereon, and asking for demolition. No question of jurisdiction was raised.

King's Asbestos v. Thetford, 41 Can. S.C.R. 585.

This was a possessory action in which the defendant pleaded counter-possession by virtue of proceedings taken to expropriate the strip of land in dispute for a public highway. The plaintiffs' title and possession were admitted, and the only question between the parties was with respect to the validity of the expropriation proceedings. No question of jurisdiction was raised.

Blachford v. McBain, 19 Can. S.C.R. 42.

In this case the plaintiff had leased certain lands to the defendant for one year from 1st May, 1888, at a rental of $138, but refused to deliver up possession to the landlord at the expiration of the term, alleging a title in herself by virtue of a verbal agreement for sale between plaintiff and one M. and a further agreement between M. and the defendant. The plaintiff brought an action of ejectment in the Circuit Court. This action of the plaintiff was dismissed by the Circuit Court upon exception to the form inasmuch as the writ and declaration did not disclose or state the occupation or quality of the plaintiff as required on pain of nullity, reserving the right to plaintiff to bring another action for the same cause.

Article 887 of the Code of Civil Procedure provides that actions arising from the relation of lessor and lessee are instituted either in the Superior Court or the Circuit Court according to the value or the amount of the rent or the amount of the damages, and article 1105 provides that the Circuit Court has jurisdiction in cases between lessors and lessees, whenever the rent or the annual value or the amount of the damages claimed does not exceed $200.

The plaintiff then instituted his action in the Superior Court asking that the lease should be declared to have terminated and appellant ordered to give him possession, and to be condemned to pay $46 rent, and the judge of first instance

dismissed the action holding that the Superior Court had no jurisdiction but only the Circuit Court as the action was brought to resiliate or rescind the lease. The Court of Review reversed this judgment holding that the action was brought to obtain possession of the immoveable and not to resiliate the lease and consequently there was jurisdiction. The Court of Queen's Bench reversed the Court of Review and re-instated the judgment of court of first instance. On appeal to the Supreme Court it was held that the question of the jurisdiction of the Supreme Court did not depend in any way upon the articles of the Code, but solely upon sections 24, 28 and 29 of the Supreme Court Act, and that by the pleadings the matter in controversy clearly related to title to lands and that rights in future would be bound. Strong, J., dissenting.

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The plaintiff then instituted a new action in the Superior Court which was dismissed by the trial judge on the ground that the jurisdiction was solely in the Circuit Court. This was reversed by the Court of Review, but re-instated by the Court of Queen's Bench. The plaintiff's claim in the Supreme Court is stated by Mr. Justice Taschereau in this case, reported in 20 Can. S.C.R. 269, at p. 272, as follows:—

"L'action de l'appelant est pour obtenir la possession d'un certain immeuble par lui loué à raison de $138.00 par an à l'intimée, qui en retient la possession illégalement, malgré que le bail soit expiré. Il y joint une demande pour $16.00 valeur d'après le bail même, de cette occupation illégale, et une saisiegagerie."

Delorme v. Cusson, 28 Can. S.C.R. 66.

An action to revendicate a strip of land upon which an encroachment was admitted to have taken place by the erection of a building extending beyond the boundary line, and for the demolition and removal of the walls and the eviction of the defendant, involves questions relating to a title to land, independently of the controversy as to bare ownership, and is appealable to the Supreme Court of Canada under the provisions of the Supreme and Exchequer Courts Act.

In this case the defendant (appellant) in good faith when erecting a valuable building upon his own land, through the mutual mistake of both himself and his neighbour, caused his wall to encroach slightly upon the latter's land. A motion to quash an appeal to the Supreme Court on the ground that the action was possessory in its nature and did not involve any question of title to lands was dismissed, the Court saying: "Nous n'hésitons pas à decider qu'il s'agit ici du titre à un terrain indépendamment du titre à la nue propriété, qui n'est pas contesté."

Chicoutimi Pulp Co. v. Price, 39 Can. S.C.R. 81.

P. brought an action *au possessoire* against the company for interference with his rights in a stream, for damages and for

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an injunction against the commission or continuance of the acts complained of. On service of process, the company ceased these acts, admitted the rights and title of P., alleged that they had so acted in the belief that a verbal agreement made with P. some years previously gave them permission to do so, that this license had never been cancelled but was renewed from year to year and that, although the privilege had not been exercised by them during the two years immediately preceding the alleged trespass in 1904, it was then still subsisting and in force, and tendered $40 in compensation for any damage caused by their interference with P.'s rights.

It was held, reversing the judgment appealed from, Davies and Idington, JJ., dissenting, that, as there had been no formal cancellation of the verbal agreement nor withdrawal of the license thereby given, it had to be regarded, notwithstanding non user, as having been tacitly renewed, that it was still in force in 1904, at the time of the acts complained of and that P. could not recover in the action as instituted. The Chief Justice, on his view of the evidence, dissented from the opinion that the agreement had been tacitly renewed for the year 1904.

Per Davies and Idington, JJ. (dissenting). As the appeal involved merely a question as to costs, it should not be entertained.

Although the granting of an order for injunction, under article 957 of the Code of Civil Procedure of Quebec is an act dependent on the exercise of judicial discretion, the Supreme Court of Canada, on an appeal, reversed the order on the ground that it had been improperly made upon evidence which showed that the plaintiff could, otherwise, have obtained such full and complete remedy as he was entitled to under the circumstances of the case. Davies and Idington, JJ., dissenting, were of opinion that the order had been properly granted.

A possessory action will not lie in a case where the *trouble de possession* did not occur in consequence of the exercise of an adverse claim of right or title to the lands in question, and is not of a permanent or recurrent nature. Davies and Idington JJ., dissenting, were of opinion that, under the circumstances of the case a possessory action would lie.

The judgment below was reversed.

Exceptions:—

Frechette v. Simmoneau. 31 Can. S.C.R. 12.

In an action by the lessee of lands leased for four years and nine months at a rental of $250 per annum, to have the lease cancelled as being simulated, as he was at the time of the lease owner of the property, the appeal was quashed on the ground that this was not a case of title to lands or other matters or things where rights in future might be bound.

An earlier case, very similar in its character, (*Klock v. Chamberlain*, 15 S.C.R. 325) was not cited. The Supreme

Court in this case affirmed a judgment in which a sale of real estate was set aside as a contravention of art. 1301 C.C., where the sale was by a wife, duly separated as to property from her husband, to her husband's creditors, it being shown that the sale was only intended to operate as a security for the payment of the husband's debts. S. 46 (b). Quebec Appeals. Title to lands.

Carrier v. Sirois, 36 Can. S.C.R. 221.

In an action for the price of real estate sold for warranty a plea alleging troubles and fear of eviction under a prior hypothec to secure rent charges on the land does not raise questions affecting the title nor involving future rights so far as to give the Supreme Court of Canada jurisdiction to entertain an appeal.

Cully v. Ferdais, 30 Can. S.C.R. 330.

The respondent, in execution of a judgment of the Superior Court in an action of *Macdonald* v. *Ferdais*, issued a writ of possession ordering the sheriff to put him in possession of a road described in the judgment. The appellant filed an opposition to the writ of execution alleging that he had delivered to the respondent a right of way over his land though not the one described in the judgment, and this had been accepted by the respondent as a due compliance with the judgment. The opposition was maintained by the Superior Court, but set aside by the Court of Queen's Bench. An appeal to the Supreme Court was quashed, the Court holding that this was merely a contestation upon the execution of a judgment and no rights relating to land were in controversy. *Held*, further, that the case was not free from doubt; that the right to appeal was not clear, and the Court would not assume jurisdiction in a doubtful case.

Davis v. Roy, 33 Can. S.C.R. 345.

In a possessory action claiming $200 damages, the defendant (appellant) admitted plaintiff's title, but claimed to retain possession as tenant. The trial judge dismissed the possessory conclusions, but gave judgment for $200 rent of the premises in question. An appeal to the Supreme Court was quashed, as nothing was in question but a personal condemnation to pay $200.

Hull City v. Scott, 34 Can. S.C.R. 617.

Where, in an action *au pétitoire* and *en bornage*, the question as to title has been finally settled, a subsequent order

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defining the manner in which the boundary line between the respective properties shall be established is not appealable to the Supreme Court of Canada. *Cully* v. *Ferdais*, 30 Can. S.C.R. 330, followed.

Brompton Pulp and Paper Co. v. Bureau.

The plaintiff claimed $300 (the amount awarded by arbitrators) for damages in consequence of the defendants' dam flooding his lands; he also asked for the demolition of the dam and an order restraining the defendants from thereby causing further injury to his lands. By the judgment appealed from the award was declared irregular, but damages, once for all, were assessed in favour of the plaintiff for $225, recourse being reserved to him in respect of any further right of action he might have for the demolition of the dam, etc. On an appeal being taken by the defendants' the plaintiff did not move to quash as provided by Supreme Court Rule No. 4, but took objection, in his factum, to the jurisdiction of the Supreme Court of Canada to entertain the appeal and, when the appeal came on for hearing on the merits, he took the same objection orally.

Held, that the only issue on the appeal was in respect of damages assessed at an amount below that limited for appeals from the Province of Quebec. The appeal was, consequently, quashed, but without costs, as the objection to the jurisdiction of the court had not been taken by motion as provided by the Rules of Practice. *Price Brothers & Co.* v. *Tanguay*, (42 Can. S.C.R. 133) followed.

Vide La Compagnie d'Aqueduc de la Jeune Lorette v. *Verrett*, 42 Can. S.C.R. 156, *infra*, p. 234.

Actio Pauliana.

Lamothe v. Daveluy, 41 Can. S.C.R. 80.

Held, in the Province of Quebec, the *Actio Pauliana*, though brought to set aside a contract for sale of an immoveable, is a personal action and does not relate to title to lands so as to give a right of appeal to the Supreme Court.

Flatt v. Ferland, 21 Can. S.C.R. 32.

Appeal from a decision of the Court of Queen's Bench for Lower Canada (appeal side).

In December, 1889, F. F. Ferland, a trader, sold to Gauthier, one of the respondents, certain real estate in Mon-

treal, which was mortgaged for $7,000, or $8,000, with a right of *reméré* for one year. S. 46 (b). Quebec Appeals. Title to lands.

In January, 1890, F. F. Ferland made an assignment, and Ira Flatt, *et al.* creditors of Ferland in the sum of $1,880, brought an action against Gauthier to have the deed of sale of the property which was valued at over $11,000 set aside as made in fraud of his creditors. G. pleaded that he was willing to return the property upon payment of the sum of $1,000 which he had advanced to F., and the courts below dismissed F. *et al.'s* action. An appeal to the Supreme Court of Canada:—

Held, that as the appellants' claim was under $2,000 and they did not represent Ferland's creditors, the amount in controversy was insufficient to make the case appealable.

Servitudes, etc.

Difficulties, however, in determining the jurisdiction frequently arise under three classes of possessory actions, involving, *servitudes, bornage*, and *toll roads and bridges*. Where jurisdiction is exercised by the Supreme Court in these three classes of cases, it is on the ground that they fall within the words "other matters or things where rights in future might be bound." Construed to mean "matters and things" *ejusdem generis* with "title to lands or tenements" on the ordinary rule of construction *"noscitur a sociis."* (*Odell* v. *Gregory*, 24 Can. S.C.R. at p. 663).

Servitudes are defined in arts. 499 and 500 of the Civil Code as follows:

"499. A real servitude is a charge imposed on one real estate for the benefit of another belonging to a different proprietor."

"500. It arises either from the natural position of the property or from the law, or it is established by the act of man."

They include, therefore,

(*a*) cases where lands on a lower level are subject to receive waters flowing from a higher level;

(*b*) division walls and ditches between adjoining properties; and

(*c*) rights of way, etc.

Wheeler v. Black, 14 Can. S.C.R. 242.

In 1843, B. *et al.* (the plaintiffs) by deed obtained the right of draining their property by passing a drain through

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an alley left open between two houses on another lot in the town of St. Johns. In 1880, W. *et al.* (defendants) built a barn covering the alley under which the drain was constructed and used it to store hay, etc., the flooring being loose and the barn resting on wooden posts. In 1881 the drain needing repairs, the plaintiffs brought an action *confessoria* against defendants as proprietors of the servant land, praying that they (plaintiffs) may be declared to have a right to the servitude constituted by the deed of 1843, and that the defendants be ordered to demolish such a portion of the barn as diminished the use of the drain, and rendered its exercise more inconvenient, and claiming damages; the defendants pleaded *inter alia* that there was no change of condition of the servient land contrary to law, and prayed for the dismissal of plaintiffs' action.

Held, Gwynne, J., dissenting, that by the building of the barn in question, the plaintiff's means of access to the drain had been materially interfered with and rendered more expensive, and therefore that the judgment of the court below ordering the defendants to demolish a portion of their barn covering the said drain, in order to allow the plaintiffs to repair the drain as easily as they might have done in 1843, when said drain was not covered, and to pay $50 damages, should be affirmed.

Fournier, J., said the question was whether the defendant had done anything to diminish the right of the plaintiff's servitude.

Wineberg v. Hampson, 19 Can. S.C.R. 369.

The parties owned adjoining properties separated by a lane. The drainage of the defendant's houses was carried by a French drain of loose stones down the land into the city sewers. The plaintiff claimed his cellars were flooded from the French drain and claimed that the defendant should cease to use it in such manner as to be a source of danger to his property. The defendant alleged that if water flooded the plaintiff's cellars it could come from the natural flow of water from the higher to the lower ground excepting through fissures in the rocks, a servitude to which all like properties were liable. A report of experts in favour of the plaintiff was adopted by the Superior Court and confirmed by the Court of Queen's Bench. A motion to quash an appeal to the Supreme Court was allowed, the Court holding that the controversy did not relate to title to lands or such like matters or things where rights in future might be bound.

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and that the fact that a question of a right of servitude arose would not give jurisdiction; that the words "title to lands" are only applicable in a case where a title to the property or a right to the title are in question.

Macdonald v. Ferdais, 22 Can. S.C.R. 260.

The respondent claimed a right of way over part of a lot owned by one of the appellants and which he had enjoyed for some years. The plaintiff having been prevented from using the road by one of the appellants, brought an action (confessoire). The Superior Court maintained the plaintiff's claim as to the right of way. This judgment was affirmed by the Court of Queen's Bench, and upon appeal thereto by the Supreme Court of Canada. The preceding case was not cited.

After 56 V. c. 29, s. 1, by which the words "or such like matters" were changed to "and other matters."

Chamberland v. Fortier, 23 Can. S.C.R. 371.

This was an action to have a certain lot of land declared free from all servitude of right of way in favour of the defendant. The Supreme Court upon a motion to quash an appeal from the Court of Queen's Bench held that since the amendment 56 V. c. 29, s. 1, which altered section 29 of the Act by substituting for the words "such like matters and things where the rights in future might be bound" to "and other matters or things," etc., an action such as this is now appealable to the Supreme Court.

From that time onward, jurisdiction has been exercised in the following cases:—

Berthier v. Denis, 27 Can. S.C.R. 147.

In 1768 the Seigneur of Berthier granted an island called "l'ie du Milieu," lying adjacent to the "Common of Berthier'" to M., his heirs and assigns (ses hoirs et ayants cause), in consideration of certain fixed annual payments and subject to the following stipulation: "En outre à condition qu'il fera à ses frais, s'il le juge nécessaire, une clôture bonne et valable, à l'épreuve des animaux de la Commune, sans aucun recours ni garantie à cet égard de la parte de sieur seigneur. lesquelles conditions ont été acceptees du dit sieur preneur, pour sureté de quoi il a hypothéqué tous ses biens présents et à venir, et spécialement la dite isle qui y demeure affectée par privilège, une obligation ne dérogeant à l'autre."

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Held, reversing the decision of the Court of Queen's Bench, Strong, C.J., dissenting, that the clause quoted did not impose merely a personal obligation on the grantee, but created a real charge or servitude upon l'Ile du Milieu for the benefit of the "Common of Berthier."

Riou v. Riou, 28 Can. S.C.R. 53.

In 1831 the owners of several contiguous farms purchased a roadway over adjacent lands to reach their cultivated fields beyond a steep mountain which crossed their properties, and by a clause inserted in the deed, to which they all were parties, they respectively agreed "to furnish roads upon their respective lands to go and come by the above purchased road for the cultivation of their lands, and that they would maintain these roads and make all necessary fences and gates at the common expense of themselves, their heirs and assigns." Prior to this deed and for some time afterwards, the use of a road from the river front to a public highway at some distance farther back, had been tolerated by the plaintiff and his *auteurs*, across a portion of his farm which did not lie between the road so purchased over the spur of the mountain, and the nearest point on the boundary of the defendant's land, but the latter claimed the right to continue to use the way.

In an action (*négatoire*) to prohibit further use of the way;

Held, affirming the decision of the Court of Queen's Bench that there was no title in writing sufficient to establish a servitude across the plaintiff's land over the roadway so permitted by mere tolerance; that the effect of the agreement between the purchasers was merely to establish servitudes across their respective lands so far as might be necessary to give each of the owners access to the road so purchased from the nearest practicable point of their respective lands across intervening properties of the others for the purpose of the cultivation of their lands beyond the mountain.

Lafrance v. Lafontaine, 30 Can. S.C.R. 20.

The appellants claimed by an action *pétitoire* to be proprietors of certain lands, the deed to them conveying the water power in the river in front of the land conveyed. The respondent was riparian owner of land on a lower level and had been permitted by the appellants for a number of years to take water necessary to operate his mill, and did not deny the appellants' right of property in the land, but denied

however, that they had any exclusive property free of a servitude in favour of the respondent in respect to the water power. The Supreme Court of Canada affirmed the judgment of the Court of Queen's Bench, and dismissed the appeal.

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Audette v. O'Cain, 39 Can. S.C.R. 103.

The plaintiff (respondent) brought his action claiming that the defendant (appellant) by the construction of an ice-house adjoining plaintiff's property had caused water to percolate into his premises rendering his house uninhabitable, causing damage to the walls, and preventing his renting it, and claimed to be declared the owner of the property in question and that defendant be ordered not to trouble him in the possession of his property and $417 damages. The plaintiff pleaded that the ice-house was constructed in such a way that it was impossible that any water should have percolated on to the plaintiff's property; that plaintiff before instituting his action, never notified defendant of his damages and that even admitting that water went on to the plaintiff's property, which he denied, the damages would have been prevented by the expenditure of two or three dollars by the plaintiff. The plaintiff inscribed in law against the latter part of the plea. The trial judge dismissed both the inscription in law and the action. The Court of Appeal reversed and trial judge, maintained the action and gave $10 damages. An appeal having been taken to the Supreme Court, the respondent moved to quash for want of jurisdiction, but the Court without calling upon counsel for the appellant, dismissed the motion with costs.

Cliche v. Roy, 39 Can. S.C.R. 244.

By a deed executed in 1879, C. granted to R. the right of building a reservoir in connection with a system of waterworks, laying pipes and taking water from a stream on his land, and in 1897 executed a deed of lease of the same land to him with the right, for the purposes of the waterworks established thereon "de vaquer sur tout le terrain.....et le droit d'y conduire des tuyaux, y faire des citernes et autres travaux en rapport au dit aequeduc et aux réparations d'icelui."

It was held that the deed executed in 1897 gave R. the right of bringing water from adjoining lands through pipes laid on the lands so leased.

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Thompson v. Simard, 41 Can. S.C.R. 217.

By the judgment appealed from (Q.R. 18 K.B. 24 reversing the judgment of the Superior Court (Q.R. 32 S.C. 289), it was held that (1) Where the purchaser of two parcels of land upon one of which there existed a servitude for the benefit of the other, that was extinguished by the unity of ownership thus restored, executes a deed of sale of the former, subject to the servitude as constituted by the original title deed to which it made reference, such deed of sale in turn becomes a title which revives the servitude; (2) The situation of a servitude giving a right of passage, which has not been defined in the title by which it was created, is sufficiently determined by the description given of its position, accompanied by a plan, in a deed of compromise between the owners of the two parcels of land submitting their differences in regard to the servitude to the decision of an arbitrator; (3) Both before and since the promulgation of the Civil Code, apparent servitudes are not purged by adjudication on a sale by the sheriff under a writ of execution.

On appeal to the Supreme Court of Canada the judgment appealed from was affirmed.

G. T. Rly. Co. v. Perrault, 36 Can. S.C.R. 671.

Orders directing the establishment of farm crossings over railways subject to "The Railway Act, 1903," are exclusively within the jurisdiction of the Board of Railway Commissioners for Canada.

The right claimed by the plaintiff's action, instituted in 1904, to have a farm crossing established and maintained by the railway company cannot be enforced under the provisions of the Act, 16 V. c. 37 (Can.), incorporating the Grand Trunk Railway Company of Canada.

Judgment appealed from reversed, Idington, J., dissenting in regard to damages and costs.

An application to have the appeal quashed on the grounds that the cost of the establishing the crossing demanded together with the damages sought to be recovered by the plaintiff would amount to less than $2,000 and that the case did not come within the provisions of the Supreme Court Act permitting appeals from the Province of Quebec was dismissed.

Exceptions: Easement.

In the case of *Macdonald* v. *Brush*, 1894, Cont. Cas. 141, where an action was brought for trespass against the defend-

ant who constructed a roof projecting over the plaintiff's land, and a declaration that the plaintiff was proprietor of the land on which the trespass was committed, and in which the defendant admitted the plaintiff's title to the lands referred to in the declaration, but alleged that the roof did not overlap said lands, the court quashed an appeal on the ground that the title to the land in question had not been in any way contested by the parties, and that future rights would not be affected by the judgment.

In a recent case of *Meighen* v. *Pacaud*, 40 S.C.R. 188, jurisdiction was exercised although the question was not raised. In that case the plaintiff claimed to be the proprietor of a certain lane upon which the property of the defendant abutted. The defendant having erected a fire escape which overhung the lane, the plaintiff brought his action to have it declared that he was the proprietor, and for an order for the demolition of the construction in question. The defence was that the lane was dedicated to the common use of all the proprietors of lands abutting upon it of whom the defendant was one, and he was entitled to use the lane in such a way as did not interfere with the common user to which the other abutting property owners were entitled, and denying the plaintiff had any rights in the lane whatsoever.

Brompton Pulp & Paper Co. v. Bureau, 45 S.C.R. 292.

The plaintiff, respondent, brought an action claiming $300 damages from the defendants for raising the waters of Lake St. Francis so as to flood his lands, and asking the demolition of the dam, and amended his declaration so as to allege that the defendant had no right of servitude on his lands. He also amended his conclusions by asking that the defendant be condemned to cease troubling him in the peaceable enjoyment of his lands and be ordered to discontinue exercising the right of servitude over them. The defendant made no claim of a right of servitude, but offered $150 in full of all damages, past, present and future. This tender was held sufficient by the trial judge, but the Court of Review increased the damages to $225. The defendant then appealed to the Court of Appeal where the judgment below was confirmed. A motion made to the Supreme Court to quash a further appeal for want of jurisdiction was allowed. *Cf. Gale* v. *Bureau*, 44 Can. S.C.R. 305.

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Bourget v. Blanchard, 29th November, 1882.

Bourget, the plaintiff, obtained a judgment in the Superior Court of Quebec against the defendants for a sum of $723, and issued an execution therefor against the defendants' immoveable property, in virtue of which a certain lot and building were seized. To this seizure the defendants filed an opposition on the ground that their late father's will, under which they held this property, contained a clause prohibiting them to alienate it. To this opposition Bourget filed a contestation, but the Superior Court dismissed this contestation, and maintained the defendants' opposition, holding the prohibition to alienate in the said will legal and valid, and quashing the plaintiff's seizure of the property. The plaintiff, Bourget, appealed from that judgment to the Court of Queen's Bench, but was again unsuccessful and his appeal was dismissed.

He then applied to Mr. Justice Tessier, of the Q.B., in Chambers, for leave to appeal to the Supreme Court of Canada, but was refused, on the ground that an appeal would not lie in such a case, under section 8 of the S.C. Am. Act, 1879. (See 9 Q.L.R. 262.)

The plaintiff then made a motion in the Supreme Court of Canada, asking leave to appeal from the judgment of the Court of Queen's Bench (appeal side), and praying that the order of Mr. Justice Tessier be rescinded, and that the said judge, or any other judge of the said Court of Queen's Bench, be ordered to receive security.

Held, that the Supreme Court had no jurisdiction to grant the conclusions of the motion, even if the appellant had a right to appeal in such a case.

Bornage.

After 56 V. c. 29, s. 1, when the words "or such like matters" were changed to "and other matters," etc.

McGoey v. Leamy, 27 Can. S.C.R. 193.

The parties executed a deed for the purpose of settling the boundary between contiguous lands of which they were respectively proprietors, and named a provincial surveyor as their referee to run the line. The line thus run being disputed, an action was brought to have the line declared the true boundary, and to revendicate a disputed strip of land lying upon the plaintiff's side of the line. *Held*, that an appeal would lie to the Supreme Court, although the action

was not actually in the form of an action *en bornage*, as the plaintiff sought such relief as is usually granted in such cases, and that this was a controversy involving questions of "title to lands or tenements, annual rents or other matters or things where rights in future may be bound." S. 46 (b). Quebec Appeals. Bornage.

Laurentide Mica Co. v. Fortin, 39 Can. S.C.R. 680.

Appeal from the judgment of the Court of King's Bench (Q.R. 15 K.B. 432) affirming, with a slight variation, the judgment of the Superior Court, District of Ottawa, which ordered the appointment of surveyors to proceed to the bounding and delimitation of the contiguous lands of the parties, according to a line of division between them from certain posts, said to be in existence at the southerly and northerly boundaries of the lots of land, by following blazed trees between the said posts, directing a plan and report to be made, and rejecting certain objections to the reception of evidence taken by the appellants, plaintiffs, with costs against the said appellants. By the judgment appealed from, it was held, that oral testimony as to a former *bornage* by a surveyor, with the production of his field notes, as to the existence of posts at either end of the division line and blazings along said line, and of eighteen years' possession by one of the owners in conformity therewith, was admissible and sufficient to establish a settlement of the boundaries, in the absence of an official statement or authentic procès-verbal thereof; and, further, that the award of costs to the successful party had been properly given, in the action *en bornage*, which was governed by the usual rules as to costs of litigation.

After hearing counsel on behalf of the parties, on the appeal, the Supreme Court of Canada dismissed the appeal with costs, for the reasons given in the court below.

The Johnson's Co. v. Wilson, Cout. S.C. Cas. 356.

Motion to quash an appeal from the judgment of the Court of King's Bench, appeal side, Province of Quebec, setting aside the judgment of the Superior Court, District of St. Francis, with costs and ordering [illegible]ertise.

The appellants brought the action for establishment of the boundary between their lands and the lands of the respondents in the township of Coleraine, County of Megantic. At the trial, Lemieux, J., ordered the boundaries to be settled according to the original plans of survey and sub-

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division of the townships of Ireland and Coleraine, the division line to commence at a post indicated on one of the plans and to be run on a course parallel with the old line shewn as the boundary between Ireland and Coleraine.

On an appeal by the respondents, the Court of King's Bench considered that the line between lots 9 and 10 in range "B" of Coleraine, as laid out on the ground upon the original survey of that township, was intended to serve as the guiding line for the establishment of the other side lines, including those of the lands in question, and by the judgment appealed from, the judgment of Mr. Justice Lemieux was set aside, the case remitted back to the trial court and it was ordered that experts should establish the course of the line between said lots 9 and 10 to serve as the base for determining the division line between the lands in question in the cause, and that, upon the report of the experts, such further order should be made in the Superior Court as to law and justice might appertain.

On the appeal by the plaintiffs to the Supreme Court of Canada the respondents moved to quash the appeal for want of jurisdiction, on the grounds that the action did not affect the titles to the lands, and that the judgment of the Court of King's Bench was not a final judgment within the meaning of the provisions of the Supreme and Exchequer Courts Act limiting the jurisdiction of the Court in regard to appeals.

The Court dismissed the motion with costs.

In *Willson* v. *The Shawinigan Carbide Co.*, 37 Can. S.C.R. 535, this case was referred to by Girouard, J., at page 538, as follows:

"A final judgment (*judgment définitif*) is not necessarily the last one of the court, for we have held frequently, and more particularly in the recent case of *Johnson's Company* v. *Wilson*, that the whole issue between the parties might be finally disposed of by a judgment which is not the last one."

Exceptions:

Hull v. **Scott, 34 Can. S.C.R. 617.**

In this case it was held that where in an action au pétitoire and en bornage the question as to title has been finally settled, a subsequent order defining the manner in which the boundary line between the respective properties shall be established is not appealable to the Supreme Court. In that case the court followed an earlier case of *Cully* v. *Ferdais*, 30 Can. S.C.R. 330, *infra*, p. 221.

Emerald Phosphate Co. v. Anglo-Continental Co., 21 Can. S.C.R. 422.

In this case, which arose previous to the amendment of 56 V., c. 29, s. 1, *supra*, the action began by a petition for a writ of injunction restraining the defendants from trespassing and mining upon plaintiffs' lands, and the defence was that the mining operations were carried on on their own lands. The Court of Appeal below held that the action should have been *en bornage*, and an injunction did not lie. On a motion to quash an appeal to the Supreme Court it was held, affirming the judgment of the Court of Appeal, that the proceedings should have been en bornage and that in the present action no judgment either *au possessoire* or *au petitoire* could be given as no title to land was in issue, and no appeal would lie.

Toll Roads and Bridges.

Galarneau v. Guilbault, 16 Can. S.C.R. 579.

The plaintiffs had constructed a toll bridge which was destroyed and during its reconstruction the plaintiffs furnished the public with a ferry. The defendants built a temporary bridge for the public. In an action claiming $1,000 damages and demolition of the bridge, the Superior Court dismissed plaintiffs' action which was affirmed by the Court of Queen's Bench, appeal side (Quebec). Upon an appeal to the Supreme Court an application to quash appeal for want of jurisdiction was dismissed on the ground that defence set up to the action had the effect of placing the plaintiffs' title in question and rendered the case appealable as involving a question of the title to an immoveable, and that the case clearly fell under the words "in any matter which relates to any title to lands or tenements where the rights in future might be bound," and was accordingly appealable to this Court.

Fournier, J., gave the judgment of the court on the question of jurisdiction. He said that the only question raised in the cause was as to whether during the fifteen months' delay allowed by the statute for the reconstruction of the bridge, the plaintiff had the right to prevent the construction of another bridge within the limits assigned for their bridge by the statute. He proceeds that the judgment in appeal had denied this proposition, and had the effect of putting in issue the title of the plaintiff and rendered the case accordingly appealable as raising a question of title to an immoveable, and that the case evidently fell under the section declaring that "there should be an appeal in any matter which relates to any title to lands or tenements where the rights in future might be bound."

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Corporation of St. Joachim v. Pointe Claire Turnpike Co., 24 Can. S.C.R. 486.

In this case the municipal corporation brought an action against the Turnpike Co. in which by its declaration the plaintiff asked to have it declared that the defendant had no right to operate a toll gate in the limits of the municipality; that the appellant might be ordered to cease demanding tolls, to cease operating the toll gate, to demolish the gate and in default that the plaintiffs be authorized to do so. This was not a proceeding by petition for a writ of injunction, although analogous relief was prayed for. The Superior Court gave judgment in favour of plaintiffs, which was reversed by the Court of Queen's Bench. Upon the application in the Supreme Court to allow the security for the appeal, the Registrar, by his order approving of the bond, required the respondent to move to quash at the then next session of the Court. This motion having been made *in limine* at the hearing the Court said: "As we are of the opinion that we should dismiss the appeal, we assume jurisdiction without determining that question, as we have often done in such cases, and as the Privy Council has done in many instances, amongst others, in *Braid* v. *The Great Western Rly. Co.*, 1 Moo. P.C. 101."

Rouleau v Pouliot, 36 Can. S.C.R. 26.

The plaintiff's action was for $1,000 for damages for infringement of his toll bridge privileges, in virtue of the Act 58 Geo. III. c. 20 (L.C.), by the construction of another bridge within the limit reserved, and for the demolition of the bridge, etc. The judgment appealed from dismissed the action. On a motion to quash the appeal; *Held*, that the matter in controversy affected future rights and consequently an appeal would lie to the Supreme Court of Canada. *Galarneau* v. *Guilbault*, 16 Can. S.C.R. 579, and *Chamberland* v. *Fortier*, 23 Can. S.C.R. 371, followed.

Exception:

In *La Compagnie d'Aqueduct de la Jeune Lorette* v. *Vorel*, 42 S.C.R. 156, the plaintiff instituted an action for a declaration that he had an exclusive right under a municipal franchise to construct and operate water works within an area defined in a municipal by-law, and for an injunction against the defendants constructing or operating a rival

system. The majority of the court held that there was no title to lands or rights in future involved. The minority was unable to distinguish the case from *Roulcau* v. *Pouliot*, *supra*.

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46 (b).

We have now to consider those other cases analogous to "title to lands or tenements, annual rents," where it has been contended that they were included under the words of this section "other matters or things where rights in future might be bound."

Future Rights.

In many cases which have come before the court where the party has claimed there was jurisdiction on the ground that future rights were involved, the facts have shown that the future rights were merely pecuniary in their nature and did not affect rights to or in real property, or rights analogous to interest in real property, and in all such cases the court has refused to exercise jurisdiction.

Annual Rents means "rentes foncières."

Rodier v. Lapierre, 21 Can. S.C.R. 69.

The appellant was entitled to recover under the will of her father, of which her mother, the defendant, was the executrix, a monthly allowance of $100, which had been increased to $300 per month by an Act of the Legislature of the Province of Quebec. The defendant having paid the additional allowance for one month refused to pay it for the succeeding month, and thereupon the plaintiff brought her action to recover the $200, and her declaration made no claim for any other relief. An appeal to the Supreme Court was quashed, the Court holding that the words "future rights which might be bound" referred to in section 29 (now 46), are governed by the preceding words of the clause, and that the words "annual rents" in that section mean ground rents (rentes foncières) and not an annuity or any other like charges or obligations.

Beaubien v. Bernatchez, Cout. Dig. 57.

D. entered into an agreement with the defendant and others whereby they agreed to furnish for 20 years all the milk of their cows to D. to be manufactured into cheese, at

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a percentage rate, at his factory, of which the plaintiff subsequently became proprietor and vested with all the rights of D. The defendant, among others, contrary to the agreement, sold his milk to an opposition factory, whereupon the plaintiff sued for damages in the circuit court. The action was evoked on the ground that future rights were in question, and the Superior Court gave plaintiff $8.51 damages for the breach of the agreement. The Court of Queen's Bench having reversed the judgment and dismissed the action, plaintiff applied to a judge of that court for leave to appeal to the Supreme Court, who refused on the ground that the future rights were limited, and that multiplied by their duration they would not reach the amount required for an appeal. On further application to Gwynne, J., of the Supreme Court in Chambers, *Held*, that the case was similar to one of a contract for payment of a sum by instalments to an amount of $170.20 in all, and also that it did not come within the meaning of "rights in future" as used in section 8 of the Supreme Court Amendment Act of 1879 (now section 46), and an appeal did not lie to the Supreme Court of Canada.

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

In this case the Supreme Court heard an appeal from the judgment of the Court of Queen's Bench, appeal side (Quebec), reversing the judgment of the Superior Court which maintained a demurrer to an intervention filed by the respondent as tutor *ad hoc* to minor children.

Query: Whether in view of the later decisions there was jurisdiction in this case to hear the appeal.

O'Dell v. *Gregory*, 24 Can. S.C.R. 661, *infra*, p. 238; *Talbot* v. *Guilmartin*, 30 Can. S.C.R. 482, *infra*, p. 239; *Noel* v. *Chevrefils*, 30 Can. S.C.R. 327, *infra*, p. 238.

Gilbert v. Gilman, 16 Can. S.C.R. 189.

In an action for $1,333.36, a balance of one of several money payments of $2,000 each, payable by defendant to plaintiff annually, *Held*, that the words "such like matters or things where the rights in future might be bound" in section 29 (now 46) are governed by the preceding words, that the doctrine *noscitur a sociis* applied, and that the future rights to be bound must relate to some or one of the matters or things previously specified in the sub-section, namely, to a fee of office, duty, rent, revenue or sum of

money payable to Her Majesty or to some title to lands or tenements or to some like matter or thing. Appeal quashed.

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Dionne v. The Queen, 24 Can. S.C.R. 451

The suppliant by petition of right claimed from the Government of the Province of Quebec to have set aside a surrender of his pension which he had made in consideration of the sum of $382, the pension entitling the suppliant to $21.33 per month for his life, and half this sum to his wife during her widowhood. An appeal to the Supreme Court from the Superior Court in Review was allowed.

In this appeal no question of jurisdiction was raised.

Query: If an appeal would lie in view of *Macdonald* v. *Galivan*, *infra*, p. 237, and *Raphael* v. *McLaren*, *infra*.

Raphael v. McLaren, 27 Can. S.C.R. 319.

Held, that the classes of matters which are made appealable to the Supreme Court of Canada under the provisions of section 29, sub-section (*b*) of the Supreme and Exchequer Courts Act, as amended by 56 V. c. 29 (now 46), do not include future rights which are merely pecuniary in their nature and do not affect rights to or in real property or rights analogous to interests in real property. *Rodier* v. *Lapierre*, 21 Can. S.C.R. 69, and *O'Dell* v. *Gregory*, 24 Can. S.C.R. 661, followed.

Macdonald v. Galivan, 28 Can. S.C.R. 258.

This was an action "en declaration de paternité," claiming from defendant a specific monthly allowance for the support of the infant. The court below held that this support under ordinary circumstances would cease when the child attained 14 years of age, and if this were so the amount involved would be under $2,000. The appellant contended that in the possible event of the child proving to be an invalid or a cripple, the support might be required for an indefinite period and amount to more than $2,000. *Held*, that even if more than $2,000 might under certain contingencies be involved, an appeal would not lie, following *Rodier* v. *Lapierre*, 21 Can. S.C.R. 69, *supra*, p. 235, and that the attempt to rest the claim under the clause as to "future rights" could not prevail in view of *O'Dell* v. *Gregory*, 24 Can. S.C.R. 661, *infra*, p. 238.

Banque du Peuple v. Trottier, 28 Can. S.C.R. 422.

A bank had granted a pension to a former cashier as a retiring allowance at the rate of $3,000 per annum for five

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years, and at $2,000 thereafter. The cashier assigned his claim for pension to the plaintiff, who sued to recover seven monthly payments amounting to $1,166.69. The plaintiff recovered judgment in the Superior Court which was affirmed in the Court of Review. A motion to quash an appeal to the Supreme Court was allowed, the Court holding that this was not a case of future rights within the meaning of this section, in which an appeal would lie.

Vide Sherbrooke v. *McManamy*, *supra*, p. 174; *Dubois* v. *Ste. Rose*, *supra*, p. 248; *Chamberland* v. *Fortier*, *supra*, p. 225; *McGoey* v. *Leamy*, *supra*, p. 230; *Ecclesiastiques de St. Sulpice* v. *Montreal*, *infra*, p. 247; *Macdonald* v. *Corcoran*, *supra*, p. 237; *Waters* v. *Manigault*, *infra*, p. 276; *Winkler* v. *Davidson*, 34 Can. S.C.R. 274. See addenda et corrigenda.

"Other matters or things" applied ejusdem generis.

O'Dell v. Gregory, 24 Can. S.C.R. 661.

This was an action brought for *séparation de corps* from the plaintiff's wife. The Superior Court gave judgment for the plaintiff which was reversed by the Court of Queen's Bench. A motion to quash an appeal to the Supreme Court was allowed, the Court holding that although the defendant's right to certain goods and chattels specified in the marriage contract might be accidentally affected by the judgment, yet the value of these articles did not appear to be $2,000; that the words in section 29, "fee of office, duty, rent, revenue or any sum of money payable to Her Majesty," related only to claims against the Crown, and that the words "other matters or things where rights in future might be bound" must be construed to mean matters and things *ejusdem generis* with "title to lands or tenements, annual rents" immediately preceding those words. That the word "title" means a vested right or title, something to which the right is already acquired, though the enjoyment may be postponed; that there was no vested right to the annuity during widowhood in case defendant should survive her husband; that had there been some actual right or title to lands or rents or other similar matters or things incidentally involved in the action, it would have been doubtful even then if there would have been jurisdiction.

Noel v. Chevrefils, 30 Can. S.C.R. 327.

In this case the Superior Court dismissed a petition for the cancellation of the respondent's appointment as tutrix

to her minor children. The Court of Review reversed this judgment, but it was restored by the Court of Queen's Bench. Upon a motion to quash an appeal to the Supreme Court it was held that although the children's estate amounted to over $2,000, the Court had no jurisdiction as there was no pecuniary amount in dispute and the matter in controversy did not fall within the provisions of this section (following *O'Dell* v. *Gregory*, *supra*, p. 238).

Talbot v. Gullmartin, 30 Can. S.C.R. 482.

This was an action for *séparation de corps*, instituted by the respondent against her husband, and other relief asked was a condemnation to pay $10,000, money alleged to have come to the hands of the appellant. *Held*, that no appeal would lie to the Supreme Court from the decree for separation (*O'Dell* v. *Gregory*, 24 Can. S.C.R. 661, followed), and the money demanded in the declaration being only incidental to the main cause of action, could not give the Court jurisdiction to entertain the appeal.

Vide also cases collected under 46 (*c*).

Taxes, Rates and Assessments.

There is a long line of decisions of the court dealing with taxes, rates and assessments on lands, where the direct amount involved is under $2,000 but the case in appeal would bind subsequent rates and assessments, and therefore it might well be said that it was a matter or thing of the nature of title to lands in which future rights might be bound, within s. 29 R.S.C. 1886, c. 135, now s. 46. Cases of this class often involve a great deal of difficulty in their determination, the reason being that whereas in the earlier decisions of the court a liberal construction was given to the statute, in later years the court has drawn more and more tightly the cords which limit the jurisdiction in this and other classes of appeals, the principle applied being vigorously expressed by the late Sir Elzear Taschereau in the case of *Toussignant* v. *Violet*, where he says:

> It is settled law that neither the probative force of a judgment nor its collateral effects, nor any contingent loss that a party may suffer by reason of a judgment, are to be taken into consideration when our jurisdiction depends upon the pecuniary amount, or upon any of the subjects mentioned in s. 29 of the Supreme Court Act. . . . The fact that the lands of the appellant will be assessed for the cost of the work does not make the controversy one relating to the title to these lands, nor to anything of that nature. That is the consequence of the judgment, but that is not the judgment."

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The Quebec cases naturally fall into the following groups:

1. Proceedings to annul municipal by-laws affecting the assessment of lands;

2. Proceeding to set aside assessment or valuation rolls; and

3. Proceedings to recover, or to prevent the collection of, taxes payable under municipal by laws.

Group 1.

This group may be divided into two subdivisions.

(*a*) Where the proceedings commenced by writ.

(*b*) Where the proceedings commenced by a motion to quash.

Group 1 (*a*).—In the two cases which fall under this class the court exercised jurisdiction.

Corporation of Aubert-Gallion v. Roy, 21 Can. S.C.R. 456.

The respondent constructed a toll bridge over the Chaudière River under special authority of a statute of the Province of Quebec which gave him exclusive rights for 30 years. The appellants subsequently passed a by-law to erect a toll bridge in close proximity to the former and thereupon the respondent obtained on petition a writ of injunction, and upon the issues joined the Superior Court upheld the by-law and dismissed the writ. The Court of Queen's Bench reversed this judgment. An appeal to the Supreme Court was heard on the merits.

Murray v. Westmount, 27 Can. S.C.R. 579.

In this case the defendant corporation passed a by-law for widening a certain street and that the cost of expropriating the lands for that purpose should be raised in part by a special tax levied upon the properties abutting upon the street, and the balance by the other properties benefited by the expropriation. The plaintiff, a property owner, affected by the by-law, brought an action to have the by-law declared null and void. The plaintiff's action was dismissed by the Superior Court and this judgment was affirmed by the Court of Queen's Bench. A motion to quash an appeal to the Supreme Court was dismissed, the Court holding that the controversy related to a title to land and the case was therefore appealable.

Group 1 (b).—In all this class of cases where the proceedings commenced by motion to quash, the Court has denied its jurisdiction.

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Procès verbal.

In the province of Quebec there is a proceeding called a *procès verbal* which is defined as "a true relation in writing in due form of law of what has been done and said verbally in the presence of a public officer, and what he himself does upon the occasion."

In that province the municipal council is empowered to make by-laws for the opening, construction and maintenance of public roads (M.C. art. 526). The procedure adopted to carry out the by-law is to appoint a special superintendent whose duty it is to convene and hold a public meeting of the rate-payers interested, and after investigation, report what has been done to the council. On this report the council may decide to proceed with the work, and thereupon orders the superintendent to prepare a report called a *procès verbal* which must indicate the description of the work, the time in which it is to be performed, the taxable property required to contribute, etc. After the *procès verbal* has been deposited with the council, it is taken into consideration and may be homologated or confirmed. After due notice of such homologation, and no appeal being taken, it becomes final and binding upon the parties concerned.

The court has held that a judgment in a proceeding attacking a *procès verbal*, where the amount due under the assessment at the time the proceedings were instituted is less than $2,000, although the subsequent annual rates to be paid by the party bringing the action would exceed $2,000, is not appealable to the Supreme Court.

Vercheres v. Varennes, 19 Can. S.C.R. 365.

The Municipality of Vereherès adopted a *procès-verbal* for the building and maintaining of a bridge over a stream separating it from the Municipality of Varennes. Subsequently Verehères homologated a *procès-verbal* by an engineer defining who were liable for the work and maintenance. Thereupon Varennes brought an action in the Superior Court to have the *procès-verbal* set aside and quashed. The plaintiffs' action was dismissed, but this decision of the Superior Court was reversed by the Court of Review, and on appeal affirmed by the Court of Queen's Bench. An appeal to the

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Supreme Court was quashed on the ground that this was not a case of a rule or order to quash referred to in section 24 (*g*) (now 39 (*e*)).

Toussignant v. Nicolet, 32 Can. S.C.R. 353.

This was an action for annulment of a *procès-verbal* establishing a public highway in the County of Nicolet, providing for the opening of the road and charging the lands of the appellants with the expenses of construction amounting to $2,000, and of maintenance of the road estimated at about $400 per year. The respondent having moved to quash, *held*:—

"The constant jurisprudence of this Court is against our right to entertain the appeal. The fact that the *procès-verbal* attacked by the appellants action may have the result to put upon them the cost of the work in question, alleged to be over $2,000, does not make the controversy one of $2,000. There is no pecuniary amount in controversy. In other words, there is no controversy as to a pecuniary amount or of a pecuniary nature. It is settled law that neither the probative force of a judgment, nor its collateral effects, nor any contingent loss that a party may suffer by reason of a judgment are to be taken into consideration when our jurisdiction depends upon the pecuniary amount or upon any of the subjects mentioned in section 29 of the Supreme Court Act. *Fréchette* v. *Simmoneau*, 31 Can. S.C.R. 12, and cases there cited. Compare *Ross* v. *Prentiss*, 3 How. 771. And there is here no title to lands or other matters or things of that nature, *ejusdem generis*, where the rights in future might be bound that the controversy relates to as there words of that section of the Act have been authoritatively construed. . . The fact that the lands of the appellants will be assessed for the cost of the work does not make the controversy one relating to the title to these lands nor to anything of that nature. That is the consequence of the judgment, but that is not the judgment."

Leroux v. Ste. Justine, 37 Can. S.C.R. 321.

The proceeding was by petition to set aside two resolutions of the council of the corporation providing for the opening of a public road according to *procès-verbal* made on 1st September, 1857, and homologated on the 13th of October of the same year, but which had not been put into execution up to the time of the resolutions in 1904. The petitioners also

asked for an injunction forbidding the execution of the *procès-verbal* and resolutions. In the Superior Court Mr. Justice Dunlop dismissed the petition and demand for an injunction and dissolved the interim injunction which had been issued, with costs. In the Court of Review the judgment at the trial was reversed and it was declared that the *procès-verbal* of 1857 had ceased to be in force and the corporation was enjoined against the execution of the *procès-verbal* and resolutions in question. By the judgment appealed from the Court of King's Bench reversed the judgment of the Court of Review and restored the judgment of the Superior Court.

The Court referred to article 560 C.C. and, considering that the case of *Toussignant* v. *County of Nicolet*, 32 Can. S.C.R. 353, was binding, quashed the appeal with costs.

Group 2.—Proceedings to set aside assessment or valuation rolls.

Jurisdiction was exercised in the following cases:—

Stevenson v. Montreal, 27 Can. S.C.R. 187.

A by-law was passed for the widening of a street and the necessary expropriation therefor, including the assessment of the properties benefited. Certain proprietors dissatisfied with the assessment, petitioned the Superior Court to set aside the assessment roll. The petition was dismissed by the Superior Court and this judgment affirmed by the Court of Queen's Bench. Upon an application to allow security for an appeal to the Supreme Court referred by the Registrar to a judge of the court, it was held that the question in this case was whether certain proprietors should bear a greater or lesser burden of taxation not only as the result of expropriation which had already been made, but also as the result of expropriation to be made; that the appeal would settle the liability of the property of the petitioners both as regards past and future assessments, and that although no question of title to lands within the meaning of these words used in the section arose, yet it fell within the words "other matters or things where rights in future might be bound," and that the rights questioned, if not real rights were analogous to real rights, and therefore within the contemplation of the statute.

Followed *Stevenson* v. *City of Montreal*, 27 Can. S.C.R. 593.

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White v. City of Montreal, 29 Can. S.C.R. 677.

By his petition to the Superior Court the appellant alleged that an assessment roll prepared in connection with the widening of a street was irregular, illegal and void and ought to be annulled and set aside. This petition was dismissed by the Superior Court and this judgment affirmed by the Court of Review, but the Supreme Court reversed these judgments and quashed the assessment and declared it to be null and void.

City of Montreal v. Belanger, 30 Can. S.C.R. 574.

A petition to set aside an assessment roll for the cost of widening a street dismissed by the Superior Court was reversed by the Court of Queen's Bench and restored by the Supreme Court of Canada.

Jurisdiction was denied in the following cases:—

McKay v. Township of Hinchinbrooks, 24 Can. S.C.R. 55.

This was an action brought by the appellant, a ratepayer of the municipality of the township of Hinchinbrooke, asking the Superior Court to have the valuation roll of the municipality for the year 1890, which had been homologated and not appealed against, as provided in article 1061 (M.C.), and which was in force for local and county purposes, set aside and declared null and void, because the valuators appointed by the Lieutenant-Governor, who were paid a sum of $118 for their services, had been illegally appointed, and that a roll of valuation previously made should have been homologated by the municipal council. The Superior Court maintained the appellant's action, and declared the valuation roll null and void. The Court of Queen's Bench, reversing the judgment of the Superior Court, dismissed the plaintiff's action and held that the court had no jurisdiction to grant the appellant's prayer, the delay for appealing having elapsed since the last roll came into force for local and county purposes. On appeal to the Supreme Court of Canada, the Chief Justice said:

"I am of opinion that this court has no jurisdiction to entertain this appeal. It is not within the provisions of the Supreme and Exchequer Courts Act s. 24 (g), R.S.C. ch. 135, which gives jurisdiction in the case of an application to quash a by-law, and that for two reasons. The present case is a proceeding not in the nature of a public action, as in the case of Webster v. Sherbrooke (24 Can. S.C.R. 52), decided yesterday

by this court, but an action taken in the interest of a private ratepayer; and in the next place, it is not a proceeding to annul the by-law of the corporation. All that is sought is to set up the validity of a valuation roll which the municipal council itself has refused to homologate. S. 46 (b). Quebec Appeals. Taxes, etc.

"Then again, it does not refer to future rights. The cases coming under that head in subsection (b) of section 29 (now 46) of the Supreme and Exchequer Courts Act, are cases which relate to annual rents, or annuities, or periodical payments of an analogous character. In such cases a judgment in an action relating to arrears would be binding in future actions. There is nothing of that kind here.

"I also agree with my learned brothers that the appeal should be dismissed for the reasons given in the case of Moir v. Corporation of Huntingdon, 19 Can. S.C.R. 363. The question in the present action is now merely one of costs. The appeal should be quashed with costs."

Group 3.—Proceedings to recover or to prevent the collection of taxes, payable under municipal by-laws.

In the following cases jurisdiction was exercised:—

Les Commissaires d'Ecoles St. Gabriel v. Les Soeurs de la Congregation-Montreal, 12 Can. S.C.R. 45.

This action was brought to recover the sum of $808.50 for three years' school taxes (1878, 1879, 1880) imposed by the appellants upon certain immovable property owned by the respondents within the limits of the village of St. Gabriel.

The respondents alleged by their defence, that they were an educational institution and that the lands mentioned in appellants' declaration as being their property were exempt from the payment of municipal and school taxes, inasmuch as the said parcels of land were held by the respondents for the objects for which they were established.

By their answer the appellants denied that the property taxed was held by the respondents for educational objects, but contended that the respondents carry on the school for the purposes of deriving an income therefrom. The respondents admitted the truth of the declaration and relied solely upon the exemption pleaded by them.

The judgment of the Superior Court in favour of the defendants was affirmed by the Court of Queen's Bench, but on appeal to the Supreme Court of Canada the appeal was allowed with costs. This judgment was delivered the same day as the *Bank of Toronto* v. *Le Curé, etc.*, 12 Can. S.C.R. 25. It is not clear in what way the Court distinguished

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these two cases. The amount involved here was under $2,000, and it does not appear to fall within any of the other classes of cases mentioned in old section 29 (now 46).

Wylie v. Montreal, 12 Can. S.C.R. 384.

In an action brought by the City of Montreal to recover $408 for taxes, the defence being that the defendants were an educational institution within the meaning of 41 V. c. 6, s. 26 (Q), and entitled to exemption. The judgment of the Superior Court sustaining the city's contention was affirmed by the Court of Queen's Bench, but was reversed by the Supreme Court.

Atty.-General of Canada v. City of Montreal, 13 Can. S.C.R. 352.

The Government of Canada were lessees of land in the City of Montreal under a lease whereby the lessees covenanted to pay taxes. In an action by the city against the landlord for three years' taxes amounting to $1,832, the Attorney-General of Canada intervened contending that as against the Crown the lands were exempt. This intervention was dismissed by the Superior Court and the judgment affirmed by the Court of Queen's Bench, but was reversed on appeal to the Supreme Court. It is pointed out in the judgment of the majority of the Court that C.S.L.C., c. 4, s. 2, expressly exempted from taxation property such as that in question in the action.

Central Vermont v. St. Johns, 14 Can. S.C.R. 288.

The railway company presented a petition to the Superior Court for a writ of injunction restraining the corporation from proceeding to enforce a distress warrant to collect $559.26 claimed to be due from the petitioners for taxes upon the appellant's railway bridge, etc., over the River Richelieu. The petition was opposed by a demurrer and pleas to the merits. The Superior Court held that notwithstanding that the river was a navigable one and its bed and waters under the control of the Federal authority for the purpose of commerce and navigation, nevertheless private constructions erected in the bed of the river were liable to taxation. Upon appeal the Supreme Court of Canada held that the property was not legally liable to taxation and allowed the appeal.

(This judgment was affirmed by the Privy Council, 14 App. Cas. 590.)

Reburn v. Corporation of Parish of St. Anne, 15 Can. S.C.R. 92.

By a *procès-verbal* duly homologated, made by the municipal corporation of St. Anne du Bout de l'Isle, a portion of the road fronting the land of appellant was ordered to be improved by raising and widening it. Upon appellant's refusal to do the work the council had it performed, paid $200 for it, and subsequently sued appellant for this sum. *Held*, per Fournier, Henry and Gwynne, JJ. (Strong and Taschereau, JJ., dissenting, and Ritchie, C.J., passing no opinion on the point), that although the matter in controversy did not amount to $2,000, yet as it related to a charge on the appellant's land whereby his rights in future might be bound, the case was appealable.

In *Toussignant* v. *Nicolet*, 32 Can. S.C.R. 353, it is said that since the decision in *Dubois* v. *Ste. Rose*, *infra*, this case is no longer a governing authority.

Les Ecclesiastiques de St. Sulpice de Montreal v. City of Montreal, 16 Can. S.C.R. 399.

In an action brought to recover $361.90, amount of a special assessment for a drain along the property of the defendants, the amount of the taxes was not contested, the defence being that the property was exempt from taxation under 41 V. c. 6, s. 26 (Que.). The Court held that the case was appealable as coming within the words "such like matters or things where the rights in future might be bound," and that if the rate struck was found to be insufficient and another rate imposed, the parties would be bound by the judgment in this case.

City of Montreal v. Cantin, 35 Can. S.C.R. 223.

In this case the appellants caused the sheriff to seize certain lands belonging to respondent for the recovery of a special assessment of $24,000. The respondents by an opposition, asked the annulment of the seizure on the ground that the appellants' claim was prescribed. The opposition was maintained by the Superior Court and Court of King's Bench, and finally by the Supreme Court.

Jurisdiction was denied in the following cases:—

Bank of Toronto v. Le Cure, etc., 12 Can. S.C.R. 25.

In this case the declaration alleged that the defendant was proprietor of certain lands in the plaintiffs' parish; that the property was subject to a tax in favour of the plaintiffs for

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$165.82 charged thereon while in the possession of the defendant's vendor, a Roman Catholic. By its conclusion the declaration asked that the property might be declared charged with the paymet of the said tax and the defendants condemned to pay the same, and in default that the lands might be sold. The Superior Court gave judgment in favour of the plaintiff in the following language:

"Déclare les dits immeubles affectés et hypothéqués au paiement de la dite somme de cent soixante et cinq piastres, etc., et condamne la dite défenderesse comme propriétaire, possesseur et détentrice des dits immeubles à les délaisser en justice, pour qu'ils soient vendus par décret au plus offrant et dernier enchérisseur, en la manière ordinaire et accoutumée, sur le curateur qui sera créé au délaissement, pour sur le prix de la dite vente être les dits demandeurs payés de la dite somme de cent soixante et cinq piastres, etc."

This judgment was affirmed by the Court of Queen's Bench and on appeal to the Supreme Court it was held that the case did not fall within any of the provisions of 42 V. c. 29, s. 8 (now section 46 (*b*)), and the appeal was quashed for want of jurisdiction, the Court, per Taschereau, J., saying: "The title to this land is not disputed nor in controversy, nor do the words 'such like matters or things where the rights in future might be bound' support the appeal. The right of the plaintiffs to tax this property is not disputed here, nor is its liability to future taxation in contestation, and the fact that the taxes claimed are payable by instalment some of which may not yet be due, cannot render the case appealable. The present liability of the bank, or rather the lien on this property, is the only matter in controversy."

The defendant filed an admission that the taxes claimed were based upon a regular roll and that the amount claimed by the action was due to the defendant as proprietor and occupant of the lands mentioned in the declaration. If the exemption claimed in this defence was not allowed by the court.

Dubois v. Village of St. Roce, 21 Can. S.C.R. 65.

In an action for the recovery of a sum of $262.14, money paid by the respondents for macadam work done on the road fronting upon appellant's land, the work being imposed under a by-law of the respondent corporation, the appellants set up the nullity of the by-law. *Held*, that the future rights which might be bound did not relate to a fee of office, duty, rent, revenue, etc., or to any title to lands or tenements, annual rents and other matters or things where the rights in future might be bound referred to in this section.

City of Montreal v. Land & Loan Co., 34 Can. S.C.R. 270.

In this case the respondents, together with other land owners, were taxed under a special assessment, and the sheriff was directed to levy upon respondents' lands amount of this

assessment of $316.88. The value of the respondents' lands seized exceeded $2,000 and value of the lands assessed exceeded $50,000. The respondents filed an opposition to the seizure which was maintained by the Superior Court and affirmed by the Court of King's Bench. An appeal to the Supreme Court was quashed, the Court holding that the amount in controversy was $316; that the whole amount of the roll was not in controversy; that the value of the land seized was not the amount in controversy, nor did the controversy relate to any title to lands, and that neither the collateral effect of the judgment, nor any loss that a party might suffer by reason of the judgment, should be taken into consideration.

Town of Outremont v. Joyce, 43 Can. S.C.R. 611.

The action was for the recovery of $1,133.53 claimed by the town corporation as the amount of an instalment of taxes extending over a period of twenty years (which, in gross, exceeded $2,000), imposed on the lands of the defendant as a special tax for the improvement of the highways of the municipality. The action was dismissed by the Superior Court, at the trial, and the appeal was asserted from the judgment of the Court of King's Bench affirming this decision.

The questions raised on the argument of the motion are stated in the judgment of the Chief Justice:

"This is an action brought to recover a sum of $1,133.53 alleged to be an instalment due on a larger amount for municipal taxes, which, it was said at the argument, is within the appealable limit. The defence is based on grounds that involve the liability of the respondent for the whole assessment, and the judgment appealed from is conclusive on the liability in any action for the other instalments. By the conclusion of the declaration the appellants have with much care limited the matter in controversy in this proceeding to the amount of the one instalment due ($1,133.53), and they could not, if successful, get judgment for more. The statute enacts: 'No appeal shall lie wherein the matter in controversy does not amount to the sum or value of two thousand dollars,' and we are, therefore, without jurisdiction to entertain this appeal.

"The motion to quash must be granted with costs.

"See hereon *Dominion Salvage and Wrecking Company v. Brown*, 20 Can. S.C.R. 203."

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46 (c)—$2,000 involved—cases generally.

Value established by affidavit.

Dreschell v. Auer Incandescent Light Mfg. Co., 28 Can. S.C.R. 268.

On a motion to quash an appeal where the respondents filed affidavits stating that the amount in controversy was less than the amount fixed by the statute as necessary to give jurisdiction to the appellate court, and the affidavits were also filed by the appellants shewing that the amount in controversy was sufficient to give jurisdiction under the statute, the motion to quash was dismissed, but the appellants were ordered to pay the costs as the jurisdiction of the Court to hear the appeal did not appear until the filing of the appellants' affidavits in answer to the motion.

McCorkill v. Knight, Cout. Dig. 56.

The appellant was allowed to shew by affidavit that the amount in dispute was over $2,000.

Muir v. Carter; Holmes v. Carter, 16 Can. S.C.R. 473, Cass. Dig. 407.

Where the matter in controversy is bank shares, their actual value at the time of the institution of the action and not their par value will determine the right of appeal under section 29, Supreme and Exchequer Courts Act (now 46) and the actual value of such shares may be shewn by affidavit.

Hamilton Brass Co. v. Barr Cash Co., 38 Can. S.C.R. 218.

After leave to appeal was refused, *infra*, p. 285, the appellants launched an appeal *de plano* and applied to the registrar to have their security allowed, and filed affidavits shewing that the amount involved was more than $1,000. The registrar referred the application to the Honourable Mr. Justice Girouard, who held, on the material filed, that there was jurisdiction, and made an order allowing the security. The appeal was accordingly held on the merits.

Hood v. Sangster, Nov. 12th, 1889; 16 Can. S.C.R. 723.

An action was instituted by the respondent against the appellant for the partition and licitation of a cheese factory, etc., in order that the proceeds might be divided according to the rights of the parties who had carried on

business as partners. The judgment appealed from ordered the licitation of the factory and its appurtenances. On a motion to quash the appeal by the respondent on the ground that the matter in controversy was under $2,000, the appellant in answer to the respondent's affidavit filed another affidavit shewing that the total value of the property was $3,000, but it being admitted that the respondent (plaintiff) claimed but one-half interest in the property it was *Held*, that the matter in controversy, and claimed by the respondent, not amounting to the sum or value or $2,000, the appeal should be quashed with costs.

Copeland-Chatterson Co. v. Business System, Dec. 7, 1907.

This was an action claiming no specific amount of damages and an injunction. An order was made by the registrar, Dec. 11th, 1907, affirming the jurisdiction of the Court, it being established upon affidavit and counsel for respondent not objecting, that the amount involved exceeded $1,000.

In Wenger v. Lamont, 41 Can. S.C.R. 603, the facts were as follows:

In 1905 L. and others purchased from W. his creameries on the faith of a statement purporting to be made up from the books and shewing an output for the years 1904-5 equal to or greater than that of 1903. Having discovered that this statement was untrue they brought action for recission of the contract to purchase and damages for the loss in operating during 1906. The judgment at the trial dismissing the action was affirmed by the Divisional Court. The Court of Appeal reversed the latter judgment, held that recission could not be ordered but the only remedy was damages, and ordered a reference to assess the amount. On appeal to the Supreme Court of Canada leave to appeal was refused, by two judges on the ground that the amount did not appear in the record and was the very question in dispute, while Girouard, J., dissenting, was of opinion that the amount involved had been satisfactorily established by affidavits.

In La Compagnie d'Aqueduc de la Jeune-Lorette v. Verrett, 42 Can. S.C.R. 156.

Motion to quash an apeal from the judgment of the Court of King's Bench, appeal side, affirming the judgment of the Superior Court, District of Quebec, maintaining the plaintiff's action with costs.

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By the judgment of the Superior Court (affirmed by the judgment appealed from) it was declared that the plaintiff had the exclusive right, under a municipal by-law, of placing water-pipes on certain streets in the Village of St. Ambroise de la Jeune-Lorette (the mis-en-cause), for the purpose of supplying water to part of the municipality during twenty-five years from the 10th April, 1893, and that the defendants had infringed that privilege by placing water-pipes, in connection with their rival system of water-works, on those streets to the injury of the plaintiffs, and it was ordered that the water-pipes so placed by the defendants should be removed; the defendants were enjoined against operating waterworks within the area in question, condemned to pay to the plaintiff the sum of $50 damages, with costs, and the right was reserved to the plaintiff to take such further action as he might be advised for the recovery of damages subsequent to the date of his action. At the hearing of the motion to quash the appeal to the Supreme Court of Canada for want of jurisdiction, affidavits were filed, on behalf of the appellants, showing that the total value of their system of waterworks was from $20,000 to $25,000; that the actual value of their works in the Village of St. Ambroise de la Jeune Lorette, apart from the value of the land, was $16,000; that the portion ordered to be demolished was capable of returning them an annual revenue of $500 or $600 from one part of the municipality and that the remainder, which would be destroyed in consequence of the judgment, was of the value of from $8,000 to $10,000 and capable of producing an annual revenue of $600.

It was held, Girouard and Idington, JJ., dissenting, that, as it did not appear from the record that the sum or value demanded by the action was of the amount limited by the Supreme Court Act in respect to appeals from the Province of Quebec nor that any title to lands or future rights were affected, an appeal would not lie to the Supreme Court of Canada.

Amount involved in cases of Oppositions—Interventions—Counterclaims.

Oppositions—Jurisdiction denied.

Champoux v. Lapierre, Cout. Dig. 56.

Contestation on opposition by respondent to a seizure of lands by appellant on a judgment for $640. The opposition alleged that respondent was a creditor of defendant for $31,000 and asked that seizure be annulled on the ground that by agreement of 17th October, 1876, no property of the defendant should be sold without the respondent's consent. Defendant was a building society, and respondent alleged by appellant to be a director had become a party to and bound by the agreement. The opposition was maintained by the Superior Court and by the majority of the Court of Queen's Bench. *Held*, that the appeal did not

come within any of the cases mentioned in 42 V. c. 39, s. 8, providing for appeals from the Province of Quebec (now 46). The demand was for $640; the opposition was not for any particular sum and did not ask for the payment of the debt of $31,000, but attacked only the seizure for $640 and sought to interfere with the exemption of a judgment for that sum; the amount in dispute therefore was this $640, and the question of jurisdiction was governed by this amount and not by the value of property seized, although such value exceeded the sum of $2,000. Henry, J., dissented. Appeal quashed for want of jurisdiction, but without costs, the objection having been raised by the Court.

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Gendron v. McDougall, 4th March, 1885.

The appellants, being creditors of the late Isaac Gouvernour Ogden, Sheriff of the District of Three Rivers, sued and obtained a judgment on the 16th March, 1874, against his sole heir, Isaac Low Evans Ogden, for $528.83, with interest.

The latter having died, the appellants recovered another judgment, on the 18th January, 1881, declaring that the former could be enforced by execution against his representative, Charles Kinnis Ogden, to the extent of $231, with interest and costs.

By virtue of the last judgment, the appellant caused to be made a seizure of an immovable derived from the succession of Sheriff Ogden by Isaac Low Evans Ogden, and from the succession of the latter by Charles Kinnis Ogden.

The respondents contested the seizure of that lot of land, by an opposition *à fin de distraire*.

They alleged in their opposition, that Isaac Low Evans Ogden had sold them the land seized, for the price of $2,000 paid cash, and they prayed that they might be declared the true owners and proprietors of the said lot of land, and that the seizure of it might be annulled and set aside.

The appellants contested this opposition, pleading several pleas, impugning the alleged sale and title of the respondents to the land in question.

On appeal to the Supreme Court of Canada from the judgment rendered by the Court of Queen's Bench for Lower Canada, reversing the judgment of the Superior Court on this contestation, *Held*, that the opposition having been filed in a suit in which the amount in dispute was less than $2,000, the appeal would not lie. *Macfarlane* v. *Leclaire*, 15 Moo. P.C.C. 181, referred to; also *Champoux* v. *Lapierre* (*supra*, p. 252).

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Appeal quashed for want of jurisdiction, but without costs, a motion to quash not having been made at the earliest convenient moment.

Canadian Breweries Co. v. Gariepy, 38 Can. S.C.R. 236.

In this case the Chief Justice said: "Here the appellant, a creditor of one Hersehorn for the sum of $600, by a proceeding known under the Quebec Code of Procedure as a *tierce opposition*, asked that a judgment rendered *ex parte* seven months before, and to which the curator to the estate was a party, be set aside. By the judgment to which this opposition was fyled the respondent was declared to be entitled to the possession as owner of certain property then in the hands of the curator to Hersehorn's estate, and the question in issue on the *tierce opposition* was the right of the present appellant to have the *ex parte* judgment rendered in favour of the respondent set aside. On that issue there was no matter in controversy involving directly a question of money and this court is without jurisdiction."

Lachance v. La Societe de Prets, 26 Can. S.C.R. 200.

The respondents proved a claim of over $2,000 against an insolvent estate based upon a hypothec security. The appellant had proved a claim of $920, and contested respondent's security, and claimed that the curator of the insolvent estate had "improperly collocated the whole amount in his hands to the respondents, whereas it should be distributed proportionately amongst all the creditors of the estate whose claims amounted to over $10,000. The Court of Appeal having affirmed the collocation of the curator, an appeal therefrom to the Supreme Court was quashed, the Court holding that the pecuniary interest of the party appealing alone could be taken into consideration and that appellant's contestation of the respondents' collocation might result in bringing back to the insolvent estate a sum of over $2,000, but the jurisdiction of the Supreme Court did not depend upon the possible consequences of a possible judgment.

Kinghorn v. Larue, 22 Can. S.C.R. 347.

In this case the appellant K. had recovered judgment against H. for $1,125, and under a writ of execution seized certain lands which were sold for $950. The defendant L. having fil d an opposition *afin de conserver* for $24,000, claimed to be collocated on this sum of $950 *au marc la livre*. K. contested this opposition and the Superior Court

maintained his contestation, but this judgment was reversed by the Court of Queen's Bench. On appeal to the Supreme Court it was held after 54-55 V. c. 25 [now 46 (2)] that the latter statute had no application, and that it was the interest of the party appealing that had to be taken into consideration to determine whether the case was appealable or not; the appellant's judgment was for $1,125, and he was pecuniarily interested only to that amount, and the appeal should be quashed.

Vide s. 46 (2), *infra*, amount in dispute.

Oppositions.

Jurisdiction affirmed.

Great Easterin Rly. Co. v. Lambe, 21 Can. S.C.R. 431.

The plaintiff, respondent, recovered judgment against the Montreal & Sorel Rly. Co. for $675 and took in execution the railway property of the said company. Thereupon the opposants, appellants, filed an opposition to the writ of execution claiming to have the property sold subject to its claim for $35,000. The Superior Court dismissed the opposition which was affirmed by the Court of Queen's Bench. The opposants then appealed to the Supreme Court. The respondents thereupon moved to quash on the ground that the amount involved was less than $2,000, viz., $675. The Court, without expressly dismissing the motion to quash, ordered the appeal to be heard on the merits.

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

An opposition filed under the provisions of articles 484 and 487 of the Code of Civil Procedure of Lower Canada for the purpose of vacating a judgment entered by default, is a "judicial proceeding" within the meaning of section 29 of "The Supreme and Exchequer Courts Act" (now 46), and where the appeal depends upon the amount in controversy, there is an appeal to the Supreme Court of Canada if the amount of principal and interest due at the time of the filing of the opposition under the judgment sought to be annulled is of the sum or value of $2,000.

Robinson & Little v. Scott, 38 Can. S.C.R. 490.

In this case the Chief Justice said:

"The appellant, a creditor of the defendant McGillivray for the sum of $900, brought a suit on behalf of himself

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and all other creditors against the respondents to have it declared that a transfer of a cheque for the sum of $1,172.27, made by McGillivray to Scott, was preferential and void and to recover for purposes of distribution among all the creditors the proceeds of such cheque. . . . What is the matter in controversy between the parties upon which the right to appeal depends? . . . Undoubtedly the cheque the proceeds of which it is sought by the action to bring into the estate for distribution. In this proceeding that is the only issue. If the appellant succeeds here, the result will be in so far as the judgment of this court is concerned to set aside the transfer as fraudulent and void, and condemn the defendants to pay over the proceeds of the cheque for distribution among all the creditors in whose interest the suit is brought. There is no controversy as to the amount of plaintiff's claim, he sued as one of a class. In *Canadian Breweries Co.* v. *Gariépy* (38 Can. S.C.R. 236), to which reference was made at the argument, there was no pecuniary amount in controversy."

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

In this case the plaintiff, present respondent, had recovered a judgment against T. for $119.57, and seized in execution a quantity of logs and lumber valued at $3,500, whereupon the appellants filed an opposition *afin de distraire* claiming ownership. *Held*, that when the judgment appealed from has dismissed the opposition, the the amount in controversy is the value of the goods sought to be withdrawn from seizure and not the amount demanded by the plaintiff's action, or for which execution has issued. *Turcotte* v. *Dansereau*, 26 Can. S.C.R. 578; *McCorkill* v. *Knight*, 3 Can. S.C.R. 233, followed. *Champoux* v. *Lapierre*, *supra*, p. 252; *Gendron* v. *McDougall*, *supra*, p. 253 discussed and distinguished.

Interventions—Jurisdiction affirmed:

Cote v. Richardson, 38 S.C.R. 41.

An intervention filed under the provisions of the Code of Civil Procedure of the Province of Quebec is a "judicial proceeding" within the meaning of s. 29 of the Supreme and Exchequer Courts Act, and a final judgment thereon is appealable to the Supreme Court of Canada where the matter in controversy upon the intervention amounts to the

sum of value of $2,000 without reference to the amount demanded by the action in which such intervention has been filed. *Walcott* v. *Robinson*, (11 L.C. Jur. 303); *Miller* v. *Dechene* (8 Q.L.R. 18); *Turcotte* v. *Dansereau* (26 Can. S.C.R. 578); and *King* v. *Dupuis* (28 Can. S.C.R. 388) followed. *The Atlantic and North-West Railway Co.* v. *Turcotte* (Q.R. 2 Q.B. 305); *Allan* v. *Pratt* (13 App. Cas. 780), and *Kinghorn* v. *Larue* (22 Can. S.C.R. 347) distinguished.

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Counterclaims—Jurisdiction affirmed:

Hunt v. Taplin, 24 Can. S.C.R. 36.

The plaintiff's claim was for $1,470, balance of account due him as agent for the defendant's testator. By their pleas the defendants, besides denying the plaintiff's claim, alleged that plaintiff was indebted to defendant's testator in the sum of $3,416, and that a deed given by plaintiff to defendant's testator was in truth only a security for said indebtedness, and the taxes and insurance which made up the plaintiff's claim arose out of the said lands and were payable by the plaintiff under the agreement by which the defendant's testator had taken the deed from the plaintiff. The Superior Court found for the defendant, which was reversed by the Court of Queen's Bench. Upon a motion to quash an appeal to the Supreme Court it was held that although the defendant did not claim judgment against plaintiff for balance between plaintiff's claim and the said sum of $3,416, being a sum over $2,000, nevertheless the amount in controversy was the whole of the appellant's claim, and as long as the judgment of the Court of Queen's Bench stood, the defendant could have no action against the plaintiff for balance of his claim, and the defendant's pecuniary interest in the appeal exceeded $2,000. The motion was therefore dismissed.

Molleur v. Moorehouse, Nov. 17, 1909; not reported.

The plaintiff Moorehouse brought an action in the Province of Ontario against defendant Molleur, for balance due on purchase and sale of machinery amounting to $1,100. By an incidental demand or counterclaim in the same action, the defendant claimed for loss and damage, in respect of the improper condition of the machinery and otherwise, the sum of over $2,000. The trial judge found for the plaintiff and dismissed the counterclaim. An action on the said judgment was instituted in the Province of Quebec. The defence now

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set up by defendant was that he was not personally served with the writ, and that he had not had a fair trial in Ontario, and again set up a counterclaim of over $2,000 and applied to increase same to over $5,000 on ground of facts which came to the knowledge of defendant subsequent to filing of his plea, although they occurred previous to the institution of the second action.

Art. 211 C.P.Q. reads as follows: "Any defence which might have been set up to the original action may be pleaded to an action brought upon a judgment rendered in any other Province of Canada, provided that the defendant was not personally served with the action within such other province, or did not appear in such action."

The plaintiff's action was again maintained and the counterclaim dismissed. This judgment was confirmed by the Court of King's Bench.

On appeal to the Supreme Court, after argument of the question of jurisdiction, the following judgment was pronounced by the Chief Justice: "Without expressing any opinion as to whether the defence set up, 'demande re conventionelle,' could be properly pleaded to this action, in view of art. 212 C.P. (on this point I have grave doubts), I would on the facts agree with the trial judge, confirm the judgment maintaining the plaintiff's action, and dismiss the appeal with costs."

Action for an account—Jurisdiction affirmed:

L'Heureux v. Lamarche, 12 Can. S.C.R. 460.

The plaintiff's declaration alleged that he had abandoned to the defendants immoveable and moveable property, the moveable property consisting of general merchandise of the value of $2,250, and books of account amounting to $627.91, and promissory notes amounting to $718.20, and a hypothec of $182, and that the defendants in default be condemned to pay $5,478.

In this case, Taschereau, J., in delivering the judgment of the Court, said:—

"In 1882 the plaintiff, now appellant, assigned his estate to the defendants, present respondents, for the benefit of his creditors. By his present action he claims from the defendants an account of their administration of his estate. By their plea, the defendants first allege that they are not bound to account to the plaintiff, wherefore they ask the dismissal of the action.

"2nd. They allege that they have already accounted to him before the institution of this action—and this as garnishees in a suit between one Gnillet and the plaintiff—so, therefore, they pray for the dismissal of the action. 3rd. They plead the general issue. 4th. They produce a statement which

they ask the Court to declare to be a true and faithful account of their administration, and that the action be consequently dismissed.

To this extraordinary plea the plaintiff's filed a general answer. The defendants produced evidence to establish their account.

"The Superior Court dismissed the plaintiff's action, on the ground that the account produced was a true and faithful one. The *considérants* refer to the garnishment pleaded, but the *dispositif* clearly shews that the Court was of opinion that the account therein given by the present defendants was not sufficient alone to entitle them to ask for tho dismissal of the present action.

"The Court of Review unanimously reversed that judgment on the ground that the issue to he first determined in the case is as to the right of the plaintiff to ask for an account from the defendants, and that, till that point has been adjudicated upon, he, the plaintiff, is not bound to contest or admit the account filed with the plea.

"The Court of Queen's Bench reversed the judgment of the Court of Review and restored the first judgment by which the plaintiff's action had been dismissed. The plaintiff now appeals from that last judgment.

"I am of opinion that the judgment of the Court of Review is the right one, and that the plaintiff's action was wrongly dismissed by the Superior Court."

Gillespie v. Stephens, 14 Can. S.C.R. 709.

In this case the plaintiff in his declaration claimed that for years defendant had acted as his agent and received large sums of money arising from sales of the plaintiff's property, for which he had failed to account; that the accounts he rendered were inaccurate, and prayed to have the pretended accounts renderd by defendant to plaintiff declared null and void, and that defendant be ordered to render an account under oath; and that in default of an account defendant be condemned to pay $10,000; that the defendant had not accounted for the receipt of monies amounting in all to over $2,000. After argument the appeal was dismissed.

Bell v. Vipond, 31 Can. S.C.R. 175.

This was an action for an account and in default payment of $1,000. Defendant admitted the plaintiff's right to an account and filed same, shewing a balance in his favour of $242. The plaintiff contested this, claiming there was an amount exceeding $2,000 due him from the defendant. Upon the trial of this contestation the plaintiff recovered judgment for $2,190, which was reversed hy the Court of Queen's Bench and action dismissed. The

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plaintiff applied to have his security for an appeal to the Supreme Court allowed. The Court held that the amount in controversy was clearly over $2,000, and the security was allowed accordingly.

Jurisdiction denied:

Donohue v. Donohue, 33 Can. S.C.R. 134.

The declaration demanded first an account and in default $2,000. Secondly, that the executors be dismissed from office. The Superior Court ordered the removal of the executors, but did not order the account, reserving to plaintiff a right to make the same claim in another action. This judgment was reversed by the Court of King's Bench. There was no appeal by plaintiff from the judgment of the Superior Court refusing the account. *Held*, that the Supreme Court had no jurisdiction to hear an appeal, following *Noel* v. *Chevrefils*, 30 Can S.C.R. 327, *supra*, p. 238.

St. Aubin v. Birtz dit Desmarteau, 44 Can. S.C.R. 470, the Chief Justice said:

"The respondent moves to quash for want of jurisdiction. This is an action to reform an account (*en reformation de compte*), in which the plaintiff alleges that his interest in the sum with respect to which the new account is claimed amounts to $1,000. By the conclusions of the declaration it is prayed that the defendant should be ordered to render an account and, in default of his doing so, that he be condemned to pay the said sum of $1,000. The judgment of the court below orders an account and, in default of compliance with the order, the defendant is condemned to pay the sum of $1,000.

"On these facts I am of opinion that the amount in controversy is the amount with respect to which the plaintiff claims an interest to have the account corrected, viz., $1,000, which sum is not within the appealable limit; and the motion to quash should be granted with costs."

Cases generally:

The Quebec, Montmorency, etc., Rly. v. Mathieu, 19 Can. S.C.R. 426.

In a railway expropriation case the arbitrators made an award in favour of the land owner for a sum under $2,000.

In an action brought to set aside the award judgment was given in favour of the landowner and affirmed by the Court of Queen's Bench. On appeal to the Supreme Court, Strong and Taschereau, JJ., expressed doubts as to the jurisdiction of the Court, the amount of the award being under $2,000 but the appeal was dismissed on the merits. S. 46 (c). Quebec Appeals. Amount involved.

Dominion Salvage Co. v. Brown, 20 Can. S.C.R. 203.

In an action to recover a 10 per cent. call on $10,000 of stock subscribed by defendant, *Held*, by the Supreme Court, Gwynne and Patterson, JJ., dissenting, that amount in controversy was $1,000 and no appeal would lie.

Dawson v. Dumont, 20 Can. S.C.R. 709.

In this case the plaintiff recovered judgment in a suit of *Macdonald* v. *Simon J. Dawson and W. McD. Dawson*, for over $2,000. Thereupon the defendant, W. McD. Dawson, instituted proceedings in that action as provided by the Code of Procedure disavowing the solicitor Dumont, who had entered an appearance for him, alleging that he never authorized him to appear and never knew of the proceedings or the judgment until his property was taken in execution. The petition in disavowal was dismissed by the Superior Court and this judgment was affirmed by the Court of Queen's Bench. On appeal to the Supreme Court it was held that as the judgment obtained against the appellant on the appearance filed by the defendant exceeded the amount of $2,000 the judgment on the petition in disavowal was appealable.

Canadian Rly. Accident Co. v. McNevin, 32 Can. S.C.R. 194.

Held, that a judgment below for $1,000 and interest from a certain date before action brought was a judgment for more than $1,000 within this section, and the case was appealable. Whether the fact that the defendant had paid a sum of money into Court in satisfaction of plaintiff's claim and filed a plea to that effect operated to make the amount in controversy less than $1,000, the Court was in doubt, but having decided to dismiss the appeal expressed no opinion.

Vide cases cited under 46 (*c*), *supra*.

Labrosse v. Langlois, 41 Can. S.C.R. 43.

An action having been brought against the maker and indorser of a note for $2,000, the makers sued the indorser

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in warranty claiming that no consideration was given for the note and asking that the indorser guarantee them against any judgment obtained in the main action. They also asked that an agreement under which the makers were to become liable for $3,000, be declared null. The two actions were tried together and judgment given for the plaintiff in the action on the note while the action in warranty was dismissed. On appeal from the latter judgment it was held that the amount in dispute was $2,000, the value of the note sued on; that the costs of the action in warranty could not be added and without them the sum of £500 was not in controversy even if interest and costs in the main action were added; the appeal, therefore, did not lie.

Town of Outremont v. Joyce, 43 Can. S.C.R. 611.

In an action instituted in the Province of Quebec to recover the sum of $1,133.53 claimed as an instalment of an amount exceeding $2,000, imposed on the defendant's lands for special taxes, the Supreme Court of Canada has no jurisdiction to entertain the appeal although the judgment complained of may be conclusive in regard to the further instalments accruing under the same by-law which would exceed the amount mentioned in the statute limiting the jurisdiction of the Court. *Dominion Salvage and Wrecking Co.* v. *Brown* (20 Can. S.C.R. 203) followed.

Vide also Great Eastern Railway Company v. Lamb, 21 Can. S.C.R. 431, supra, p. 255; Hunt v. Taplin, 24 Can. S.C.R. 36, supra, p. 257; O'Dell v. Gregory, 24 Can. S.C.R. 661, supra, p. 238; Lachance v. La Societe de Prets, 26 Can. S.C.R. 200, supra, p. 254; Turcotte v. Dansereau, 26 Can. S.C.R. 578, supra, p. 255; King v. Dupuis, 28 Can. S.C.R. 388, supra, p. 256; Noel v. Chevrefils, 30 Can. S.C.R. 327, supra, p. 238; Talbot v. Gullmartin, 30 Can. S.C.R. 482, supra, p. 239; Bell v. Vipond, 31 Can. S.C.R. 175, supra, p. 259; Donohue v. Donohue, 33 Can. S.C.R. 134, supra, p. 260; Winteler v. Davidson, 34 Can. S.C.R. 274, supra, p. 238; Lapointe v. Montreal Police Society, 35 Can. S.C.R. 5, addenda et corrigenda. Clement v. La Banque Nationale, 33 Can. S.C.R. 343. See addenda et corrigenda.

Interest or costs cannot be added.

Bresnan v. Bisnaw, Cout. Cas. 318.

Judgment of the Registrar:

The facts as disclosed by the affidavits and material filed shew that the respondents brought an action against the appellants and recover judgment for the sum of $3,000. On appeal to the Divisional Court of Ontario, judgment was directed to

be entered, on 27th April, 1903, against the defendants, present appellants, for $1,000 and costs. From this judgment an appeal was taken by the present appellants to the Court of Appeal, which was dismissed on the 25th January, 1904, and it is from this latter judgment that the appellants now propose to carry an appeal to the Supreme Court of Canada. S. 46 (c), Quebec Appeals. Amount involved.

The question to be decided is whether or not there can be taken into consideration interest since the 27th April, 1903, on the said judgment for $1,000, so as to bring the case within the provisions of the Act 60 & 61 V. c. 34, which, by s.s. (c) provides that an appeal should not lie unless "the matter in controversy in the appeal exceeds the sum or value of $1,000 exclusive of costs."

The right to interest on the judgment depends solely upon s. 116 of the Ontario Judicature Act, which will be found in the Revised Statutes of Ontario (1897), c. 51, which reads as follows: "Unless it is otherwise ordered by the court, a verdict or judgment shall bear interest from the time of the rendering of the verdict or of giving of judgment, as the case may be, notwithstanding proceedings in the action, whether in the court in which the action is pending or in appeal."

The view taken by Mr. Justice Maclennan, and as I think, by the Judicial Committee, in the last mentioned case, (?), appears to me to be the correct one. The interest is payable pursuant to the section of the Judicature Act to which I have referred, and is a matter, in my opinion, collateral altogether to the judgment, and should not be taken into consideration in considering the amount involved in the appeal. This view is in accord with the decision of the Supreme Court in the case of Toussignant v. The County of Nicolet (32 Can. S.C.R. 353), where the Chief Justice said:

"It is settled law that neither the probative force of a judgment nor its collateral effects, nor any contingent loss that a party may suffer by reason of a judgment, are to be taken into consideration when our jurisdiction depends upon the pecuniary amount, or upon any of the subjects mentioned in section 29 of the Supreme Court Act."

I am of the opinion, therefore, that no appeal lies in the present case, and the motion to allow the security is, therefore, refused with costs. Motion refused with costs.

Toronto Rly. Co. v. Milligan, 42 Can. S.C.R. 238.

The action was to recover damages for personal injuries alleged to have been sustained through the negligence of the company in the operation of their tramway. At the trial the jury answered the questions submitted to them favourable to the plaintiff and assessed damages at $1,000, for which amount judgment was, some time subsequently, entered for the plaintiff. This judgment was affirmed by the judgment from which the appeal was sought.

Counsel urged that the judgment on the verdict had been entered long before the decision of the Court of Appeal (17

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Ont. L.R. 530), and contended that the amount of $1,043.50 was the true amount in controversy on the present appeal. He also applied for a stay of execution to enable the company to apply for special leave to appeal, in case such leave was thought necessary.

The Court granted the motion and quashed the appeal with costs, holding that the amount in controversy was, by the judgment appealed from, that at which damages had been assessed by the verdict of the jury, and as interest had not been included in nor made part of such judgment it could not be added in order to bring the controversy involved within the amount limited by the Supreme Court Act in respect to appeals from the Province of Ontario.

The application for stay of execution was refused.

Appeal quashed with costs.

Beauchemin v. Armstrong, 34 Can. S.C.R. 285.

Where the Court of Queen's Bench affirmed the judgment of the Superior Court dismissing the action, but varied it by ordering the defendant to pay a portion of the costs. *Held*, that although more than $2,000 was demanded by the action, the defendant had no appeal to the Supreme Court as the amount of the costs he was ordered to pay was less than $2,000, and in this case it was the amount in controversy and not the amount demanded that governed the jurisdiction; the case falling within the principle of the decision in *Allan* v. *Pratt*, 13 App. Cas. 780.

Dufresne v. Guevremont, 26 Can. S.C.R. 216.

The plaintiff (respondent) sued defendant on a contract to construct an engine for $3,000, and recovered judgment for $2,150 and interest, in all $2,559.96, which judgment was affirmed by the Court of Review. The defendant appealed to the Supreme Court. The plaintiff moved to quash on the ground that no appeal lay to the Supreme Court unless an appeal also would lie to the Judicial Committee of the Privy Council, and that an appeal only lay to the Privy Council when the amount in controversy amounted to £500, and that excluding interest the amount involved was under £500. The Court held that although interest would be added to the plaintiff for the purpose of giving jurisdiction under the jurisprudence of the Privy Council, nevertheless, this would not apply to appeals from the Province of Quebec wherein it is expressly enacted (artic

2311, R.S.Q.) that "wherever 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," and the appeal was accordingly quashed.

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Consolidated actions.

Practice in the Privy Council.

"Where there are several suits which taken separately are below the appealable amount in value, but taken conjointly are above it, the suits being substantially for the same matter and involving the same questions, and the court below has pronounced one judgment as its decision which is to determine all the suits, the Privy Council has given leave to appeal, and has further directed that if the parties should agree that all suits were to abide the event of the appeal in one of the suits, the record in that suit alone need be transmitted to the Privy Council. Baboo Gopal Lall Thakoor v. Teluk Chunder Ral, 7 Moo. Ind. App. 548; Ko Khine v. Snadden, 5 Moo. P.C. (N.S.) 67.

Practice in Supreme Court.

Ontario Bank v. McAllister, Nov. 19, 1909.

This was an action against defendants for $750 rent due under a lease in which present appellants were added as third parties. While this action was pending a second action was brought for subsequent gales of rent. The trial judge gave judgment for plaintiff against defendant and in favour of defendant against third parties. On appeal by the third parties to Divisional Court, the trial judgment was set aside and defendant's claim against third party dismissed. From these two judgments the defendants appealed to the Court of Appeal where the two actions were consolidated and argued as one appeal. The Court of Appeal gave judgment in favour of the two defendants and restored the judgment of the trial judge. From this judgment an appeal was taken to the Supreme Court.

A motion to quash for want of jurisdiction having been made, the Court said the motion was well founded but allowed appeal to stand until appellant had an opportunity to obtain leave in court below. Leave was subsequently obtained and case heard on the merits.

Defences raised will not be considered on question of jurisdiction.

Bastien v. Filiatrault et ux., 31 Can. S.C.R. 129.

A wife after a judicial separation as to property, became a party, along with her husband, to an "Acte de dation en

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paiement et vente avec faculté de rémérer " in favour of the plaintiff. In an action to recover $1,324 the female defendant attacked the contract alleging that it was made to secure payment of a personal debt of the husband and not a debt of the community, and claimed the benefit of article 1301 of the Civil Code. The Superior Court and the Court of Queen's Bench found in favour of the defendant and on appeal to the Supreme Court judgment was given on the merits dismissing the appeal without determining the question as to the jurisdiction of the Court raised by the respondent upon a motion to quash.

Laberge v. Equitable Life, 24 Can. S.C.R. 59.

The declaration claimed $10,000. The Superior Court gave judgment for $285. The defendant appealed to the Court of Queen's Bench which allowed the appeal and dismissed the action. The plaintiff did not cross-appeal to the Court of Queen's Bench. *Held*, that under the amendment of 54-55 V. c. 25, the Court had jurisdiction.

Carter v. Canadian Northern Rly. Co., Sept., 1911.

The plaintiff alleged in his statement of claim that the defendants proposed to form a syndicate for the purchase of 10,000 acres of land in the Province of Saskatchewan, and requested him to subscribe for part of the said 10,000 acres, on the agreement and understanding that the defendants would resell the lands at an advance of $2.50 per acre for the number of acres each member of the syndicate should subscribe for; that in accordance with this agreement the plaintiff became a member of the proposed syndicate to the extent of $480. He further alleged that the defendants undertook and agreed that if the syndicate was not completed and the 10,000 acres not subscribed for, or if the lands remained unsold at an advance of $2.50 per acre, the defendants would return the plaintiff the said $480 and the agreement would become null and void and of no effect. The plaintiff alleged that the syndicate was not completed, that the undertaking was abandoned by the defendants and he became entitled to the repayment of the $480, and this was the amount claimed in his statement of claim.

The defence was that the plaintiff had agreed to select and purchase a certain number of acres of land at $10.50 per acre payable in instalments, and that he paid the first instalment amounting to $480; that the plaintiff refused to select

the lands or to pay the balance of the instalments and that the $480 became forfeited under the terms of the agreement as liquidated damages. S. 46 (c). Quebec Appeals. Amount involved.

The trial judge found for the plaintiff. The Divisional Court dismissed an appeal, and a further appeal to the Court of Appeal was also dismissed. Defendants thereupon applied to the Registrar, under Rule 1, to affirm the jurisdiction of the Court, but the motion was refused, the Registrar holding that the pleadings in the action did not raise any question of an interest in land within s. 48 ss. (*a*) of the Supreme Court Act, but was purely and simply a money demand involving the $480. *Vide Beauchemin* v. *Armstrong*, *supra*, p. 264.

Effect of a retraxit or renunciation.

Montreal Street Ry. v. Labrosse, Feby. 18, 1908.

The plaintiff's declaration contained a demand for $10,000 damages. Before trial the plaintiff filed a retraxit limiting her damages to $1,990. The defendant refused to consent to the retraxit. The case went down to trial without further objection and the retraxit was referred to in one of the considérants of the judgment in favour of the plaintiff. No objection was taken to the practice or procedure by which the retraxit was given effect to in the court below when the appeal was taken to the Court of Appeal. Upon the judgment in first instance being affirmed the defendant appealed to the Supreme Court, and the respondent moved to quash. After argument the appeal was quashed for want of jurisdiction. *Vide Augers* v. *Duggin*, *infra*, p. 294.

Injunctions.

Where an action or proceeding is taken for an injunction, although the amount indirectly involved is over the limit fixed by ss. 46 or 48 jurisdiction will be denied.

Price v. Tanguay, 42 Can. S.C.R. 133.

In the Province of Quebec the privilege of floating timber down water-courses, in common with others, is not a predial servitude nor does it confer an exclusive right of property in respect of which a possessory action would lie, and, in a case where the only controversy relates to the exercise of such a privilege, the Supreme Court of Canada has no jurisdiction to entertain an appeal.

S. 46 (c).

Quebec Appeals. Amount involved.

The appeal was quashed without costs as the objection to the jurisdiction was not taken by the respondents in the manner provided by the Rules of Practice.

If an injunction is asked but the action is substantially to set aside a contract involving the amount required to give jurisdiction the Court will hear the appeal.

Shawinigan Hydro-Electric Co. v. Shawinigan Water & Power Co., 43 Can. S.C.R. 650.

The action was brought by the respondents and other ratepayers of the Town of Shawinigan, against the town and the hydro-electric company, to set aside a by-law of the town corporation authorizing the purchase of certain lands with an electric power-house and plant from the hydro-electric company for $40,750, and for an injunction prohibiting the carrying into effect of the contract of sale. The final judgment in the Superior Court dissolved the injunction and dismissed the action, but on appeal by the plaintiffs the Court of King's Bench maintained the action and made the injunction permanent. On a motion to quash an appeal by the hydro-electric company to the Supreme Court of Canada, it was held (per Fitzpatrick, C.J., and Girouard, J.), that the Supreme Court was competent to entertain an appeal under the provisions of s. 39(*c*) of the Supreme Court Act. *The Bell Telephone Co.* v. *City of Quebec* (20 Can. S.C.R. 230) disapproved.

Per Idington, Duff and Anglin, JJ., (Davies, J., contra), that, as the appeal was from the final judgment of the highest court of final resort in the Province of Quebec in an action instituted in a court of superior jurisdiction for the purpose of preventing the consummation of a contract for a consideration exceeding $2,000, the Supreme Court of Canada was competent to entertain the appeal under ss. 36 and 46 of the Supreme Court Act. *Vide* Ontario cases, *infra*, p. 290.

46 (2).

Until 1891 when this sub-section was added (54-55 V. c. 25, s. 3) the Supreme Court Act did not specify any method of determining the amount in controversy when the sum found due by the judgment differed from the amount claimed in the declaration.

The question came up for the first time for determination in the case of *Joyce* v. *Hart*, *infra*, p. 271, where the Court held "that in determining the sum or value in dispute in

cases of appeal by the defendant, the proper course was to look at the amount for which the declaration concluded and not at the amount of the judgment." This was the jurisprudence of the Court on the point until 1888 when the Judicial Committee of the Privy Council held, in *Allan* v. *Pratt*, 13 App. Cas. 780, on appeal from the Court of Queen's Bench, appeal side (Quebec), that it was the amount in controversy in the appeal as disclosed by the judgment against the proposed appellant in the court below which determined the jurisdiction. The decision in *Allan* v. *Pratt* was followed by the Supreme Court in the following cases, which are decisions prior to 54-55 V. c. 25, s. 3.

R.S.C. 1906, c. 139, s. 46 (2).

Quebec Appeals. Amount involved.

Monette v. Lefebvre, 16 Can. S.C.R. 387.

Where the plaintiff has acquiesced in the judgment of the court of first instance by not appealing from the same the measure of value for determining his right of appeal is the amount awarded by the said judgment.

Ontario & Quebec v. Marcheterre, 17 Can. S.C.R. 141.

Held, following *Allan* v. *Pratt*, that when a defendant in an action for damages or other money demand seeks to appeal to the Supreme Court he must be able to shew from the judgment that the amount in controversy is not less than $2,000. In other words, he must establish that a judgment to that amount at least has been rendered against him. In this case as the judgment of the Superior Court was in favour of the plaintiff, but directed a reference to ascertain the amount of damages which the plaintiff had sustained, the case was not appealable to the Supreme Court of Canada.

Cossette v. Dunne, 18 Can. S.C.R. 222.

The plaintiff recovered judgment against defendant for $2,000. On appeal by defendant the Court of Queen's Bench reduced this judgment to $500. On appeal to the Supreme Court a motion by defendant to quash for want of jurisdiction was dismissed, Taschereau and Patterson, JJ., dissenting. The majority of the Court held that the question was not $1,500, the difference between the amounts awarded respectively by the Court of Review and the Court of Queen's Bench, but as to whether the plaintiff had the right to have the judgment obtained by him in the Superior Court of $2,000 restored.

Vide Dawson v. *Dumont*, *supra*, p. 261.

S. 46 (2).

Quebec Appeals. Amount involved.

Williams v. Irvine, 22 Can. S.C.R. 108.

Following the preceding it was *held* that the right of appeal given by 54-55 V. c. 25 does not extend to cases standing for judgment in the Supreme Court prior to the passing of this Act.

Cowen v. Evans, 22 Can. S.C.R. 328.

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

To the same effect *Mitchell* v. *Trenholme*, *Mills* v. *Limoges* (22 Can. S.C.R. 331).

Montreal St. Rly. v. Carriere, Cout. Dig. 59.

Prior to the passing of the Act 54 & 55 V. c. 25, the Superior Court at Montreal dismissed an action for $5,000 damages by a judgment which was reversed on appeal, and the entry of judgment for $600 in favour of the plaintiff was ordered by the Court of Queen's Bench. The defendant then appealed to the Supreme Court of Canada. On motion to quash for want of jurisdiction: *Held*, following *Cowen* v. *Evans*, *Mitchell* v. *Trenholme*, and *Mills* v. *Limoges*, 22 Can. S.C.R. 331, that the Supreme Court of Canada had no jurisdiction to entertain the appeal.

Labelle v. Barbeau, 16 Can. S.C.R. 390.

The appellants petitioned for payment to them of $3,000 paid into court by an insurance company upon the death of one L. The respondent, the widow, claimed one-half. Her claim was maintained by the Court of Queen's Bench, appeal side, affirming judgment of the Superior Court. On appeal to the Supreme Court the appeal was quashed on the ground that the money in controversy was only $1,500. *Vide Cassells* v. *Dunne* (*supra*, p. 269).

S. 46 (2). Quebec Appeals. Amount involved.

As stated above, previous to the decision of the Privy Council in *Allan* v. *Pratt*, July, 1888, the Supreme Court had adopted the rule of looking to the declaration in determining in Quebec cases whether or not the amount in controversy was under $2,000, the rule, therefore, prior to July, 1888, being the same as has obtained since 1891 when this subsection (46 (2)) was made part of the Supreme and Exchequer Courts Act.

Cases prior to Allan v. *Pratt, 13 App. Cas. 780.*

Joyce v. Hart, 1 Can. S.C.R. 321.

The 38th V. c. 11, s. 17, enacts that no appeal shall be allowed from any judgment rendered in the Province of Quebec in any case wherein the sum or value in dispute does not amount to two thousand dollars. H. brought an action against J., praying that J. be ordered to pull down wall, and remove all new works complained of, etc., in the wall of H.'s house, and pay $500 damages, with interest and costs. H. obtained judgment for $100 damages against J., who was also condemned to remove the works complained, or pay the value of "*mitoyenneté*."

Held, Strong, J., dissenting, that in determining the sum or value in dispute in cases of appeal by a defendant, the proper course was to look at the amount for which the declaration concludes, and not at the amount of the judgment.

Per Strong, J., dissenting.—The amount in dispute was the sum awarded for damages and the value of the wall of which the demolition was ordered by the judgment appealed against.

Levi v. Reed, 6 Can. S.C.R. 482.

L., appellant, sued R., the respondent, before the Superior Court at Arthabasca, in an action of damages (laid at $10,000) for verbal slander. The judgment of the Superior Court awarded to the appellant a sum of $1000 for special and vindictive damages. R. appealed to the Court of Queen's Bench (appeal side), and L., the present appellant, did not ask, by way of cross appeal, for an increase of damages, but contended that the judgment for $1,000 should be confirmed. The Court of Queen's Bench partly concurred in the judgment of the Superior Court, but differed as to the amount, because L. had not proved special damages, and the amount awarded was reduced to $500, and costs of appeal were given against the present appellant. L. thereupon appealed to the Supreme Court.

S. 46 (2).

Quebec Appeals. Amount involved.

Held, Taschereau, J., dissenting, that L., the plaintiff although respondent in the court below, and not seeking in that court by way of cross appeal an increase of damages beyond the $1,000, was entitled to appeal; for, in determining the amount of the matter in controversy between the parties, the proper course was to look at the amount for which the declaration concluded, and not at the amount of the judgment. *Joyce* v. *Hart*, 1 Can. S.C.R. 321, reviewed and approved.

Ayotte v. Boucher, 9 Can. S.C.R. 400.

Held, that although the plaintiff's claim amounted to $2,000 only, he, including in it a demand for interest which was prescribed and for which the plaintiff had no right of action on the face of declaration, nevertheless there was a claim for over $2,000, and therefore the case was appealable to the Supreme Court.

Weir v. Clande, 16 Can. S.C.R. 575.

A landowner whose property abutted upon a small stream brought an action claiming $2,000 damages from the defendants and restraining them from polluting the stream. The trial judge condemned the defendants to pay $500 damages and granted an injunction. This judgment was reversed by the Court of Queen's Bench, appeal side. The Supreme Court exercised jurisdiction and dismissed the appeal with costs.

It is to be noted that this case was argued in January, 1889, and judgment pronounced on March 18th, 1889, and no reference is made in the judgment to the then recent decision of *Allan* v. *Pratt*, which overruled *Joyce* v. *Hart*, 1 Can. S.C.R. 321, and the decision seems to be based upon *Joyce* v. *Hart* and possibly was pronounced previous to the report of that decision being had. On the next day, however, decisions were pronounced in *Monette* v. *Lefebvre*, 16 Can. S.C.R. 387, and *Labelle* v. *Barbeau*, 16 Can. S.C.R. 390, in both of which the decision in *Allan* v. *Pratt* is referred to.

Cases since 51-55 V. c. 25.

Gazette Printing Co. v. Shallow, 41 Can. S.C.R. 339.

Action for $10,000 damages in action of libel. At trial action was dismissed. On appeal judgment was reversed and action maintained for $250 and costs. The defendants now appeal. Question of jurisdiction not raised.

In this case defendants obtain benefit of declaration with respect to amount involved although the amount actually in controversy was only $250.

Standard Life v. Trudeau, 30 Can. S.C.R. 308.

Held, that issues raised merely by the pleas cannot have the effect of increasing the amount in controversy so as to give the Supreme Court jurisdiction, although the questions raised, if originally demanded in the declaration or introduced by an incidental demand would have been sufficient to warrant an appeal.

Cf. Hunt v. Tapin, 24 Can. S.C.R. 36, *supra*, p. 257.

Dufresne v. Fee, 35 Can. S.C.R. 8.

The action was for $2,300, the price of a cargo of lumber. After action was instituted by consent the lumber was sold by the plaintiff and the proceeds, $1,524, credited on the amount sued for. The plaintiff recovered judgment for the difference, viz., $775.40, but this was reversed by the Court of King's Bench. A motion to quash an appeal to the Supreme Court was refused, the Court holding that the amount demanded governed and there was jurisdiction.

Montreal Water & Power Co. v. Davie, 35 Can. S.C.R. 255.

Held, that where a conditional renunciation reducing the amount of the judgment to a sum less than $2,000 has not been accepted by the defendant, the amount in controversy remains the same as it was upon the original demand, and if such demand exceeds the amount limited by section 29 (now section 46 (*c*)), an appeal will lie.

Vide notes to section 40, *supra*, p. 179.

Vide also Talbot v. Guilmartin, supra, p. 239; Kinghorn v. Larue, 22 S.C.R. 347, supra, p. 254; Laberge v. Equitable Life, 24 S.C.R. 59, supra, p. 266; Dufresne v. Guevremont, 26 S.C.R. 216, supra, p. 264; Couture v. Bouchard, 21 S.C.R. 281, infra, p. 413.

47. Nothing in the three sections last preceding shall in any way affect appeals in Exchequer cases, cases of rules for new trials, and cases of mandamus, habeas corpus, and municipal by-laws. R.S., c. 135, s. 30.

The three sections immediately preceding, which are not to apply to the cases specially mentioned in s. 47, require, (*a*) that the appeal shall be from a final judgment (s. 44);

S. 47.

Quebec Appeals. Mandamus, etc.

(*b*) that there shall be no appeal when there has been an exercise of judicial discretion (s. 45); and (*c*) that in cases coming from Quebec the appeal is subject to certain preliminary requirements before it is appealable.

Sections 17 and 23 of the original Supreme and Exchequer Courts Act, 38 V. c. 11, read as follows:—

"17. Subject to the limitations and provisions hereinafter made, an appeal shall lie to the Supreme Court from all final judgments of the highest court of final resort, whether such court be a court of appeal or of original jurisdiction, now or hereafter established in any province of Canada, in cases in which the Court of original jurisdiction is a Superior Court: Provided that no appeal shall be allowed from any judgment rendered in the Province of Quebec in any case wherein the sum or value of the matter in dispute does not amount to two thousand dollars and the right to appeal in civil cases given by this Act shall be understood to be given in such cases only as are mentioned in this section, except Exchequer cases, and cases of *mandamus*, *habeas corpus* or municipal by-laws, as hereinafter provided.

"23. An appeal shall lie to the Supreme Court in any case of proceedings for or upon a writ of *habeas corpus*, not arising out of a criminal charge, and in any case of proceedings for or upon a writ of *mandamus*, and in any case in which a by-law of a municipal corporation has been quashed by a rule of court, or the rule for quashing it has been refused after argument."

In 1879, by 42 V. c. 39, the provision with respect to appeals from the Province of Quebec was amended so as to read substantially as it now appears, in section 46. The amendment of 1879 also introduced the provisions now contained in sections 44 and 45, *supra*, and in addition introduced the provision of this section.

In the case of *Danjou* v. *Marquis*, 3 S.C.R. 251, arising on the statute as it was previous to the amendment of 1879, and when the question was governed by the interpretation to be placed upon ss. 17 and 23 (*supra*, p. 9) of the original Supreme and Exchequer Courts Act, it was discussed whether or not under these sections an appeal would lie to the Supreme Court in the matters mentioned in s. 23, where the judgment was not a final judgment of the highest court of last resort, and Strong, J., was of the opinion it was not necessary that the judgment appealed from should have been a final judgment. The subject was discussed later in a number of cases, but the question was finally settled by the judgment in *Langevin* v. *St Marc*, 18 Can. S.C.R. 599, where it was held that a judgment to be appealable in matters of mandamus, habeas corpus, and municipal by-laws, must be final, and, subject to the exception provided

for by s. 40, *supra*, giving an appeal in the Province of Quebec, from the Superior Court sitting in Review, the appeal must come from the highest court of last resort. S. 48. Ontario Appeals.

It is to be noticed in this last case that no where except in the dissenting judgment of Mr. Justice Patterson is there reference to the present section 47, then s. 30 (R.S.C. c 145), nor was any argument based upon the fact that as s. 28 (now s. 44) gave an appeal only from final judgments, and s. 30 (now s. 47) said that s. 28 should not apply to cases of mandamus, therefore it was clear no appeal would lie in cases of mandamus when the judgment was interlocutory. The Court dealt with the question solely in the light of s. 24, which in s.s. (*a*) said an appeal should lie "from all final judgments," etc., and in s.s. (*g*) said an appeal would lie in cases of "mandamus," etc. The only point considered by the Court was whether the word "final" in s. 24 (*a*) governed the other subsections of that section.

The Exchequer Court Act provides that the appeal to the Supreme Court shall be from final judgments, with the one exception of judgments on demurrers.

The jurisprudence of the Supreme Court with respect to *demurrers* is discussed, *supra*, p. 24.

In Admiralty cases an appeal lies from the local judge in Admiralty direct to the Supreme Court.

The bearing of this section upon cases of new trials and municipal by-laws is discussed, *supra*, pp. 196 and 171 respectively.

48. No appeal shall lie to the Supreme Court from any judgment of the Court of Appeal for Ontario, unless,—

(a.) the title to real estate or some interest therein is in question;

(b.) the validity of a patent is affected;

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

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

(e) special leave of the Court of Appeal for Ontario or of the Supreme Court of Canada to appeal to such last-mentioned Court is granted.

2. Whenever the right to appeal is dependent upon the amount in dispute such amount shall he understood to he that demanded and not that recovered, if they are different. 60-61 V., c. 34, s. 1.

S. 48 (a).

Ontario Appeals. Title to lands.

48 (a)—Title to real estate.

The language used in s. 48 limiting appeals from the Province of Ontario, differs from that in the Province of Quebec, where the words are "the title to real estate or some interest therein is in question." Whether this language is the exact equivalent of the words in the Quebec section, has not been expressly declared. But Idington, J., makes use of the following language in *Grimsby Park* v. *Irving*, 41 S.C.R. p. 35:

"It was held in this court so long ago as the case of *Wineberg* v. *Hampson*, 19 S.C.R. 369, that the merely raising of a question of a right of servitude would not give it jurisdiction. It is true that the words 'interest therein' did not appear in the same connection, in relation to appeals from Quebec definitely settled by the said decision as in this section, but I do not think, as used in this section, they cover or were intended to cover cases of servitude or easement."

He proceeds to point out the amendment made in Quebec, above referred to, where the words "such like matters or things" were altered to read "other matters or things," and concludes by expressing the opinion that the Ontario section involves the same construction as was given to the section in Quebec when *Wineberg* v. *Hampson*, *supra*, was decided.

Jermyn v. Tew, 28 Can. S.C.R. 497.

While an action to set aside a second mortgage on lands for $2,000 was pending, the lands were sold under a prior mortgage which only left $270 to apply on second mortgage. A motion having been made to quash the appeal for want of jurisdiction it was urged for the appellant that the title to real estate or some interest therein was in question, but the Court quashed the appeal holding that only the $270 was in question and not any question of a title or interest in land.

Waters v. Manigault, 30 Can. S.C.R. 304.

The plaintiff's action was for an injunction to restrain a municipal engineer from proceeding with the cleaning out of a ditch made under the Ditches and Watercourses Act, in such a manner as he claimed would cause injury to his lands by bringing down thereon surface water by artificial means in an illegal and improper manner, and so as to interfere with the enjoyment of his legal rights in the said lands. *Held*, that no appeal would lie to the

Supreme Court under the Act in question, 60-61 V. c. 34, s. 1, sub-s. (*a*) (now 48 (*a*)).

S. 48 (a). Ontario Appeals. Title to lands.

Canadian Pacific Rly. v. City of Toronto, 30 Can. S.C.R. 337.

Upon a reference to a master under the Vendor and Purchaser Act his ruling with respect to covenants which should be contained in a lease was affirmed by a judge of the High Court and by the Court of Appeal. *Held*, that no appeal would lie to the Supreme Court.

Vide, cases cited under 46 (*b*), *supra—Title to lands.*

Canadian Mutual v. Lee, 34 Can. S.C.R. 224.

The plaintiff's action was to have it declared that a mortgage assigned by the mortgagee to the defendant was paid and to recover $460.80 paid to the defendant beyond the principal and interest. The defendants, by counter-claim, claimed a balance due of $79.20. The plaintiff's action was dismissed, but the Court of Appeal reversed the judgment and directed a reconveyance of the mortgaged lands and that judgment be entered for plaintiff for $47.04. An appeal by the defendants to the Supreme Court was quashed, the Court holding that the pecuniary amount in controversy was less than $1,000 and there was no title to real estate or an interest therein in question.

Upon the argument of the motion to quash herein the appellant applied for leave to appeal which was refused, the Court holding that more than 60 days having elapsed since the judgment below, the Supreme Court had no jurisdiction.

Vide O'Brien v. *Allen*, *infra*, p. 291.

48 (b)—Validity of a patent.

48(c)—Matter in controversy exceeds $1,000.

Bain v. Anderson, 28 Can. S.C.R. 481.

To reconcile paragraphs *c* and *f* of this section (now 48 (*c*) and 48 (2), the latter should be read as if it meant the amount demanded in the appeal and, therefore, in the Province of Ontario in determining what is the amount in controversy it is necessary to consider the amount of the judgment recovered, not the amount demanded, if they are different.

S. 48 (c).

Ontario Appeals. Amount involved.

City of Ottawa v. Hunter, 31 Can. S.C.R. 7.

Held, that to harmonize sub-sections *c* and *f* of this section (now 48 (*c*) and 48 (2)), the latter sub-section must be construed as if the words "by the appeal" were inserted after the word "demanded." As a result in the Province of Ontario it is the amount in controversy in the appeal which governs the jurisdiction of the Supreme Court and not the amount demanded by the declaration of the plaintiff, as in the Province of Quebec.

Bennett v. Havelock Electric Light & Holcroft, &c. Feby. 22, 1912

This was an action brought by the plaintiff on behalf of himself and the shareholders in the defendant company in which it was alleged that the defendants other than the company, had, by a fraudulent scheme, obtained incorporation of the defendant company, of which the defendants' other than Matheson became directors, and as such directors, entered into a fraudulent agreement with defendant, Matheson, by which the company was to purchase certain property belonging to Matheson for $5,000 and to receive from him $1,000 each, with which each should subscribe and pay for forty shares of the capital stock of the company at the par value of $25 per share; and asked that the shares so issued to the said directors should be cancelled, or in the alternative, that they be condemned to pay $4,700, the amount of their secret and dishonest profits, or the amount unpaid on the stock so subscribed for by them, or that the agreement and the conveyance between the defendant Matheson and the company be rescinded and the defendants ordered to pay the company $5,000.

The trial judgment dismissed the action. The Divisional Court varied this and ordered that the plaintiffs recover against each of the four defendants other than Matheson the sum of $1,000 and costs, and dismissed the action as against the defendant Matheson. This was reversed by the Court of Appeal and the judgment at the trial restored. The plaintiffs then launched the appeal to the Supreme Court and a motion was made to quash for want of jurisdiction.

In the reasons against the appeal the plaintiffs, present appellants, began by the words: "The respondents (plaintiffs) submit that the judgment appealed from is right and should be confirmed for the reasons therein mentioned and for the following among other reasons." The sixth reason against the appeal said: "The liability of the directors in the circumstances to refund the secret profits is joint and several and they should be charged with interest thereon from the date of its receipt, and the plaintiffs should have a salvage lien upon the funds to be paid into court for costs as between solicitor and client throughout the whole of the action."

The motion to quash was allowed.

The conclusion to be drawn from the judgment in this case would appear to be that although a statement of claim

S. 18 (c).

Ontario Appeals. Amount involved.

may ask a joint and several judgment against the defendants exceeding what is required to give jurisdiction to the Supreme Court, if the plaintiff recover judgment against each defendant individually for a sum less than that required to give jurisdiction, and when the other party appeals from such a judgment and the plaintiff does not cross appeal but demands confirmation of the judgment in his favour, if the defendant succeeds and the plaintiff's action is dismissed in the Court of Appeal, he has no right of appeal to the Supreme Court, because the amount in controversy is the amount for which he had judgment in the court below. Where a judgment for an amount in the case of each individual defendant is less than what is required to give jurisdiction to the Supreme Court, although the total amount for which judgment was given against all the defendants is more than the amount required to give jurisdiction, no appeal will lie to the Supreme Court.

Bradley v. Saunders, Cout. Cas. 380.

Appeal from the judgment of the Court of Appeal for Ontario, affirming the decision of the trial judge.

This case arose from a provision in a will appointing two brothers of the testator executors and trustees, that "in the event of the death or inability or refusal to act of either of said trustees, then my surviving brothers and sisters, or a majority of them," should have power of appointment.

After the testator's death, the executors named obtained probate of the will, and three months later one of them died. A year after his death, a majority of the brothers and sisters surviving appointed the plaintiff executor and trustee in his place. The surviving executor refused to recognize such appointment, claiming that the power could only be exercised in case of the refusal or death at the time of the testator's death.

The plaintiff (respondent) brought an action to have it declared that he was a trustee under the will, and for a mandatory order to compel the surviving trustees (appellants) to permit him to assist in administering the trusts.

The trial judge held that the plaintiff was properly appointed, reserving all the other issues. The Court of Appeal for Ontario affirmed his judgment

Motion to quash the appeal for want of jurisdiction on the ground that there was no title to real estate involved and that the case was not otherwise appealable to the Supreme Court of Canada under the provisions of the Supreme and

S. 48 (e). Ontario Appeals. Leave to appeal.

Exchequer Courts Act and its amendments. The appellants opposed the motion and alternatively asked that special leave for an appeal should be granted on account of the importance of the questions involved.

The motion to quash was allowed by the court and the application for special leave to appeal was refused.

Appeal quashed with costs.

Vide notes to Section 46(c), *supra*, p. 250.

48 (d)—Vide cases cited under 46 (b), supra.

48 (e)—Leave to appeal.

Aurora v. Markham, 32 Can. S.C.R. 457.

Held, per Taschereau, J.—"When special leave has been asked of the Court of Appeal for Ontario and refused or granted the case is concluded. It is clearly concluded when granted. I do not see why it is not concluded if refused. If refused by the Court in first instance it could hardly be contended that the Court of Appeal for Ontario could subsequently grant leave. Yet that would be the consequence if we should decide that a party having elected to ask leave from one of the two courts would, after being refused, have the right to apply to the other court."

Fisher v. Fisher, 28 Can. S.C.R. 494.

An action in which less than the sum or value of one thousand dollars is in controversy and wherein the decision involves questions as to the construction of the conditions indorsed upon a benevolent society's certificate of insurance and as to the application of the statute securing the benefit of life insurance to wives and children to such certificates is not a matter of such public importance as would justify an order by the Court granting special leave to appeal under the provisions of subsection (*c*) of the first section of the statute 60 & 61 V. c. 34 (now 48 (*c*)).

G. T. Rly. Co. v. Atcheson, Cout. Dig. 116.

In affirming a judgment for $500 damages the Court of Appeal for Ontario (1 Ont. L.R. 168) held that "when a car of a foreign railway company forms part of a train of a Canadian railway company it is 'used' by the latter company within the meaning of section 192 of the Railway Act, 51 V. c. 29 (D) 3, so as to make the company liable in

damages for the death of a brakeman caused by the car being so high as not to leave the prescribed headway between it and an overhead bridge." On special application for leave to appeal from this judgment it was urged that the car had been taken over from an American line to which the Act limiting height of cars in the Dominion could not apply; that the company was by statute obliged to accept and haul the car; that in hauling the car the company could not, at most, be subject to any other than the penalty prescribed by statute, and that in any case, deceased was insured against accidents in the company's association and his representatives could claim no more than $250 for which he was insured. The application was refused on the ground that a sufficient *primâ facie* case for granting special leave for an appeal had not been made out.

S. 48 (c). Ontario Appeals. Leave to appeal.

G T R. v. Vallee, Cout. Dig. 116.

On special application for leave to appeal from a judgment (1 Ont. L.R. 224) affirming the trial court judgment awarding less than $1,000 damages, it was urged that the courts below had erred in adhering to rules laid down years ago in respect to granting nonsuits, with which the later English decisions do not accord. The application was refused by the Supreme Court without calling upon respondent's counsel.

Toronto Rly. Co. v. Robinson, 29th October, 1901.

The respondent recovered a judgment for $600 damages in an action tried before Falconbridge, C.J., and a jury. On appeal to the Court of Appeal the majority of the court held that there was no evidence to justify a finding of negligence, and set aside the judgment in respondents favour. An application was made to the Court of Appeal for leave to appeal to the Supreme Court. The two judges who dissented upon the appeal were of opinion to grant leave, but the majority refused. A further application for leave to appeal made to the Supreme Court of Canada was refused.

Royal Templars v. Hargrove, 31 Can. S.C.R. 385.

Held, that special leave to appeal from a judgment of the Court of Appeal for Ontario will not be granted where the questions involved are not of public importance and the judgment of the Court of Appeal appears to be well founded.

S. 48 (e). Ontario Appeals. Leave to appeal.

Rice v. The King, 32 Can. S.C.R. 480.

This was a motion for leave to appeal from the Court of Appeal for Ontario affirming the conviction of the appellant for murder. *Held*, that the statute 60-61 V. c. 34 (now section 48) only applies to civil cases and that criminal cases are still governed by the Criminal Code.

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

Held, that special leave to appeal will not be granted on the ground merely that there is error in the judgment of the Court of Appeal. There must be special reasons to support such an application.

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

Held, that this section merely gives a right to grant leave to appeal in the class of cases which previous to 60-61 V. c. 34, were appealable, but which by that Act are not thereafter appealable *de plano*.

Schulze v. The Queen, 6 Exch. C.R. 268.

Leave to appeal to the Supreme Court in this case was refused by Gwynne, J., who gave the following oral judgment:—

"I think in all applications to the this Court for leave to appeal from the Exchequer Court, when the amount involved is under $500, leave should not be granted unless the judge before whom the motion is made is of the opinion that the judgment of the court below is so clearly erroneous that there is reasonable ground for believing that a court of appeal should reverse the judgment upon a point of law, or upon the ground that the evidence does not at all warrant the conclusions of fact arrived at. In the present case no such grounds appear, and the motion for leave will, therefore, be refused with costs.

Municipal bylaws in the Province of Ontario.

There being no provision in the statute with respect to appeals from the Province of Ontario similar to that in the Province of Quebec, which excludes from the section limiting appeal cases of municipal by-laws, the result has been that the court has held that in the Province of Ontario there is no appeal where the proceeding is a motion to quash a by-law, however large may be the amount involved as the direct result of the by-law being set aside.

The same rule has been applied where the by-law has been attacked in an action instituted by writ, *infra*, p. 283.

S. 48 (c).

Ontario Appeals. Leave to appeal.

Aurora v. Markham, 32 Can. S.C.R. 457.

This was a motion for special leave to appeal from the judgment of the Court of Appeal, quashing a by-law of the Town of Aurora. In refusing leave the Chief Justice who gave the judgment of the Court, said:—

"I am of opinion that we ought not to sanction an appeal in a case such as the present. First, for the reason that leave has already been refused by the provincial court. Were we to do so we should be substantially, but indirectly, reviewing the discretion of the Court of Appeal in a matter in which no appeal is given, for it has been held by high authority in England that a decision granting or refusing leave to appeal is not itself the proper subject of an appeal. Parties having the election of making the application to either court and, indeed, according to the words of the Act, to both alternatively, but it does not seem reasonable that having elected to make application to one court they should in case of failure be at liberty to resort to the other. Therefore upon this, treating it as a ground for refusing leave and not as an objection to the jurisdiction of this Court, I think we ought to refuse this application.

"Further, the ground on which the Court of Appeal quashed the by-law is so clear and plain that, taking into consideration the probability or improbability of error being established in the judgment of the court below (a matter always considered by the Privy Council on an application for leave to appeal), it appears that the judgment cannot be otherwise than right."

With respect to the right to appeal *de plano, vide Aurora v. Markham, supra*, p. 177.

Hamilton v. Hamilton Distillery Co., 38 Can. S.C.R. 239.

This was an action in which plaintiffs asked for a declaration that certain municipal by-laws were unauthorized, illegal and invalid, and an injunction restraining defendants from levying or collecting certain water rates. A motion having been made to quash the appeal for want of jurisdiction, the Court said: "No relief is sought in the action but the declaration and injunction above mentioned; and no return of rates already paid is sought. Therefore, the only clause of the Act, 60 & 61 Vict. ch. 34, regulating the right to appeal to this court from the Court of Appeal for Ontario which could be invoked as possibly permitting an appeal, is clause (*d*), which allows it:

S. 48 (e). Ontario Appeals. Leave to appeal.

Where the matter in question relates to the taking of an annual or other rent, customary and other duty or fee, or a like demand of a general or public nature, affecting future rights.

"We are of opinion that these cases cannot be held to come within the language of that clause, and that, without leave, this court has no jurisdiction.

"We however, allow the appeals to stand to afford the appellants an opportunity, if so advised, to apply to the Court of Appeal for leave to appeal."

Hamilton Street Railway Co. v. City of Hamilton, Nov. 27th, 1906 (not reported).

This action was brought to enforce an agreement confirmed by by-law by which the defendants agreed to sell working men's tickets, 8 for 25 cents, to be used between certain limited hours. The plaintiff in addition to specific performance of the agreement, also claimed a mandatory injunction to compel the defendants to sell the tickets in question. The plaintiffs succeeded at the trial and this was affirmed by the Court of Appeal. When this case was on the list of the Supreme Court for hearing, and when judgment was given in the next preceding case, the appellants applied for and obtained leave to appeal from the Court of Appeal. When the case was called, the Registrar was instructed to enter a minute to the effect that an order of the Court of Appeal granting leave to appeal had been filed.

Goold Bicycle Co. v. Laishley, 35 Can. S.C.R. 184.

In this case the company sought special leave to appeal on the ground that the judgment below was for $1,000, and the costs already amounted to $1,000 more, but the application was refused.

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

Held, leave to appeal might well be granted where the case involves matters of public interest or some important question of law or the construction of Imperial or Dominion Statutes, or a conflict of provincial and Dominion authority, or questions of law applicable to the whole Dominion.

Held, if a case is of great public interest and raises important questions of law, yet the judgment is plainly right, no leave should be granted.

This case was affirmed and followed in *Whyte Packing Co. v. Pringle*, 42 Can. S.C.R. 691.

S. 48 (e).

Ontario Appeals. Leave to appeal.

Townsend v. Cox (1907), A.C. 514. C.R. [1907] A.C. 26.

In this case Lord Collins said:

"In the judgment of this Board delivered by Lord Watson in *La Cité de Montréal* v. *Les. Ecclesiastiques du Séminaire de St. Sulpice de Montréal* (14 App. Cas. 660, at 662) there is the following passage: 'A case may be of a substantial character, may involve matter of great public interest, and may raise an important question of law, and yet the judgment from which leave to appeal is sought may appear to be plainly right, or at least to be unattended with sufficient doubt to justify their Lordships in advising Her Majesty to grant leave to appeal.'"

Hamilton Brass Manufacturing Co. v. Barr Cash and Package Co., Cout. Cas. 382.

Motion for special leave to appeal from the Court of Appeal for Ontario.

By agreement, the appellants were to manufacture and sell cash and package carriers, and, after charging up the cost of construction, to divide the net profits with the respondent who were patentees of the articles. The profits were divided up to August, 1895, when appellants, claiming a breach of the conditions, treated the contract as ended, but continued to manufacture and sell.

In an action against them for an account, they pleaded termination of the contract; account stated and settled; statute of limitations, and breach by the respondents. On a reference to the Master to take the accounts, he held that appellants were licensees and that the account should only go back to 1901; that it should be taken to the time of the issue of the writ, and that the contract was terminated by notice after the judgment on which the reference was made.

The Master's report was affirmed by Mr. Justice Street, but the Court of Appeal held that the appellants were grantees and not licensees, and that the statute of limitations could not be invoked; that the Master should take the account to the date of his report, and that it was beyond the scope of his functions to decide that the contract was at an end, and even if not, he was wrong, as the facts did now shew a termination.

The motion was refused by the court on the ground that the questions in controversy upon such an appeal would not justify the exercise of judicial discretion in granting an order for special leave. Motion refused with costs.

Note.—Subsequently an appeal was taken from the above judgment, *de plano*, the appellants claiming that the pecuniary amount in controversy actually exceeded one thousand dollars. This appeal was heard by the Supreme Court of Canada, on 22nd and 23rd November, 1906, and on 11th December, 1906, the appeal was allowed in part without costs. See 38 Can. S.C.R. 217.

S. 48 (e). Ontario Appeals. Leave to appeal.

Beck Manufacturing Co. v. Valin, 40 Can. S.C.R. 523.

Appeal by special leave of the Court of Appeal for Ontario (16 Ont. L.R. 21) from a decision of that Court affirming the judgment of the Divisional Court which sustained the refusal of a judge in Chambers to issue a writ of mandamus.

In 1903 the C. Beck. Mfg. Co. obtained an order from the judge of the District of Nipissing fixing the tolls to be paid on logs floated down a stream called Post Creek. This order was set aside by a Divisional Court on the ground that it related to operations before it was made and that the judge had not the necessary evidence before him to make a proper order and had not considered certain matters required by the Act. A fresh order was then obtained fixing the tolls, as the respondents, the Ontario Lumber Company, claimed, for future operations. The C. Beck Company claimed to be entitled under this to payment of tolls for logs floated before it was made and brought action to recover the same, but failed in all the courts. The decision of the Court of Appeal in that action is reported in 12 Ont. L.R. 163, and affirms that of the Divisional Court, 10 Ont. L.R. 193.

In 1906 the C. Beck Company applied to the district judge to take evidence for the purpose of fixing tolls which might be charged for logs driven on Post Creek in 1903 and on his refusal to hear the evidence or make the order they applied to the judge of the High Court for a writ of mandamus to compel him to do so. The writ was refused, and the refusal sustained by the Divisional Court and Court of Appeal. The company then appealed to the Supreme Court of Canada.

John Goodison Threeher Co. v. Corporation of the Township of McNab, 42 Can. S.C.R. 694.

Appeal from a decision of the Court of Appeal for Ontario reversing the judgment of a Divisional Court which sustained the verdict at the trial in favour of the plaintiffs.

The action was brought to recover compensation for injury to an engine of the plaintiff company, which went through a bridge in the defendant municipality owing, it was alleged to negligence of the defendants in failing to keep such a bridge in a proper state of repair. The plaintiffs succeeded at the trial, and in a Divisional Court, but their action was dismissed by the Court of Appeal, which, on application to the plaintiffs, granted an order extending the time for appealing to the Supreme Court of Canada.

S. 48 (e). Ontario Appeals. Leave to appeal.

As the damages recovered at the trial were only $807, there was no appeal to the latter court as of right, and the plaintiffs moved for special leave. It was held, that after the expiration of sixty days from the signing or entry or pronouncing of a judgment of the Court of Appeal for Ontario, the Supreme Court of Canada is without jurisdiction to grant special leave to appeal therefrom, and an order of the Court of Appeal extending the time will not enable it to do so.

Leave was subsequently granted by the Court of Appeal, and the case came on for hearing on the merits, 44 Can. S.C.R. 187.

Ellis v. Renfrew, Mar. 24, 1911.

This was a motion for leave to appeal from the judgment of the Court of Appeal, reported 2 O.W.N. 837. An application had been unsuccessfully made to a single judge to quash a local option by-law on the ground that the election had not been conducted in accordance with the principles of the Municipal Act, that the town clerk improperly acted as returning officer, that the secrecy of the ballot was violated in many instances, that the clerk did not declare that the by-law had received the assent of three-fifths of the electors, and alternatively, if he did so declare, he did so illegally, because of his failure to comply with the law in that behalf. An appeal from this refusal to quash was dismissed by the Divisional Court and subsequently by the Court of Appeal. The Supreme Court refused the motion, the reason assigned by the Chief Justice being that the facts did not disclose circumstances sufficient to warrant the Court in exercising the discretion vested in it by the statute.

Henderson v. West Nissouri, Nov. 17th, 1911.

This was a motion for leave to appeal from the judgment of the Court of Appeal, reported 20 O.W.R. 50. A motion was made to a single judge to quash a municipal by-law for erecting and maintaining a continuation school based on a by-law of the county setting aside and establishing the township as a continuation school district. The motion was refused. Further appeals to the Divisional Court and Court of Appeal were also dismissed. The application was dismissed without calling on counsel contra.

S. 48 (e). Ontario Appeals. Leave to appeal.

Rex. v. Ing Kon, Nov. 17th, 1907.

The defendant was convicted by the police magistrate of Toronto for selling liquor without a license, and an order was made for the destruction of the liquor seized. On *certiorari* the High Court confirmed the conviction but varied the order so far as part of the liquor seized was concerned, on the ground that it was covered by the provisions of 61 V. c. 30, s. 3. His judgment was affirmed by the Court of Appeal (reported Weekly Notes). The private prosecutor applied to the Supreme Court for leave to appeal which was refused.

Lyman v. Canada Foundry Co., Dec. 2nd, 1908.

Motion for leave to appeal where, in another case arising out of the same accident, the defendants are appealing to this court *de plano*, and now ask leave as in this case the amount involved is $500. The judgment appealed from grants a new trial. The case does not fall within *Lake Erie* v. *Marsh*, and the majority of the court is of opinion that the circumstances of this case do not afford grounds for extending the cases in which, by the above judgment, leave to appeal should be granted.

Whyte v. Pringle, Feb. 25th, 1911.

The Court refused a motion for leave as the case did not fall within grounds upon which leave will be granted laid down in *Lake Erie & Detriot River* v. *Marsh*.

Re Shantz, May 8th, 1911.

An application made on motion to Mr. Justice Teetzel under Judicature Act, s. 58, s.s. 9, and Rule 1091, for a mandatory order compelling company to cause to be transferred to the appellant F. S. Good five shares of fully paid up stock of the company. A by-law of the company provided that all transfers of stock must be approved by the Board of Directors. Following *re Imperial Starch Co.*, 10 O.L.R. 22, the order was refused. This was affirmed by the Divisional Court. Leave to appeal to the Court of Appeal was granted by Moss, C.J.O., in terms that the company pay respondent's costs as between solicitor and client in any event of the the appeal,—costs of application to be costs to respondent in any event. If not accepted, application dismissed with costs. Leave granted by the Supreme Court upon terms similar to those imposed by Chief Justice below. *Vide* also

Lovell v. *Lovell*, 13 O.L.R. 587; *Milligan* v. *Toronto Rly. Co.*, 18 O.L.R. 109; *Irving* v. *Grimsby Park Co.*, 18 O.L.R. 114. *Vide* leave to appeal to the Judicial Committee of the Privy Council, *infra*, p. 322.

S. 48 (e). Ontario Appeals. Leave to appeal.

When application must be made.

Application to the Supreme Court for leave must be made within 60 days from the signing, entry or pronouncement of the judgment under section 69.

Vide Canadian Mutual v. *Lee*, 34 Can. S.C.R 224, *supra*, p. 277; *Goodison* v. *McNab*, *supra*, p. 286.

Connell v. Connell, 9th June, 1905.

On this appeal being called, a motion to quash was made on behalf of the respondents on the ground that the case did not fall within any of the provisions of 60-61 V. c. 34 (now section 48), limiting appeals from the Court of Appeal for Ontario to the Supreme Court of Canada. The Court reserved the question of jurisdiction and the argument was partially heard, but before its conclusion the Court announced that there was grave doubt as to its jurisdiction, and that as more than 60 days had elapsed since the judgment below, the Supreme Court had no power to grant leave to appeal, but that the application for leave would require to be made to the Court of Appeal. The argument was thereupon directed to stand over until an opportunity was given to the appellants to obtain such leave. Leave having subsequently been granted, the case was heard on the merits.

Brussels v. McCrae, unreported (1904).

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

S. 48 (2).

Ontario Appeals. Amount in dispute.

Appeal for leave to appeal, which was granted, and the case subsequently was heard by the Supreme Court on the merits. *Vide Hamilton* v. *Hamilton Distillery, supra*, p. 283; and *Hamilton Street Railway* v. *Hamilton, supra*, p. 284.

48 (2)—Amount in dispute.

The jurisprudence of the Supreme Court, as settled in *Ottawa* v. *Hunter, supra*, p. 278, is that, reading sub-sections 48 (*c*) and 48 (2) together, it is the amount in controversy in the appeal which governs and not the amount claimed in the declaration. The decision, therefore, in the Province of Quebec, between *Allan* v. *Pratt* (July 1888), and 54-55 V. c. 25, in the year 1891, during which period it was held similarly that it was the amount in controversy in the appeal which governed in the Province of Quebec, are applicable to this section. These decisions are: *Moutte* v. *Lefebvre, supra*, p. 269; *Ontario & Quebec* v. *Marchesterre, supra*, p. 269; *Cossette* v. *Dunne, supra*, p. 269; *Dawson* v. *Dumont, supra*, p. 261; *Williams* v. *Irvine, supra*, p. 411; *Cowans* v. *Evans, supra*, p. 270; *Mitchell* v. *Trenholme, supra*, p. 411; *Mills* v. *Limoges, supra*, p. 411; *Montreal Street Ry.* v. *Carrière, supra*, p. 270; *Labelle* v. *Barbeau, supra*, p. 270.

49. No appeal shall lie to the Supreme Court from any final judgment of the Territorial Court of the Yukon Territory, other than upon an appeal from the Gold Commissioner, unless,—

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

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

(c) the validity of a patent is affected;

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

(e) the matter in controversy amounts to the sum or value of two thousand dollars or upwards. 2 Edw. VII. c. 35, s. 4.

49 (a).—Vide notes to 46 (b), supra, p. 211.

49 (b).—Vide notes to 48 (a), supra, p. 276.

49 (c).—Vide notes to 46 (c), supra, p. 250.

49 (d).—Mandamus—prohibition. Vide notes to 39 (c) and (d), supra, pp. 156 and 162.

S. 49.

Yukon Appeals.

Injunctions.—This section gives an appeal in all cases in which an injunction is the remedy, or one of the remedies claimed. No similar provision is found in the sections giving an appeal in cases from Quebec or Ontario, and in these provinces the appeal, in cases where an injunction is asked, will only lie if the case falls within one or more of the conditions giving jurisdiction provided for in sections 46 and 48 respectively.

49 (e).—Vide notes to 46 (2), supra, p. 268.

O'Brien v. Allen, 30 Can. S.C.R. 340.

In this case the executive government of the Yukon Territory granted the appellants the privilege of constructing a toll tramway, and fixed a tariff of charges for the carriage of passengers and freight. The appellants constructed the tramway at an expense of over $45,000. The respondents being required to pay the charge of toll on some freight amounting to $1.25, brought an action for repayment of the amount, and claiming that the appellants had no authority to levy the same. The trial judge gave judgment in favour of the respondents. An appeal to the Supreme Court was allowed.

This decision was given when the Yukon Territory Act, 62-63 V. c. 11 (1899), was in force, which provided for an appeal from the Territorial Court of the Yukon to the Supreme Court of British Columbia, subject to the same conditions as are now contained in section 49, and by the same Act a like appeal was given to the Supreme Court of Canada.

JUDGMENTS.

50. The Court may quash proceedings in cases brought before it in which an appeal does not lie, or whenever such proceedings are taken against good faith. R.S., c. 135, s. 59.

Motions to quash cannot be made to a judge in Chambers, but must be made to the full Court, and should be brought on for hearing at the earliest moment possible, otherwise no costs may be allowed. The object of this is to save costs in the event of the motion being granted. The proper course is to set the motion down for the first day of the nearest session, and if counsel consent that the motion shall

S. 50.

Quashing appeals.

he taken up when the appeal is called on the merits, the Registrar will enlarge the motion until that date. When it is intended that the motion to quash shall be heard along with the appeal, the respondent should raise his objection to the jurisdiction of the court in his factum.

Where the respondent has been prompt in having the question of jurisdiction disposed of by the court, he will, if the appeal is quashed, be allowed the general costs up to the judgment quashing the appeal, and a counsel fee on the motion to quash. Unless the court directs that the counsel fee to be allowed shall be only as of a motion to quash, and the appeal is quashed when it comes on for hearing on the merits, the Registrar, if the motion to quash has been launched promptly and by consent of parties has stood over until the case was called on the merits, has been accustomed to take into consideration in fixing the counsel fee, the fact that counsel had to be prepared to argue the case on the merits.

Danjou v. Marquis, 3 Can. S.C.R. 251.

In this case the respondent moved to quash the appeal for want of jurisdiction. On taxation the respondent was allowed the general costs of the appeal up to the hearing of the motion to quash and a fee on argument of $100.

Reid v Ramsay, 1879.

In this case the appeal was quashed and the objection to the jurisdiction was taken by the respondent in his factum. the respondent was allowed the costs of a motion to quash.

McGowan v. Mockler, 1879.

The appeal was quashed for want of jurisdiction, and the general costs of the appeal to the hearing were allowed.

Le Maire de Terrebonne v. Lee Soeurs de Providence, 1886.

The motion to quash was granted and the appeal was quashed with costs, the objection to the jurisdiction being taken by the respondent in his factum.

Where the objection to the jurisdiction is taken at the hearing by the court, or is not taken promptly, as a general rule no costs will be given. *Vide* notes to Rule 1. *Major* v. *Three Rivers*, Cout. Dig. 71; *Champoux* v. *Lapierre*, Cout. Dig. 56; *Bank of Toronto* v. *Le Curé*, Cass. Dig. 432; *Gladwin* v. *Cummings*, Cout. Dig. 388.

In these cases the objection was taken by the court.

The Queen v. Nevins, 1884.

In this case a conviction by justices of the peace was brought into the Court of Queen's Bench, Manitoba, by a writ of *certiorari*, and a rule *nisi* to quash the conviction was on motion granted, and after argument made absolute. The Supreme Court quashed the appeal for want of jurisdiction, as the cause had not arisen in a superior court of original jurisdiction, but gave the respondents the costs of the appeal, although the objection had been taken by the court.

Gladwin v. Cummings, Cout. Dig. 388.

Where an appeal is quashed for want of jurisdiction it will be quashed without costs if the objection has been taken by the court itself.

Gendron v. McDougall, Cout. Dig. 56.

No costs were given as the motion was not made at the earliest convenient moment.

Domville v. Cameron, Cout. Dig. 122.

In this case the appeal was quashed for want of jurisdiction, but without costs, the appeal having been heard *ex parte*, the respondent not appearing.

Barrington v. City of Montreal, 25 Can. S.C.R. 202.

Appeal was quashed without costs, the objection not having been taken in the factum nor by a motion.

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

On this case coming on for hearing the court of its own motion suggested that the judgment appealed from was not a final judgment and that there was no jurisdiction in the court to hear such an appeal. Although the appeal was quashed with costs the latter were limited to those of a motion to quash.

Schlomana v. Dowker, 30 Can. S.C.R. 323.

A motion was made to quash the appeal not on the ground that the court had no jurisdiction, but because there had been *acquiescement* in the judgment below, the Court holding that there had been *acquiescement*, quashed the appeal, saying: "This is not exactly a case such as we

S. 51.

Power of Court.

have hitherto considered as a proper one for a motion to quash, but we are of opinion that in future this proceeding should be adopted in cases like the present, as it has the advantage of avoiding costs." The appeal was accordingly quashed with costs as of a motion to quash.

Angers v. Duggan, Feby. 19th, 1907.

This appeal was quashed on the ground that since the judgment against the appellant in the Superior Court, his interest in the lands in question under a deed of sale *à réméré* had ceased by payment and by a deed of retrocession, executed by him to the party entitled to reclaim. It was further held that, following *Schlomann* v. *Dowker*, 30 Can. S.C.R. 323, a motion to quash was a convenient way of disposing of the appeal before further costs had been incurred.

Genereau v. Bruneau. Dec. 9th, 1910.

In this case the respondent promptly moved to quash, but the Court directed that the motion should stand to be heard and disposed of when the appeal came on to be argued on the merits. The merits were argued by the appellants for one day, and respondent's counsel raised the question of jurisdiction in opening his argument on the merits. The Court quashed the appeal without hearing respondent on merits, and reserved judgment as to costs, and subsequently ordered that the respondent should have his costs of the appeal and not merely the costs of motion.

51. The Court may dismiss an appeal or give the judgment and award the process or other proceedings which the court, whose decision is appealed against, should have given or awarded. R.S., c. 135, s. 60.

Sewell v. British Columbia Towing Co., 9 Can. S.C.R. 527.

In an action for damages for negligently towing a ship and causing her destruction, the jury answered certain questions put to them by the judge, and were discharged, and on motion to the trial judge on behalf of the plaintiff for judgment, his Lordship directed judgment to be entered for the defendants with costs. The plaintiff thereupon appealed to the full Court, where the judgment below was affirmed. Upon a further appeal to the Supreme Court of Canada, the plaintiff contended that pursant to the Judi-

cature Act and the Rules of the Supreme Court of British Columbia, the Supreme Court of Canada could direct a judgment to be entered according to the merits of the case, as it had before it all the material necessary for finally determining the questions in dispute, and had the power also to supplement the findings of the jury. *Held*, that the Court, giving the judgment which the court below ought to have given, was in a position to give judgment upon the evidence at large. The appeal was therefore allowed, and judgment directed to be entered for the plaintiff for $80,000 and costs.

S. 52. New Trial.

Green v. Miller, 33 Can. S.C.R. 193.

In this case the Court held that although there was no evidence which could reasonably be left to the jury, and that it was a case in which the Court, had it the power, would have made a final disposition of the matters in issue, yet the Nova Scotia Judicature Act did not permit of this being done, and the appeal was therefore allowed and a new trial directed to be had between the parties.

52. On any appeal, the Court may, in its discretion, order a new trial, if the ends of justice seem to require it, although such new trial if deemed necessary upon the ground that the verdict is against the weight of evidence. R.S., c. 135, s. 61.

This section was introduced into the Supreme and Exchequer Courts Act by 43 V. c. 34 (1880), probably owing to the decision of the Court in *Moore* v. *Connecticut Mutual*, 6 Can. S.C.R. 634, where the Court held that the Court of Queen's Bench below not having thought fit to grant a new trial upon the ground that the finding of the jury was against the weight of evidence, the Supreme Court, sitting as a court of appeal, had no power to interfere with the exercise of their discretion. This section vests an almost unlimited discretion in the Supreme Court of Canada to direct a new trial in any case, and leaves it unfettered by any decision of the court below refusing or granting a new trial.

Pudsey v. Dominion Atlantic Rly. Co., 25 Can. S.C.R. 691.

After hearing counsel the Court, without reserving judgment, ordered a new trial on the ground that the jury had not properly answered some of the questions submitted. In other respects the judgment appealed from was affirmed.

Vide notes of cases under section 38, *supra*, page 115.

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COSTS.

53. The Court may, in its discretion, order the payment of the costs of the court appealed from, and also of the appeal, or any part thereof, as well when the judgment appealed from is varied or reversed as where it is affirmed. R.S., c. 135, s. 62.

The rule has been to allow costs to the successful party as well where the appeal has been heard on the merits as where it has been quashed for want of jurisdiction, but the respondent may be deprived of his costs where the motion to quash has not been made promptly, or the objection to its jurisdiction has been taken by the Court itself. *Vide* section 50, *supra*.

Beamish v. Kaulbach, 5th June, 1879.

When an appeal is quashed for want of jurisdiction, the court may order the taxation and payment of costs.

Dorion v. Crowley, Cass. Dig. 709. 1886.

Where an objection that the action had been prescribed was taken by the appellant for the first time on the argument of the appeal, the Court held that it was bound to give effect to the objection, but the appeal was allowed without costs in any of the Courts.

Ross v. Gannon, Feby. 19th, 1907.

Plaintiff's action was dismissed by the trial judge. On appeal the Supreme Court of Nova Scotia, consisting of four judges, WRS equally divided and accordingly the appeal was dismissed without costs. The defendant appealed to the Supreme Court of Canada when the appeal was dismissed with costs. On settling the minutes of judgment, after bringing the point before the Court, the registrar provided that the respondent should have his costs as well in the Supreme Court of Nova Scotia as in the Supreme Court of Canada.

Costs out of estate.

Marks v. Marks, June 16th, 1908.

Upon application of counsel for unsuccessful appellant, counsel appearing for respondent and also for executors not parties to the appeal and not objecting, it is ordered that the costs in the Supreme Court be paid out of the estate.

When defendant partially succeeds.

Knock v. Owen, Cout. S.C. Cas. 325.

On application to the Court to vary the judgment as to costs on the ground that the person against whom costs were awarded by the judgment of the Supreme Court had succeeded in one of her contentions, the Court refused, saying: "The partial modification of the judgment appealed from does not alter the fact that *substantially* the respondent succeeded in both courts."

Neglect to bring special circumstances before Court.

Canada Carriage Co. v. Lea, 37 Can. S.C.R. 672.

The respondent moved to vary the minutes settled by the registrar so as to give costs to the respondent, no costs having been given originally, because respondent had not moved promptly. The grounds of the present application were that he had moved promptly and before any printing was done, but his motion was stayed by the Court of Appeal and that subsequently, by consent, the motion stood over until the argument of the merits. The motion was refused with costs fixed at $25. None of the facts set out on motion to vary minutes were brought to the attention of the Court by counsel when the appeal was quashed, although counsel was present. It would appear that in the absence of fraud if counsel neglects to bring any special circumstances to the attention of the Court bearing on the question of costs, relief will not be given subsequently upon a motion to vary minutes.

Costs—Privy Council Practice.

Suraj Bunsi Koer v. Sheo Proshad Singh, L.R. 6 I.A. 88.

When appellants succeeded on a material portion of their claim, although failing in part, they were allowed their costs of the appeal.

Where the appellant has succeeded through a point which was not taken in the court below the Judicial Committee sometimes make him pay the costs of the appeal, and sometimes give no costs. (*Lawson* v. *Carr*, 10 Moo. P.C. 162) as where his conduct has been such as to mislead the opposite party (*Batten* v. *The Queen*, 11 Moo. P.C.C.

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271), or to put the opposite party to needless expense (*McKellar* v. *Wallace*, 8 Moo. P.C.C. 378), or where his proceedings have been unreasonably dilatory, (*Pattabhiramier* v. *Vencatarow*, 13 Moo. Ind. App. 560), or in any way litigious or vexatious, or his claims exorbitant (*Nedham* v. *Simpson*, 2, Knapp, 1; *Harrison* v. *The Queen*, 10 Moo. P.C.C. 201). So where the appellant succeeds in obtaining a slight variation of the decree complained of, but the variation confers no real benefit upon him (*Labouchère* v. *Tupper*, 11 Moo. P.C.C. 198).

Where there have been inaccuracies in the judge's summing up which might reasonably lead the appellant to think that his case had not been properly understood by the court below, the Judicial Committee, though affirming the judgment, have given no costs, (*General Iron Screw Co.* v. *Moss*, 15 Moo. P.C.C. 122).

The Privy Council often decline to allow costs against the appellant, though unsuccessful, when they consider the case to be in itself one upon which it was reasonable to take their opinion (*Churchuard* v. *Palmer*, 10 Moo. P.C. 472), or where there has been a difference of opinion in the court below or in the Court of Appeal (*Bank of Bengal* v. *East India Company*, 2 Knapp, 245; *Barrett* v. *Beaumont*, 1 Moo. P.C.C. 59).

The Judicial Committee allows the costs of both parties to be paid out of the estate whether the appeal be successful or not in those cases only where the circumstances are such as would have justified the court below in making a similar allowance (*Arbuthnot* v. *Norton*, 5 Moo. P.C.C. 219; *Bremer* v. *Freeman*, 10 Moo. P.C. 306).

Where there is more than one respondent, though separate cases are lodged, sometimes only one set of costs is given. (*Safford & Wheeler* P.C. Practice, p. 866).

Where each party succeeded and each failed on substantial issues, the respondent was ordered to pay half the costs, (*Peacock* v. *Byjnauth*, L.R. 18 I.A. 78).

Where parties in the same interest, who might have acted together in an appeal, think proper to put in separate cases or to employ different solicitors, the Judicial Committee generally inclines, unless very good reasons be given for the severance, to allow only one set of costs out of the estate, such costs being awarded to the party first entering appearance. (*Safford & Wheeler*, p. 871. The general rule to allow but one set of costs will not be departed from in favour of a

party who comes forward as a separate respondent when the suit is already substantially defended. (*Woomatara Debia* v. *Kristo Kaminee Dossee*, 12 Beng. L.R. 170.) S. 53. Costs.

Where there was an appeal and cross appeal and each appellant in part succeeded, no costs were given (*Retemeyer* v. *Obermuller*, 2 Moo. P.C. 93).

When Court equally divided.

The Liverpool, London & Globe Ins. Co. v. Wyld, 1 Can. S.C.R. 605.

The judges of the Supreme Court being equally divided in opinion, and the decision of the court below affirmed, the successful party was refused the costs of the appeal. "But (per Richards, C.J.,), by 38th V. c. 11, s. 38, the Supreme Court being authorized, in its discretion, to order the payment of the costs of the appeal, the decision in this case will not necessarily prevent the majority of the Court from ordering the payment of the costs of the appeal in other cases where there is an equal division of opinion amongst the judges."

The uniform practice of the Court before 1893 was not to give costs when the Court was equally divided. *Curry* v. *Curry*, 13th March, 1880; *McLeod* v. *N. B. Rly. Co.*, 5 Can. S.C.R. 283; *Caté* v. *Morgan*, 7 Can. S.C.R. 1; *McCallum* v. *Odette*, 7 Can. S.C.R. 36; *Shields* v. *Peak*, 8 Can. S.C.R. 579; *Milloy* v. *Kerr*, 8 Can. S.C.R. 474; *Megantic Election Case*, 8 Can. S.C.R. 169; *Trust and Loan* v. *Lawrason*, 10 Can. S.C.R. 679; *Poulin* v. *City of Quebec*, 9 Can. S.C.R. 185; *MacQueen* v. *The Queen*, 16 Can. S.C.R. 1.

After 1893 this rule was not followed, but the practice was to give the respondent costs in such cases. Cout. Dig. 1108. *Calgary & Edmonton R.W. Co.* v. *The King*, Cout. Cas. 271. In *Coté* v. *Richardson*, 38 Can. S.C.R. 41, however, no costs were given, and in *Ottawa Electric Co.* v. *O'Leary*, Oct. 5th, 1909, the Court announced that the rule is now settled that when the Court is equally divided no costs will be awarded.

Habeas corpus not arising out of a criminal charge.

In re Johnson, Cass. Dig. 677.

J. was in custody on an execution for debt and applied to a judge of the County Court to be examined as to his

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affairs with a view to obtaining his discharge. The examination was held, when the county judge made an order that J. was guilty of fraud in connection with his affairs, and he was remanded to jail. An application was made to the Supreme Court of Nova Scotia for the discharge of the prisoner on *habeas corpus*, which was refused. On appeal to the Supreme Court of Canada, held that the appeal must be dismissed, but without costs.

Habeas corpus cases (criminal).

The uniform practice of the Court in these matters is to allow no costs.

In re Sproule, 12 Can. S.C.R. 140; *In re McDonald*, 27 Can. S.C.R. 683; *In re White*, 31 Can. S.C.R. 383; *In re Vancini*, 34 Can. S.C.R. 621; In *re Smitheman*, 35 Can. S.C.R. 189.

Criminal appeals.

The same rule prevails in criminal appeals: *Gosselin* v. *The King*, 33 Can. S.C.R. 255; *Drew* v. *The King*, 33 Can. S.C.R. 228; *George* v. *The King*, 35 Can. S.C.R. 376; *Slaughenwhite* v. *The King*, 35 Can. S.C.R. 607.

Under special circumstances of the case, however, costs have been allowed.

Fraser v. Tupper, Cass. Dig. 421. 21st June, 1880.

The prisoner, Simon Fraser, had been convicted before F. A. Laurence, stipendiary magistrate for the Town of Truro, of violating the license laws in force in the town, and was fined $40 and costs as for a third offence. Execution was issued in the form given in the Rev. Statutes, c. 75, under which Fraser was committed to jail. While there he was convicted of a fourth offence and fined $80 and costs, and was detained under an execution in the same form. The matter came before the Supreme Court of Nova Scotia on a motion to make absolute a rule *nisi* granted by Weatherbe, J., under chapter 99 of the Rev. Stats. of Nova Scotia, for "securing the liberty of the subject." The rule was discharged.

It appeared that before the institution of the appeal to the Supreme Court of Canada, the time for which the appellant had been imprisoned had expired and he was at large.

On motion to dismiss the appeal for want of jurisdiction, *Held*, that an appeal will not lie in any case of proceedings for or upon a writ of *habeas corpus* when at the time of bringing the appeal the appellant is at large. S. 53. Costs.

Appeal dismissed. The question of costs was reserved and subsequently the Court ordered that the respondent should be allowed his general costs of the appeal.

Interlocutory applications.

It is under this section that costs are given on applications made in Chambers.

Rule 57, *infra*, provides that costs between party and party shall be taxed pursuant to the tariff fees contained in Schedule D.

Section 107, *infra*, provides that an order for costs may be enforced by writs of execution issued out of the Supreme Court.

Writs of execution are not issued out of the Supreme Court to enforce payment of costs unless there is some difficulty in enforcing process if issued out of the court below.

Distraction of costs.

Letourneux v. Dansereau, 27th May, 1886.

Held, that, in appeal, where distraction of costs has not been asked for by the pleadings, or by the factum, it should be asked for when judgment is rendered. If not then asked for, any subsequent application must be made to the court upon notice to the other side.

See *Converse* v. *Clarke*, 12 L.C.R. 402; *The Water Works Co. of Three Rivers* v. *Dostaler*, 18 L.C.J. 196; *Lator* v. *Campbell*, 7 Legal News 163.

Article 553, C.C.P., provides as follows:—

"Every condemnation to costs involves by the operation of law, distraction in favour of the Attorney of the party to whom they are awarded."

This article was inserted for the first time in the last codification of the Law of Civil Procedure, and since that date the decision in *Letourneux* v. *Dansereau* has no application.

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No one appearing on behalf of appellant.

Burnham v. Watson, 7th Dec., 1881.
Scott v. The Queen, 27th March, 1886.
Western Ass. Co. v. Scanlan, 27th March, 1886.

Where no one appears on behalf of the appellant when an appeal is called for hearing, and counsel for respondent asks for the dismisal of the appeal, it will be dismissed with costs.

Costs for or against the Crown.

Lovitt v. Atty.-Gen. of Nova Scotia, 33 Can. S.C.R. 350.

Costs will be given for or against the Crown as in other cases.

Costs—between solicitor and client.

Boak v. Merchants Mar. Ins. Co., 3rd June, 1879.

Application for an order directing Registrar to tax costs between solicitor and client, refused. The Chief Justice stated that the question was duly considered by the judges at the organization of the Court and it was not thought advisable to regulate costs between solicitor and client.

Paradis v. Bosse, 21 Can. S.C.R. 419.

There is no tariff in the Supreme Court as between solicitor and client, but such costs may be recovered in an action upon a *quantum meruit*.

Party arguing appeal in person.

Re Charlevoix Election, Valin v. Langlois, Cout. Dig. 388.

The respondent, who was an advocate argued his appeal in person. Motion to tax counsel fee was refused.

Costs paid pursuant to judgment below—how recovered when judgment reversed.

Lewin v. Howe, 14 Can. S.C.R. 722.

The defendants having succeeded in the court below and in the Supreme Court, their costs after taxation were paid by the plaintiffs. Subsequently these judgments were reversed by the Judicial Committee of the Privy Council

Upon an application to the Supreme Court to have the judgment of the Privy Council made a judgment of the Supreme Court the plaintiffs applied to have the order of the Supreme Court direct the repayment of the costs so paid with interest. The application being referred to Strong, J., a clause was inserted in the judgment of the Supreme Court by which the defendants were ordered to refund the said costs, but without interest. Supreme Court Records. S. 53. Costs.

Duggan v. The London and Canadian Loan and Agency Co. et al., 23rd March, 1893.

A judgment of the Supreme Court of Canada allowing an appeal with costs (20 Can. S.C.R. 481), was carried, in further appeal, by the respondents to Her Majesty's Privy Council, where the decision was reversed ((1893), A.C. 506; 63 L.J. 14). The respondents had, however, in the meantime paid the costs under the order of the Supreme Court.

On motion in the Supreme Court of Canada, on behalf of the said respondents, it was held that they were entitled to an order directing the re-payment to them of the costs so paid, the amount of such costs to be settled upon an inquiry before the Registrar.

(Motion granted with costs.)

Costs—where point not raised in the pleading.

City of Montreal v. McGee, 30 Can. S.C.R. 582.

In an action for bodily injuries where the extinction of the right of action by prescription was not pleaded or raised in the courts below and upon an appeal the prescription was judicially noticed and the action dismissed, the appeal was allowed without costs.

Sandon Water Works Co. v. White, 35 Can. S.C.R. 309.

In this case the plaintiffs in their reply set up a failure of defendants to comply with certain conditions precedent, but did not set up another condition precedent upon which the judgment appealed from proceeded, though it was not referred to at the trial. *Held*, that the plaintiffs need not have replied as they did, but having done so without setting up the condition especially relied upon in appeal, thereby possibly misleading the defendants, they were properly punished by the court below by being deprived of their costs of appeal.

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Costs—jurisprudence generally.

Fisher v. Anderson, Cout. Dig. 384; 4 Can. S.C.R. 406.

In a case submitted for the construction of a will, upon allowing an appeal it was ordered that the costs should be paid by the respondents, who were executors and trustees out of the general residue of the estate of the deceased, but if the residue should have been distributed then that costs should be contributed by the persons who should have received portions of the residue ratably according to the amounts respectively received by them.

The Ætna Life Insurance Co. v. Brodie, 5 Can. S.C.R. 1.

Appellants not having tendered with their plea costs up to and inclusive of its production, ordered to pay the respondent the cost incurred in the court of first instance.

Brunet v. Pilon, 5 Can. S.C.R. 356.

A motion to quash an appeal on the ground that it should not have been brought as a substantive appeal, but as a cross-appeal, was dismissed. But the respondent having succeeded in having the judgment of the court below varied (reversed on one point and affirmed on another), was allowed costs as of a cross-appeal taken under rule 61.

The Queen v. Starrs, 17 Can. S.C.R. 118.

Where a claim against the Government was referred to arbitration, the Crown not insisting on its strict legal rights and the claimants thereby put to great expense, the Crown was deprived of costs in all the courts.

Bell v. Wright, Cout. Dig. 1331; 24 Can. S.C.R. 656.

In a suit for construction of a will and administration of testator's estate, where the land of the estate had been sold and the proceeds paid into court, J.J.B., a beneficiary under the will and entitled to a share in said fund, was ordered personally to pay certain costs to other beneficiaries. *Held*, reversing the decision of the Court of Appeal, that the solicitor of J.J.B. had a lien on the fund in court for his costs as between solicitor and client in priority to the parties who had been allowed costs against J.J.B. personally. *Held*, also, that the referee before whom the administration proceedings were pending had no authority to make an order depriving the

solicitor of his lien, not having been so directed by the administration order and there being no general order permitting such an interference with the solicitor's *primâ facie* right to the fund. S. 53. Costs.

Dreschel et al. v. Auer Incandescent Light Mfg. Co., 28 Can. S.C.R. 268.

On a motion to quash an appeal where the respondents filed affidavits stating that the amount in controversy was less than the amount fixed by the statute as necessary to give jurisdiction to the appellate court, and affidavits were also filed by the appellant showing that the amount in controversy was sufficient to give jurisdiction under the statute, the motion to quash was dismissed, but the appellants were ordered to pay the costs, as the jurisdiction of the Court to hear the appeal did not appear until the filing of the appellants' affidavits in answer to the motion.

Gauthier v. Jeannotte, 14th June, 1898; 28 Can. S.C.R. 590.

The defendant had caused a defamatory statement to be printed in a newspaper, and on a separate fly-sheet, and circulated through the constituency, during a Parliamentary election, with a printed challenge to the plaintiff and others implicated in the charges made to justify their innocence by taking an action for damages in case they were not guilty, and offering at the same time to make a deposit to cover the costs of suit.

The Supreme Court of Canada, in affirming the judgment of the Court of Queen's Bench for Lower Canada (which had reversed the judgment of the Superior Court in favour of the plaintiff, and dismissed the action without costs), refused to allow costs under the circumstances. Strong, C.J., dissented being of opinion that the Superior Court judgment for $100 damages with costs as of an action for that amount should be restored.

Brigham v. Banque Jacques Cartier, 30 Can. S.C.R. 429.

Where the appellant was an inspector of an insolvent estate and participated in arrangements intended to secure a fraudulent preference to a particular creditor, the appeal was allowed with costs, but the action against him was dismissed without costs and an order made that no costs should be allowed in any of the courts below.

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Bell Telephone Co. v. Chatham, 31 Can. S.C.R. 61.

A person driving on a public highway who sustains injury to his person and property by the carriage coming in contact with a telephone pole lawfully placed there, cannot maintain an action for damages if it clearly appears that his horses were running away and that their violent uncontrollable speed was the proximate cause of the accident. In an action against the city corporation for damages in such a case the latter was ordered to pay the costs of the telephone company brought in as third party, it having been shewn that the company placed the pole where it was lawfully, and by authority of the corporation.

Millard v. Darrow, 31 Can. S.C.R. 196.

In an action for the price of land under an agreement for sale, or in the alternative for possession, defendant filed a counterclaim for specific performance and paid into court the amount of the purchase money and interest, demanding therewith a deed with covenants of warranty of title. Plaintiff proceeded with his action and recovered judgment at the trial for the amount claimed and costs, including costs on the counterclaim; the decree directing him to give the deed demanded by the defendant as soon as the costs were paid. The verdict was affirmed by the court *en banc*. *Held*, reversing the judgment appealed from (33 N.S. Rep. 334), that as defendant had succeeded on his counterclaim he should not have been ordered to pay the costs before receiving his deed and the decree was varied by a direction that he was entitled to his deed at once with costs of appeal to the court below *en banc*, and to the Supreme Court of Canada against plaintiff. Parties to pay their own costs in court of first instance. *Held*, per Gwynne, J., defendant should have all costs subsequent to the payment into court.

Challoner v. Lobo, 32 Can. S.C.R. 505.

The judgment appealed from (1 Ont. L.R. 156, 262 reversed the trial court judgment (32 O.R. 247), and held that the "last revised assessment roll" governing the status of petitioners in proceedings under the Drainage Act, was the roll in force at the time the petition was adopted by the municipal council and referred to the engineer for report, and not the roll in force at the time that the by-law was finally passed. The contractor had been made party in the Court of Appeal for Ontario and appeared at the hear-

ing, but did not himself appeal. The judgment appealed from held that the effect of allowing the appeal did not give him any costs on the appeal. The Supreme Court affirmed the judgment appealed from. S. 54. Amendments.

Montreal v. C.P.R. 33 Can. S.C.R. 396.

Where the contentions of neither party were fully adopted, the appeal was allowed without costs in the Supreme Court of Canada..

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

In this case the Court said: "The appeal is dismissed, but under the special circumstances of the case, and as the respondents opposed the motion to rectify, and occasioned unnecessary costs, it is dismissed without costs in this Court and in the court appealed from."

AMENDMENTS.

54. At any time during the pendency of an appeal before the Court, the Court may, upon the application of any of the parties, or without any such application, make all such amendments as are necessary for the purpose of determining the appeal, or the real question of controversy between the parties, as disclosed by the pleadings, evidence or proceedings. R.S., c. 135, s. 63.

North Shore Power Co. v. Dugnay, 37 Can. S.C.R. 624.

The court, while dismissing the appeal for the reasons given in the courts below, the case only involving questions of fact, under the above power of amendment order the record to be amended so as to shew that the amount of $300 for which judgment was entered in the Superior Court, was payable to the plaintiff and his wife as *communs en bien* from whom the appellants will get a final discharge when they satisfy the judgment.

55. Any such amendement may be made, whether the necessity for the same is or is not occasioned by the defect, error, act, default or neglect of the party applying to amend. R.S., c. 135, s. 64.

56. Every amendment shall be made upon such terms as to payment of costs, postponing the hearing or otherwise as to the court seems just. R.S., c. 135, s. 65.

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Swim v. Sheriff, 1881.

The defendant having seized under a writ of replevin issued out of the Supreme Court of New Brunswick a quantity of logs, the plaintiff brought an action for trespass. The defendant neglected to include in his pleas to the declaration justification under the writ.

Held, per Ritchie, C.J., and Fournier, J., that if the evidence could not be given under the pleadings, the Court could allow the record to be amended by adding such a plea.

Per Fournier, J., that if such amendment became necessary, the defendant should pay the costs.

Per Henry, J., that no effort having been made in the court below to add such a plea, it was too late and contrary to precedent and justice now to admit it.

Piche v. City of Quebec, 1885.

The plaintiff, a commercial traveller, was in a store in Quebec writing down an order for his firm, and had a small sample of his goods in his hand, when he was arrested by a policeman. A by-law of the City of Quebec prohibited the selling of goods by samples by transient traders without having paid a license fee of $60. After his arrest the plaintiff paid the license fee and brought the action for illegal arrest. The corporation justified under the by-laws and municipal regulations.

Held, per Strong and Fournier, J.J. The evidence fell short of establishing the allegation of the defendant's plea that the plaintiff was actually engaged in selling, there being no proof of any actual sale, but did shew that he was openly pursuing the occupation of a transient merchant or trader, or employee of a transient merchant or trader, without license, and the Court would permit of an amendment of the pleadings, which would adapt the allegations of the parties to the case as disclosed by the evidence.

Baker v. La Societe de Construction Metropolitaine, 22 Can. S.C.R. 364.

In their declaration the appellants alleged that the respondents had been in possession of the property since 9th May, 1876, and after the *enquête* they moved the court to amend the declaration by substituting for the 9th May, 1876, the words "1st Dec., 1886." The motion was refused by the Superior Court, which held that the admission

amounted to a judicial avowal from which they could not recede, and the Court of Queen's Bench affirmed this decision. S. 56. Amendments.

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

Porter v. Hale, 23 Can. S.C.R. 265.

At the hearing of a suit by P. to enforce performance of an agreement by the devisee of land under a will to convey it to P. he claimed to be entitled to a decree, in the event of the case made by his bill failing, on the ground that the said will was not registered according to the registry laws of New Brunswick, and was therefore void as against him an intending purchaser, and C. had an interest in the land he had agreed to sell to him as an heir-at-law of the estate.

Held, that on a bill claiming title under the will, P. could not have relief based on the proposition that the same will was void against him, and no amendment could be permitted to make a case not only at variance with, but antagonistic to that set out in the bill, especially as such amendment was not asked for until the hearing.

Ferrier v. Trepannier, 24 Can. S.C.R. 86.

Where parties are before the Court *quâ* executors, and the same parties should also be summoned *quâ* trustees, an amendment to that effect is sufficient, and a new writ of summons is not necessary.

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

Between the hearing of a case and the rendering of the judgment in the trial court, the defendant died. His solicitor by inadvertence inscribed the case for revision in the name of the deceased defendant. The plaintiffs allowed a term of the Court of Review to pass without noticing the irregularity of the inscription, but, when the case was ripe for hearing on the merits, gave notice of motion to reject the inscription. The executors of the deceased defendant then made a motion for permission to amend the inscription by substituting their names *es qualité* The Court of Review

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Amendments.

allowed the plaintiffs' motion as to costs only, permitted the amendment and subsequently reversed the trial court judgment on the merits. The Court of King's Bench (appeal side) reversed the judgment of the Court of Review on the ground that it had no jurisdiction to allow the amendment and hear the case on the merits, and that consequently all the orders and judgments given were nullities. *Held*, reversing the judgment appealed from (Q.R. 10 K.B. 511), the Chief Justice and Taschereau, J., dissenting, that the Court of Review had jurisdiction to allow the amendment and that, as there had been no abuse of discretion and no parties prejudiced, the Court of King's Bench should not have interefered.

City of Montreal v Hogan, 31 Can. S.C.R. 1.

The Court said:—

The contention was put forward by the appellants at the hearing of this appeal that as by the deed of ownership of the property in question filed at the trial by the respondent as his title thereto, the sale thereof appears to have been made not to him alone, but to him and one Beaufort jointly, he, the respondent, could not alone bring this action as he has done. To meet this objection the respondent thereupon tendered a deed of assignment by Beaufort to him of all his rights in the property. We could not, however, allow the production of this document, as it has been the constant jurisprudence of this Court not to receive here any new evidence whatever. *Exchange Bank* v. *Gilman*, 17 Can. S.C.R. 108. But the appellants cannot now avail themselves of an objection of this nature that was not taken at the trial, where, upon the necessary amendment of the declaration, the evidence to meet such objection could have been brought. They, by their pleas, acknowledge the respondent's title to the property by offering to return it to him. And for them at this stage of the case to turn round and ask, for the first time, the dismissal of his action on the ground that he has not proved his title is what cannot be allowed.

Hill v. Hill, 33 Can. S.C.R. 13.

A petition in revocation of a judgment homologating a report failed to attack specifically an earlier judgment. A motion to amend the petition so as to include the earlier

judgment was refused in the court below, but was granted by the Supreme Court in the exercise of its discretion under these sections. S. 56. Amendments.

Burland v. City of Montreal, 33 Can. S.C.R. 373.

In this case the plaintiff claimed to recover the value of certain lands illegally retained by the defendant. The evidence shewed that the only matter in dispute was the value of the land in question, but the court below dismissed plaintiff's action on the ground that the proper remedy was either an action *en bornage* or *au petitoire*, but the Supreme Court having power to amend the pleadings so as to determine the real question in controversy by setion 63 (now section 54), remitted the record to the court below to ascertain by expertise or otherwise to determine the extent of the lands taken, and ordered defendants to return the same to the plaintiff in the same condition as it was before possession was taken, and ordered that all necessary amendments of the pleadings should be treated as having been made.

Porter v. Pelton, 33 Can. S.C.R. 449.

In this case the Court said:—

"The appellants applied at the opening of the argument to add three alternative claims. We are of opinion that all proper amendments should be made where the Court is satisfied that such amendments are necessary to do justice and the nature of the demand is not changed, and that neither party can be prejudiced. Such amendments must be dealt with in each case in the sound exercise of a judicial discretion. We cannot in this case interfere with the exercise of a discretion in the court below refusing the same application."

Massawippi Valley Rly. Co. v. Reed, 33 Can. S.C.R. 457.

This action was brought *au petitoire* for a declaration of plaintiff's title to certain lands. It was shewn that the plaintiff company had under the provisions of their Act, leased the railway and all its appurtenances to another railway company, which held and operated the railway at the time of the institution of the action. The trial judge held that the plaintiffs having parted with the interest, had no right of action. *Held*, affirming in this respect the Court of Appeal below, that a right of action subsisted in

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the plaintiffs, and if necessary the plaintiffs should have the right of adding the other railway company as co-plaintiff.

Dorion v. Crowley, Cass. Dig., 2nd ed., 709.

In an appeal from Quebec, where it was sought to add a party as co-respondent on the ground that he had obtained from the respondents a notarial assignment of all their interest in the suit, made prior to the hearing of the case by the Court of Appeal of the province, the Supreme Court held that the application to add the assignee should have been made at the earliest opportunity to the court below, and was not one the Supreme Court should be called upon to decide. Cass. Prac. 78.

Caldwell v. Stadacona F. & L. Ins. Co., 11 Can. S.C.R. 212.

Where a party has been improperly joined as co-plaintiff or co-defendant, the Supreme Court will order him to be struck out of the record. Cass. Prac. 78.

Long v. Hancock (not reported).

Where a party was, by the judgment of the court, made liable for the costs of the appeal, although he had in fact not been a party to such appeal, nor interfered in the appeal by depositing a factum, or appearing by counsel at the argument, the judgment was amended by the Court. Cass. Prac. 78.

Dumoulin v. Langtry, 13 Can. S.C.R. 258.

Where parties, other than those on the record have an interest entitling them to prosecute an appeal in the name of the plaintiff on the record, the Supreme Court will permit them to do so, on such terms as may seem just. Cass. Prac. 78.

Hogaboom v. Receiver-General, December, 1897.

Where a party was not in the case as originated, but received notice of appeal, and was represented by counsel at the hearing, he was allowed to tax his costs of the appeal. Cass. Prac. 78.

Grant v. The Queen, 20 Can. S.C.R. 297.

In this case the action was instituted against the Government of Quebec, but when the case came up for hearing on

the appeal of the Supreme Court the Court ordered that the name of "Her Majesty the Queen" be substituted for that of the "Province of Quebec." S. 57. Interest.

Syndicat Lyonnais du Klondyke v. McGrade, 36 Can. S.C.R. 251.

In an action to set aside a conveyance as made in fraud of creditors, the defendant desiring to meet the action by setting up that there was no debt due and consequently that no such fraud could exist, must allege these objections in his pleadings. In the present case the defendant, having failed to plead such defence, was allowed to amend on terms, the Chief Justice dissenting.

Rule 8, *infra*, provides that the Court or a judge may order a case to be remitted to the court below in order that it may be made more complete by the addition thereto of farther matter.

For decisions under this rule, *vide* page 488, *infra*.

INTEREST.

57. If on appeal against any judgment, the Court affirms such judgment, interest shall be allowed by the Court for such time as execution has been delayed by the appeal. R.S., c. 135, s. 66.

Trust & Loan v. Ruttan, 5th Febrnary, 1878.

An application to vary judgment by inserting direction that interest be allowed for the period during which the appeal has been pending, must be on notice.

Clark v. Scottish Imperial Insurance Company, 19th February, 1880.

Motion for allowance of interest on verdict from date thereof in appeal from N.B. *Held*, that it be allowed on principal sum from last day of next term after verdict.

McQueen v. The Phœnix Mutual Fire Insurance Co., 9th April, 1880.

Counsel for appellant moves for interest for time judgment has been stayed, pursuant to section 34 Supreme and Exchequer Courts Act. Question to full Court by Fournier, J. *Held*, a question the Court should dispose of on its own motion

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The Queen v. MacLean et al., 12th May, 1885.

M. & Co. brought an action by petition of right against the Dominion Government for damages for an alleged breach of contract whereby the suppliants contracted for the Parliamentary and Departmental printing for a certain specified period. The alleged breach consisted in the Government giving a portion of the said printing to other parties, the suppliants claiming that, by the terms of the contract, they were entitled to the whole of it. The Crown demurred to the petition, and as to the departmental printing, the demurrer was overruled (8 Can. S.C.R. 210). The petition subsequently came on for hearing in the Exchequer Court, and a reference was made to the Registrar and Queen's Printer to ascertain and report as to the profit lost to the suppliants by not being allowed to do the departmental printing. The referees found a certain sum as the profit lost to suppliants, stating in their report, that the suppliants claimed interest on the amount, but that the referees were of opinion they had no power, under the order of reference to consider the question of interest.

No exception was taken to the report of the referees, and the suppliants moved in the Exchequer Court for judgment for the amount found by the referees with interest, as the damages to which they were entitled under their petition of right. Mr. Justice Henry, before whom the motion was made, gave judgment for the amount found by the referees with interest thereon at 6 per cent., such interest to be computed on the aggregate of the sums which, according to said report, the suppliants up to the 31st day of December in each year during the currency of the said contract, would have received as profit.

On appeal to the Supreme Court of Canada from that part of the judgment allowing interest, *Held*, Henry, J., dissenting, that the suppliants were not entitled to interest on the amount found by the referees for loss of profits.

Appeal allowed with costs.

St. Louis v. The Queen, 25 Can. S.C.R. 665. Cass. Prac. 87.

Interest was allowed against the Crown, but the question of the suppliant's right to it was not argued.

Toronto Rly. Co. v. The Queen, Oct., 1897. Cass. Prac 87

In a case before the Exchequer Court for return of duties improperly imposed, judgment was given against the

claimants. This was afterwards affirmed by the Supreme Court, but reversed by the Privy Council, and judgment ordered to be entered for the suppliant for the amount claimed and costs. On the case coming again before the Exchequer Court judgment was entered for the principal sum only, interest being refused, and an appeal was taken to the Supreme Court for the interest. In the meantime the Crown presented a petition to the Judicial Committee of the Privy Council, praying for a declaration that the claimants were not entitled to interest under their Lordship's judgment. The petition was dismissed, their Lordships stating that interest having been claimed, and the question not having been argued in any of the courts, it should be allowed. The Crown thereupon consented, under section 52 of the Act, to the judgment of the Exchequer Court being reversed on the appeal to the Supreme Court.

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The Queen v. Henderson, 28 Can. S.C.R. 425.

An action instituted in the Exchequer Court. *Held*, where a claim against the Crown arises in the Province of Quebec and there is no contract in writing, interest may be recovered against the Crown, according to the law in that province, and section 33 of the Exchequer Court Act does not apply.

Queen v. Armour, 31 Can. S.C.R. 499.

The Supreme Court dismissed an appeal by the Crown from the judgment of the Exchequer Court which awarded the suppliant $14,158 as compensation for lands expropriated with interest and costs. In setting the minutes of judgment of the Supreme Court, the Registrar by the direction of the Chief Justice, inserted a provision that the suppliant was entitled to be paid by the Crown interest on the compensation money awarded by the judgment of the Exchequer Court from the date of that judgment at the rate of six per centum per annum.

Other cases.

Wilkins v. Geddes, 3 Can. S.C.R. 203.

Under 31 V. c. 12 and 37 V. c. 13, the Minister of Public Works of the Dominion of Canada appropriated to the use of the Dominion certain lands in Yarmouth county, known as "Bunker's Island." In accordance with said Acts, on

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the 2nd April, A.D. 1875, he paid into the hands of W., prothonotary at Halifax, the sum of $6,180 as compensation and interest, as provided by those Acts to be thereafter appropriated among the owners of said island. This sum was paid at several times, by order of the Supreme Court of Nova Scotia, to one A., as owner, to one G., as mortgagee, and to others entitled, less ten dollars. As the money had remained in the hands of W., the prothonotary of the court, for some time, H., attorney for G., applied to the Supreme Court for an order of the Court caling upon W., the prothonotary, to pay over the interest upon G's proportion of the moneys, which interest (H. was informed) had been received by the prothonotary from the bank where he had placed the amount on deposit. W. resisted the application on the ground that he was not answerable to the proprietor of the principal, or to the Court, for interest, but did not deny that interest had been received by him. A rule *nisi* was granted by the Court and made absolute, ordering the prothonotary to pay whatever rate of interest he received on the amount.

Held, 1. That the prothonotary was not entitled to any interest which the amount deposited earned while under the control of the Court. That, in ordering the prothonotary to pay over the interest received by him, the Court was simply exercising the summary jurisdiction which each of the superior courts has over all its immediate officers. (Fournier and Henry, J.J., dissenting.)

2. That the order appealed from, being a decision on an application by a third party to the Court, was appealable under the 11th section of 38 V. c. 11. (Fournier, J., dissenting, and Taschereau, J., doubting.)

Leak v. City of Toronto, 30 Can. S.C.R. 321.

If in the construction of a public work land of a private owner is injuriously affected and the compensation therefor is determined by arbitration, interest cannot be allowed by the arbitrator on the amount of damages awarded. Judgment appealed from (26 Ont. App. R. 351) affirmed.

Sinclair v. Preston, 31 Can. S.C.R. 408.

To entitle a creditor to interest under 3 & 4 Wm. IV., c. 42, s. 28 (Imp.), the written instrument under which it is claimed must shew by its terms that there was a debt certain payable at a certain time. It is not sufficient that the

same may be made certain by some process of calculation or some act to be performed in the future. S. 58.

Certificate of judgment.

Dunn v. The King. 12th Nov., 1901. Cont. Dig. 728.

The petition of right was to recover unpaid interest on duties exacted by the Government of New Brunswick for export duties for taking lumber cut under licenses from the Dominion of Canada, on lands in dispute between the provinces and eventually found to belong to Canada. The interest was claimed as both provinces and Dominion had paid interest and otherwise admitted liability therefor. The Crown claimed that it paid as a matter of grace and without liability by statute or express contract and that the interest could not be recovered by suit. The Supreme Court held that there was no liability of the Crown for interest, there having been no statutory liability nor express contract therefor, and that none arose on account of payments of interest from time to time or on the account stated as claimed.

CERTIFICATE OF JUDGMENT.

58. The judgment of the Court in appeal shall be certified by the Registrar of the court to the proper officer of the court of original jurisdiction, who shall thereupon make all proper and necesary entries thereof; and all subsequent proceedings may be taken thereupon as if the judgment had been given or pronounced in the said last mentioned court. R.S., c. 135, s. 67.

Dawson v. McDonald, Cass. Dig. 683.

The judgment of the Supreme Court must, under section 46 (now 58), Supreme and Exchequer Court Act, be entered and sent to the court below before defendant can have recourse to a proceeding by *requête civile*. A *requête civile* does not stay execution as a matter of course. The defendant would have to apply to the Superior Court or a judge thereof for an order. A judge in chambers should not grant an order staying execution of a judgment, especially when defendant has had ample time to apply to the full Court. Per Taschereau, J.

Ex parte Jones, Cout. Dig. 1124.

Under the provisions of R.S. c. 135, s. 67, a judgment of the Supreme Court of Canada, certified to the proper

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officer of the Court of original jurisdiction, becomes a judgment of the inferior court for all intents and purposes, and it is not necessary to obtain special leave to issue execution in order to levy the costs of the party awarded costs on the appeal to the Supreme Court of Canada.

Durocher v. Durocher, 27 Can. S.C.R. 634.

When judgment on a case in appeal has been rendered by the Supreme Court and remitted to the proper officer of the court of original jurisdiction, the Supreme Court has no jurisdiction to entertain a petition (*requête civile*) for revocation of its judgment.

JUDGMENT FINAL AND CONCLUSIVE.

59. The judgment of the Court shall, in all cases, be final and conclusive, and no appeal shall be brought from any judgment or order of the Court to any court of appeal established by the Parliament of Great Britain and Ireland, by which appeals or petitions to His Majesty in Council may be ordered to be heard, saving any right which His Majesty may be graciously pleased to exercise by virtue of his royal prerogative. R.S., c. 135, s. 71.

Johnston v. Ministers and Trustees of St. Andrew's Church, Montreal, 3 App. Cas. 159.

The Lord Chancellor said: (p. 162.)

"The first question is, is there in this case a power, notwithstanding the Canadian Act, to allow, if Her Majesty should be so advised, such an appeal. Now I will read the section of the Canadian Act. It is the 47th section:—'The judgment of the Supreme Court shall in all cases be final and conclusive, and no appeal shall be brought from any judgment or order of the Supreme Court to any Court of Appeal established by the Parliament of Great Britain and Ireland, by which appeals or petitions to Her Majesty in Council may be ordered to be heard, saving any right which Her Majesty may be graciously pleased to exercise by virtue of Her royal prerogative.' That section consists of three parts: the second or intermediate part of the section contains the negative words 'no appeal shall be brought,' et cetera. Those words their Lordships may leave out of consideration because they refer to what may be called the hypothetical establishment of a Court by the Parliament of Great Britain and Ireland, by which Court appeals from the colonies are

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supposed to be ordered to be heard; and inasmuch as no Court of that kind has been established, that part of the section may be omitted from our consideration. I will read it, therefore, as if the section ran thus, 'The judgment of the Supreme Court shall in all cases be final conclusive, saving any right which Her Majesty may be graciously pleased to exercise by virtue of Her royal prerogative.'

"Now their Lordships have no doubt whatever that assuming, as the petitioners do assume, that their power of appeal as a matter of right is not continued, still that Her Majesty's prerogative to allow an appeal, if so advised, is left entirely untouched and preserved by this section. Therefore their Lordships would have no hesitation, in a proper case, in advising Her Majesty to allow an appeal upon a judgment of this Court."

Leave to appeal.

Kelly v. Sullivan, 21st January, 1877.
Moore v. Connecticut Mutnal Ins. Co., 9th April, 1880.
Queen Ins. Co. v. Parsons, 21st Jnne, 1880.

The Court has no jurisdiction either to refuse or grant an application for leave to appeal to the Privy Council.

Nasmith v. Manning, 4th March, 1881.

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

Appeals to the Judicial Committee of the Privy Council from the Supreme Court of Canada lie only by special leave of the Privy Council.

Privy Council rules.

The "Privy Council Rules and Orders 1908" will be found printed in the appendix hereto, as Appendix C., p. 668.

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

Procedure.

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

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or requisition with the Registrar for a certified copy of the case, returns, judgment and reasons of the judges. These documents are delivered out to the solicitor for the appellant upon payment of the fees provided by the Supreme Court Rules, *infra*, p. 613. The solicitor thereupon prepares the petition for presentation to the Judicial Committee, and the affidavit supporting the same. The Judicial Committee has granted special leave to appeal from the Supreme Court where the only material filed on the application was the petition and a copy of the judgment with an affidavit of the appellant's solicitor verifying the facts alleged.

As to what the petition should contain and the circumstances under which leave to appeal will be granted or refused together with the forms *vide infra*, pp. 322-500.

Time.

There is no limit with respect to the time within which the King in Council will grant special leave to appeal from the judgment of the Supreme Court of Canada, but the practice is to make the application for special leave with reasonable promptitude after the judgment of the Supreme Court has been rendered.

Section 5 of the "Statutory Rules and Orders, 1908" reads as follows: "A petition for special leave to appeal may be lodged at any time after the date of the judgment sought to be appealed from, but the appellant shall, in every case, lodge his petition with the least possible delay."

King's order.

If leave is granted the King's order directs the Registrar of the Supreme Court "to transmit to the Registrar of the Privy Council without delay the authenticated copies under the seal of the said Supreme Court of the record, pleadings, proceedings and evidence proper to be laid before His Majesty on the hearing of the appeal, upon payment by the petitioner of the usual fees for the same" or expressly provides that the record used in the application for leave shall be used.

Printing in England.

The Privy Council Rules regulating appeals provide that the appellant or his agent should make an application for

the printing of the transcript record within two calendar months from the arrival of the transcript and the registration thereof, and that in default of the appellant or his agent taking effectual steps for the prosecution of the appeal within such time or times respectively, the appeal shall stand dismissed without further order. S. 59. P. C. Appeals.

As the papers furnished the solicitor by the Registrar of the Supreme Court for the purpose of the application for special leave are identical with those which he is directed to forward by the King's order in the event of leave to appeal being granted, in recent years in the petition for leave it has been customary to ask that the papers certified by the Registrar of the Supreme Court, used on the application, be accepted as the record in the appeal by the Registrar of the Privy Council. In such case the King's order contains the following provisions: "And it is hereby further ordered that the authenticated copy under the seal of the said Supreme Court of the record produced upon the hearing of the said petition be accepted as the record in the said appeal." *Chappelle* v. *The King*, March 12th, 1903.

Where the King's order contains no provision dispensing with the forwarding of the transcript record, and the intention is to have the printing done in England, the solicitor for the appellant should file with the Registrar of the Supreme Court a requisition to have the transcript record in the case made up and despatched.

Printing record in Canada.

Under the Privy Council Rules, the appellant may print the record before it is transmitted to England, but in doing so must comply strictly with the rules of the Judicial Committee regulating the size of type, etc., etc. The practice to be observed in such cases is discussed, *infra*, p. 505.

When the printing is done in Canada the appellant is required to leave with the Registrar of the Supreme Court one copy of the printed case for the purpose of having the same certified by the Registrar and the seal of the Supreme Court affixed thereto, and forty other copies are required to be deposited with the Registrar, and the necessary expense of transmission paid for the purpose of being forwarded to the Registrar of the Privy Council.

Hearing.

Since the publication of *Safford & Wheeler's* Privy Council Practice, a new rule has been passed to cover the case of

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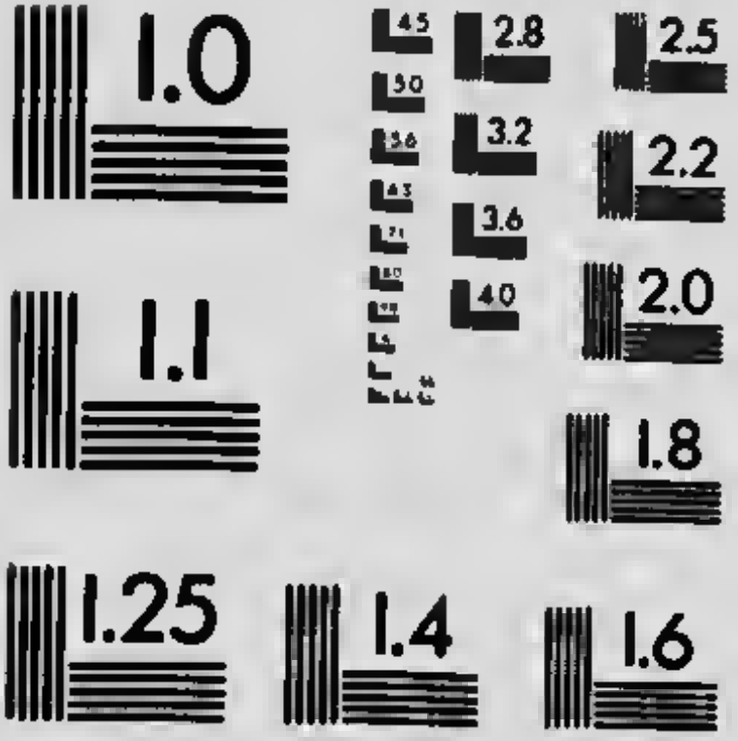

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no appearance being entered by the respondent (*vide* Appendix, "Rules and Orders, 1908," Rule No. 43). In the appeal of the *Grand Trunk Pacific Rly.* v. *Fort William*. (1912) A.C. 224, the Registrar of the Supreme Court, in accordance with the provision of Rule 43, certified to the Privy Council that he had been notified by the solicitor for one of the respondents that it was not the intention of such respondent to enter an appearance.

Appeals in forma pauperis.

Leave to appeal in *forma pauperis* may be granted by the Judicial Committee. *Vide Safford & Wheeler,* Privy Council Practice, p. 752.

In *Dominion Cartridge Co.* v. *McArthur,* the King's order, 11th August, 1902 directed the Registrar of the Supreme Court to transmit the transcript record to the Registrar of the Privy Council in the language above set out, but without the words "upon payment by the petitioner of the usual fees for the same." In this case the Registrar was instructed by the Chief Justice, Sir Henry Strong, to forward the transcript record without the usual stamps being affixed thereto, and without the payment of any fee.

Walker v. Walker (1903) A.C. 170.

It is a rule of general, if not universal, application that the Judicial Committee will not entertain a petition for leave to prosecute an appeal in *forma pauperis* when the court below has power to grant leave on the usual conditions, unless in the first instance an application for leave to appeal has been made within due time to the court from which it is proposed, that the appeal should be brought; but the court below, when authorized to grant leave to appeal subject to certain specified conditions as to security, cannot grant leave to appeal in *forma pauperis.* Such leave must be obtained from the Judicial Committee. *Ex. parte* Commissioner of Railways, 20 N.S.W. Rep. (1899 Equity) p. 28.

Granting leave to appeal—Special circumstances necessary.

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

"Before the constitution of the Supreme Court of the Dominion of Canada there was a right to appeal from the Courts then in existence where the value of the matter in

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

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

La Cite de Montreal v. Les Ecclesiastiques de St. Sulpice, 14 App. Cas. 660.

Per Lord Watson, p. 662:—"Cases vary so widely in their circumstances that the principles upon which appeal ought to be allowed do not admit of anything approaching to exhaustive definition. No rule can be laid down which would not necessarily be subject to future qualification, and an attempt to formulate any such rule might therefore prove misleading. In some cases, as in *Prince* v. *Gagnon*, 8 App. Cas. 103, their Lordships have had occasion to indicate certain particulars, the absence of which will have a strong influence in inducing them to advise that leave should not be given, but it by no means follows that leave will be recommended in all cases in which these features occur. A case may be of a substantial character, may involve matter of great public interest, and may raise an important question of law, and yet the judgment from which leave to appeal is sought may appear to be plainly right, or at least to be unattended with sufficient doubt to justify their Lordships in advising Her Majesty to grant leave to appeal."

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

Held—"According to section 71 of Revised Statutes of Canada, 1886, c. 135, there is no appeal from any judgment or order of the Supreme Court of Canada except by special leave of His Majesty in Council. Where a suitor, having his choice whether to appeal to the Supreme Court or to His Majesty in Council, elects the former remedy, it is not the practice to give him special leave except in a very strong case. (*Prince* v. *Gagnon* (1882), 8 App. Cas. 103, followed.)"

C.P.R. v. Blain (1904), A.C. 453.

Special leave to appeal from a decree of the Supreme Court of Canada will not be granted to a petitioner who has elected to appeal to that Court and not to His Majesty direct, unless a question of law is raised of sufficient importance to justify it. *Ex parte Clergue* (1903), A.C. 521, followed.

Approved *Daily Telegraph* v. *McLaughlin* (1904), A.C. 776; *Townsend* v. *Cox* (1907), A.C. 514; C.R. (1907), A.C. 26.

Victoria Railway Commissioners v. Brown (1906), A.C. 381.

In this case the Committee, in discussing the application for leave to appeal, expressly affirmed the language used in *Clergue* v. *Murray* above.

Principle—how applied:

The principle expressed in the above cases is clear, but it is not always possible to see how it was applied in the later decisions.

One would expect that where the applicant to the Privy Council had already exercised his right of appeal by going to the Supreme Court, a review of the decisions would show many more cases in which leave was refused than cases in which it was granted, but of the 24 applications of this class made since the decision in *Clergue* v. *Murray*, 11 were granted and 13 refused. Of the applications for leave to appeal, where the Supreme Court has reversed the judgment of the court below, of a total number of 41 made since *Clergue* v. *Murray*, we find that in 22 leave was granted and in 19 leave was refused.

A person contemplating an appeal to the Privy Council may obtain some assistance by examining the decisions of the

Supreme Court in which the Committee has granted or refused leave to appeal, and I have therefore collected under the four divisions into which they naturally fall, all the applications made since the decision in *Clergue* v. *Murray*. S. 59. P. C. Appeals.

1. *Leave refused*, where the applicant had already appealed to the Supreme Court and his appeal was dismissed.

North Cypress v. Canadian Pacific Rly. Co., 35 Can. S.C.R. 550.
Bank of Montreal v. The King, 38 Can. S.C.R. 258.
McNichol v. Malcolm, 39 Can. S.C.R. 265.
Laidlaw v. Vaughan-Rhys, 44 Can. S.C.R. 458.
Ontario Bank v. McAllister, 43 Can. S.C.R. 338.
McNeil v. Cullen, 35 Can. S.C.R. 510.
Midland Navigation Co. v. Dominion Elevator Co., 34 Can. S.C.R. 578.
Liscombe Falls Co. v. Bishop, 35 Can. S.C.R. 539.
Farrell v. Manchester, 42 Can. S.C.R. 339.
Hawley v. Wright, 32 Can. S.C.R. 40.
Imperial Book Co. v. Black, 35 Can. S.C.R. 488.
Coote v. Borland, 35 Can. S.C.R. 282.
Toronto v. Grand Trunk Rly. Co., 37 Can. S.C.R. 232.

2. *Leave granted*, where the applicant had already appealed to the Supreme Court and his appeal was dismissed.

Canadian Northern Rly. Co. v. Robinson, 43 Can. S.C.R. 387.
Burchell v. Gowrie & Blockhouse Collieries, (1910) A.C. 614, C.R. [1910] A.C. 250.
Toronto Rly. Co. v. The King, C.R. [1908] A.C. 326.
McVity v. Tranouth, 36 Can. S.C.R. 455, C.R. [1907] A.C. 1.
Montreal v. Cantin, 35 Can. S.C.R. 223.
McClellan v. Powassan Lumber Co., 42 Can. S.C.R. 249.
Imperial Bank v. Bank of Hamilton, 31 Can. S.C.R. 344.
Ontario Mining Co. v. Seybold, 32 Can. S.C.R. 1.
Ewing v. Dominion Bank, 35 Can. S.C.R. 133.
St. John Pilot Commrs. v. Cumberland Rly. Co., 38 Can. S.C.R. 169, C.R. [1910] A.C. 31.
Hanson v. Grand Mere, 33 Can. S.C.R. 50.

3. *Leave refused*, where the applicant was the respondent in the Supreme Court, and the judgment below in his favour was reversed.

Fralick v. Grand Trunk Rly. Co., 43 Can. S.C.R. 494.
Berlin v. Berlin & Waterloo Street Rly. Co., 42 Can. S.C.R. 581.
Pitt v. Dickson, 42 Can. S.C.R. 478.
Burke v. Ritchie, Cout. Cas. 365.
Conmee v. Securities Co., 38 Can. S.C.R. 601.
Jamieson v. Harris, 35 Can. S.C.R. 625.
Mayran v. Dussault, 38 Can. S.C.R. 460.
Union Bank v. Brigham, Cout. Cas. 355.

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Leahy v. North Sydney, 37 Can. S.C.R. 464.
Wade v. Kendrick, 37 Can. S.C.R. 32.
Bell Bros. v. Hudson Bay Ins. Co., 44 Can. S.C.R. 419.
Le Club de Chasse v. Riviere-Ouelle, etc., Co., 45 Can. S.C.R. 1.
Colonist Printing Co. v. Dunsmuir, 32 Can. S.C.R. 679.
Kirkpatrick v. McNamee, 36 Can. S.C.R. 152.
McMullin v. Nova Scotia Steel Co., 39 Can. S.C.R. 593.
Meloche v. Deguire, 34 Can. S.C.R. 24.
Union Investment Co. v. Wells, 39 Can. S.C.R. 625.
Provident Savings Society v. Bellew, 35 Can. S.C.R. 35.
East Hawkesbury v. Lochiel, 34 Can. S.C.R. 513.

4. *Leave granted*, where the applicant was the respondent in the Supreme Court and the judgment below in his favour has been reversed.

Horne v. Gordon, 42 Can. S.C.R. 240.
Lovitt v. The King, 43 Can. S.C.R. 106.
Sedgewick v. Montreal Light, Heat & Power Co., 41 Can. S.C.R. 639.
Stuart v. Bank of Montreal, 41 Can. S.C.R. 516, C.R. [1911] A.C. 1.
Equity Fire Ins. Co. v. Thompson, 41 Can. S.C.R. 491, C.R. [1910] A.C. 151.
Larin v. Lapointe, 42 Can. S.C.R. 521.
Attorney-General of Quebec v. Fraser, 37 Can. S.C.R. 577.
Prevost v. Lamarche, 38 Can. S.C.R. 1.
Syndicat Lyonnais du Klondyke v. Barrett, 36 Can. S.C.R. 279.
Day v. Crown Grain Co., 39 Can. S.C.R. 258, C.R. [1908] A.C. 150.
Norton v. Fulton, 39 Can. S.C.R. 202, C.R. [1908] A.C. 416.
Polushie v. Zacklynski, 37 Can. S.C.R. 177, C.R. [1908] A.C. 23.
Red Mountain Rly Co. v. Blue, 39 Can. S.C.R. 390.
Toronto Rly Co. v. Toronto, 37 Can. S.C.R. 430.
Grand Trunk Rly. Co. v. Miller, 34 Can. S.C.R. 45.
Victoria Mutual Fire Ins. Co. v. Home Ins. Co., 35 Can. S.C.R. 208.
Alberta Rly & Irrigation Co. v. The King, 44 Can. S.C.R. 505.
Maddison v. Emmerson, 34 Can. S.C.R. 533.
Montreal v. Montreal Street Rly. Co., 34 Can. S.C.R. 459, C.R. [1906] A.C. 109.
Saunby v. London, 34 Can. S.C.R. 650, C.R. [1906] A.C. 1.
McArthur v. Dominion Cartridge Co., 31 Can. S.C.R. 392.
Belcher v. McDonald, 33 Can. S.C.R. 321.

Other cases.

Wilfley Ore Concentrator Syndicate vs. Guthridge (1906) A.C. 548.

The question of the application of the law to the particular case involving the construction of a document, how-

ever substantial as between parties, is not one of public importance affording sufficient ground for granting special leave. S. 59. P. C. Appeals.

Special leave refused when legislation subsequent to the decision in appeal had disposed of the controversy, the amount at stake being inconsiderable. Commissioners of Taxation for *New South Wales* v. *Crouch*, (1908) A.C. 214.

Ex parte Applications.

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

Motions to Dismiss Appeal.

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

Staying execution.

McDougall v. Montreal Street Rly. Co., Q.R. 24 S.C. 509.

The Superior Court cannot, on the mere affirmation of a party that he intends to apply to His Majesty's Privy Council for leave to appeal from a final judgment of the Supreme Court of Canada, suspend the execution of said judgment.

Adams & Burns v. Bank of Montreal, Cont. Dig. 593.

A judge in Chambers of the Supreme Court of Canada will not entertain an application to stay proceedings pending an appeal from the judgment of the Court to the Judicial Committee of the Privy Council.

This decision was overruled in *Union Investment Co.* v. *Wells*, 41 Can. S.C.R. 244. *Vide* notes to Rule 136, *infra*.

Criminal appeals.

The judgment of the Supreme Court is final in criminal appeals. The provisions of the Criminal Code take away any further appeal to the Judicial Committee of the Privy Council. *Vide* p. 816, *infra*.

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Election cases.

In the exercise of its authority to create "additional courts" the Parliament of Canada, in 1874, by 37 V. c. 10 (R.S. (1906), c. 7), created courts for the trial of controverted elections. No appeal lies from these courts to His Majesty in Council. *Théberge* v. *Landry*, 2 App. Cas. 102; *Valin* v. *Langlois*, 5 A.C. 115.

Section 69 of the Controverted Elections Act, *infra*, p. provides that the judgment of the Supreme Court of Canada in election cases shall be final.

In the Glengarry election case, *Kennedy* v. *Purcell*, 59 L.T. 279, *infra*, p. 765, the Judicial Committee in refusing leave to appeal said that there was no substantial distinction between the statute which was the subject of decision in *Théberge* v. *Landry* and in *Valin* v. *Langlois*, and the case in question, and held, without giving any decision on the abstract question of the existence of the Royal prerogative to grant leave to appeal, that if it did exist it ought not to be exercised in that case.

Appeals from Board of Railway Commissioners.

Canadian Pacific Rly. Co. v. Toronto (1911), A.C. 461.

It was held that an appeal lay from Supreme Court of Canada to the Privy Council in matters in which an appeal lay to the Supreme Court from the Board, under sec. 56, sub-s. 2 of the Railway Act (1906). *Vide* p. 801, *infra*.

Admiralty cases.

The Exchequer Court of Canada is a Colonial Court of Admiralty, and by 54-55 V. c. 29, being an Act to provide for the exercise of Admiralty jurisdiction within Canada in accordance with the "Colonial Courts of Admiralty Act, 1890," provision is made in section 14 for an appeal from a local judge in Admiralty direct to the Supreme Court of Canada.

The Colonial Courts of Admiralty Act (Imp.), 53-54 V. c. 27, s. 6, sub-s. 1, provides as follows: "The appeal from the judgment of any court in a British possession in the exercise of the jurisdiction conferred by this Act either where there is as of right no local appeal or after a decision on local appeal, lies to His Majesty the King in Council." 53-54 V. c. 27, s. 6, sub-s. 2, provides "Save as may be

otherwise specially allowed in a particular case by Her Majesty the Queen in Council, an appeal under this section shall not be allowed (a) from any judgment not having the effect of a definite judgment unless the Court appealed from has given leave to appeal."

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In *Bow McLachlin* v. *Camosun*, June 30th, 1908, an application was made for leave to appeal from a judgment of the Supreme Court. The Court granted leave on the ground that the question in issue involved the jurisdiction of the Exchequer Court of Canada acting under the Imperial Statute as a Court of Admiralty.

Section 7, sub-s. 1, in part provides as follows:

"Rules of Court for regulating the procedure and practice (including fees and costs) in a court in a British possession in the exercise of the jurisdiction conferred by this Act, whether original or appellate, may be made by the same authority and in the same manner as rules touching the practice, procedure, fees, and costs in the said Court in the exercise of its ordinary civil jurisdiction respectively are made."

The general rules and orders regulating the practice and procedure in Admiralty cases in the Exchequer Court of Canada contain no provision regulating the procedure to be adopted on appeals to His Majesty in Council, but rule No. 228 provides that 'in all cases not provided for by these rules the practice for the time being in force in respect to Admiralty proceedings in the High Court of Justice in England, shall be followed."

As to this Safford & Wheeler say in their Privy Council Practice, at p. 916: ' Inasmuch as no one of the rules of the High Court of Justice applies to appeals to the Privy Council and the Order in Council does not provide any substitute for Rules 150 to 155 of the rules of 1883, as to the proceedings to be taken in the court appealed from on appeals to the King in Council, no such rules appear at present to exist."

Practice in Supreme Court in Admiralty appeals to the Privy Council.

The forms given in Safford & Wheeler, pages 908, et seq., in connection with the giving of bail in appeals from the Vice-Admiralty Courts under the above section 150, have not been followed in the Supreme Court. The practice which is now settled is as follows: The party desiring to appeal having already given a notice of appeal as required by Vice-Admiralty,

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rule 150, *infra*, gives a notice of an application to the court or a judge for an order fixing the bail upon the proposed appeal to His Majesty in Council. A form, C. 2, will be found, *infra*, p. 688.

The first application made in the Supreme Court of this kind was in the case of the SS. *"Cape Breton"* v. *The Richelieu & Ontario Navigation Co.*, before Mr. Justice Idington. In the next following case of *The "Albano"* v. *The Allan Line Steamship Co.*, the motion was made returnable in court. In the case of the SS. *"Tranmore"* v. *Rudolf*, the motion was made returnable before a judge of the Supreme Court and the order fixing bail was made by Mr. Justice Davies.

It is desirable that applications of this sort, which are purely formal, should be made to a judge, rather than to the full court.

Upon the return of the motion, the usual order is made directing the proposed appellant to give bail in a sum not exceeding £300 sterling, to the satisfaction of the Registrar of the Court, on or before a day fixed in the order. A form of order C. 3, will be found, *infra*, p. 689.

Instead of having the bail taken by the Registrar of the Court, which would be a practice analogous to what obtains in the Vice-Admiralty Courts (*Vide Safford & Wheeler*, p. 911), the practice is to have the bond executed as in ordinary cases and presented to the Registrar for his approval, on notice to the opposite party. Where the bond is not that of a Guarantee Company, there should be the usual affidavits of justification.

If the security is given by paying money into court, the usual order allowing the security in the form used on appeals to the Supreme Court may be adopted *mutatis mutandis*. The body of the bond is in the same language as is used in appeals from the Vice-Admiralty courts in England. A form of bail, C. 4, will be found, *infra*, p. 690. A form of order, C. 5, approving bail will be found *infra*, p. 690.

The Vice-Admiralty Rules in question read as follows:

"150. A party desiring to appeal shall within one month from the date of the decree or order appealed from, file a notice of appeal and give bail in such sum not exceeding £300, as the judge may order, to answer the costs of the appeal. A form of notice is to be found in Appendix No. 51.

"151. Notwithstanding the filing of the notice of appeal, the judge may at any time before the service of the inhibition proceed to carry the decree or order appealed from into effect, pro-

vided that the party in whose favour it has been made gives bail to abide the event of the appeal, and to answer the costs thereof in such sum as the judge may order. S. 59. P. C. Appeals.

"152. An appellant desiring to prosecute his appeal is to cause the Registrar to be served with an inhibition and citation, and a monition for process, or is to take such other steps as may be required by the practice of the appellate court.

"153. On service of the inhibition and citation all proceedings in the action will be stayed.

"154. On service of the monition for process the Registrar shall forthwith prepare the process at the expense of the party ordering the same.

"155. The process which shall consist of a copy of all the proceedings in the action shall be signed by the Registrar, and sealed with the seal of the Court, and transmitted by the Registrar to the Registrar of the appellate court."

In the first edition of this work the opinion was expressed that section 6 above of the Colonial Courts of Admiralty Act (Imp.), 53-54 V. c. 27, would appear to give a right of appeal *de plano* from the Supreme Court of Canada to His Majesty in Council in appeals taken to the Supreme Court from a judgment of the local judge in Admiralty or from the Exchequer Court sitting in appeal from the local judge in Admiralty

Since then the Judicial Committee has expressly so decided. *Richelieu & Ontario Navigation Co.* v. *SS. "Cape Breton,"* (1907) A.C. 112, C.R. [1907] A.C. 295. Their Lordships there said:

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

Judgments of Judicial Committee—how enforced.

Lewin v. Howe, 14 Can. S.C.R. 722.

When a judgment of the Supreme Court of Canada has been reversed by the Privy Council the proper manner of enforcing the judgment of the Privy Council is to obtain an order making it a judgment of the Supreme Court of Canada, and then have a certificate of the judgment of the Supreme Court forwarded to the Court below. If the judg-

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ment of the Supreme Court is affirmed by the Privy Council, it is not necessary to take out an order in the Supreme Court.

The application to make an order of the Judicial Committee an order of the Supreme Court should be made in Chambers.

As to enforcing the order of the Privy Council with respect to costs, *vide* notes to section 53, p. 302, *supra*.

For provisions relating to appeals from provincial courts direct to the Privy Council, *vide* p. 56, *supra*.

Concurrent appeals—Supreme Court and Privy Council.

McGreevy v. McDougall, Cout. Dig. 74.

At the hearing of the appeal it appeared that the respondent had taken an appeal from the same judgment to Her Majesty's Privy Council, and that the respondent's said appeal was then pending. The Court, in consequence, stopped the arguments of counsel and ordered that the hearing of the appeal to the Supreme Court of Canada should stand over until after the adjudication of the said appeal to the Privy Council.

Eddy v. Eddy, Cout. Dig. 130.

Where the respondent has taken an appeal, from the same judgment as is complained of in the appeal to the Supreme Court of Canada, to the Judicial Committee of Her Majesty's Privy Council, the hearing of the appeal to the Supreme Court will be stayed until the Privy Council appeal has been decided, upon the respondent undertaking to proceed with diligence in the appeal so taken by him. In the case in question the costs were ordered to be costs in the cause.

Bank of Montreal v. Demers, 29 Can. S.C.R. 435.

Held, (following *Eddy* v. *Eddy*, Cout. Dig., 130), that where one party to the appeal in the court below has launched an appeal to the Privy Council, the other party to the appeal should not inscribe an appeal from the same judgment to the Supreme Court while the other appeal is pending, and if he does his proceedings in the Supreme Court will be stayed with costs.

For Privy Council rules, *vide* p. 668, *infra*.

English cases.

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"*Court below acting without jurisdiction.*—Special leave was granted to appeal where the allegation on behalf of the Crown was that the Supreme Court, in quashing an order forfeiting recognizances of sureties made by a police magistrate, had acted without jurisdiction. *The Queen* v. *Price* (Ceylon, 1854), 8 Moo. 203; *Syad Muhammud Yusuf-ud-Din* v. *The Queen*. Where the Court of British Guiana had treated the publication of letters in newspapers by a barrister criticising the administration of justice as a contempt of court, the Judicial Committee recommended special leave to appeal, as it appeared *prima facie* that it was not within the competency of the Court to deal with the case as one of contempt. In re De Souza, P.C. Arch., 1st Dec., 1888. (*Safford & Wheeler*, P.C. Practice.)

"*Several suits taken conjointly exceed the Appealable Amount.*—Where the suits are substantially for the same matter, and involve the same questions, and the Court below has pronounced one judgment as its decision which is to determine all the suits, the Privy Council may give leave to appeal. It has directed in such a case that if the parties should, within two months, agree that all the suits were to abide the event of the appeal in the first suit on the list, the record of the first suit only should be transmitted to this country; otherwise that all the records should be transmitted. (*Baboo Gopal Lall Thakoor* v. *Teluk Chunder Rai* (Calc. 1860), 7 Moo. I.A. 548; *Ka Khine* v. *Snadden* (Bengal, 1868), L.R. 2 P.C. 50). So where many other suits depended upon the decision. (*Joykissen Mookerjea* v. *Collector of East Burdwan* (Calc. 1860), 8 Moo. I.A. 265). *Safford & Wheeler*, P.C. Practice.)

"*Important Point of Law.*—Under the special circumstances of the case, an important point of law being in dispute, the Judicial Committee have recommended the granting of leave to appeal, although the amount in question was less than the appealable amount. (*Castrique* v. *Buttigieg* (Malta, 1855), 10 Moo. 94; *Kreakaose* v. *Braaks* Madras 1860), 14 Moo. 452; *Rogers* v. *Rajendro Dutt* (Calc. 1860), 8 Moo. I.A. 103; *Sun Fire Office* v. *Hart* (of general importance to insurance offices) (Windward Islands, 1889, 14 A.C. 98). (*Safford & Wheeler*, P.C. Practice.)

"*Question of Public Interest.*—Several verdicts had been obtained against the Crown in a Colonial Court, and the

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points involved in all the cases were the same, and materially concerned the rights of the Crown and the duties of the Governor. The Privy Council, although the value was in two of the cases below the appealable amount, permitted the Attorney-General to appeal, the appeals being consolidated. (*In re Attorney-General of Victoria* (1866), L.R. 1, P.C. 147; 3 Moo. (N.S.) 527; *Ko Khine* v. *Snadden* (Bengal. 1868) L.R. 2 P.C. 50). Where the Attorney-General of a Colony had exhibited a criminal information against a person for an assault, which he charged to be a contempt of the local legislature, and the Colonial Court had allowed a demurrer to the information, the Committee gave the Attorney-General leave to appeal. (*Att.-Gen. of New South Wales* v. *Macpherson* (N.S.W. 1870), 7 Moo. (N.S.), 491. So also where a question involved a principle of general local application, and of local importance in judicial proceedings. (*Emery* v. *Binns* (Jamaica, 1850), 7 Moo. 195; cf. also *Brown* v. *McLaughan* (South Australia, (1870), 7 Moo. (N.S.) 306). So where the construction of a Colonial Act was in question, leave to appeal was granted, though only as to that part. (*Brown* v. *McLaughan* (South Australia, 1870), 7 Moo. (N.S.) 306. See generally *Lindo* v. *Barrett* (Jamaica, 1856), 9 Moo. 456; *Wilson* v. *Callender* (Barbadoes, 1855), 9 Moo. 100; *St. George's Churchwardens* v. *May* (Jamaica, 1858), 12 Moo. 282; *Boswell* v. *Kilborn* (Quebec, 1859), 12 Moo. 467; cf. *Castrique* v. *Buttigieg* (Malta, 1855), 10 Moo. 94. Contra, *Johnstone* v. *St. Andrew's Church, Montreal* (Canada, 1877), 3 App. Cas. 159; *Spearman* v. *East India Ry.* (Bengal. 1869), 20 L.T. (N.S.) 501; *Ex parte Kensington* (Leeward Islands, 1863), 15 Moo. 209). (Cf. Ex parte Gregory (1901), A.C. 128)." (*Safford & Wheeler*, P.C. Practice.)

60. Important questions of law or fact touching—

" (a) the interpretation of The British North America Acts, 1867 to 1886; or

" (b) the constitutionality or interpretation of any Dominion or provincial legislation; or

" (c) the appellate jurisdiction as to educational matters, by The British North America Act, 1867, or by any other Act or law vested in the Governor in Council; or

" (d) the powers of the Parliament of Canada or of the legislatures of the provinces, or of the respective governments

thereof, whether or not the particular power in question has been or is proposed to be executed; or S. 60.

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"(e) any other matter, whether or not in the opinion of the court ejusdem generis with the foregoing enumerations, with reference to which the Governor in Council sees fit to submit any such question:—

"'May be referred by the Governor in Council to the Supreme Court for hearing and consideration, and any question touching any of the matters aforesaid, so referred by the Governor in Council, shall be conclusively deemed to be an important question.'

"2. When any such reference is made to the Court is shall be the duty of the Court to hear and consider it, and to answer each question so referred; and the Court shall certify to the Governor in Council, for his information, its opinion upon each such question, with the reasons for each such answer; and such opinion shall be pronounced in like manner as in the case of a judgment upon an appeal to the said Court; and any judge who differs from the opinion of the majority shall in like manner certify his opinion and his reasons."

3. In case any such question relates to the constitutional validity of any Act which has heretofore been or shall hereafter be passed by the legislature of any province, or of any provision in any such Act, or in case, for any reason, the government of any province has any special interest in any such question, the attorney-general of such province, shall be notified of the hearing, in order that he may be heard if he thinks fit.

4. The Court shall have power to direct that any person interested, or, where there is a class of persons interested, any one or more persons as representatives of such class, shall be notified of the hearing upon any reference under this section, and such persons shall be entitled to be heard thereon.

5. The Court may, in its discretion, request any counsel to argue the case as to any interest which is affected and as to which counsel does not appear, and the reasonable expenses thereby occasioned may be paid by the Minister of Finance out of any moneys appropriated by Parliament for expenses of litigation.

6. The opinion of the Court upon any such reference, although advisory only, shall, for all purposes of appeal to His Majesty in Council, be treated as a final judgment of the said Court between parties. 54-55 V. c. 25, s. 4;—6 E. VII. c. 50.

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By 6 Ed. VII. c. 50, the sub-sections 1 and 2 of section 37 of R.S.C. 1886, c. 135, as amended by section 4 of chapter 25, 54-55 V., were repealed and the above sections 1 and 2 substituted therefor. The original sub-sections read as follows:—

"60. Important questions of law or fact touching provincial legislation, or the appellate jurisdiction as to educational matters vested in the Governor in Council by the British North America Act, 1867, or by any other Act or law, or touching the constitutionality of any legislation of the Parliament of Canada, or touching any other matter with reference to which he sees fit to exercise this power, may be referred by the Governor in Council, to the Supreme Court for hearing or consideration; and the Court shall thereupon hear and consider the same.

2. The Court shall certify to the Governor in Council, for his information, its opinion on questions so referred, with the reasons therefor, which shall be given in like manner as in the case of a judgment upon an appeal to the said court; and any judge who differs from the opinion of the majority shall, in like manner, certify his opinion and his reasons."

It was stated in Parliament when the amendment was under discussion that its object was to compel the Supreme Court to answer questions with respect to hypothetical or intended legislation and to meet the objection stated by the Supreme Court in pronouncing judgment in the reference *re Sunday Legislation*, 35 Can. S.C.R. 581, *infra*, page 337.

The following observations have been made with respect to the matters which are proper to be submitted under this section as it originally stood and as to the binding effect of any decision given thereunder.

Attorney-General for Ontario v. Attorney-General for the Dominion, Brewers Case (1896), A.C. p. 348:—

"Their Lordships will now answer briefly, in their order, the other questions submitted by the Governor-General of Canada. So far as they can ascertain from the record, these differ from the question which has already been answered in this respect, that they relate to matters which may possibly become litigious in the future, but have not as yet given rise to any real and present controversy. Their Lordships must further observe that these questions, being in their nature academic rather than judicial, are better fitted for the consideration of the officers of the Crown than of a court of law. The replies to be given to them will necessarily depend upon the circumstances in which they may arise for decision; and these circumstances are in this case

left to speculation: It must, therefore, be understood that the answers which follow are not meant to have, and cannot have, the weight of a judicial determination, except in so far as their Lordships may have occasion to refer to the opinions which they have already expressed in discussing the seventh question."

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Attorney-General of Ontario v. Hamilton Street Rly., (1903), A.C. 524:—

"With regard to the remaining questions, which it has been suggested should be reserved for further argument, their Lordships are of opinion that it would be inexpedient and contrary to the established practice of this Board to attempt to give any judicial opinion upon those questions. They are questions proper to be considered in concrete cases only: and opinions expressed upon the operation of the sections referred to, and the extent to which they are applicable, would be worthless for many reasons. They would be worthless as being speculative opinions on hypothetical questions. It would be contrary to principle, inconvenient, and inexpedient that opinions should be given upon such questions at all. When they arise, they must arise in concrete cases, involving private rights; and it would be extremely unwise for any judicial tribunal to attempt beforehand to exhaust all possible cases and facts which might occur to qualify, cut down and override the operation of particular words when the concrete case is not before it."

In re Sunday Legislation, 35 Can. S.C.R. 581, the majority of the Court said, p. 591:—

"We are of the opinion that the questions submitted to us as to whether certain supposed or hypothetical legislation which the legislature of one of the provinces might in the future enact would be within the powers of such legislature, are not within the purview of the section. Questions as to the constitutionality of existing legislation are clearly within the meaning of that 37th section (now section 60), and the general words 'touching any other matter' must be considered as within the rule *ejusdem generis* and may well refer to orders in council by the Governor-General or Lieutenant-Governors, as the case may be, passed pursuant to the Dominion or provincial legislation the constitutionality of which may be in question, or to departmental regulations authorized by statute. These orders in council cover

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a very large legislative area, and include regulations on the subjects of navigation, pilotage, fisheries, Crown lands, forests, mines and minerals. For the first time this question of jurisdiction has been raised by one of the interested parties, and for that reason we feel bound to express the foregoing views, from which Mr. Justice Sedgewick dissents.

"As, however, the practice of this Court heretofore has been to answer questions similar to those now submitted as to the power to legislate vested in the Dominions or the provinces and on appeals to the Judicial Committee of the Privy Council answers have been given by that Board on the assumption that the questions were warranted by the section to which we have referred, we will follow in this case, subject to the expression of the foregoing views, the practice of the courts on similar references and proceed to answer to the questions as follows."

In the reference *Re Provincial Fisheries*, 26 Can. S.C.R. 444, which was a special case referred by the Governor-General in Council to the Supreme Court under the provisions of this section, Taschereau, J., made the following observations:—

"Our answers" (to the questions submitted) "are merely advisory and we have to say what is the law as heretofore judicially expounded, not what is the law according to our opinion. We determine nothing. We are mere advisers, and the answers we give bind no one, not even ourselves."

The following references have been made under this section, or the corresponding section of 38 V. c. 11:—

In re New Brunswick Penitentiary, April, 1880.

In re Canada Temperance Act of 1878, *and County of Perth*, Cass. Dig. (2d. ed.) 105.

In re Canada Temperance Act of 1878, *and County of Kent*, Cass. Dig. (2d. ed.) 106.

The Thrasher Case, Cass. Dig. 480.

The Manitoba Railway Crossings Case.

In re Statutes of Manitoba relating to Education, 22 Can. S.C.R. 577.

In re Provincial Jurisdiction to pass Prohibitory Liquor Laws, 24 Can. S.C.R. 170.

In re Provincial Fisheries, 26 Can. S.C.R. 444.

In re Criminal Code, Bigamy Sections, 27 Can. S.C.R. 461.

In re Representations in the House of Commons, Nova Scotia and New Brunswick, 33 Can. S.C.R. 475.

In re Representation in the House of Commons, Prince Edward Island, 33 Can. S.C.R. 594.

In re Sunday Legislation, 35 Can. S.C.R. 581.

Re Guarantee of Bonds of Grand Trunk Pacific Rly. Co., 42 Can. S.C.R. 505.

Re Criminal Code, 43 Can. S.C.R. 434.

References by Parliament.

Legislative jurisdiction of Parliament.

The question of the legislative jurisdiction of the Parliament of Canada to enact s. 60 of the Supreme Court Act was never raised until 1910, when this preliminary objection was taken by counsel for the Provinces in *re* References by the Governor-General of Canada, 43 Can. S.C.R. 536. It was there held by a majority of the Court that there was jurisdiction. From this preliminary holding, and before the merits of the reference were taken up, the Province appealed to the Judicial Committee of the Privy Council when the judgment of the Supreme Court was affirmed.

Case and factums.

Rule 80 provides as follows:—

"Whenever a reference is made to the Court by the Governor in Council or by the Board of Railway Commissioners for Canada, the case shall only be inscribed by the Registrar upon the direction and order of the Court or a judge thereof, and factums shall thereafter be filed by all parties to the reference in the manner and form and within the time required in appeals to the Court."

Counsel.

In the case of the *Manitoba School Act*, 22 Can. S.C.R. 577, the Court requested Mr. Christopher Robinson, Q.C., to argue the appeal on behalf of the province. In the *Prohibition case* in 24 Can. S.C.R. 170, it directed the Brewers and Distillers' Association of Ontario to be notified and counsel appeared for them at the hearing. Cass. Prac. 59.

61. The Court, or any two of the judges thereof, shall examine and report upon any private bill or petition for a private bill presented to the Senate or House of Commons, and referred to the Court under any rules or orders made by the Senate or House of Commons. R.S., c. 135, s. 38.

The following bills have been referred to the Supreme Court under this section, namely: A Bill to Incorporate the Christian Brothers (1876), Cout. Cas. 1; A Bill to incorporate the Quebec Timber Company (1882), Cout. Cas. 43; and a Bill to incorporate the Canada Provident Association (1882), Cout. Cas. 48.

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62. Every judge of the Court shall except in matters arising out of any claim for extradition under any treaty, have concurrent jurisdiction with the courts or judges of the several provinces, to issue the writ of habeas corpus ad subjiciendum, for the purpose of an inquiry into the cause of commitment in any criminal case under any Act of the Parliament of Canada.

2. If the judge refuses the writ or remands the prisoner, an appeal shall lie to the Court. R.S., c. 135, s. 32.

63. In any habeas corpus matter before a judge of the Supreme Court, or on any appeal to the Supreme Court in any habeas corpus matter, the Court or judge shall have the same power to bail, discharge or commit the prisoner or person, or to direct him to be detained in custody or otherwise to deal with him as any court, judge or justice of the peace having jurisdiction in any such matters in any province of Canada. R.S., c. 135, s. 33.

64. On any appeal to the Court in any habeas corpus matter the Court may by writ or order direct that any prisoner or person on whose behalf such appeal is made shall be brought before the Court.

2. Unless the Court so direct it shall not be necessary for such prisoner or person to be present in court, but he shall remain in the charge or custody to which he was committed or had been remanded, or in which he was at the time of giving the notice of appeal, unless at liberty on bail, by order of a judge of the court which refused the application or of a judge of the Supreme Court. R.S., c. 135, s. 34.

65. An appeal to the Supreme Court in any habeas corpus matter shall be heard at an early day, whether in or out of the prescribed sessions of the Court. R.S., c. 135, s. 35.

The Supreme Court has appellate jurisdiction in *habeas corpus* proceedings arising out of a criminal charge to review the decision of a judge of the Supreme Court, on whom, under section 62, is conferred concurrent jurisdiction with the courts or judges of the several provinces of Canada, except in extradition matters, and the Supreme Court has no power to hear an appeal from any decision made by a

provincial court or a judge in any *habeas corpus* criminal proceedings. S. 65.

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In the first edition of this work it was said that "it is a judge of the Court only who has power to issue the writ, and that the Court itself has no original, but only an appellate jurisdiction," but in the case of *Placide Richard*, 38 Can. S.C.R. 394, it was held that on an application to a judge for a writ of habeas corpus he may refer the same to the court which has jurisdiction to hear and dispose of it, (Idington and Maclennan, JJ., dissenting).

In the case of "*Jerome D. Tellier*," Cont. Cas. 110, Mr. Justice Patterson expressed his views as to the circumstances under which a judge of the Supreme Court should exercise his jurisdiction under the Supreme Court Act as follows:

"My impression is that when the powers already vested in the judges of the provincial courts were given to the judges of this court, not by way of appeal from the provincial tribunals, but by way of original jurisdiction, the intention must have been to provide for cases of emergency, or cases in which, for some reason or other, there may have been obstacles in the way of effective resort to the provincial courts, and not to invite a withdrawal from those courts of cases like the present, which may be more conveniently and with less expense dealt with there than here."

The judges of the Supreme Court have not, however, followed this opinion, but have exercised jurisdiction as fully as a judge of the Superior Court in any province of Canada.

In re Trepanier, 12 Can. S.C.R. 111. Per Ritchie, C.J.

If on the return to the writ of *habeas corpus* it appears that the prisoner is committed for trial on a criminal charge under a Dominion statute, the prisoner, by virtue of the *habeas corpus* jurisdiction of a judge of the Supreme Court, could be either bailed or remanded.

Per Strong, J.:—"The only consideration which on the return to the writ of *habeas corpus* can be entered upon by the court or judge is the sufficiency of the commitment. If the officer returns to the writ a good commitment, whether it is in pursuance of a sentence of a common law court, that is a sentence following a conviction by a jury, or whether it is a commitment following a summary adjudication by a magistrate under a statutory jurisdiction, in either case that is conclusive. . . . The officer who has the prisoner in custody has not the record, he cannot return the record. He

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can only return the warrant of commitment, and if that appears to be good, it must be conclusive so far as the writ of *habeas corpus* is concerned."

In re Boucher, Nov., 1879.

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

In re Pierre Poitvin, August, 1881.

In a case of committment by a coroner for murder, application was made to Strong, J., for a writ of *habeas corpus*.

Held, that under sec. 51 (now sec. 62), the writ is to be issued for the purpose of an inquiry into a commitment only "in any criminal case under any Act of the Parliament of Canada," and the Act of the Parliament of Canada (1869) does not create the offence of murder, but only defines the punishment which may be awarded for such offence. Writ refused.

In re Sproule, 12 Can. S.C.R. 140.

Held, the right to issue a writ of *habeas corpus* being limited by section 51 to "an enquiry into the cause of commitment in any criminal case under any Act of the Parliament of Canada," such writ cannot be issued in a case of murder, which is a case at common law. (Fournier and Henry, JJ., dissenting.)

An application to quash a writ of *habeas corpus* as improvidently issued may be entertained in the absence of the prisoner. (Henry, J., dissenting.)

After a conviction for a felony by a court having general jurisdiction over the offence charged, a writ of *habeas corpus* is an inappropriate remedy.

If the record of a superior court, produced on an application for a writ of *habeas corpus* contains the recital of facts requisite to confer jurisdiction it is conclusive and

cannot be contradicted by extrinsic evidence. (Henry, J., dissenting.) S. 65.

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A return by the sheriff to the writ setting out such conviction and sentence and the affirmation thereof by the court of error is a good and sufficient return. If actually written by him or under his direction the return need not be signed by the sheriff. (Henry, J., dissenting.)

In re Trepanier, 12 Can. S.C.R. 111.

Application was made to the Chief Justice of the Supreme Court of Canada in Chambers on behalf of a person arrested on a warrant issued on a conviction by a magistrate, for a writ of *habeas corpus* and for a *certiorari* to bring up the proceedings before the magistrate, the application being based on the lack of evidence to warrant the conviction. The aplication was dismissed. On appeal to the full Court,

Held, Henry, J., dissenting, that the conviction having been regular, and made by a court in the unquestionable exercise of its authority and acting within its jurisdiction, the only objection being that the magistrate erred on the facts and that the evidence did not justify the conclusion at which he arrived as to the guilt of the prisoner, the Supreme Court could not go behind the conviction and inquire into the merits of the case by the use of a writ of *habeas corpus* and thus constitute itself a court of appeal from the magistrate's decision.

The only appellate power conferred on the court in criminal cases is by the 49th section of the Supreme & Exchequer Courts Act, and it could not have been the intention of the legislature, while limiting appeals in criminal cases of the highest importance, to impose on the court the duty of revisal in matters of fact of all the summary convictions before police or other magistrates throughout the Dominion.

Section 34 of the Supreme Court Amendment Act of 1876 does not in any case authorize the issue of a writ of *certiorari* to accompany a writ of *habeas corpus* granted by a judge of the Supreme Court in Chambers, and as the proceedings before the court on *habeas corpus* arising out of a criminal charge are only by way of appeal from the decision of such judge in Chambers, the said section does not authorize the Court to issue a writ of *certiorari* in such proceedings; to do so would be to assume appellate jurisdiction over the inferior court.

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Semble, per Ritchie, C.J., that chapter 70 of the Revised Statutes of Ontario relating to *habeas corpus* does not apply to the Supreme Court of Canada.

Ex parte McDonald, 27 Can. S.C.R. 683.

The Court in delivering judgment said:—

"The petitioner has filed before me a copy of the warrant of commitment and also of the conviction and information filed before the stipendiary magistrate, and other papers, but I must say that I am not inclined to go into any inquiry behind the warrant of commitment.

"I am not disposed to go beyond what appears to me to be the plain words of the Supreme Court Act and the well settled jurisprudence of this Court: *Re Boucher*, 1879; *Re Poitvin*, 1881; *Re Trepanier*, 1885; *Re Sproule*, 1886.

"The first paragraph of section 32 of the Supreme and Exchequer Courts Act, provides as follows:—

"'Every judge of the Court shall have concurrent jurisdiction with the courts or judges of the several provinces, to issue writs of *habeas corpus ad subjiciendum* for the purpose of an inquiry into the cause of commitment in any criminal case under any Act of the Parliament of Canada.'

"I believe therefore that the jurisdiction of a judge of the Supreme Court in matters of *habeas corpus* in any criminal case is limited to an inquiry into the cause of commitment, that is, as disclosed by the warrant of commitment, under any Act of the Parliament of Canada."

Re Patrick White, 31 Can. S.C.R. 383.

An application for a writ of *habeas corpus* was referred by the judge to the Supreme Court of the province, and after hearing the application was refused. On an application subsequently made to a judge of the Supreme Court of Canada, in Chambers, *Held*, per Sedgewick, J.:—

"Section 32 of the Supreme and Exchequer Courts Act (now section 63) may give me all the power which the common and statute law gives to judges of superior courts in matters of *habeas corpus*, but it does not constitute me a court of appeal with jurisdiction to void or reverse judgments of the Supreme Court of Nova Scotia. If I have in the premises equal and co-ordinate power with a judge of that court, my power most certainly does not extend further. The suggestion is almost impertinent, but were either of the two judges of the provincial court who until now have had

no part in the matter, to grant the writ and, in spite of the judgment of the Supreme Court, and in vindication and assertion as well of his autonomy as of his possibly superior and conceivably infallible knowledge of law, to release the prisoner, his action, violating elementary principles as to legal authority and precedent, would be open to not undeserved censure. In the case supposed he would unhesitatingly and without question accept as law the judgment of his court. And what he should and would do, I must also do.

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"Even if I thought the imprisonment illegal (which I do not), I would not, and under the circumstances above stated, I cannot interfere.

"The application is refused." But *vide in re Seeley, infra*, p. 346.

In re Vancini, 34 Can. S.C.R. 621.

The appellant Vancini was charged with the crime of theft before the police magistrate at Fredericton, N.B., and having elected to be tried summarily he pleaded guilty and was sentenced to imprisonment in the penitentiary. Application was made to a judge of the Supreme Court of New Brunswick for a writ of *habeas corpus* on the two main grounds: 1. That as by section 785 of the Criminal Code, as amended by 63 V. c. 46, a summary trial can only be had for an offence triable at a court of general sessions of the peace, such section is inoperative, there being no such court in New Brunswick. 2. That the Dominion Parliament cannot give jurisdiction to a provincial court to try criminal offences; the power to constitute a court of criminal jurisdiction being given only to the legislature.

The application for the writ was referred to the full Court in New Brunswick by which it was refused. A similar application was then made to Mr. Justice Killam of the Supreme Court of Canada, in Chambers, who also refused the writ. An appeal taken from this refusal to the full Court was dismissed.

In re William Smitheman, 35 Can. S.C.R. 189.

In this case an application was made to Killiam, J., in Chambers for a writ of *habeas corpus* to inquire into the cause of imprisonment of one William Smitheman, then in the penitentiary at Dorchester in the Province of New Brunswick, on a conviction by his Honour William B. Wallace, judge of the County Court Judges' Criminal Court, in and

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for the Metropolitan County of Halifax, District No. 1, in the Province of Nova Scotia, under the provisions of article 54 of the Criminal Code, 1892, for the speedy trial of indictable offences, and the following order was made:—

"It is ordered that a writ of *habeas corpus* issue directed to John A. Kirk, Esquire, Warden of Dorchester Penitentiary, at Dorchester, in the Province of New Brunswick, to have the body of William Shitheman before a judge in Chambers at the City of Ottawa, in the Dominion of Canada forthwith to undergo and receive all and singular such matters and things as the said judge shall then and there consider of concerning him in this behalf.

"And it is further ordered that a motion for the discharge of the said William Smitheman from custody under the said writ of *habeas corpus* be set down for hearing by a judge of this Court in Chambers at the Supreme Court Building in the City of Ottawa aforesaid, for the 14th day of June, A.D. 1904, at eleven o'clock in the forenoon.

"And it is also further ordered that the production of the body of the within named William Smitheman in pursuance of the said writ be dispensed with upon his solicitor signing upon said writ an endorsement dispensing with the production of the body of the said William Smitheman."

The motion for the discharge of the prisoner from custody came on for hearing before Davies, J., in Chambers, and was refused.

Upon appeal to the full Court (35 Can. S.C.R. 490), *Held*, "by the Penitentiary Act, R.S.C. c. 182, s. 42, the officer conveying a convict to a penitentiary is to deliver him over without any further warrant than a copy of the sentence taken from the minutes of the court before which the convict was tried and certified by a judge or by the clerk or acting clerk of such court. This was done in the present case and the copy furnished showed a record in the form which satisfied the statute and which by virtue of the statute shewed the jurisdiction of the court."

In re Charles Seeley, 41 Can. S.C.R. 5.

Seeley applied to a judge of the Supreme Court of New Brunswick for a writ of *habeas corpus* application was referred to the full Court and the writ was finally refused (13 Can. Crim. Cas. 259). He then applied to Mr. Justice Girouard, who, following in *re White* (*supra*, p. 344) refused to interfere with the decision of the Provincial Court. He

then applied to the Supreme Court, when the appeal was dismissed on the merits. S. 66. Certiorari.

During the argument of this appeal it was stated by counsel that in the appeal in *re Richard*, 38 Can. S.C.R. 394, *supra*, p. 341, the application in the Supreme Court was simply a repetition of a similar application which had been refused by the Supreme Court of Nova Scotia; but this point was not made in the argument of that case in the Supreme Court, nor was the attention of the Court called to it.

Extradition.

In re Lazier, 29 Can. S.C.R. 630.

An application having been made to the Court to fix a day for hearing a motion to quash an appeal to the Supreme Court in an extradition matter, the Court refused to fix a day as there was no necessity for a motion to quash, the Court having no jurisdiction to hear an appeal in a case of proceedings upon a writ of *habeas corpus* arising out of a claim for extradition under a treaty.

Vide also *Gaynor & Green* v. *United States*, *supra*, p. 102.

CERTIORARI.

66. A writ of certiorari may, by order of the Court or a judge thereof, issue out of the Supreme Court to bring up any papers or other proceedings had or taken before any court, judge or justice of the peace, and which are considered necessary with a view to any inquiry, appeal or other proceeding had or to be had before the Court. R.S., c. 135, s. 36.

The judges of the Supreme Court have not the extensive common law jurisdiction of the provincial courts to superintend by *certiorari* the administration of the law by inferior courts.

Re Trepanier, 12 Can. S.C.R. 111, per Ritchie, C.J.

"*Certiorari* is the medium through which the Court of Queen's Bench exercises its jurisdiction over the summary proceedings of inferior courts, and always was unless expressly taken away; no writ of error lies upon a conviction, so that a *certiorari* is the only mode of bringing it into the Queen's Bench in order to revise it."

Per Strong, J.

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Reference by Courts below.

"This section only authorizes the bringing up of proceedings and papers required before the Supreme Court sitting as an appellate court. The writ is not meant to accompany a writ of *habeas corpus* returnable before a single judge. If, therefore, on a return to a writ of *habeas corpus*, it appears that the prisoner is in custody after conviction, and the warrant of commitment is regular upon its face, this is a conclusive return to the writ, and a judge has no power to bring up, by writ of *certiorari*, something behind the warrant, namely, the conviction.'"

The decision *In re Trepanier* was followed by Mr. Justice Patterson, in *Re Arabin alias Ireda* on an application for a writ of *habeas corpus*. Cass. Prac. (2d ed.) 55.

Sswell v. British Colnmhia Towing Co., Cass. Prac. 55.

A writ of *certiorari* was moved for to bring up papers from the Supreme Court of British Columbia, the Chief Justice of that court having made an order staying execution on the judgment of the Supreme Court of Canada, certified to the court below in the usual way, on the ground that an appeal was being proceeded with to the Privy Council. Motion refused.

SPECIAL CASES REFERRED TO THE COURT.

67. Whsn the iegisiature of any provincs of Canada has passed an Act agreeing and providing that the Snpreme Court of Canada shall have jurisdiction in any of ths following cases, that is to say:—

(a.) Of suits, actions or proceedings in which the parties thsreto by their pieading havs raised the qnestion of ths validity of an Act of the Parliament of Canada when in the opinion of a judge of ths court in which the same ars psnding such questioa is materiai;

(h.) Of suits, actions or proceedings in which the parties thereto by their pieadings have raised ths question of the validity of an Act of the legisiaturs of such province, when in the opinion of a judge of ths court in which the same ars pending such question is material;

the judge who has decided that such question is material shall at ths request of ths parties, and may without such request, if hs thinks fit, in any suit, action or procesding withia the class

or classes of cases in respect of which such Act so agreeing and providing has been passed, order the case to be removed to the Supreme Court for the decision of such question, whatever may be the value of the matter in dispute, and the case shall be removed accordingly. S. 67. Reference by Courts below.

2. The Supreme Court shall thereupon hear and determine the question so raised and shall remit the case with a copy of its judgment thereon to the court or judge whence it came to be then and there dealt with as to justice appertains.

3. There shall be no further appeal to the Supreme Court on any point decided by it in any such case, nor, unless the value of the matter in dispute exceeds five hundred dollars, on any other point in such case.

4. This section shall apply only to cases of a civil nature. R.S., c. 135, ss. 72, 73 and 74.

This section contains that portion of the Supreme and Exchequer Courts Act, section 72, which refers to the jurisdiction of the Supreme Court of Canada. The original section also gave jurisdiction to the Exchequer Court in certain cases, and these provisons are now contained in section 31 of the Exchequer Court Act, which reads as follows:—

"31. When the legislature of any province of Canada has passed an Act agreeing that the Exchequer Court shall have jurisdiction in cases of controversies.

"(*a.*) between the Dominion of Canada and such province;

"(*b.*) between such province and any other province or provinces which have passed a like Act;

the Exchequer Court shall have jurisdiction to determine such controversies and an appeal shall lie from the Exchequer Court to the Supreme Court."

The legislature of Ontario, Nova Scotia, New Brunswick, British Columbia and Manitoba have passed the necessary statutes to give jurisdiction to the Supreme and Exchequer Courts.

Attorney-General of Ontario v. Attorney-General of Canada, 14 Can. S.C.R. 736.

This was an action instituted in the Exchequer Court of Canada in which the Attorney-General of Ontario was plaintiff and the Attorney-General of Canada defendant.

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Reference by Courts below.

The statement of claim recited that the legislature of Ontario had passed an Act intituled "An Act to amend the law respecting escheats and forfeitures," authorizing the Lieutenant-Governor in Council to dispose of lands, tenements, hereditaments and personal property; that the Government of the Dominion of Canada claimed that Her Majesty was entitled to such property for the benefit of the Government of the Dominion and not for the benefit of the province and accordingly disallowed the said Act; that subsequently the Court of Queen's Bench for the Province of Quebec in a case between the Attorney-General of Quebec and the Attorney-General of Canada, with reference to the estate of one Fraser, had held that his goods, moveable and immoveable, escheated for the benefit of the province and not of the Dominion; that in consequence of this decision it had been agreed between the Governments of Canada and Ontario that for the future, until there should be judicial decision overruling the above case in the Province of Quebec, the Government of Canada should act upon the assumption that lands and personal property in any province escheated or forfeited belonged to the province; that, in 1877, the Province of Ontario had passed an Act to amend the law respecting escheats and forfeitures (40 V. c. 3); that the decision of the Court of Queen's Bench was subsequently overruled by the Supreme Court of Canada in a case of *Mercer* v. *Attorney-General*, 5 Can. S.C.R. 538, but this decision was reversed by the Judicial Committee of the Privy Council so far as regarded lands escheated for want of heirs, but did not determine the law with respect to personal property; that the Dominion Government now claimed that although not entitled to land, it was entitled as against the province to personal estate escheated as aforesaid; and prayed a declaration that personal property of persons dying domiciled within Ontario intestate and leaving no next of kin or other person entitled thereto, belonged to the province or to Her Majesty in trust for the province, or that if all of such personal property did not so belong, that some other declaration might be made as to the respective rights to said property.

To this statement of claim the Attorney-General of Canada pleaded by a statement of defence claiming that the property in question escheated to Her Majesty in the right of the Dominion, and not of the province. No reply having been filed the pleadings were closed.

An order was made on notice by Mr. Justice Taschereau, sitting in Chambers as a judge of the Exchequer Court, appointing a day for hearing an application to fix the time and place of hearing. The application was made before Mr. Justice Gwynne, also sitting in Chambers as a judge of the Exchequer Court, when the summons was discharged on the ground that no proper case was presented for the decision of the Court. Juris-prudence generally. Concurrent findings.

An appeal was taken from the order in Chambers to the Exchequer Court, Sir W. J. Ritchie presiding, where the motion was dismissed on the ground that he was not prepared to interfere with the order of another judge of the same court.

From this order an appeal was taken to the Supreme Court of Canada, where it was held "affirming the decision appealed from that the pleadings did not disclose any matter in controversy in reference to which the Court could be properly asked to adjudge, or which a judgment of the Court could affect."

JURISPRUDENCE GENERALLY.

Sections 35-67, above, contain all the statutory provisions conferring appellate and original jurisdiction upon the Supreme Court. The following sections deal with procedure; and it has been thought desirable to insert at this point the decisions which deal with the jurisprudence of the Court and which could not appropriately be placed under any of the preceding sections.

Weight to be Attached to Findings of Fact Below.

Concurrent findings.

The Court will not reverse concurrent findings of facts of two courts below unless clearly erroneous.

Bickford v. Howard, Cout. Dig. 96 (1882).

Appeal from two judgments of the Court of Appeal for Ontario, affirming judgments recovered in actions on contracts on trials by a judge without a jury. The verdicts had been sustained by the Queen's Bench and Common Pleas, respectively. The appeal was dismissed with costs. Per Gwynne, J.—When a judge has tried a case without a jury and found a verdict, which verdict has been affirmed

Juris-prudence generally. Concurrent findings.

by two courts, this Court, sitting in appeal, should not reverse the conclusion arrived at by the lower courts on the weight of evidence, unless convinced beyond all reasonable doubt that all the judges before whom the case came have clearly erred.

Black v. Walker, Cout. Dig. 96 (1886).

Per Taschereau, J.—Concurrent findings on a question of fact in two courts below ought not to be reversed on appeal except under very unusal circumstances. *Hays* v. *Gordon*, L.R. 4 P.C. 337; *Gray* v. *Turnbull*, L.R. 2 H.L. 53; *Bell* v. *City of Quebec*, 5 App. Cas. 94; *Smith* v. *Lawrence*, L.R. 5 P.C. 308, referred to.

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

Where a jury has made findings of fact and the verdict has been affirmed by the judgment appealed from, the Supreme Court of Canada will not disturb the decision.

White v. Currie, 22 C.L.J. 17. November 16th, 1885.

C., a member of the defendant's firm of solicitors, was employed to prepare a mortgage for W., who gave instructions, partly verbal and partly written. Nearly six years after W. brought an action against the firm for neglecting to register the mortgage, and shortly before the trial asked to be allowed to add to his statement of claim an allegation of neglect to include a certain property in the mortgage, which he claimed had been included in the instructions. There was conflicting evidence at the trial as to the instructions, and judgment was given for the defendants, which judgment was sustained by the Divisional Court and by the Court of Appeal.

On appeal to the Supreme Court of Canada, *Held*, affirming the judgments of the courts below, that as the plaintiff had delayed so long in prosecuting his claim against the defendants, and the judge who heard the case had decided against him on the evidence, this Court would not interfere with that judgment affirmed by two courts.

Appeal dismissed with costs.

Warner v. Murray, 16 Can. S.C.R. 720.

M. having assigned his property to trustees for the benefit of his creditors his wife preferred a claim against the estate for money lent to M. and used in his business.

The assignee refused to acknowledge the claim, contending that it was not a loan but a gift to M. It was not disputed that the wife had money of her own and that M. had received it. The trial judge gave judgment against the assignee, holding that M. did not receive the money as a gift. This judgment was confirmed on appeal.

Jurisprudence generally. Concurrent findings.

Held, confirming the judgment of the Court of Appeal for Ontario, that as the whole case was one of fact, namely, whether the money was given to M. as a loan by, or gift from, his wife, who in the present state of the law of Ontario, is in the same position, considered as a creditor of her husband, as a stranger, and as this fact was found on the hearing in favour of the wife and confirmed by the Court of Appeal, this, the second appellate court, would not interfere with such findiag.

Titus v Colville, 18 Can. S.C.R. 709.

Held, affirming the judgment of the Court of Appeal, that the question being purely one of fact which the trial judge was the person most competent to determine from seeing and hearing the witnesses, and it not being clear beyond all reasonable doubt that his decision was erroneous, but, on the contrary, the weight of evidence being in its favour, his judgment should not be interfered with on appeal.

Schwersenski v. Vineberg, 19 Can. S.C.R. 243.

S. brought an action to compel V. to render an account of the sum of $2,500, which S. alleged had been paid on the 6th of October, 1885, to be applied to S.'s first promissory notes maturing and in acknowledgment of which V.'s bookkeeper gave the following receipt: "Montreal, October 6th, 1885. Received from Mr. D. S. the sum of two thousand five hundred dollars to be applied to his first notes maturing. M. V., per F. L.," and which V. failed and neglected to apply. V. pleaded that he never got the $2,500 and that the receipt was given in error and by mistake by his clerk. After documentary and parol evidence had been given the Superior Court for Lower Canada, whose judgment was affirmed by the Court of Queen's Bench, dismissed S.'s action. On appeal to the Supreme Court of Canada,

Held, that the finding of the two courts on the question of fact as to whether the receipt had been given through error should not be interfered with.

Jurisprudence generally. Concurrent findings.

Bickford v. Hawkins, 19 Can. S.C.R. 362.

Held, Strong, J., dissenting, that the questions raised were entirely matters of fact, as to which the decision of the trial judge who saw and heard the witnesses, confirmed as it was by the Court of Appeal for Ontario should not be interfered with.

Bowker v. Laumeister, 20 Can. S.C.R. 175.

At the trial parol evidence was given to establish the alleged trust and its existence was found as a fact by the trial judge who made a decree ordering the property to be sold and the proceeds applied as, according to the contention of the plaintiff, and the evidence in proof thereof, had been agreed upon. The full Court (Supreme Court of British Columbia) affirmed this decree.

Held, that the fact of the existence of the trust having been found by the trial judge, and such finding having been affirmed by the full Court, it should no be disturbed on this further appeal.

Grand Trunk Rly. Co. v. Weegar, 23 Can. S.C.R. 422.

Held, that though the findings of the jury were not satisfactory upon the evidence, yet, where they had been upheld on a first appeal, a second appellate court could not interfere. Per King, J.—The findings of the jury have to be accepted by the appellate court.

Headford v. McClary Mfg Co., 24 Can. S.C.R. 291.

Held, per Strong, C.J., that although the case might properly have been left to the jury, the judgment of nonsuit, having been affirmed by two courts, should not be interfered with.

North British Ins. Co. v. Tourville, 25 Can. S.C.R. 177.

In this case an appeal was allowed against the concurrent findings of two courts on a question of fact on the grounds: 1. That the case was not tried by a jury; 2. The judge who determined it in the first instance did not hear the witnesses. 3. The Court of Appeal expressed grave doubts in adopting the findings of the Court of first instance. 4. The judgment of the Court of Apepal was not unanimous. 5. By the *considérants* of the judgment of the Superior Court it did not appear that the non-production by the respondents of the written documents bearing on the controversy was

taken into consideration. 6. The Court of Appeal appeared to have given weight to a piece of evidence of undoubted illegality.

Jurisprudence generally. Concurrent findings.

Snetsinger v. Peterson, 23rd May, 1894.

S. and P. were engaged in business together, under a written agreement, in the packing and selling of fruit, and a dispute having arisen as to the state of accounts between them, a third person was chosen to enable them to effect a settlement. S. claimed that the person so chosen was only to go over the accounts and make a statement, while P. contended that the whole matter was left to him as an arbitrator. This person, having gone over the accounts, made out a statement shewing $235 to be due to S., and some time afterwards he presented a second statement shewing the amount due to be $286. S. was given a cheque for the latter amount, which, he asserted, was taken only on account, and he afterwards brought an action for the winding-up of the partnership affairs.

Held, affirming the decision of the Court of Appeal for Ontario, that whether or not there was a submission to arbitration was a question of fact as to which the Supreme Court of Canada would not, on appeal, interfere with the finding of the trial judge that all matters were submitted, affirmed as it was, by a Divisional Court and the Court of Appeal.

Senesac v. Central Vermont Railway Co., 26 Can. S.C.R. 641.

In an action against a railway company for damages for loss of property by fire alleged to have been occasioned by sparks from an engine or hot-box of a passing train, in which the court appealed from held, affirming the Court of Review, that there was no sufficient proof that the fire occurred through the fault or negligence of the company, and it was not shewn that such finding was clearly wrong or erroneous, the Supreme Court would not interfere with the finding.

Charlebois v. Surveyor, 27 Can. S.C.R. 556.

In this case the trial judge dismissed plaintiff's action which was affirmed by the Court of Queen's Bench. The Supreme Court reversed both courts and directed judgment to be entered for the plaintiff for $500 damages and costs in all the courts.

Jurisprudence generally. Concurrent findings.

Demers v. Montreal Steam Laundry, 27 Can. S.C.R. 537.

The plaintiff, appellant, had recovered judgment in the Superior Court against respondents for $500 which judgment was reversed by the Court of Queen's Bench, and the action dismissed. On appeal by plaintiff to the Supreme Court it was held that where a judgment upon facts having been rendered by a court of first instance has been reversed upon appeal, a higher court of appeal should not interfere with the judgment of the court of appeal below unless clearly satisfied that it is erroneous.

George Matthews Co. v. Bonchard, 28 Can. S.C.R. 580.

In an action for damages in which the plaintiff recovered judgment at the trial which was upheld by the Court of Queen's Bench (the evidence was taken at *enquête* and the written depositions filed of record, but the witnesses were not heard in presence of the trial judge), *Held*, that although the evidence on which the court below based their findings of fact might appear weak and there might be room for the inference that the primary cause of the injuries might have been the plaintiff's own imprudence, the Supreme Court of Canada would not on appeal reverse such concurrent findings of fact.

Grand Trunk Rly. v. Rainville, 29 Can. S.C.R. 201.

Held, that where mere questions of fact were involved the jurisprudence of the Supreme Court, as of the Privy Council, is not to distrub the unanimous findings of two courts, especially so when they are findings of a jury, unless clearly wrong or erroneous (following *Sénésac* v. *The Central Vermont*, 26 Can. S.C.R. 641).

City of Montreal v. Cadieux, 29 Can. S.C.R. 618.

Held, that although there may be concurrent findings on questions of fact in both courts below, the Supreme Court will upon appeal interfere with their decisions when it clearly shows that a gross injustice has been occasioned to the appellant, and there is evidence sufficient to justify findings to the contrary.

Quebec Fire Ins. Co. v. Bank of Toronto, Cout. Dig. 101 (1900).

During the argument of counsel for respondent, he was stopped, the Chief Justice announcing that the majority of the Court considered that there should be no interference

with the judgment appealed from, saying: "I am clearly of opinion that we should dismiss the appeal as it is upon questions of fact already passed upon by two courts below and, if we should reverse, it would be in the teeth of decided cases in this Court." Jurisprudence generally. Concurrent findings.

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

An action having been tried by a judge without a jury. *Held*, that the Court would not be precluded from entering into an examination of the evidence by the rule that a second Court of Appeal will not interfere with the concurrent findings of two preceding courts on a question of fact, a rule well established and often acted upon in the Supreme Court as well as in the Privy Council and in the United States, but in this case the Supreme Court reversed the court below on a question of evidence which was not taken into consideration by the court below.

Gareau v. Montreal Street Rly. Co., 31 Can. S.C.R. 463.

In an action by the owner of adjoining property for damages caused by the vibrations of machinery in an electric powerhouse, the evidence was contradictory and the courts below gave effect to the testimony of scientific witnesses in preference to that of persons acquainted with the locality. *Held*, Taschereau, J., dissenting, that notwithstanding the concurrent findings of the courts below, as the witnesses were equally credible the evidence of those who spoke from personal knowledge of the facts ought to have been preferred to that of persons giving opinions based merely upon scientific observations.

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

Held, following *Lambkin* v. *South Eastern Rly. Co.*, 5 App. Cas. 352, that the question of negligence being one of fact for the jury, and the finding having been upheld in the court appealed from, the highest appellate tribunal would not interfere.

D'Avignon v. Joner 32 Can. S.C.R. 650.

Held, that the evidence being contradictory and the two courts below having unanimously found in favour of the respondent, the appeal should be dismissed.

Jurisprudence generally. Concurrent findings.

Williams v. Stephenson, 33 Can. S.C.R. 232.

The evidence being insufficient to enable the trial judge to ascertain the damages claimed for breach of contract, he stated that he was obliged to guess at the sum awarded and his judgment was affirmed by the judgment appealed from. The Supreme Court of Canada was of opinion that no good result could be obtained by sending the case back for a new trial and therefore allowed the appeal and dismissed the action, thus reversing the concurrent findings of two courts below. Armour, J., however, was of opinion that the proper course was to order a new trial.

Belcher v. McDonald, 33 Can. S.C.R. 321.

The Supreme Court being of the opinion that the judgment of the trial judge affirmed in appeal was manifestly against the weight of evidence, reversed the court below. (Reversed in the Privy Council (1904), A.C. 429.)

Citizens Light & Power v. St. Louis, 34 Can. S.C.R. 495.

Held, "The controversy raised by the respondent upon the alleged non-fulfilment by the appellants of their contract relates merely to questions of fact upon which the two courts below have unanimously found against the respondent's contention, a finding with which nothing in the case would justify us in interfering."

McNeil v. Cullen, 35 Can. S.C.R. 510.

Held, affirming the judgment appealed from (36 N.S. Rep. 482) that two courts having pronounced against the validity of the will such decision would not be reversed by a second court of appeal.

Hood v. Eden, 36 Can. S.C.R. 476.

Per Taschereau, C.J.—"The respondent has not failed to resort to the stock argument on appeals to this class of cases, that upon a question of fact he has the concurrent finding of three courts below in his favour. Now, in the first place, there are no controverted facts of any importance here. The case rests principally upon inferences of law and facts from admitted or uncontradicted facts. And, secondly, it must not be forgotten that, when the statute allows of an appeal on facts, even if concurred in by three courts, as here, it is on the assumption, as in all cases, that there may be error in all these judgments, and the respondent

is not entitled to invoke as an argument in his favour the very judgment that the appellant complains of.

Jurisprudence generally. Concurrent findings.

"It is our duty in every case to give the judgment that the Court of Appeal should, in our opinion, have given. The fact that two or three courts have passed upon a question of fact does not relieve us from the responsibility of judging of the evidence as we view it. If, in this case, we think that the local master came to a wrong conclusion, it is not simply because two successive appeals from his findings have failed that the appeal to us must also fail. When the statute gives an appeal to any court it never imposes the condition that the judgment must not be reversed. We have repeatedly had to reverse on questions of fact: *Russell* v. *Lefrancois*, 8 Can. S.C.R. 335; *The North British & Mercantile Ins. Co.* v. *Tourville*, 25 Can. S.C.R. 177; *Dompster* v. *Lewis*, 33 Can. S.C.R. 292, and the cases there cited; and as long as the right to appeal as to findings of fact exists, we have to continue to do so every time that we are convinced that there is error in the judgment complained of, whatever may be the number of courts or of judges that the respondent has previously succeeded in leading into error."

Polushie v. Zacklynski, 37 Can. S.C.R. 177. C.R. [1908], A.C. 23.

In this case the majority of the Supreme Court reversed the concurrent judgments of two courts below where there was conflict of testimony, Idington, J., saying:

It is not a case of conflict of evidence so much as a case needing to properly appreciate the evidence given and then to disregard the trifling unimportant incidents and matters subsequent to the creation of the trust, when the general scope and purpose of the parties in relation to that trust had already been made clear, and to apply that properly appreciated evidence to the interpretation of the ambiguous phrase in this certificate of title.

"With every respect I think this evidence was not properly appreciated in the court below, and weight given to the subsequent events that should have been discarded."

Wabash Railroad Co. v. Misener, 38 Can. S.C.R. 94.

M. attempted to drive over a railway track which crossed the highway at an acute angle where his back was almost turned to a train coming from one direction. On approaching the track he looked both ways, but did not look again just before crossing when he could have seen an engine approaching which struck his team and he was killed. In

Jurisprudence generally. Concurrent findings.

an action by his widow and children the jury found that the statutory warnings had not been given and a verdict was given for the plaintiffs and affirmed by the Court of Appeal.

It was held, affirming the judgment of the Court of Appeal (12 Ont. L.R. 71), Fitzpatrick, C.J., hesitante, that the findings of the jury were not such as could not have been reached by reasonable men and the verdict was justified.

Mayrand v. Dussault, 38 Can S.C.R. 460.

While the testator was suffering from a wasting disease of which he died shortly afterwards, the defendant, his brother, took advantage of his weakness of mind and secretly obtained the execution of a will, in which he was made the principal beneficiary, by fraudulently suggesting and causing the testator to believe that his malady was caused and aggravated by the carelessness and want of skill of his wife in the preparation of his food. The testator and his wife had lived together in harmony for a number of years and, shortly after their marriage, had made wills by which each of them, respectively, had constituted the other universal residuary legatee and the testator's former will, so made, was revoked by the will propounded by the defendant.

It was held that as the promoter of the will, by which he took a bounty, had failed to discharge the onus of proof cast upon him to show that the testator had acted freely and without undue influence in the revocation of the former will, the second will was invalid and should be set aside.

The judgment appealed from was reversed, on the ground of captation and undue influence, but the Supreme Court of Canada refused to interfere with the concurrent findings of both courts below against the contention as to the testator's unsoundness of mind.

DeGalindez v. Owens, Cout. Cas. 393.

In this case the Chief Justice said:

"It is a well settled rule of this court that when the question is whether or not concurrent judgments of the courts below should be reversed by reason of erroneous views of the facts of the case having been taken, it is incumbent upon the appellant to adduce the clearest proof that there was such error in the judgments, or so to speak, to put his finger on the mistake.

"I concur in the view taken by my brother Idington that the appeal should be dismissed with costs for the reasons assigned in the courts below." Jurisprudence generally. Concurrent findings.

Weller v. McDonald-McMillan Co., 43 Can. S.C.R. 85.

The Chief Justice said:

"The only question at issue on this appeal is one of fact, the determination of which depends largely, if not entirely, on the weight to be attached to the evidence given by the two witnesses Weller and McMillan. The trial judge who saw the witnesses and had opportunities to test the relative merits of the different versions of the facts, which we have not, came to the conclusion that McMillan's version was absolutely correct and finds as a fact 'that the contract was made by Weller for the respondent company and that they are entitled to the money in dispute.' The conclusion reached by the trial judge has the unanimous approval of the Court of Appeal, a matter not lightly to be disregarded.

"The jurisprudence of this court is well settled; we will not interfere with the concurrent findings of two courts on a pure question of facts unless we are satisfied that the conclusion reached is absolutely wrong."

Dominion Fish Co. v. Isbester, 43 Can. S.C.R. 637.

In this case the Chief Justice said:

"I think I may say that it is the well settled rule of this tribunal that, in a case like the present, when the question is whether or not the concurrent judgments of two courts should be set aside on a question of fact the appellant must put his finger on the mistake made by the trial judge, and this the appellants have failed to do in the present instance.

"When there have been concurrent findings of fact by the courts below the question in appeal is not what conclusion their Lordships might have arrived at if the matter had for the first time come before them, but whether it has been clearly established that the judgments of the courts below were clearly wrong." *Montgomerie & Co.* v. *Wallace-James* (1904), A.C. 73; *Allen* v. *Quebec*, 12 App. Cas. 101.

Laramee v. Ferron, 41 Can. S.C.R. 391.

In this case the Chief Justice said:

"Under these circumstances we are asked to reverse.

"This is, in my opinion, one of the cases in which we should apply the rule that has been laid down on more than

Jurisprudence generally. Concurrent findings.

one occasion in this court, that we should not reverse the concurrent findings of two courts on questions of fact unless clearly erroneous."

Davies, J. said:

"The learned judge who heard the case and knew all the parties and their circumstances and relations to each other and to the testatrix, and who was the judge who had removed the interdiction found for the will, accepting the testimony of these notaries and the other witnesses who testified to the testatrix's sanity. A majority of the Court of King's Bench confirmed that judgment and, notwithstanding the many suspicious circumstances which surround the case, I am unable to reach such a clear conviction of the error of these judgments as would justify me in reversing them."

Idington, J., said:

"The learned trial judge saw the witnesses and had a better opportunity in many ways of forming a correct judgment than any one else, and he is satisfied and also the majority of the court of appeal, and it seems to me great weight must in such a case be attached to these circumstances.

Whitney v. Joyce, 75 L.J.P.C. 89.

In this case Lord Macnaghten said:

"Now it is well settled that when the question is whether concurrent judgments of the Courts below shall be reversed on the ground that the judges have taken an erroneous view of the facts, it is incumbent on the appellant to adduce the clearest proof that there is an error in the judgment appealed from, and, so to speak, to put his finger on the mistake. That rule has often been laid down, but never more distinctly than in an appeal from the very court from which the present appeal is brought.

"In this case six judges—five in the Court of Appeal, and the learned judge who heard the evidence and saw the witnesses—have come to the conclusion that the plaintiff Whitney failed to prove the partnership upon which his claim was based. The only difference between the two courts is that in the one the opinion was expressed that Joyce and Greenshields were to be believed, and that Whitney was not to be believed, while the Court of Appeal has refrained from expressing any opinion on that subject. No error was actually shewn or even distinctly alleged. The arguments merely came to this—that the judges below must have approached the question from a wrong point of view and

failed to give just weight to a number of minute circumstances which have little or no bearing on the vital matter in issue. Jurisprudence generally. Findings of jury.

"Nothing, therefore, remains for the Lordships but humbly to advise his Majesty that the appeal should be dismissed. The appellant will pay the costs of the appeal."

Weight to be attached to findings of jury.

Peters v. Hamilton, Cout. Dig. 976 (1880).

Held.—"Whether or not a memorandum of agreement, set up by the defendant as containing the only contract between the parties was intended to settle the contract in whole or in part is a question for the jury. The onus of shewing that it contained all the terms of the contract is upon the party producing it. In such a case oral testimony is admissible on behalf of both parties. A verdict based upon the appreciation of the evidence in such a case ought not to be interfered with by an appellate court."

Fraser v. Stephenson, S.C. Cas. 214, 8th March, 1886.

An action was brought to recover the price and value of goods sold by the plaintiff to the defendant's brother, and on the trial the plaintiff gave evidence of an agreement with the defendant whereby the latter, as the plaintiff alleged, undertook to give notes at four months to retire notes at three months given by his brother, the purchaser of the goods. The plaintiff swore that this agreement was carried out for a time, but that the defendant finally refused to continue it any longer. The evidence shewed that the defendant always gave his notes to his brother who carried them to the plaintiff. The defendant, on the other hand, swore that he never made any such agreement, but only gave notes to his brother to help him in his business. The evidence of the plaintiff was entirely uncorroborated. A verdict was found for the plaintiff and the Supreme Court of New Brunswick refused a new trial.

Held, Ritchie, C.J., and Taschereau, J., dissenting, that the weight of evidence was not sufficiently in favour of the plaintiff to justify the verdict, and there must be a new trial.

Appeal allowed with costs and new trial granted.

Mail Printing Co. v. Laflamme, Cout. Dig. 979 (1889).

Damages were assessed by a jury at $6,000 for a newspaper libel and $4,000 additional on a further libel con-

Juris-prudence generally. Findings of jury.

tained in a defamatory plea. *Held*, on appeal from the Court of Queen's Bench (M.L.R. 4 Q.B. 84) that the damages were excessive; that they should be reduced to a total of $6,000, and in the event of plaintiff's refusal to accept a reduced verdict for that amount a new trial should be allowed.

Phœnix Insurance Co. v. McGhee, 18 Can. S.C.R. 61.

Held, per Strong, J.—An appeal court exercises different functions in dealing with a case tried by a judge without a jury from those exercised in jury cases. In the former case the Court has the same jurisdiction over the facts as the trial judge, and can deal with them as it chooses. In the latter the court cannot be substituted for the jury to whom the parties have agreed to assign the facts for decision. Appeal allowed, rule for a new trial made absolute.

Royal Ins. Co. v. Duffus, 18 Can S.C.R. 711.

On motion for new trial on grounds of excessive damages, etc., the verdict was sustained. The Supreme Court affirmed the decision, Gwynne, J., dissenting, although the amount of damages found was unsatisfactory.

York v. Canada Atlantic Rly. Co., 2 Can. S.C.R. 167.

An order for a new trial was affirmed, on appeal, for grounds, amongst others, that the damages were excessive under the evidence.

Fraser v. Drew, 30 Can. S.C.R. 241.

Held, that when a case has been properly submitted to the jury and their findings upon the facts are such as might be the conclusions of reasonable men, a new trial will not be granted on the ground that the jury misapprehended or misunderstood the evidence, notwithstanding that the trial judge was dissatisfied with the verdict.

Dominion Cartridge Co. v. McArthur, 31 Can. S.C.R. 392.

Held, that it is the duty of the appellate court to set aside the verdict of a jury in an action for damages by an employee resulting from an explosion when there was no evidence as to the immediate cause of the explosion notwithstanding that the findings of a jury in favour of plaintiff have been affirmed by two courts below. Reversed in the Privy Council (1905), A.C. 72.

McKelvey v. Le Roi Mining Co., 32 Can. S.C.R. 664.

Juris-prudence generally. Findings of jury.

An appellate court should not disregard the verdict of a jury which is supported by evidence.

Jackson v. G. T. Rly., 32 Can. S.C.R. 245.

The Court of Appeal below being of opinion that the verdict of the jury was against the weight of evidence dismissed the action. The Supreme Court being of the same opinion dismissed the appeal with costs.

Dunsmuir v. Lowenberg, Harris & Co., 34 Can. S.C.R. 228.

The contest in this case was with respect to an alleged collateral parol agreement. A judgment for the plaintiffs at the first trial was set aside by the full Court and a new trial ordered. A judgment at the second trial in favour of plaintiffs was affirmed by the full Court, but on appeal to the Supreme Court a new trial was ordered. A judgment at the third trial in favour of plaintiff was affirmed by the full Court, but on an appeal to the Supreme Court a new trial was again ordered.

Confederation Life v. Borden, 34 Can. S.C.R. 338.

In this case a judgment for the plaintiffs (appellants) was set aside by the full Court and a new trial ordered. Upon appeal to the Supreme Court the judgment of the court of first instance was restored, the majority of the court being of opinion that there was no error on the part of the judge or jury below; that every defence sought to be raised had been tried and disposed of; that to allow a new trial for the purpose of inquiring whether there are other defences would be against all precedent.

Held, that the judgment of the court below having proceeded upon the view that the findings of the jury were against the weight of evidence, this was not an exercise of discretion with which an appellate court will refuse to interfere.

Dartmouth Ferry Co. v. Marks, 34 Can. S.C.R. 366.

The plaintiffs (appellants) having failed in the full Court to have the judgment at the trial set aside owing to the court being evenly divided, an appeal to the Supreme Court was allowed and a new trial ordered on the ground that the findings of the jury were clearly contrary to the evidence.

Jurisprudence generally. Findings of jury.

Metropolitan Life v. Montreal Coal & Towing Co., 35 Can. S.C.R. 266.

Unless the evidence so strongly predominates against the verdict as to lead to the conclusion that the jury has either wilfully disregarded the evidence or failed to understand or appreciate it, a new trial ought not to be granted.

Windsor Hotel Co. v. Odell, 39 Can. S.C.R. 336.

Where the question was one of fact, and the jury, on evidence properly submitted to them, accepted the evidence on one side and rejected that adduced upon the other, the Supreme Court of Canada refused to disturb their findings.

Findings of Jury—Excessive damages.

Toronto Rly. Co. v. Mulvaney, 38 Can. S.C.R. 327.

The appellants contended the damages were excessive. As to this the Court said:

"It was also objected that the damages were excessive. But although they are large, I do not think them so excessive as to warrant us in setting the verdict aside."

Winnipeg Electric Rly Co. v. Wald, 41 Can. S.C.R. 431.

For injuries to a child under six years of age the jury awarded $8,000. The Chief Justice, (dissenting), said: "I am, however, of opinion that the damages are grossly excessive, and on that ground I would grant a new trial."

Davies, J., said:

"I am by no means, however, satisfied on the question of the damages awarded by the jury. In my opinion, considering the age, position in life and prospects of the injured child, the damages were grossly excessive. As, however, the Court of Appeal did not think a new trial should be granted on this ground and a majority of this court concurs in the same opinion, I will not formally dissent." The appeal was dismissed.

British Columbia Electric Rly. Co. v Wilkinson, 45 Can. S.C.R. 263.

The jury awarded the widow of a mechanic employed by the defendants, the sum of $25,000 for herself and infant child. The appellants faintly contended that the amount was excessive, but the Court referred to the case of *Winnipeg Electric Rly. Co.* v. *Wald*, as disposing of this argument.

Findings of Nautical Assessors.

Juris-prudence generally. Assessors. Arbitrators, etc.

Arranmore v. Rudolph, 38 Can. S.C.R. 176.

The Supreme Court will not set aside the finding of a nautical assessor on questions of navigation adopted by the local judge, unless the appellant can point out his mistake and shew conclusively that the judgment is entirely erroneous. The Pieton (4 Can. S.C.R. 648) followed.

Weight to be attached to findings of arbitrators and valuators.

The Queen v Murphy, Cont. Dig. 96 (1886).

On 3rd February, 1852, the Minister of Railways and Canals requiring part of a lot for construction of the I. C. Rly. deposited in accordance with the Government Railway Act, 1881, a plan of the land, and gave notice under section 15 tendering compensation. Respondents refused the sum tendered, and the question of compensation was submitted by the Minister under the Act to the official arbitrators who, after hearing evidence of the claimants and the Crown, awarded the amount tendered and refused as full compensation for the land expropriated and all damages, and imposed the costs of arbitration upon the claimants. An appeal to the Exchequer Court was heard by Fournier, J., one witness on either side being examined, the award of the arbitrators was set aside. On further appeal to the Supreme Court, respondents gave notice of intention upon the hearing to contend that the decision should be varied and respondent allowed a larger sum as compensation and damages. The question was entirely one of fact, and it was held, that the judgment of the court below should be affirmed and the appeal dismissed with costs.

Grand Trunk Rly. Co. of Canada v. Coupal, 28 Can. S.C.R. 531.

On an arbitration in a matter of the expropriation of land under the provisions of the Railway Act, the majority of the arbitrators appeared to have made their computation of the amount of the indemnity awarded to the owner of the land by taking an average of the different estimates made on behalf of both parties according to the evidence before them.

Held, reversing the decision of the Court of Quen's Bench, and restoring the judgment of the Superior Court (Taschereau and Girouard, JJ., dissenting), that the award

Juris-prudence generally. Jury's findings.

was properly set aside on the appeal to the Superior Court, as the arbitrators appeared to have proceeded upon a wrong principle in the estimation of the indemnity thereby awarded.

Allan v. City of Montreal, 23 Can. S.C.R. 390.

Lemoine v. City of Montreal, 23 Can. S.C.R. 390.

Held, in a matter of expropriation such as this the decision of arbitrators, men of more than ordinary business experience upon a question of value, should not be interfered with.

The King v. Likely, 32 Can. S.C.R. 47.

The Crown expropriated land of L. and had it appraised by valuators who assessed it at $11,400, which sum was tendered to L. who refused it and brought suit by petition of right for a larger sum as compensation. The Exchequer Court awarded him $17,000. On appeal by the Crown. *Held,* reversing the judgment appealed from, Girouard, J., dissentiug, that the evidence given on the trial of the petition shewed that the sum assessed by the valuators was a very generous compensation to L. for the loss of his land and the increase by the judgment appealed from was not justified. The Court, while considering that a less sum than that fixed by the valuators should not be given in this case expressly stated that the same course would not necessarily be followed in future cases of the kind.

Jury findings—generally.

Sewell v. B.C. Towing Co. and the Moodyville Sawmill Co., 9 Can. S.C.R. 527.

In a case where a towing company made a contract and afterwards engaged the assistance of another transportation company in carrying out the contract, the ship in tow was damaged through careless and improper navigation by the tugs of both companies employed about the work. *Held,* reversing the judgment appealed from that an action in which both companies were joined as defendants was maintainable in that form under the B.C. Judicature Act, that the case coming before the court below on motion for judgment under the order which governs the practice in such cases, and which is identical with the English Order 40, Rule 10, of the Orders of 1875, the court could give judgment finally determining all matters in dispute, although the jury

may not have found on them all, but does not enable the court to dispose of a case contrary to the finding of the jury. In case the court considers particular findings to be against evidence, all that can be done is to order a new trial, either generally or partially under the powers conferred by the rule similar to the English Order 39, Rule 40; and that the Supreme Court of Canada giving the judgment that the court below ought to have given, was in this case in a position to give judgment upon the evidence at large, there being no findings by the jury interposing any obstacle to their doing so, and therefore a judgment should be entered against both defendants for damages and costs. (See the *Thrasher Case*, 1 B.C. Rep., p. 1. 153.)

Jurisprudence generally. Jury's findings.

Nixon v The Queen Ins. Co., 23 Can. S.C.R. 26.

The jury not having answered two questions submitted to them which the Court held could not truthfully have been answered in any other way than favourably to the defendants, the judgment of the court below was affirmed which allowed an appeal from the judgment at the trial upon the findings of the jury and instead of directing a new trial had dismissed the plaintiff's action with costs.

St. Stephens Bank v. Bonness, 24 Can. S.C.R. 710.

This was an action tried with a jury. The jury disagreed upon all the questions submitted to them but upon the second divided six yeas and one nay, which, under the practice in Nova Scotia was sufficient to warrant a judgment being entered. The trial judge was of opinion the verdict could not be sustained and directed judgment to be entered for defendant. On motion to the full Court for a new trial, the court was equally divided and the verdict stood; upon appeal to the Supreme Court a new trial was ordered.

Cowans v. Marshall, 28 Can. S.C.R. 161.

In an action to recover damages for injuries alleged to have been caused by negligence, the plaintiff must allege and make affirmative proof of facts sufficient to shew the breach of a duty owed him by defendant and that the injuries thereby were occasioned; and when the jury failed to find defendant guilty of the particular act of negligence charged in the declaration as constituting the cause of the injuries, a verdict for the plaintiff cannot be sustained and a new trial should be granted.

Juris-prudence generally. Jury's findings.

Moore v. Woodstock Woollen Mills Co., 29 Can. S.C.R. 627.

In this case the evidence as to user of a highway was conflicting and the jury found that there had been no public user of the way in question. The trial judge disregarded this finding and held that dedication was established by a deed of lease filed in evidence, and this decision was affirmed by the full Court. On appeal to the Supreme Court it was held that the company having entirely failed to get a finding from the jury in its favour upon the point of user had therefore failed in making out the case it set out to make, and that the judgment below should be reversed, and as all the facts were fully gone into it would best meet the justice of the case to direct that judgment should be entered for the defendants.

Rowan v. Toronto Rly. Co., 29 Can. S.C.R. 717.

In an action for damages the Supreme Court reversed the judgment of the Court of Appeal in the construction it placed upon the findings of the jury, and as there was no evidence of negligence on the plaintiff's part, the Court held that, as it had before it all the material necessary for finally determining the questions in dispute, a new trial was not necessary, and the appeal was allowed and judgment for the respondents vacated and judgment directed to be entered for the appellant.

Randall v. Ahearn & Soper, 34 Can. S.C.R. 698.

A jury having answered two questions submitted to them and neglected to answer the third, the trial judge treated this as a disagreement and discharged the jury. Both parties appealed to the Divisional Court where it was held that the trial judge was right and judgment could not be entered for either party. The Court of Appeal gave judgment for defendant and dismissed the action, stating in its reasons that A. was barred upon certain admissions of counsel during his argument before that court. On appeal to the Supreme Court counsel for appellant took exception to the statement as to his admissions contained in the judgment of the Court of Appeal, and the Supreme Court being of opinion that the court below had misconceived the admissions allowed the appeal and ordered a new trial.

Misdirection or non-direction.

Juris-prudence generally. Misdirection or non-direction.

Providence Washington Ins. Co. v. Gerow, 14 Can. S.C.R. 731.

A marine policy insured a ship for a voyage from Melbourne to Valparaiso for orders, thence to a loading port on the western coast of South America, and thence to a port of discharge in the United Kingdom. The ship went from Valparaiso to Lobos, an island from twenty-five to forty miles off the coast of South America and was afterwards lost. In an action on the policy, *Held*, that whether or not Lobos was a loading port on the western coast of South America within the policy was a question for the jury, and it not having been submitted to them a new trial was ordered for misdirection.

After judgment application was made to vary or reverse the judgment on affidavits shewing that the question was submitted and answered.

Held, that the application was too late, as the Court had to determine the appeal case transmitted, and the respondent had allowed the appeal to be argued and judgment rendered without taking any steps to have the case amended.

Hardman v. Putnam, S.C. Cas. 112.

In an action for winding-up a partnership in the gold mining business the defence pleaded was that there never was a partnership formed between the plaintiff and the defendants, or, if there was, that it had been put an end to by a verbal agreement between the parties. The case was tried by a jury and the result depended on the credit to be attached to the respective witnesses on each side who gave evidence as to the agreement that had been entered into. No issue of fraud was raised by the defendants, but the trial judge, in charging the jury, made strong observations in respect to fraudulent concealment of facts from the plaintiff and submitted questions to the jury calling for findings in relation to such fraud. The plaintiff having obtained a verdict which was sustained by the Supreme Court of Nova Scotia.

Held, reversing the judgment of the court below, Gwynne, J., dissenting, that there should be a new trial.

Per Ritchie, C.J.—The Supreme Court, as an appellate court for the Dominion, should not approve of such strong observations being made by a judge as were made in this case, in effect charging upon the defendants fraud not set out in the pleadings and not legitimately in issue in the cause.

Juris-prudence generally. Misdirection or non-direction.

Griffiths v. Boscowitz, S.C. Cas. 245.

W., a trader, being in financial difficulties assigned all his property to B., who undertook to arrange with W.'s creditors. W. subsequently assigned his property in trust for the benefit of his creditors and the assignee and some of the creditors brought an action to have the transfer to B. set aside. On the trial, after the evidence on both sides was concluded, plaintiff's counsel asked the judge to instruct the jury as to what constituted fraud under the Statute of Elizabeth, and he also urged that an account should be taken of the dealing between W. and B. The judge refused to define fraud to the jury as requested and the jury stated that they were unable to deal with the accounts. Judgment having been given for the defendants and affirmed by the full Court,

Held, that the refusal of the judge to charge the jury as requested amounted to misdirection, and there should be a new trial; that the case could not be properly decided without taking the accounts; and that it could be more properly dealt with as an equity case.

Cowans v. Marshall, 26 Can. S.C.R. 161.

The judgment appealed from (Q.R. 6 Q.B. 534) affirmed the decision of the Court of Review at Montreal (Q.R. 10 S.C. 316), and a new trial was sought by defendants *inter alia* upon the ground that the judge charged the jury in such terms as to lead them away from a proper appreciation of the special issues of fact and to divert their attention only to the general question of negligence. In allowing the appeal the Supreme Court observed that the appellant's contention was well founded.

Green v. Miller, 31 Can. S.C.R. 177.

A plaintiff is entitled to an explicit direction stating the law on points directly affecting issues of which the burden of proof is upon him. A judge's charge in a suit for libel is not open to objection for want of an explicit reference to pre-exisiting unfriendliness between the parties as a proof of malice where the only evidence of unfriendliness consisted of hard things said of the defendant by the plaintiff. Judgment appealed from (32 N.S. Rep. 129) affirmed.

Spencer v. Alaska Packer's Ass., 35 Can. S.C.R. 362.

Held, that upon a trial by jury the judge in directing the jury as to the law is bound to call their attention to the

manner in which the law should be applied by them according to their findings as to the facts. Where the form of the charge was defective in this respect, and left the jury in a confused state of mind as to the questions in issue, a new trial was ordered. *Juris-prudence generally. Misdirection or non-direction.*

Mader v. Halifax Electric Tramway Co., 37 Can. S.C.R. 94.

Where on the trial of an action based on negligence questions are submitted to the jury they should be asked specifically to find what was the negligence of the defendants which cause the injury; general findings of negligence will not support a verdict unless the same is shewn to be the direct cause of the injury.

Red Mountain Rly. Co. v. Blue, 39 Can. S.C.R. 390. C.R. [1909], A.C. 210.

It was held that in consequence of the want of more explicit directions to the jury on the question of law, and the misdirection as to the issue, the defendants were entitled to a new trial.

Joce v. Metallic Roofing Company of Canada, Limited, (1908), A.C. 514, C.R. [1909], A.C. 1.

In an action against the appellants alleging that they had conspired to injure the plaintiffs in the conduct of their business, and that in pursance of the conspiracy the union whom they represented caused the plaintiffs' men to go out on strike, the judge in effect directed the jury that if the resolutions of the union calling out the plaintiffs' men were the cause of the strike they were an actionable wrong, without regard to the motive and without regard to the conspiracy alleged.

It was held that this direction could not be supported and that there must be a new trial.

Wood v. Rockwell, 38 Can. S.C.R. 165.

On trial of an action against a surety, the defence was that he had been discharged by the plaintiff's dealings with his principal. The trial judge directed the jury that the facts proved in no way operated to discharge him; and that while, if they could find any evidence to satisfy them that he was relieved from liability they could find for defendant he knew of no such evidence and it was not to be found in the case.

Juris-prudence generally. Misdirection or non-direction.

It was held that the disputed facts were practically withdrawn from the jury, and as there was evidence proper to be submitted and on which they might reasonably find for defendant, there should be a new trial.

Bartlett v. Nova Scotia Steel Co., 38 Can. S.C.R. 336.

Where it appeared that in directing the jury, at the trial, the judge attached undue importance to the effect of a plan of survey referred to in a junior grant as against a much older plan upon which the original grants of the lands in dispute depended and that the findings were not based upon evidence sufficient in law to shift the onus of proof from the plaintiff and were, likewise, insufficient for the taking of accounts in respect to trespass and conversion of minerals complained of.

It was held, affirming the order for a new trial made by the judgment appealed from (1 East L.R. 293), that in the absence of evidence of error therein, the older grants and plan must govern the rights of the parties.

Lamothe v. North American Life Ass. Co., 39 Can. S.C.R. 323.

It was argued, on behalf of the appellant, that the trial judge had erred in his charge to the jury on questions as to the wagering character of the policy and as to certain representations made by the assured being materially incorrect and wilful mistatements. The appellant asked for judgments in his favour in both cases or for a new trial. The Chief Justice said:

"This appeal is dismissed with costs, and the application for a new trial is refused, on the ground that there was no misdirection by the judge which occasioned substantial prejudice to the appellant; and, in view of the whole evidence, the jury could, in our opinion, reasonably find the verdict complained of."

Canadian Pacific Rly. Co. v. Hansen, 40 Can. S.C.R. 194. C.R. [1907], A.C. 523.

Where, on a specific objection to his charge, the trial judge recalled the jury and directed them as requested, the contention that the directions thus given were erroneous should not be entertained on appeal.

Winnipeg Electric Rly. Co. v. Wald, 41 Can. S.C.R. 431.

An order for a new trial should not be granted merely on account of error in the form of the questions submitted

to the jury where no prejudice has been suffered in consequence of the manner in which the issues were presented by the charge of the judge at the trial and the jury passed upon the questions of substance. Jurisprudence generally. Misdirection or non-direction.

The judgment appealed from (18 Man. R. 134) was affirmed, the Chief Justice dissenting, and Davies, J., *hesitante*, as to the quantum of the damages awarded.

Brownell v. Brownell, 42 Can. S.C.R. 368.

The judge presiding at the trial of a cause has a necessary discretion for the protection of witnesses under cross-examination and, where it does not appear that he has exercised that discretion improperly, his order ought not to be interfered with on an appeal. Hence, an appellate court is not justified in ordering a new trial on the ground that counsel has been unduly restricted in cross-examination by a question being disallowed which did not at the time it was put to the witness have relevancy to the issues.

Idington, J., dissented on the ground that, under the circumstances of the case, counsel was entitled to have the question answered.

Barthe v. Huard, 42 Can. S.C.R. 406.

H., to qualify as candidate in a municipal election procured from a friend a deed of land giving him a *contre-lettre* under which he collected the revenues. Having sworn that he was owner of real estate to the value of $2,000 (that described in the deed) B., in his newspaper accused him of perjury and he took action against B. for libel. On the trial the deed to H. was produced, and the existence of the *contre-lettre* proved, but the notary having the custody of both documents refused to produce the latter, claiming privilege on the ground that it was a confidential document. The trial judge maintained this claim, but oral evidence was admitted proving to some extent what the *contre-lettre* contained. A verdict having been given in favour of H., it was held that the trial judge erred in ruling that the notary was not obliged to produce the *contre-lettre*, as it was impossible without its production to determine what, if any, limitations it placed upon the deed, and there should be a new trial.

B. in his newspaper article also accused H. of having been drunk during the election, and the judge, in charging the jury, said, "You should consider the case as if the charge of drunkenness had been made against yourselves, your brother or your friend."

Jurisprudence generally. Misdirection or non-direction.

It was held that this was calculated to mislead the jury and was also a reason for granting a new trial.

If objections to one or more portions of the judge's charge is not presented until after the jury have rendered their verdict, the losing party cannot demand a new trial as of right, but in such case an appellant court, to prevent a miscarriage of justice, may order a new trial as a matter of discretion.

British Columbia Sugar Refining Co. v. Graaick, 44 Can. S.C.R. 105.

In an action in the Supreme Court of British Columbia claiming damages under the Employers' Liability Act and, alternatively, under the Workmen's Compensation Act, the plaintiff, at the trial, abandoned the claim under the former Act and, thereupon, the judge dealt with the case as a claim under the Workmen's Compensation Act, found that the plaintiff's deceased husband came to his death solely in consequence of his own "wilful and serious misconduct," and, therefore, under ss. 2 (*c*) of s. 2 of the Art, held that she was precluded from obtaining compensation in consequence of his death.

It was held per Davies, Duff and Anglin, J.J., that the right of appeal from a decision in the course of proceedings to which article 4 of the second schedule of the Workmen's Compensation Act applies is available only for questioning the determination of the Court or judge upon some question of law. Decisions upon questions of fact in adjudicating upon a claim brought before the Supreme Court under ss. 4 of s. 2 of that Act are not subject to appeal. Whether or not there is any reasonable evidence to support a finding of wilful and serious misconduct is an appealable question.

In the circumstances of the case the court held, Davies and Anglin, JJ., dissenting, that there was not reasonable evidence to support the finding of wilful and serious misconduct.

The appeal from the judgment of the Court of Appeal for British Columbia (15 B.C. Rep. 198) was dismissed Davies and Anglin, JJ., dissenting.

Toronto Rly. Co. v. Mulvaney, 38 Can. S.C.R. 327.

Maclennan, J., said in this case:

"In his address to the jury the learned Chief Justice told them that this part of the claim amounting to $193 was part of the damages, and belonged to the father and added:

'Then whatever sum you like to add to that for him will be what you would give the father.' I think we ought to agree with defendants' counsel that this sum of $193 must have been included by the jury in the $500 allowed by them as the father's damages. That this was improper, and that the charge of the learned judge was wrong is now not disputed inasmuch as the decision followed by the learned judge at the trial has since been reversed by the Court of Appeal (75 L.J., K.B. 907; 22 Times L.R. 691; (1906) 2 K.B. 648), and it has been decided that such expenses cannot be recovered on such an action. Jurisprudence generally. Where judge has heard witnesses.

If the point had been taken in the Court of Appeal, doubtless effect would have been given to it either by directing a new trial, or by deducting the sum of $193 from the sum allowed by the jury to the father. The objection not having been taken in the Court of Appeal, I think we cannot give effect to it.

"The appeal should be dismissed with costs."

Nevill v. Fine Art & General Ins. Co. (1897) A.C. 68.

In this case Lord Halsbury, L.C., said:

"That would, but for what I am about to say, give the appellant only a right to ask for a new trial, which, though he has not asked for it, it is no doubt within your Lordships' competence to give him; but what puts him out of court in that respect is this, that where you are complaining of non-direction of the judge or that he did not leave a question to the jury, if you had an opportunity of asking him to do it and you abstained from asking for it, no court would ever have granted you a new trial; for the obvious reason that if you thought you had got enough you were not allowed to stand aside and let all the expense be incurred and a new trial ordered simply because of your own neglect."

Where the trial judge has seen and heard the witnesses.

The Picton, 4 Can. S.C.R. 648.

Held, where a disputed fact involving nautical questions, is raised by an appeal from the judgment of the Maritime Court of Ontario, as in the case of a collision, the Supreme Court will not reverse the decree of the judge of the court below, merely upon a balance of testimony.

Bellechasse Election Case, 5 Can. S.C.R. 91.

Where an appeal is limited to a question of the jurisdiction of the court appealed from, the Supreme Court of

Juris-prudence generally. Where judge has heard witnesses.

Canada cannot decide upon the merits of the case, and where, in such a case, further adjudication is ordered, a second judgment therein deciding upon the merits is appealable under the Supreme Court Act. On appeal the findings of fact by the trial judge ought not to be reversed unless his conclusions appear, beyond a doubt, to be erroneous.

Ryan v. Ryan, 5 Can. S.C.R. 387, 406.

Where there was evidence which, in the opinion of the Supreme Court of Canada, established the creation of a new tenancy at will within ten years, the Court reversed the holding of the Court of Appeal for Ontario, which had reversed the findings of fact by the trial judge. Per Gwynne, J.—A court of appeal should not reverse the finding upon matters of fact of the judge who tried the cause and had the opportunity of observing the demeanour of the witnesses unless the evidence be of such a character as to convey to the mind of the judges sitting on the appellate tribunal the irresistible conviction that the findings are erroneous.

Gingras v. Desilets, Cout. Dig. 95 (1881).

In allowing the appeal with costs, *Levi* v. *Reed*, 6 Can. S.C.R. 482, was approved and the Supreme Court *Held*. Taschereau, J., dissenting, that in view of very serious injuries sustained by the plaintiff and of the misconduct of the defendant in abusing his position of a justice of the peace, $3,000 awarded by the trial judge was not so clearly excessive as to justify a reversal of his judgment. Taschereau, J., while holding that the amount to which the Court of Queen's Bench had reduced the damages ($600) was not sufficient, considered that, taking into consideration the position of the plaintiff and the nature of the injuries, $3,000 was excessive. Fournier, J., considered that the abuse of the defendant of his position of justice of the peace was an important element to be taken into consideratioa in fixing the mount of damages. Per Gwynne, J.—The sound rule to adopt is that in mere matters of fact, or in the estimation of damages not susceptible of precise calculation or not ascertainable by the application of any rule prescribing a measure of damages, the appeal court should sustain the judgment of the trial judge unless satisfied that his conclusions are clearly erroneous.

Montcalm Election Case, Magnan v. Dugas, 9 Can. S.C.R. 93.

Held, that the Supreme Court on appeal will not reverse on mere matters of fact the judgment of the judge who

tries an election petition, unless the matter of the evidence is of such a nature as to convey an irresistible conviction that the judgment is not only wrong, but is erroneous, and that the evidence in support of the charge of bribing Mireau, as well as of the other charges of bribery and treating, was not such as would justify an appellate court in drawing the inference that the respondent intended to corrupt the voters.

Juris-prudence generally. Where judge has heard witnesses.

Guilford v. Anglo-French SS. Company, 9 Can. S.C.R. 303.

This action was brought by G. against A. F. S. S. Co. to recover damages for an alleged breach of contract. The plaintiff was master of the SS. "George Shattuck," trading between Halifax and St. Pierre and other ports in the Dominion. She was owned by the defendant company, the plaintiff being one of the largest shareholders of the company. Plaintiff's contract was that he was to supply the ship with men and provisions for the passengers and crew, and sail her as commander for $900 a month, afterwards increased to $950. The ship had been originally accustomed to remain at St. Pierre forty-eight hours, but the time was afterwards lengthened to sixty hours by the company, yet the plaintiff insisted on remaining only forty-eight hours, against the express directions of the company's agents at St. Pierre, and was otherwise disobedient to the agents, in consequence of which he was, on the 22nd May, without prior notice, dismissed from the service of the company. The case was tried before Sir William Young, C.J., without a jury, who, considering that the plaintiff was not a master in the ordinary sense, held that he had been wrongfully dismissed and found a verdict in his favour for $2,000. A rule *nisi* was made absolute by the full Court for a new trial.

On appeal to the Supreme Court of Canada, it was *Held*, 1st. That even if the dismissal had been wrongful, the damages were excessive, and the case should go back for a new trial on this ground.

Orassett v. Carter, 10 Can. S.C.R. 105.

Held, where there is a direct conflict of testimony, the finding of the judge at the trial must be regarded as a decisive, and should not be overturned in appeal by a court which has not had the advantage of seeing the witnesses and observing their demeanour while under examination.

Juris-prudence generally. Where judge has heard witnesses.

Parker v. Montreal City Passenger Rly. Co., Cout. Dig. 96 (1885).

The plaintiff who was thrown out of a waggon, sustaining injuries, brought action for negligence owing to improper construction and bad order of the company's track. Torrance, J., found that the track was in bad order, the switch three inches above the level of the road, contrary to law, and that this caused the accident without any fault on the part of the plaintiff, whose damages he assessed at $2,500. The Queen's Bench reversed this judgment, being of opinion that the rails, as well as the part of the roadway the company was bound to maintain, were lawful and sufficient; that the company was not at fault, and that the plaintiff had not exercised necessary caution and prudence and might by reason, caution and prudence have avoided the accident. *Held*, that as the questions to be decided were purely matters of fact, the judgment of the court of first instance should not have been disturbed. Strong, J., dissented on the ground that the judgment of the Court of Queen's Bench on the facts was correct.

(The Privy Council refused leave to appeal, as the findings of fact should not have been disturbed.)

Arpin v. The Queen, 14 Can. S.C.R. 736.

Where a judgment appealed from is founded wholly upon questions of fact the Supreme Court of Canada will not reverse it unless convinced beyond all reasonable doubt, that such judgment is clearly erroneous. The provisions of the Supreme and Exchequer Court Act relating to appeals from the Province of Quebec apply to cases instituted under the Quebec Petition of Right Act. *McGreevy* v. *The Queen*, 14 Can. S.C.R. 735, followed.

Welland Election Case, German v. Rothery, 20 Can. S.C.R. 376.

On a charge that appellant had been guilty personally of a corrupt practice by promising to W. to endeavour to procure him a situation in order to induce him to vote, and that such promise was subsequently carried into effect, the trial judges held on the evidence that the charge had been proved. The promise was charged as having been made in Thorold on 28th February, 1891. It was proved that W. some time before the trial made a declaration upon which the charge was based, at the instance of the solicitor for petitioner, and had got for such declaration, employment in Montreal from the C.P.R. Co. until the trial took place and W. swore that the promise had been made on 17th

February. G. (appellant), although denying the charge, admitted in his examination that he intimated to W. that he would assist him, and there was evidence that after the election G. wrote to W. and did endeavour to procure him the situation, but the letters were not put in evidence, having been destroyed by W. at the request of appellant. *Held*, affirming the judgment appealed from, that as the evidence of W. was in part corroborated by the evidence of appellant, the conclusion by the trial judges was not wrong, still less so entirely erroneous as to justify the Court as an appellate tribunal in reversing the decision of the court below on the questions of fact involved.

Juris-prudence generally. Where judge has heard witnesses.

Town of Levis v. The Queen, 21 Can. S.C.R. 31.

The Supreme Court will not interfere with the award of the Exchequer Court as to the value of land expropriated for railway purposes where there is evidence to support the finding and it is not clearly erroneous.

North Perth Election Case, Campbell v. Grieve, 20 Can. S.C.R. 331.

G., a voter and supporter of the respondent, holding a free railway ticket to go to Listowel to vote and wanting two dollars for his expenses while away from home, asked for the loan of this money from W., a bartender and friend. W. not having the money at the time applied to S., an agent of the respondent, who was present in the room, for the money, telling him he wanted it to lend to G., to enable him to go to Listowel to vote. S., the agent, lent the money to W., who handed it over to G. W. returned the two dollars to S. the day before the trial. The judges at the election trial held that it was a *bona fide* loan by S. to W. On appeal to the Supreme Court of Canada,

Held, reversing the judgment of the court below, that as the decision of the trial judges depended on the inference drawn from the evidence their decision could be reviewed in appeal, and that the proper inference to be drawn from the undisputed facts in the present case was that the loan by S. to W. was a mere colourable transaction by S. to pay the travelling expenses of G. within the provisions of section 88 of the Dominion Elections Act and a corrupt practice sufficient to avoid the election under section 91 of the said Act.

88. "Santanderino" v. Vanvert et al., 23 Can. S.C.R. 145. 13th March, 1893.

In an action against the owners of the "Santanderino" for damages by collision with respondent's barque, the

Jurisprudence generally. Where judge has heard witnesses.

"Juno," through the breaking down of the steering apparatus, the local judge of Admiralty District for Nova Scotia, who was assisted on the trial by a nautical assessor, found that the steering gear was constructed on an approved patent, and was in good order when the "Santanderino" started on her voyage, but that the collision was due to want of prompt action by the master and officers when the wheel refused to work (3 Ex. C.R. 378).

On appeal to the Supreme Court of Canada, it was *Held*, Sedgewick and King, JJ., dissenting, that only a question of fact was involved, and thought it was douhtful if the evidence was sufficient to warrant the finding, the decision was not so clearly wrong as to justify an appellate court in reversing it.

Merritt v. Hepenstal, 25 Can. S.C.R. 150.

If in a case tried without a jury evidence has been improperly admitted, a court of appeal may reject it and maintain the verdict if the remaining evidence warrants it.

Montreal Gas Co. v. St. Laurent.
City of St. Henri v. St. Lanrent, 26 Can. S.C.R. 176.

Held, that the Supreme Court will not interfere with the amount of damages assessed by the judgment appealed from if there is evidence to support it.

Lefeunteum v. Beandoin, 28 Can. S.C.R. 89.

In the estimation of the value of evidence in ordinary cases, the testimony of a credible witness who swears positively to a fact should receive credit in preference to that of one who testifies to a negative.

The evidence of witnesses who are near relatives or whose interests are closely identified with those of one of the parties, ought not to prevail in favour of such party against the testimony of strangers who are disinterested witnesses.

Girouard, J., said: "We have already decided (*North British* v. *Tourville*, 25 Can. S.C.R. 177) that we are the judges of the facts, and that if the proof shews clearly that the court below has erred in its application of the facts the duty of the Court is to set aside the judgment below;" and in this case upon its appreciation of the facts the Supreme Court reversed both courts below with costs.

Paradis v. Limoilou, 30 Can. S.C.R. 405.

Juris-prudence generally. Where judge has heard witnesses.

Held, that when there does not appear to have been manifest error in the findings of the court below, they will not be disturbed on appeal.

Crawford v. Montreal, 30 Can. S.C.R. 406.

Where there is direct contradiction between equally credible witnesses the evidence of those who speak from facts within their personal knowledge should be preferred to that of experts giving opinions based upon extra judicial statements and municipal reports.

Bell v. Vipond, Cont. Dig. 102 (1901).

On the merits of this case the controversy rested upon the fact whether or not a ship had been acquired by some of the partners in a commercial firm for the purposes of the firm's business or merely as a private venture. The Court of Queen's Bench had reversed the trial court judgment, and held that it belonged to the firm. As it was not made clear that there was error in the judgment appealed from the Supreme Court of Canada dismissed the appeal with costs.

Granby v. Menard, 31 Can. S.C.R. 14.

The trial judge tried the case without a jury and heard the evidence of the witnesses. *Held*, that under such circumstances when the trial judge expressly says that he believes certain witnesses and discredits others, an appellate court should not interfere with his judgment.

The Queen v. Armour, 31 Can. S.C.R. 499.

The trial judge having come to a conclusion on the question of damages in an expropriation proceeding where a great amount of evidence on both sides was adduced, the Supreme Court being unable to say that it was demonstrated in the clearest way by reference to the evidence that there was error in the judgment appealed from, dismissed the appeal.

Hamelin v. Bannerman, 31 Can. S.C.R. 534.

An objection as to arbitration and award being a condition precedent to an action for damages which had been waived or abandoned in the Court of Queen's Bench cannot be invoked on an appeal to the Supreme Court. On a

Jurisprudence generally. Where judge has heard witnesses.

cross appeal the Supreme Court refused to interfere with the amount awarded for damages in the court below upon its appreciation of contradictory evidence.

Schr. Reliance v. Conwell, 31 Can. S.C.R. 653

In an action claiming compensation for loss of the fishing schooner "Carrie E. Sayward" by being run into and sunk while at anchor by the "Reliance," the decision mainly depended on whether or not the lights on the lost schooner were burning as the admiralty rules required at the time of the accident. The local judge gave judgment against the "Reliance." *Held*, that though the evidence given was contradictory, it was amply sufficient to justify the said judgment which should not therefore be disturbed on appeal. *Santanderino* v. *Vanvert*, 23 Can. S.C.R. 145, and *The Village of Granby* v. *Ménard*, 31 Can. S.C.R. 14, followed.

Dempster v. Lewis, 33 Can. S.C.R. 292.

Although the trial judge in his judgment distinctly said that he gave credit to the evidence of the defendant, yet the Court of Appeal reversed the trial judge and the Supreme Court affirmed this judgment. Girouard, J., dissenting, held that the case was governed by *Granby* v. *Ménard*, 31 Can. S.C.R. 14.

Massawippi Valley Rly. Co. v. Resd, 33 Can. S.C.R. 457.

On questions of law, the judgment appealed from was reversed, Davies, J., *dubitanté*, but the findings on conflicting testimony, in respect of damages, by the trial judge were not disturbed on the appeal.

Robb v. Stafford, Cout. S.C. Cas. 411.

In this case the Chief Justice said:—

"It is quite true that to some extent the evidence is conflicting, but I am of opinion that the finding of the trial judge who heard the witnesses *viva voce*, and had an opportunity to appreciate their demeanour and manner should not be disturbed, and I am clearly satisfied that the judgment of the Court of Appeal is erroneous and should be reversed, and that is the opinion of the court."

Hayes v. Day, 41 Can. S.C.R. 134.

In a dispute as to the nature and effect of a contract, the trial judge, on his view as to the weight of evidence, found the facts in favour of the plaintiff and gave judgment accord-

ingly. His decision was reversed by a majority of the court *in banco*, and the action was dismissed with costs.

Jurisprudence generally. Where judge has heard witnesses.

It was held per Idington, Maclennan and Duff, J.J., reversing the decision of the full court, that the findings of the trial judge who had seen and heard the witnesses, should not have been reversed.

The Chief Justice and Davies, J., considered that the trial judge had not made his findings as the result of conclusions arrived at by him having regard to the conduct and appearance of the witnesses in giving their evidence, and, on their view of the conflicting testimony, were of the opinion that the full court was right in reversing the judgment at the trial and that the appeal from their judgment ought to be dismissed.

Gordon v. Horae, Holland & Holland, 42 Can. S.C.R. 240.

This was an action brought by Gordon against the defendants for a declaration that the defendant Horne was a trustee for him in certain real estate transactions in which large profits had been made, and for an account.

The trial judge dismissed the action. The Supreme Court of British Columbia allowed an appeal. In the Supreme Court of Canada the judgment at the trial was restored, the Court being of the opinion that the question involved was one of fact depending upon the proper view of conflicting testimony and for this reason the judgment of the trial judge should not be disturbed. On appeal to the Privy Council the Committee analysed the evidence at length and concluded their report by saying (*not reported*):

"Their Lordships are satisfied on the evidence that there was at the date of the writ a subsisting partnership between the Holland Realty Co. and Horne in respect of the property in question, and that Horne fraudulently attempted to obtain exclusive control of the property by pretending to the plaintiff that a sale of it had been made to Ford at the price of $300 an acre. In these circumstances their Lordships will humbly advise His Majesty that the judgment of the court below should be set aside and the judgment of the Supreme Court of British Columbia restored with costs against the defendants Horne and Holland, here and below.

In Syndicat Lyonnais du Klondyke v. Barrett, 36 Can. S.C.R. 279.

The case was heard before Craig, J., in the Territorial Court of the Yukon Territory, who held that the representations relied upon, as having been falsely and fraudulently

Jurisprudence generally. Where judge has heard witnesses.

made by the appellant, were established, and he awarded damages to the respondents. Against this judgment there was an appeal to the Territorial Court *en banc*, consisting of the trial judge and two other judges. The trial judge adhered to his original view, but the other two learned judges were of a different opinion, and dismissed the counter-claim. The respondents appealed to the Supreme Court of Canada, and the majority of the learned judges in that court, Girouard, Davies and Nesbitt, J.J. (the Chief Justice and Idington, J., dissenting), reversed the judgment of the court *en banc* and restored that of the trial judge with a small variation.

Davies, J., said: "The findings of fact of the trial judge should not, I think, under the circumstances, be reversed. A great deal depended upon the manner in which the witnesses gave their evidence, and I do not find anything in the evidence which would justify me in reversing these findings."

Nesbitt, J., said: "The learned trial judge sat in appeal and after hearing full argument and the judgments of his brother judges he reiterates the view already expressed, and as it is peculiarly a case in which the local conditions of mining and certainly demeanour in the box plays such an important part, I cannot feel that it is right for an appellate court to come to a conclusion that the trial judge was clearly wrong in his findings of fact."

Against this decision of the Supreme Court an appeal was taken to the Privy Council (not reported), where it was said:

"The first and main question to be determined upon this appeal is whether the alleged fraudulent misrepresentations have been established. That is a question of fact, as to which the natural inclination of their Lordships is to be guided largely by the opinion of the learned judge who tried the case; and the majority of the judges in the Supreme Court seem to have been influenced by a similar feeling. But there are circumstances in the present case which seem to their Lordships to detract from the weight which they would ordinarily give to the opinion of the trial judge."

Early in his judgment the learned judge, in speaking of the principal witnesses on each side, said:

"The witnesses Paillard and Tarut impressed me as being particularly cautious and conservative in their statements, very deliberate and calm, and not given to exaggeration. I cannot say that Barrette's manner of giving his evidence was dishonest at all; he was much more voluble than the other men."

This sentence is enough to show that the conclusion arrived at by the learned judge was not influenced, to any serious extent, by the demeanour of the witnesses.

On one very important point the learned judge was under a very serious misapprehension, that is with regard to the contemporary notes made by Paillard of the statements made to him by the appellant, a document which will have to be mentioned again later. As to these notes the learned judge said:

"While I cannot myself follow the notes clearly, yet Mr. Paillard in his evidence pointed out that he had made these notes, and no attempt was made by Counsel to show that the notes did not correspond with the evidence which he was giving in regard to the misrepresentations, and I take it that the notes correctly conform to the evidence which he gave." Juris-prudence generally. Witnesses not heard in court.

It is now admitted that those notes afford no confirmation to Paillard's evidence as to any of the statements said to have been falsely and fraudulently made.

In dealing with one of the alleged misrepresentations as to Claim No. 32, the learned judge says: "On this point there is the evidence of two against one, and I must believe the two." This is a very unsafe way of dealing with evidence. With regard to the alleged misrepresentation as to Claim No. 12, the learned judge's finding is far from being a confident one. He says, "I am inclined to think that the weight of evidence is with the defendants on this matter."

The result is that their Lordships are unable in this case to give to the opinion of the trial judge the same preponderating weight which they are usually anxious to give upon questions of fact. They think that the Territorial Court en banc and Idington, J., in the Supreme Court of Canada, were fully justified in examining independently the evidence bearing upon the charges of fraudulent misrepresentation. (The appeal was accordingly allowed with costs.)

Where the trial judge has not seen or heard the witnesses.

Russell v. Lefrancois, 8 Can. S.C.R. 335.

It is the duty of an appellate court to review the conclusion arrived at by courts whose judgments are appealed from upon the question of fact when such judgments do not turn upon the credibility of any of the witnesses, but upon the proper inference to be drawn from all the evidence in the case. In this case the trial judge did not personally hear all the witnesses, their evidence being given at *enquête*.

Malzard v. Hart, 27 Can. S.C.R. 510.

Held, that where the witnesses have not been heard in the presence of the judge, but their depositions were taken before a commissioner, a court of appeal may deal with the evidence more fully than if the trial judge had heard it or there had been a finding of fact by a jury, and may reverse the finding of the trial court if such evidence warrants it.

Point not taken in court below.

Gray v. Richford, 2 Can. S.C.R. 431.

An appellate court cannot refuse to entertain a question as to the effect of a deed given in evidence, on the ground

Jurisprudence generally. Point not taken below.

that it was not raised at the trial nor in term. *Oakes* v. *Turquand*, L.R. 2 E. & I. App. 325, referred to by Strong, J. Judgment appealed from (I. Ont. App. R. 112) reversed.

Montreal Loan & Mortgage Co. v. Fantenx, 3 Can. S.C.R. 411.

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

Documents which have not been proved nor produced at the trial cannot be relied on or made part of the case in appeal.

The South-West Boom Co. v. McMillan, 3 Can. S.C.R. 700.

D. McM., the respondent, sued S. W. B. Co., the appellants, to recover damages alleged to have been sustained by reason of the obstruction of the River Miramichi by appellant's booms. The pleas were not guilty, and leave and license. On the trial counsel proposed to add a plea, that the wrong complained of was occasioned by extraordinary freshet. The counsel for the respondent objected on the ground that such plea might have been demurred to. The learned judge refused the application, because he intended to admit the evidence under the plea of not guilty. On appeal, counsel for the appellants contended that the obstruction complained of was justified under the statute 17 V. c. 10 (N.B.), incorporating the South-West Boom Company.

Held, that the appellants, not having put in a plea of justification under the statute, or applied to the Supreme Court of New Brunswick *in banco* for leave to amend their pleas, could not rely on that ground before this Court to reverse the decision of the court below.

Western Counties Rly Co. v. Windsor & Annapolis Rly. Co., 6th February, 1879.

A point raised at the hearing not in factum, and counsel for respondent therefore objects that he is not prepared to argue it. The Court adjourns hearing for a week.

Fuller v. Ames, Cout. Dig. 119 (1880).

Technical objection not taken in the court below, cannot be allowed to prevail in appeal, following the rule of the Privy Council. Per Taschereau, J.

Dorion v. Crowley. 17th May, 1888.

Held, that although the objection that the right of action has been prescribed is taken for the first time on the argu-

ment in appeal, the Court is bound to entertain it and give effect to it if properly raised. Juris-prudence generally. Point not taken below.

Appeal allowed but without costs in any of the courts.

L'Union St. Joseph de Montreal v. Laplarre, 4 Can. S.C.R. 164.

L. was expelled from membership in L'U. St. J., an incorporated benefit society, for being in default to pay six months' contributions. Article 20 of the society's by-laws, section 5, provides that "When a member shall have neglected during six months to pay his contributions, or the entire amount of his entrance fee, the society may erase his name from the list of members, and he shall then no longer form part of the society; for that purpose, at every general and regular meeting, it is the duty of the collector-treasurers to make known the names of those who are indebted in six months' contributions, or in a balance of their entrance fees, and then any one may move that such members be struck off from the list of members of the society." L. brought a suit under the shape of a petition, praying that writ of mandamus should issue, enjoining the company to re-instate him in his rights and privileges as a member of the society: 1. On the ground that he had not been put *en demeure* in any way; and that no statement or notice had been given him of the amount of his indebtedness. 2. On the ground that many other members of the society were in arrears for similar periods, and that it was not competent for the society to make any distinction amongst those in arrear. 3. On the ground that no motion was made at any regular meeting.

The Court of Queen's Bench for L. C. (appeal side) held that L. should have had "prior notice" of the proceedings to be taken with a view to his expulsion.

Held, on appeal, that as L. did not raise by his pleadings the want of "prior notice," or make it part of his case in the court below, he could not do so in appeal.

Per Taschereau and Gwynne, JJ.—A member of that society, who admits that he is in arrear for six months' contributions, is not entitled to "prior notice" before he can be expelled for non-payment of dues.

Oakes v. The City of Halifax, 4 Can. S.C.R. 640.

Held, reversing the judgment of the Supreme Court of Nova Scotia, that in Nova Scotia, where the rule *nisi* to set aside an award specifies certain grounds of objection, and

Juris-prudence generally. Point not taken below.

no new grounds are added by way of amendment in the court below, no other ground of objection to the award can be raised on appeal.

McGreevy v. McCarron, 18th June, 1883.

An action for $37,000 which the respondents claimed were due them for balance on a sum of $103,213.96, amount of work performed under contract between appellant and respondents, and extra work agreed to between respondents and appellants.

On appeal to the Supreme Court of Canada from the Court of Queen's Bench for Lower Canada, *Held*, Taschereau, J., delivering the judgment of the Court, 1. The contention on the part of the respondents that the *faits et articles* submitted to the appellant should be taken *pro confessis*, because the answers thereto were not direct, categorical and precise (art. 229 C.C.P.), was not open to the respondents, as they had failed to make a motion to that effect in the court of first instance. The case of *McGreevy* v. *Paillé*, 5 Leg. News 95, confirmed by Supreme Court, was not in point as a motion had been regularly made and granted in the Superior Court. Nor has *Douglas* v. *Ritchie*, 18 L.C. Jur. 274, any application. There the defendant made default and had not answered the *faits et articles* at all. Here the defendant had answered, and if plaintiffs desired to have the answers set aside, it must be by motion.

Woodworth v. Dickie, 14 Can. S.C.R. 734.

In an action on bail bond the defence was that it had been altered after execution, and that it was not in the form required by the statute.

Held, affirming the judgment of the Supreme Court of Nova Scotia (19 N.S. Rep. 96), that the defendant having refused to call the attesting witness to the bond, who was their counsel in the case, the defence as to the alteration, alleged to be in the attestation clause, could not succeed.

Held, also, that the objection as to the form of the bond being merely technical and unmeritorious, could not be taken for the first time before this Court.

Exchange Bank of Canada v. Gilman, 17 Can. S.C.R. 108.

The Exchange Bank of Canada, in an action instituted by them against G., filed a withdrawal of a part of their demand in open court reserving their right to institute a

subsequent action for the amount so withdrawn. The Court acted on this *retraxit*, and gave judgment for the balance. This judgment was not appealed from. In a subsequent action for the amount so reserved.

Juris-prudence generally. Point not taken below.

Held, reversing the judgment of the court below, Fournier, J., dissenting, that the provisions of article 451, C.C.P. are applicable to a withdrawal made outside, and without the interference of, the Court and cannot affect the validity of a withdrawal made in open court and with its permission.

2. That it was too late in the second action to question the validity of the *retraxit* upon which the Court had in the first action acted and rendered a judgment which was final and conclusive.

A document not proved at the trial but relied on in the Court of Queen's Bench for the first time cannot be relied on or made a part of the case in appeal. *Montreal L. & M. Co.* v. *Fauteux*, 3 Can. S.C.R. 411, and *Lionais* v. *Molsons Bank*. 10 Can. S.C.R. 526, followed.

Venner v. Sun Life Ins. Co., 17 Can. S.C.R. 394.

It is too late to raise an objection for the first time on the argument before the Supreme Court that the legal representatives of the assured were not made parties to an action on a policy of life insurance.

The Canadian Pacific Railway Co. v. Robinson, 19 Can. S.C.R. 292.

The husband of respondent was injured while engaged in his duties as appellant's employee, and the injury resulted in his death about fifteen months afterwards. No indemnity having been claimed during the life-time of the husband, the widow, acting for herself as well as in the capacity of executrix for her minor child, brought an action for compensation within one year after his death.

Held, reversing the judgment of the Superior Court, and the Court of Queen's Bench for Lower Canada (appeal side) (Fournier, J., dissenting), 1. That the respondent's right of action under article 1056, C.C., depends not only upon the character of the act from which death ensued, but upon the condition of the decedent's claim at the time of his death, and if the claim was in such a shape that he could not then have enforced it, had death not ensued, the article of the code does not give a right of action, and creates no liability whatever on the person inflicting the injury.

Jurisprudence generally. Point not taken below.

2. That as it appeared on the record that the plaintiff had no right of action, the Court would grant the defendant's motion for judgment *non obstante veredicto.* Article 433, C.P.C.

3. That at the time of the death of the respondent's husband all right of action was prescribed under article 2262, C.C., and that this prescription is one to which the tribunals are bound to give effect although not pleaded. Articles 2267 and 2188, C.C.

(The judgment in this case was reversed by the Judicial Committee of the Privy Council.—See [1892] A.C. 481.) Cf. *The Queen* v. *Grenier,* 30 Can. S.C.R. 42.

Mylius v. Jackson, 23 Can. S.C.R. 485.

An objection to the insufficiency of a traverse in a pleading will not be entertained when taken for the first time on appeal, the issue having been tried on the assumption that the traverse was sufficient.

Gorman v. Dixon, 26 Can. S.C.R. 87.

In this case as a matter of strict pleading the plaintiff should have raised by a replication an answer to one of the defendant's pleas, but evidence was given as if such replication was on record. An objection having been taken in the Supreme Court founded upon this question of pleading, the Court held that an appellate court would not give effect to a merely technical ground of appeal against the merits and when there had been no surprise or disadvantage to the appellant.

Sherbrooke Street Rly. Co. v. Kerr, Cout. Dig. 994 (1899).

The action was for damages from injuries to a motorman through a collision of his car with a special car returning to the car barns at unusual speed on the wrong track. A verdict was entered for the plaintiff on the findings of the jury, and on appeal to the Court of Review defendant objected (1) that plaintiff had not denied charge in the statement of defence that the accident had been caused by his fault; (2) that there was a misdirection by the trial judge telling the jury that the plaintiff could succeed even if he had himself been negligent if they thought such negligence had not caused the accident; (3) that it had not been alleged that the car which came in collision with that of the plaintiff had no right to be in the place where it was at the

time; (4) that since the trial, defendant had discovered that plaintiff had stated his age as 47 years instead of 45 years; and (5) that the verdict was against the weight of evidence. Langelier, J., in delivering the judgment appealed from. *Held*, amongst other things, that objection to the pleadings came too late, after the necessary proof had been made and an amendment permitted. The Supreme Court affirmed the judgment appealed from for the reasons stated by Mr. Justice Langelier. Juris-prudence generally. Point not taken below.

The Queen v. Poirier, 30 Can. S.C.R. 36.

Where issues have been joined in a suit and judgment rendered upon pleadings admitting and relying upon a written instrument, an objection to the validity of the instrument taken for the first time on an appeal to the Supreme Court comes too late and cannot be entertained.

Sandon Water Works v. White, 35 Can. S.C.R. 309.

In this case the plaintiffs, in their reply, set up a failure of defendants to comply with certain conditions precedent, but did not set up another condition precedent upon which the judgment appealed from proceeded, though it was not referred to at the trial. *Held*, that the plaintiffs need not have replied as they did, but having done so without setting up the condition specially relied upon in appeal, thereby possibly misleading the defendants, they were properly punished by the court below by being deprived of their costs in appeal.

City of Montreal v. Belanger, 30 Can. S.C.R. 574.

Where an assessment roll covering a valuation of over half a million dollars has been, after contestation, duly confirmed, a ratepayer cannot be permitted to raise the objection, upon an application to quash the roll, that his property was assessed for a comparatively trivial amount over its proper value, when he had failed to urge that objection before the Board of Revisors.

City of Montreal v. McGee, 30 Can. S.C.R. 582.

In an action for bodily injuries where the extinction of the right of action by prescription was not pleaded or raised in the courts below and upon an appeal the prescription was judicially noticed and the action dismissed, the appeal was allowed without costs.

Juris-prudence generally. Point not taken below.

City of Montreal v. Hogan, 31 Can. S.C.R. 1.

On hearing of appeal objection was taken for the first time to the sufficiency of plaintiff's title, whereupon he tendered a supplementary deed to him of the lands in question. *Held*, following *Exchange Bank of Canada* v. *Gilman*, 17 Can. S.C.R. 108, that the Court must refuse to receive the document as fresh evidence cannot he admitted upon appeal. *Held*, also, that defendant could not raise the question as to the sufficiency of the plaintiff's title, for the first time on appeal. The allegations and conclusions of the declaration were deficient and the Court under section 63 of the Supreme & Exchequer Courts Act, ordered all necessary amendments to he made thereto for the purpose of determining the real controversy between the parties as disclosed by the pleadings and evidence. *Piché* v. *City of Quebec*, Cass. Dig. (2 ed.) 497; *Gorman* v. *Dixon*, 26 Can. S.C.R. 87, followed. (Under the special circumstances of the case and improper actions of the defendant, the plaintiff was awarded costs in all the courts. The judgment appealed from (Q.R. 8 Q.B. 534) was varied).

Hamelin v. Bannerman, 31 Can. S.C.R. 534.

In the Supreme Court the defendant orally contended that arbitration was a condition precedent to the respondent's action. No such objection having been taken in the court below nor in the appellant's factum in the Supreme Court, *Held*, that this objection could not now be raised.

McKelvey v. LeRoi Mg. Co., 32 Can. S.C.R. 664,

Questions of law appearing upon the record, but not raised in the courts below may be relied upon for the first time in an appeal to the Supreme Court where no evidence in rebuttal could have been brought to effect them had they been taken at the trial.

Hosking v. LeRoi No. 2 (Limited), Cout. Dig. 1129 (1903).

On the hearing of the appeal, counsel for appellant suggested a question for argument which was pertinent to the issues, but had not been taken in the factum nor raised in the courts below. He was permitted to argue the question on the understanding that both parties would be permitted to file supplementary factums on the points raised after the hearing closed. Counsel for respondent made no objections to arguing the new points on the terms settled.

Chambly Manufacturing Co. v. Willet, 34 Can. S.C.R. 502.

Juris-prudence generally. Point not taken below.

The defendant (appellant) acquiesced in the judgment at trial in favour of plaintiff by the construction of certain works. On appeal by the defendants to the Court of King's Bench this ground against the appeal was not taken by the respondent by exception in accordance with article 1220 of the Codo of Procedure. *Held*, that it was too late for the respondent to raise that point in appeal to the Supreme Court and a motion to quash was dismissed.

Gervais v. McCarthy, 35 Can. S.C.R. 14.

Held, that the prohibition of parol testimony in certain cases by the Civil Code of Quebec is not a rule of public order which must be judicially noticed and where such evidence has been improperly admitted at the trial without objection, the adverse party cannot take objection to the irregularity on appeal.

Miller v. Robertson, 35 Can. S.C.R. 80.

Upon a bill in equity claiming an injunction to restrain sale of lands the question of title was referred to the common law side, and resulted in a judgment for the plaintiff. From this judgment in ejectment an appeal was taken to the Supreme Court of the province where the judgment was sustained. The judge in equity then made a final decree in equity declaring plaintiff owner of the land, whereupon the defendant applied to the Supreme Court for leave to appeal *per saltum* from the judgment in equity which was granted on the ground that the full Court below had already decided the matter in question in the common law action. The respondent contended that by the judgment in ejectment the question of title was *res judicata*, the appellant not having appealed from that judgment, and that the judge in equity was bound to make the decree he did and follow the judgment of the full Court. The Supreme Court reversed the judge in equity and dismissed the bill of complaint, holding that no relief could be had in equity on the facts of this case, but without costs as the defendant had not by demurrer or otherwise raised that answer to the plaintiff's bill.

Gale v. Bureau, 44 Can. S.C.R. 305.

The provisions of the statutes respecting the improvement of water courses in the Province of Quebec, permit the

Juris-prudence generally. Point not taken below.

raising of the height of dams erected by proprietors of lands adjoining streams; this right is subject to the liability to make compensation for all damages resulting to other persons from such works.

The mode of ascertainment of such damages by the arbitration of experts provided by article 5536 of the Revised Statutes of Quebec, 1888, does not exclude the right of action to recover compensation in the courts.

In such cases the measure of damages is the amount of compensation for injuries sustained up to the time of the action; they ought not to be assessed once for all, *en bloc*, but recourse may be reserved in regard to future damages arising from the same cause.

Per Idington and Anglin, JJ.—Objections based upon provisions of enabling statues which have not been set up in the pleadings nor relied upon in the courts below cannot be entertained upon an appeal to the Supreme Court of Canada. *Hamelin* v. *Bannerman* (31 Can. S.C.R. 534), followed.

Re Shelburne & Queen's Election, 37 Can. S.C.R. 604, at 611:

Held, that if a counsel at the trial of an issue of fact tenders evidence on a specific ground and the evidence is properly rejected on that ground, it is not open to him afterwards, before a court of appeal, to claim that the evidence should have been admitted on another and different ground never referred to on the trial.

SS. Tordenskjold v. The Horn Joint Stock Co., Limited, 41 Can. S.C.R. 154.

A Court of Appeal should not consider a ground not previously relied on unless satisfied that it has all the evidence bearing upon it that could have been produced at the trial, etc.

SS. Nanna v. Mystic, 41 Can. S.C.R. 168.

In admiralty cases the Supreme Court must weigh the evidence for itself unassisted by expert advice and will, if the evidence warrants it, reverse the judgment appealed against on a question of seamanship or navigation.

Laidlaw v. Crowsnest Southern Rly. Co., 42 Can. S.C.R. 355.

Where matter relied upon to support action was not urged at trial, nor asserted on an appeal to the provincial Court it is too late to put it forward for the first time on an appeal to the Supreme Court of Canada.

English Decisions.

Juris-prudence generally. Point not taken below.

White v. Victoria Lumber, &c., Co., (1910) A.C. 606; C.R. [1910] A.C. 207.

It is not open to a party who has not at the trial nor either in writing or argument used the opportunity in the Court of Appeal to state for the first time at their Lordships' Bar an objection to the verdict of the jury on the ground of misdirection. It is, of course, possible that some highly exceptional case may arise, but in general it may be laid down that neither party to proceedings before the Privy Council should be permitted to start fresh points of objection which have been open to him, and have been neglected, at opportune and convenient stages of the litigation in the Colonial Courts.

Connecticut Fire Ins. Co. v. Kavanagh, (1892) A.C. 473.

Where a question of law is raised for the first time in a court of last resort upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interest of justice, to entertain the plea. The expediency of adopting that course may be doubted when the plea cannot be disposed of without deciding nice questions of fact, in considering which the court of ultimate review is placed in a much less advantageous position than the courts below. But their Lordships have no hesitation in holding that the course ought not in any case to be followed unless the court is satisfied that the evidence upon which they are asked to decide, establishes beyond doubt that the facts, if fully investigated, would have supported the plea. *Vide* also *Misa* v. *Currie*, 1 App. Cas. 554; *Cooper* v. *Cooper*, 13 App. Cas. 88; *The Tasmania*, 15 App. Cas. 223; *Sutherland* v. *Thomson* (1906) A.C. 55. But if the appeal succeeds on such a point, no costs are generally allowed. *Cooper* v. *Cooper*, 13 App. Cas. 88.

Lawson v. Carr, 10 Moo. P.C. 162.

In a collision case where the Court of Admiralty had, in accordance with its ancient practice equally divided the loss between two vessels, each being in fault, but under a new statute not mentioned in the proceedings in that court the loss was chargeable wholly against the ship which had not exhibited lights, the Judicial Committee upon this point being urged in appeal, decided that the collision had taken place

Juris-prudence generally. Point not taken below.

under such circumstances as to bring the vessel within the meaning of the statute. In delivering judgment Lord Kingsdown said: "It is true that this point was not argued in the court below and their Lordships regret that in this case, as it has happened in some other cases, they are obliged to decide on which in truth no opinion has ever been expressed by the learned judge from whom the appeal is brought. They cannot, however, deprive the party of the right to avail himself of the objection, and they must therefore recommend that the sentence complained of be reversed and the action dismissed with costs in the court below. They have some doubts whether they ought not to make the appellant pay the costs of the appeal, but they think upon the whole that justice will be satisfied by giving no costs of the appeal to either side.

Sreemutty Dossee v. Ranee Lalmmonee, 12 Moo. Ind. App. Cas. 470.

Although a point has not been taken in the court below, yet if it is patent on the face of the proceedings, the court can take judicial notice of it; *Devine* v. *Holloway*, 14 Moo. P.C. 290; but they will not hear the case on issues of fact not taken below.

Lord Campbell said *Dhurm Das Pandey* v. *Mussumat Shama Soondri Dibiah*, 3 Moo. Ind. App. Cas. 229:

"No objection was made in either of the courts below that the proper parties were not before the court. If such an objection had been made it might have been removed, and I think it is a safe maxim for a court of appeal to be governed by—that an objection which, if taken, might have been cured, and which has not been taken in the court below, shall not be taken in the court of appeal."

Res judicata—chose jugée.

Leger v. Fournier, 14 Can. S.C.R. 314.

Held, affirming the judgment of the court below, where the right of redemption stipulated by the seller entitled him to take back the property sold within three months from the day the purchaser should have finished a completed house in course of construction on the property sold, it was the duty of the purchaser to notify the vendor of the completion of the house, and in default of such notice, the right of redemption might be exercised after the expiration of the three months.

There was no *chose jugée* between the parties by the dismissal of a prior action on the ground that the time to exercise the right of redemption had not arrived, and the conditions stipulated had not been complied with. Jurisprudence generally. Res judicata.

Muir v. Carter, 16 Can. S.C.R. 473.

Holmes v. Carter, 16 Can. S.C.R. 473.

A final judgment setting aside an intervention to a seizure of the dividends of bank shares founded upon an allegation that such dividends formed part of a substitution is not a *res judicata* as to the corpus of said shares nor as to the dividends of other shares claimed under a different title.

Fonseca v. Attorney-General of Canada, 17 Can. S.C.R. 612.

Per Gwynne, J.—There is no sound reason why the Government of the Dominion should not be bound by the judgment of a court of justice in a suit to which the Attorney-General, as representing the Government, was a party defendant, equally as any individual would be, if the relief prayed by the information is sought in the same interest and upon the same grounds as were adjudicated upon by the judgment in the former suit.

Farwell v. The Queen, 22 Can. S.C.R. 553.

In proceedings on an information of intrusion exhibited by the Attorney-General of Canada against the appellant, it had been adjudged that the appellant, who claimed title under a grant from the Crown under the Great Seal of British Columbia, should deliver up possession of certain lands situate within the railway belt in that province. *The Queen* v. *Farwell*, 14 Can. S.C.R. 392.

The appellant having registered his grant and taken steps to procure an indefeasible title from the Registrar of Titles of British Columbia, thus preventing grantees of the Crown from obtaining a registered title, another information was exhibited by the Attorney-General to direct the appellant to execute to the Crown in right of Canada a surrender or conveyance of the said lands.

Held, that the proceedings on the information of intrusion did not preclude the Crown from the further remedy claimed.

Davies v. McMillan, S.C. Cas. 306.

K. was a trader, and in insolvent circumstances when he sold the whole of his stock in trade to D. At the time

Juris-prudence generally. Res judicata.

of this sale D. was aware that two of D.'s creditors had recovered judgments against him. The sheriff afterwards seized the goods so sold, under executions issued upon judgments subsequently obtained, and upon an interpleader issue tried in the County Court the jury found that K. had sold the goods with intent to prefer the creditors who held the prior judgments, but that D. had purchased in good faith and without knowing of such intention on the part of the vendor. Judgment was thereupon entered against D. in the County Court, and the judgment was affirmed by the Supreme Court of British Columbia *en banc*.

In an action afterwards brought by D. against the sheriff for trespass in seizing the goods he obtained a verdict, which was, however, set aside by the court *en banc*, a majority of the judges holding that the County Court judgment was a complete bar to the action.

On appeal to the Supreme Court of Canada,

Held, reversing the judgment of the Supreme Court of British Columbia, that as the evidence shewed that the goods had been purchased in good faith by D. for his own benefit, the sale was not void under the statute respecting fraudulent preferences; that the County Court judgment, being a decision of an inferior tribunal of limited jurisdiction, could not operate as a bar in respect of a cause of action in the Supreme Court, beyond the jurisdiction of the County Court, and further, that even if such judgment could be set up as a bar, it ought to have been specially pleaded by way of estoppel, by a plea setting up in detail all the facts necessary to constitute the estoppel, and that from the evidence in the case it appeared that no such estoppel could have been established. Taschereau, J., dissented.

Stuart v. Mott, 23 Can. S.C.R. 384.

S. brought a suit for performance of an alleged verbal agreement by M. to give him one-eight of an interest of his, M.'s interest in a gold mine, but failed to recover as the court held the alleged agreement to be within the Statute of Frauds. On the hearing M. denied the agreement as alleged, but admitted that he had agreed to give S. one-eighth of his interest in the proceeds of the mine when sold, and it having been afterwards sold S. brought another action for payment of such share of the proceeds.

Held, reversing the decision of the Supreme Court of Nova Scotia, Fournier and Taschereau, JJ., dissenting that

S. was not estopped by the first judgment against him from bringing another action. Jurisprudence generally. Res judicata.

Held, also, that the contract for a share of the proceeds was not one for sale of an interest in land within the Statute of Frauds.

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

A Court of Probate has no jurisdiction over accounts of trustees under a will, and the passing of accounts containing items relating to the duties of both executors and trustees is not, so far as the latter are concerned, binding on any other court, and a Court of Equity, in a suit to remove the executors and trustees, may investigate such accounts again and disallow charges of the trustees which were passed by the Probate Court.

Law v. Hansen, 25 Can. S.C.R. 69.

A judgment of a foreign court having the force of *res judicata* in the foreign country has the like force in Canada.

Unless prevented by rules of pleading a foreign judgment can be made available to bar a domestic action begun before such judgment was obtained. *The Delta*, 1 P.D. 393, distinguished.

The combined effect of Orders 24 and 70, Rule 2, and section 12, sub-section 7 of chapter 104 R.S.N.S. (5 ser.), will permit this to be done in Nova Scotia.

Mercier et vir. v. Barrette, 25 Can. S.C.R. 94.

In an action *en bornage* between M. and B. a surveyor was appointed by the Superior Court to settle the line of division between the lands of the respective parties, and his report, indicating the position of the boundary line, was homologated, and the court directed that boundaries should be placed at certain points on said line. M. appealed from that judgment to the Court of Review claiming that the report gave B. more land than he claimed and that the line should follow the direction of a fence between the properties that had existed for over thirty years. The Court of Review gave effect to this contention and ordered the boundaries to be placed according to it, in which judgment both parties acquiesced and another surveyor was appointed to execute it. He reported that he had placed the boundaries as directed by the Court of Review, but that his measurements shewed that the line indicated was not in the line of the old fence

Jurisprudence generally. Res judicata.

and his report was rejected by the Superior Court. The Court of Review, however, held that the report of the first surveyor, having been homologated by the court, was final as to the location of the fence and that the judgment had been properly executed. The Court of Queen's Bench reversed this judgment, set aside the last report and ordered the surveyor to place the boundaries in the true line of the old fence.

Held, reversing the decision of the Court of Queen's Bench, that the judgment of the Court of Review in which the parties acquiesced was *chose jugée* between them not only that the division line between the properties must be located on the line of the old fence, but that such line was one starting at the point indicated in the plan and report of the first surveyor. The Court of Review was right, therefore, in holding that the surveyor executing the judgment could do nothing else than start his line at the said point.

Ross et al. v. The Queen, 25 Can. S.C.R. 564.

The Intercolonial Railway Act provides that no contractor for construction of any part of the road should be paid except on the certificate of the engineer, approved by the Commissioners, that the work was completed to his satisfaction. Before the suppliant's work in this case was completed the engineer resigned, and another was appointed to investigate and report on the unsettled claims. His report recommended that a certain sum should be paid to the contractors.

Held, per Taschereau, Sedgewick and King, JJ., that as the court in *McGreevy* v. *The Queen*, 18 Can. S.C.R. 371, had, under precisely the same state of facts, held that the contractor could not recover that decision should be followed, and the judgment of the Exchequer Court dismissing the petition of right affirmed.

Held, per Gwynne, J., that independently of *McGreevy* v. *The Queen*, the contractor could not recover for want of the final certificate.

Held, per Strong, C.J., that as in *McGreevy* v. *The Queen*, a majority of the judges were not in accord on any proposition of law on which the decision depended, it was not an authority binding on the Court, and on the merits the contractors were entitled to judgment.

Sleeth v. Hurlbert, 25 Can. S.C.R. 620.

Juris-prudence generally. Res judicata.

A search warrant issued under the Canada Temperance Act, is good if it follows the prescribed form, and if it has been issued by competent authority and is valid on its face it will afford justification to the officer executing it in either criminal or civil proceedings, notwithstanding that it may be bad in fact and may have been quashed or set aside. Taschereau, J., dissenting.

The statutory form does not require the premises to be searched to be described by metes and bounds or otherwise.

A judgment on *certiorari* quashing the warrant would not estop the defendant from justifying under it in proceedings to replevy the goods seized where he was not a party to the proceedings to set the warrant aside, and such judgment was a judgment *inter partes only*. Taschereau, J., dissenting.

Clarke v. Phinney, 25 Can. S.C.R. 633.

An executrix obtained from the Probate Court a license to sell real estate of a deceased testator for the payment of his debts. Judgment creditors of the devisees moved to set aside the license, but failed on their motion and again in appeal. The lands were sold under the license and the executrix paid part of the price to the judgment creditors, and they received the same knowing the moneys to have been proceeds of the sale of the lands. Afterwards the judgment creditors, still claiming the license to be null, issued execution against the lands, and the purchaser brought an action to have it declared that the judgment was not a charge thereon.

Held, that the judgment upon the motion to set aside the license was conclusive against the judgment creditors and they were precluded thereby from taking collateral proceedings to charge the lands affected, upon grounds invoked or which might have been invoked upon the motion.

Held, further, that the judgment creditors, by receiving payment out of the proceeds of the sale, had elected to treat the license as having been regularly issued, and were estopped from attacking its validity in answer to the action.

Cooper et al. v. Molsons Bank, 26 Can. S.C.R. 611.

Under the Judicature Act, estoppel by *res judicata* cannot be relied on as a defence to an action unless specially pleaded.

Juris-prudence generally. Res judicata.

Stevenson v. City of Montreal, and White, Mis-en-cause, 27 Can. S.C.R. 593.

Prior to the proceedings which give rise to the action, the City of Montreal determined to widen Stanley Street between Sherbrooke and St. Catherine Streets, and passed a by-law to provide for the expropriation of sufficient land, back of the original line of the street, to carry out the intended widening. In the assessment roll prepared to meet the cost of this widening, a rate was set upon all property on the street, not only between St. Catherine and Sherbrooke Streets, but northward to the extreme northerly limit of Stanley Street on the confines of Mount Royal Park. W. attacked this assessment roll, claiming that his property, on the upper part of Stanley Street, should not be assessed for the widening in question as the said upper part of Stanley Street was a private way. The Superior Court gave judgment in favour of W.'s contentions, and quashed the assessment roll. Further expropriations to carry out the proposed widening between St. Catherine and Sherbrooke Streets, were then proceeded with, and assessment rolls prepared by which the whole cost of these expropriations was thrown upon the proprietors between St. Catherine and Sherbrooke Streets, no part being rated against W. or other proprietors on the upper part of Stanley Street. Objections were thereupon filed to set aside these assessment rolls on the ground that the assessments were augmented by improperly releasing the property on the upper part of Stanley Street from any portion of the assessment, and W. was called into the case to defend his interests. The Superior Court *Held*, 1st. That the former judgment in the action between W. and the City of Montreal was *res judicata* and that the upper portion of Stanley Street was a private way and therefore exempt from assessment; and 2nd. Even if that point had not been settled by the former judgment, that the petitioners had failed to prove that the street was not a private way. This judgment was affirmed by the Court of Queen's Bench (Q.R. 6 Q.B. 107), and upon further appeal, the Supreme Court of Canada affirmed the decision of the Court of Queen's Bench and dismissed the appeal with costs.

Delorme v. Cusson, 28 Can. S.C.R. 66.

Where, as the result of a mutual error respecting the division line, a proprietor had in good faith, and with the knowledge and consent of the owner of the adjoining lot,

erected valuable buildings upon his own property, and it afterwards appeared that his walls encroached slightly upon his neighbour's land, he cannot be compelled to demolish the walls which extend beyond the true boundary or he evicted from the strip of land they occupy, but should be allowed to retain it upon payment of a reasonable indemnity. Juris-prudence generally. Res judicata.

In an action for revendication under such circumstances the judgment previously rendered in an action *en bornage* between the same parties cannot be set up as *res judicata* against the defendant's claim to be allowed to retain the ground encroached upon by paying reasonable indemnity, as the objects and causes of the two actions were different.

Hyde v. Lindsay, 29 Can. S.C.R. 505.

A merchant in Ottawa, Ontario, purchased the assets of an insolvent trader in Hull, Quebec, but refused to accept delivery of the same. The curator of the estate brought an action in the Superior Court of Quebec to compel him to do so and obtained judgment, whereupon he accepted delivery and paid the purchase money. The curator subsequently brought action in Ontario for special damages alleged to have been incurred in the care and preservation of the assets from the time of the purchase until the delivery. *Held*, that these special damages, most of which could not be ascertained until after the purchase was completed, could not have been included in the action brought in the Quebec courts and the right to recover them was not *res judicata* by the judgment in that action.

Carroll v. Erie Co. Natural Gas and Fuel Co., 29 Can. S.C.R. 591.

In an action relating to the construction of a deed the plaintiff claimed the benefit of a reservation contained in a prior agreement, but judgment was given against him on the ground that the agreement was superseded by the deed. He then brought an action to reform the deed by inserting the reservation therein. *Held*, that the subject matter of the second action was not *res judicata* by the previous judgment. In an action for rectification of a contract the plaintiff may be awarded damages.

Jones v. City of St. John, 31 Can. S.C.R. 320.

J. having been assessed in 1896 on personal property as a resident of St. John, N.B., appealed without success to

Jurisprudence generally. Res judicata.

the appeals committee of the common council, and then applied to the Supreme Court of New Brunswick for a writ of *certiorari* to quash the assessment, which was refused. An execution having been threatened he then paid the taxes under protest. The matter was thus left in abeyance. In 1897 he was again assessed under the same circumstances, and took the same course with the exception that he appealed to the Supreme Court of Canada from the judgment refusing a *certiorari*, and the Court held the assessment void and ordered the writ to issue for quashing. (See 30 Can. S.C.R. 122.) J. then brought an action for repayment of the amount paid for the assessment of 1896. *Held*, affirming the judgment of the Supreme Court of New Brunswick, that the judgment refusing a *certiorari* to quash the assessment in 1896 was *res judicata* against J. and he could not recover the amount so paid.

Citizens Light & Power Co. v. Town of St. Louis, 34 Can. S.C.R. 495.

Held, where there is a confession of judgment as to part of a claim a judgment entered thereon is *res judicata* that the contract was not *ultra vires* and such a defence cannot be set up to an action for a further sum claimed to be due under the contract.

Prevost v. Prevost, 35 Can. S.C.R. 193.

Where a person who might have an eventual interest in substituted lands has not been called to the family council nor made a party in the Superior Court in proceedings for authority to sell the lands, the order authorising the sale is, as to him, *res inter alios acta*, does not prejudice his rights, and, therefore, he cannot maintain an appeal therefrom.

Fontaine v. Payette, 36 Can. S.C.R. 613.

In proceedings for the sale of lands under execution, the appellants filed an opposition to secure a charge thereon and under the provision of article 726 of the Code of Civil Procedure, a judge of the Superior Court ordered that the opposants should, within a time limited, furnish security that the lands, if sold subject to the charge, should realize sufficient to satisfy the claim of the execution creditor. On failure to give security as required the opposition was dismissed, and on appeal to the Supreme Court of Canada,

the judgment dismissing the opposition was affirmed (35 Can. S.C.R. 1). Subsequently the proceedings in execution were continued and, on the eve of the date advertised for the sale by the sheriff, the opposants filed another opposition to secure the same charge, offered to furnish the necessary security, and obtained an order staying the sale. The judgment appealed from maintained a subsequent order made under article 651, C.P.Q., which revoked the order staying the sale and dismissed the opposition. Juris-prudence generally. Damages assessed once for all.

Held, that the judgment dismissing the opposition on default to furnish the required security was *chose jugée* against the appellants and deprived them of any right to give such security or take further proceedings to secure their alleged charge upon the lands under seizure.

Per Taschereau, C.J.—In a case like the present an appeal to the Supreme Court of Canada would be quashed, on motion by the respondent, as being taken in bad faith.

Per Girouard, J.—As the order by the judge of first instance was made in the exercise of judicial discretion the Supreme Court of Canada, under section 27 of the Act, was deprived of jurisdiction to entertain the appeal.

Vide Dawson v. *Macdonald, supra*, p. 43; *Miller* v. *Robertson, supra*, p. 395; *Exchange Bank* v. *Gilman, supra*, p. 390; *Shaw* v. *St. Louis, supra*, p. 15; *Ontario & Quebec* v. *Marcheterre, supra*, p. 16; *Desaulniers* v. *Payette, supra*, p. 46; *Baptist* v. *Baptist, supra*, p. 11.

Damages assessed once for all.

City of Montreal v. McGee, 30 Can. S.C.R. 582.

Held, that the reservation of recourse for future damages in a judgment upon an action for tort is not an adjudication which can preserve the right of action beyond the time limited by the provisions of the Civil Code.

Semble, where, in an action of this nature there is but one cause of action past and future damages must be assessed once for all.

Gareau v. Montreal Street Rly., 31 Can. S.C.R. 463.

The plaintiff's action was brought to recover damages to buildings resulting from vibration caused by the working of the defendant's machinery. The action was dismissed in the court below. This was reversed by the Supreme Court which fixed a sum to cover damages past, present and

Juris-prudence generally. Judicial notice by court.

future. If not accepted by the plaintiff, a new trial as amount of damages claimed by the writ (which did include future damages) was ordered.

Anctil v. Quebec, 33 Can. S.C.R. 347.

Held, that it was illegal for a plaintiff to reserve his action a right to bring a subsequent action for ot damages, as the damages must be assessed once for all.

Judicial notice by court.

L'Association St. Jean Baptiste v. Brault, 30 Can. S.C.R. 598

Held, that if the contract in question is unlawful illegality cannot be waived or condoned by conduct on part of the party against whom it is asserted and it is duty of the Court *ex mero motu* to notice the nullity at stage of the case.

City of Montreal v. McGee, 30 Can. S.C.R. 582.

Held, that the prescription of actions for personal juries established by article 2262 of the Civil Code is waived by failure of the defendant to plead the limitati but the Court must take judicial notice of such prescr tion as absolutely extinguishing the right of action.

McFarran v. Montreal Park & Island Rly., 30 Can. S.C.R. 410

When it appears upon the face of the writ of summ and statement of claim that the plaintiff has no right action, it is not necessary that objection should be taken *exception à la forme*. Absolute want of legal right action may be invoked by a defendant at any stage of a s

Logan v. Lee, 39 Can. S.C.R. 311.

As an appellate tribunal for the Dominion of Cana the Supreme Court of Canada requires no evidence of laws in force in any of the provinces or territories of Cana It is bound to take judicial notice of the statutory or ot laws prevailing in every province or territory in Cana even where they may not have been proved in the cou below, or although the opinion of the judges of the Supre Court of Canada may differ from the evidence adduced up those points in the courts below. *Cooper* v. *Cooper* App. Cas. 88 followed. (Cf. R.S.C. (1906), c. 145, s. 1

The plaintiff, a longshoreman, was engaged by the fendant, in Montreal, to act as foreman on his contra

as a stevedore at the port of St. John, N.B. While in the performance of his work, the plaintiff went into the hold to re-arrange a part of the cargo in a vessel, in the port of St. John, and, in assisting the labourers, stood under an open hatchway where he was injured by a heavy weight falling upon him on account of the negligence of the winch-man in passing it across the upper deck. The winch-man had attempted to remove the article which fell, without any order from his foreman, the plaintiff, and with improperly adjusted tackle. In an action for damages instituted in the Superior Court, at Montreal, it was held that the plaintiff was entitled to recover either under the law of the Province of Quebec or under the provisions of the New Brunswick Act, 3 Edw. VII. c. 11, as he came within the class of persons therein mentioned to whom the law of the latter province relating to the doctrine of common employment does not apply. Juris-prudence generally. Acquiescement.

Acquiescence in judgment.

Ball v. McCaffrey, 20 Can. S.C.R. 319.

The constitutionality of the statute of the Province of Quebec having been raised by the defendant's plea, thereupon the Attorney-General intervened and the judgment of the Superior Court having maintained the plaintiff's action and the Attorney-General's intervention, the defendant appealed to the Court of Queen's Bench, but afterwards abandoned his appeal from the judgment on the intervention. On appeal to the Supreme Court from the Court of Queen's Bench on the principal action the defendant claimed he had the right to have the judgment of the Superior Court on the intervention reviewed. *Held*, that the latter judgment could not be reviewed.

Societe Canadienne Francaise de Construction de Montreal v Daveluy, 20 Can. S.C.R. 449.

By a judgment of the Court of Queen's Bench defendant was ordered to deliver up a number of its shares upon payment of a certain sum. Before the time for appealing expired the attorney *ad litem* for defendant delivered the shares to plaintiff's attorney and stated he would not appeal if the society were paid the amount directed to be paid. An appeal was subsequently taken before the plaintiff's attorney complied with the terms of the offer. On motion to quash the appeal on the ground of acquiescence in the

Jurisprudence generally. Amending statutes.

judgment, *Held*, that the appeal would lie. Per Taschereau, J.—An attorney *ad litem* has no authority to bind his client not to appeal by an agreement with the opposing attorney that no appeal would be taken.

In re Ferguson, Turner v. Bennett, Turner v. Carson, 28 Can. S.C.R. 38.

The judgment appealed from gave certain costs to appellant which were taxed and paid to him out of moneys in court to the credit of the cause. A motion to quash was made on the ground that by accepting these costs the appellant had acquiesced in the judgment appealed from by taking a benefit thereunder. *Held*, that the reception of the costs in question was in no way inconsistent with the appeal against the construction the judgment had placed upon the will in dispute.

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

Defendants filed judicial abandonments as ordered by the judgments appealed from, declaring, however, in the deeds, that exception was taken thereto, and that they intended to appeal, but made the abandonment to avoid *capias*, etc. *Held*, per Strong, C.J., and Taschereau and Girouard, JJ., that appellants had acquiesced in the judgments, executed the order against them and left matters in a position where it was impossible to obtain relief. Gwynne, J., concurred on the understanding that there should not be *res judicata* in respect to an alleged partnership. Sedgewick, J., assented doubtfully, as he did not feel satisfied that the abandonment had not been made under stress.

Amending statutes—effect on pending litigation.

Taylor v. The Queen, 1 Can. S.C.R. 65.

It was held that no appeal would lie from the judgment signed, entered or pronounced prior to January 11th, 1876, the day on which the Act constituting the Court came into force.

Hurtubise v. Desmarteau, 19 Can. S.C.R. 562.

It was held that the amendment 54-55 V. c. 25, s. 3, did not apply to a case in which the judgment of the Court of Review was delivered on the day the Act came into force.

Hyde v. Lindsay, 29 Can. S.C.R. 98.

Jurisprudence generally. Amending statutes.

The Act 60 & 61 V. c. 34, which restricts the right of appeal to the Supreme Court in cases from Ontario as therein specified, does not apply to a case in which the action was pending when the Act came into force, although the judgment directly appealed from may not have been pronounced until afterwards.

Cowen v. Evans, Mitchell v. Trenholme, Mills v. Limoges, 22 Can. S.C.R. 331.

The statute 54 & 55 V. c. 25, s. 3, which provides that "whenever the right to appeal is dependent upon the amount in dispute such amount shall be understood to be that demanded and not that recovered, if they are different," does not apply to cases in which the Superior Court has rendered judgment or to cases argued and standing for judgment (*en délibéré*) before that court, when the Act came into force. *Williams* v. *Irvine*, 22 Can. S.C.R. 108, followed.

Vide Couture v. *Bouchard*, *infra*, p.

Williams v. Irvine, 22 Can. S.C.R. 108.

By section 3, chapter 25 of 54 & 55 V. an appeal is given to the Supreme Court of Canada from the judgment of the Superior Court in review (P.Q.), "where and so long as no appeal lies from the judgment of that court, when it confirms the judgment rendered in the court appealed from, which by the law of the Province of Quebec, is appealable to the Judicial Committee of the Privy Council."

The judgment in this case was delivered by the Superior Court on the 17th November, 1891, and was affirmed unanimously by the Superior Court in review on the 29th July, 1892, which latter judgment was by the law of the Province of Quebec appealable to the Judicial Committee. The statute 54 & 55 V. c. 25, was passed on the 30th September, 1891, but the plaintiff's action had been instituted on the 22nd November, 1890, and was standing for judgment before the Superior Court in the month of June, 1891, prior to the passing of 54 & 55 V. c. 25. On an appeal from the judgment of the Superior Court in review to the Supreme Court of Canada, the respondent moved to quash the appeal for want of jurisdiction.

Held, per Strong, C.J., and Fournier and Sedgewick, JJ., that the right of appeal given by 54 & 55 V. c. 25, does not extend to cases standing for judgment in the Superior Court

Jurisprudence generally. Judgment en délibéré.

prior to the passing of the said Act. *Couture* v. *Bouchard*, 21 Can. S.C.R. 281, followed. Taschereau and Gwynne, JJ., dissenting.

Fournier, J.—That the statute is not applicable to cases already instituted or pending before the Courts, no special words to that effect being used.

Sedgwick v. Montreal Light, Heat & Power Co., 41 Can. S.C.R. 639, C.R. [1910] A.C. 485.

An appeal lies to the Supreme Court of Canada from a judgment of the Court of Review which is not appealable to the Court of King's Bench but is susceptible of appeal to His Majesty in Council. By 8 Edw. VII. c. 75 (Que.) the amount required to permit of an appeal to His Majesty in Council was fixed at $5,000 instead of £500 as theretofore.

It was held that said Act did not govern a case in which the judgment of the Court of Review was pronounced before it came into force.

Colonial Sugar Refining Co. v. Irving, (1905) A.C. 369.

Held, that although the right of appeal from the Supreme Court of Queensland to His Majesty in Council given by the Order in Council of June 30, 1860, has been taken away by the Australian Commonwealth Judiciary Act, 1903, s. 39, ss. 2, and the only appeal therefrom now lies to the High Court of Australia, yet the Act is not retrospective, and a right of appeal to the King in Council in a suit pending when the Act was passed and decided by the Supreme Court afterwards was not taken away.

Judgment en délibéré—Time does not run.

McCrae v. White, 9 Ont. P.R. 288. Nov. 24th, 1882.

Judgment was delivered by the Court of Appeal on the 24th March. On the same day application was made for leave to appeal to the Supreme Court, as the case was one in which, by reason of the O.J. Act there is no appeal without leave. Leave to appeal was not granted till 1st May, and the bond was filed on the 22nd May.

Counsel for appellant applied for the allowance of the bond.

Counsel contra objected that the bond had not been filed and allowed within thirty days from the judgment, as required by the Supreme Court Act.

Patterson, J.—After consultation with Burton J., the delay being the act of the court, the time for filing the bond must count from the granting of leave to appeal, as no delay took place in applying for such leave.

Juris-prudence generally. Judgment en délibéré.

Couture v. Bouchard, 21 Can. S.C.R. 281.

In an action brought by the respondent against the appellant for $2,006 which was argued and taken *en délibéré* by the Superior Court for Lower Canada, sitting in review on the 30th September, 1891, the day on which the Act 54-55 V. c. 25, s. 3, giving a right to appeal from the Superior Court in review to the Supreme Court of Canada was sanctioned, the judgment was rendered a month later in favour of the respondents. On appeal to the Supreme Court of Canada,

Held, per Strong., Fournier and Taschereau, JJ., that the respondent's right could not be prejudiced by the delay of the court in rendering judgment which should be treated as having been given on the 30th September, when the case was taken *en délibéré*, and therefore the case was not appealable. *Hurtubise* v. *Desmarteau*, 19 Can. S.C.R. 562, followed.

St James Election Brunet v. Bergeron, 33 Can. S.C.R. 137.

The Controverted Elections Act, R.S. c. 9, s. 32 (1886), provides that "the trial of every election petition shall be commenced within six months from the time when such petition has been presented." And by section 33 "the court or judge may, notwithstanding anything in the next preceding section, from time to time enlarge the time for the commencement of the trial."

In this case the petition was presented on the 22nd February. On the 27th February preliminary objections were filed which were dismissed on the 24th April. An appeal was taken from the judgment to the Supreme Court on the 2nd May, and the judgment of the Supreme Court was not given until the 10th October. The six months within which the trial was required to commence by section 32 expired on the 22nd August.

The petitioner obtained an order postponing the trial until the 30th juridical day after the judgment of the Supreme Court should be pronounced. The judgment of the Supreme Court having been pronounced on the 10th October, the 30th juridical day it was admitted, would be the 17th November. On the 14th November the respondent

Jurisprudence generally. Court may assume jurisdiction.

in the election proceedings moved to have the judgment fixing the trial for the 17th November set aside and the petition declared lapsed, which was refused, and a further order was made directing the trial of the petition for the 4th December.

The point for the decision of the Supreme Court was to determine whether or not the election court had jurisdiction to try the petition on that date. *Held*, that on the 10th October when the Supreme Court rendered its judgment on the appeal from the judgment upon the preliminary objections, only three months and nine days could be counted out of the six months from the date of the filing of the petition, leaving two months and twenty-one days to complete the six months, and as the trial began on the 4th December it was within that period.

Held, that a case may be ten, twelve or more months before the Supreme Court, and it was impossible to give to section 32 of the Act the strict construction that the respondent in the election proceedings contended for.

Attorney-General v. Scott, 34 Can. S.C.R. 282.

Held, that the appellants could not be prejudiced by the delay of the judge in deciding upon an application until after the expiration of the 60 days allowed for bringing an appeal and that the judgment approving of the security and granting leave to appeal must be treated as having been given on the day that the case was taken *en délibéré following Couture v. Bouchard*, 21 Can. S.C.R. 281.

Court may assume jurisdiction when of opinion to dismiss appeal.

Schroeder v. Rooney, Cass. Dig. 403.

On appeal to the Supreme Court of Canada, *Held*, that it was doubtful if an appeal would lie to the Supreme Court of Canada in such a case, but if it would, the order of Wilson, C.J., affirmed by the judgment of the Divisional Court, should not be interfered with.

Quebec, Montmorency & Charlevoix Rly. Co. v. Mathieu, 19 Can. S.C.R. 423.

Appeal from judgment affirming an award for $1,974.75 damages on expropriation of lands, with interest from date of award and costs. On hearing the appeal, Strong and

Taschereau, JJ., doubted the Court's jurisdiction, but concurred in the decision of the Court dismissing the appeal on the merits, assuming, without deciding, that there was jurisdiction to entertain it. Per Taschereau, J.—The Court will not, on appeal, interfere with concurrent findings of fact in the courts below, fully supported by evidence. Jurisprudence generally. Court may assume jurisdiction.

The Great Eastern Railway Company v. Lambe, 21 Can. S.C.R. 431.

On appeal to the Supreme Court the respondent moved to quash the appeal on the ground that the amount of the original judgment was the only matter in controversy and was insufficient in amount to give jurisdiction to the Court. The Court without deciding the question of jurisdiction heard the appeal on the merits, and dismissed the same with costs.

St. Joachim v. Pointe Claire Turnpike Road Co., 24 Can. S.C.R. 486.

In pronouncing judgment the Court said: "An objection to our jurisdiction to entertain this appeal was taken *in limine* by the respondent. But as we are of opinion that we should dismiss the appeal we assume jurisdiction, without determining the question raised thereupon, as we have often done in such cases, and as the Privy Council has done in many instances, amongst others in *Braid* v. *The Great Western Rly. Co.*, 1 Moo. P.C. N.S. 101.

Bain v. Anderson, 28 Can. S.C.R. 481.

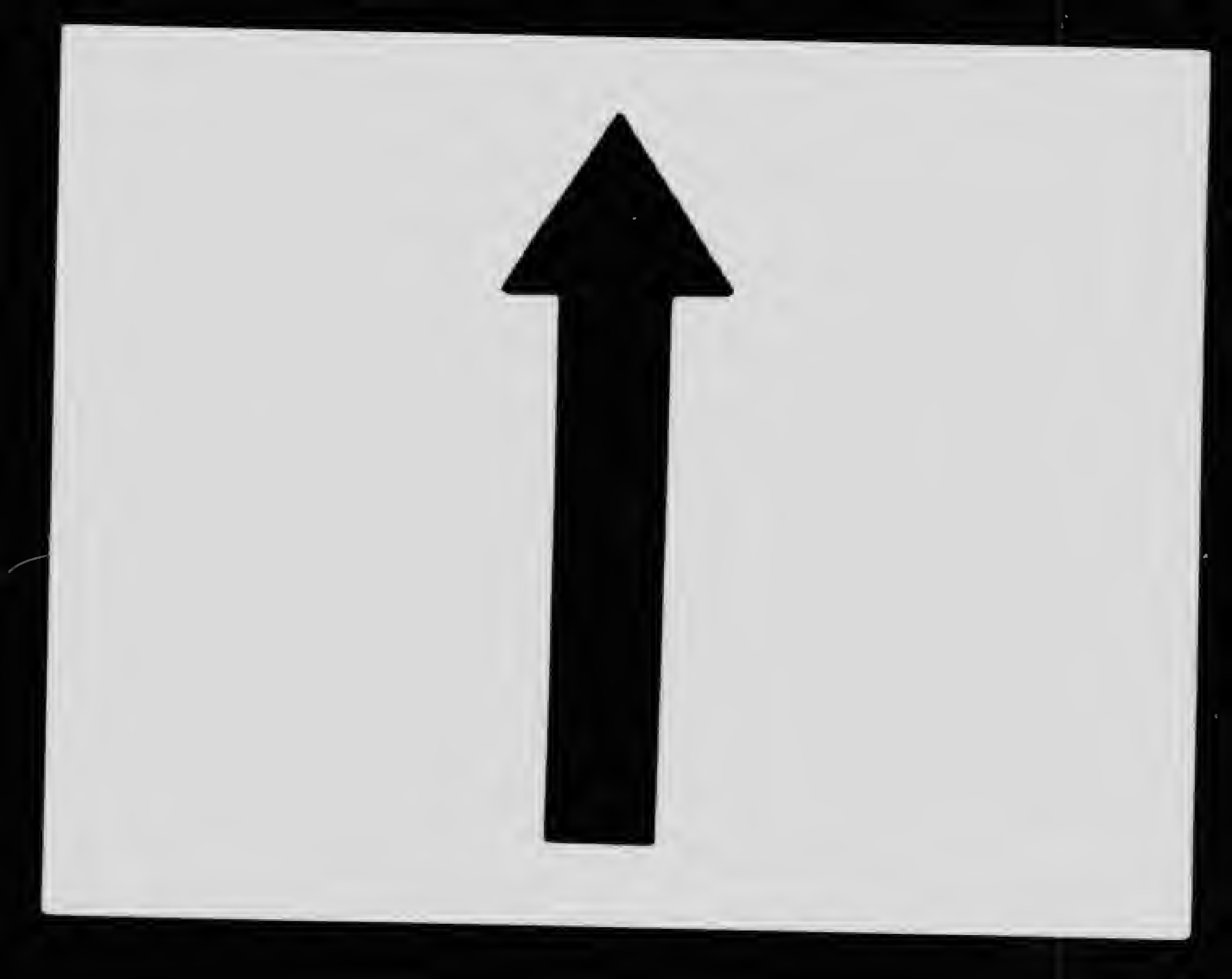
Where the jurisdiction of the Supreme Court is doubtful the Court may assume jurisdiction if it has decided to dismiss the appeal on the merits.

Bastien v. Filiatrault, 31 Can. S.C.R. 129.

In this case after hearing counsel for the parties the Court reserved judgment, and on a subsequent day, dismissed the appeal on the merits with costs for the reasons given in the courts below, and without determining a question as to the jurisdiction of the Court to entertain the appeal raised by the respondent upon a motion to quash.

Canadian Pacific Rly. Co. v. The King, 38 Can. S.C.R. 137.

Where the jurisdiction of the Supreme Court of Canada to entertain an appeal was in doubt, but it was considered that the appeal should be dismissed on the merits, the court heard and decided the appeal accordingly.



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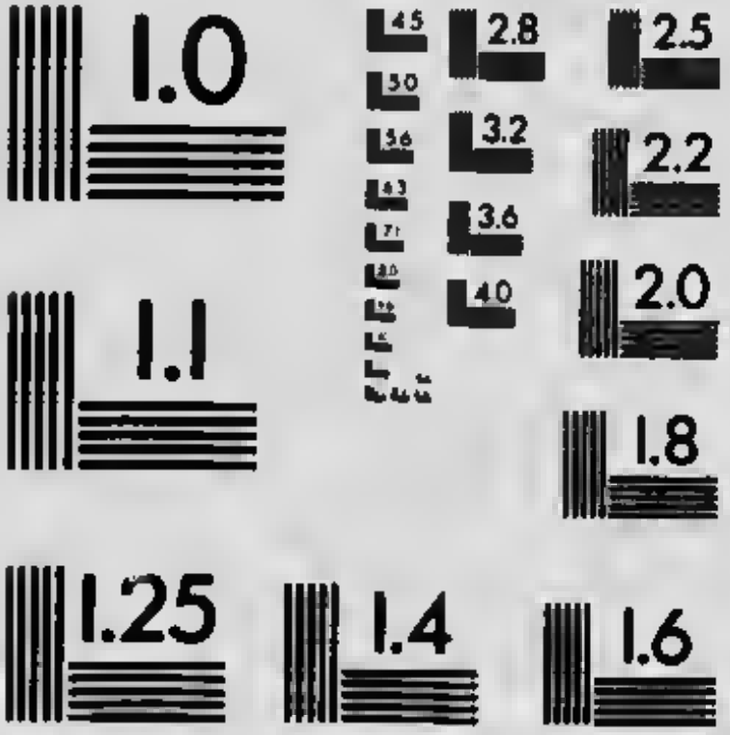

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Juris-prudence generally. Amount involved trifling.

Amount involved trifling.

McDonald v. Gilbert, 16 Can. S.C.R. 700.

The Court said it could not refuse to hear an appeal in which such a trifling sum as $20 was involved, yet the bringing of such appeals was highly objectionable and to be in every way discouraged.

Gorman v. Dixon, 26 Can. S.C.R. 87.

This was an appeal from Prince Edward Island, where the amount involved was $160. In giving judgment the Chief Justice said: "It is to be hoped that some statutory amendment of the law may in the future prevent appeals to this Court in cases of such very minor importance as the present, in which the amount in controversy is so greatly disproportioned to the expense of the appeal here."

Kent v. Ellis, 31 Can. S.C.R. 113.

In pronouncing judgment in this case the Chief Justice said: "The Maritime Provinces enjoy the costly privilege of bringing appeals to this Court upon paltry amounts. That such appeals should be possible is a blot upon the administration of justice. I hope the Bar of the Maritime Provinces will assist in obtaining the necessary legislation to put an end to that state of things."

Joinder of causes of action.

Meloche v. Deguire, 34 Can. S.C.R. 24.

Held, that there was nothing objectionable in the plaintiff in the same action making a claim *en partage* as well as *au petitoire*.

Reference to debates in Parliament.

Gosselin v. The King, 33 Can. S.C.R. 255.

Held, that it was not proper to refer to debates in Parliament for the purpose of construing a statute, although this rule has been relaxed with respect to the B.N.A. Act. The report of the codifiers of the Civil Code of Lower Canada are often referred to in the Quebec courts, in the Supreme Court and in the Privy Council.

Grand Trunk Rly. Co. v. Robertson, 39 Can. S.C.R. 506.

Jurisprudence generally. Debates in Parliament.

In the report of the Chairman of the Board of Railway Commissioners it is said:

"While not material to the construction of the amendment, it is interesting to note that, as shewn by the Hansard report of the discussion in Parliament, the amendment of 1883 was introduced by Mr. McCarthy, M.P., for the purpose of making the provision against discrimination more clear. See Hansard, vol. 13, pp. 141, 558 *et seq.*"

Nesbitt, K.C., proposed to read from the Hansard remarks made by the Minister of Railways when introducing the Bill to consolidate the Railway Act, but in the face of objection made by certain members of the Court, he abandoned his intention.

St. Catharines Milling & Lumber Co. v. The Queen, 13 Can. S.C.R. 577.

Mr. Justice Strong used this language at p. 606:

"In construing this enactment (The British North America Act) we are not only entitled, but bound, to apply that well established rule which requires us, in placing a meaning upon descriptive terms and definitions contained in statutes, to have recourse to external aids derived from the surrounding circumstances and the history of the subject matter dealt with, and to construe the enactment by the light derived from such source, and so to put ourselves as far as possible in the position of the legislature whose language we have to expound. If this rule were rejected and the language of the statute were considered without such assistance from extrinsic facts, it is manifest that the task of interpretation would degenerate into mere speculation and guess work."

Mr. Mowat, who was counsel in the case, said:

"In various cases it has been decided, I am not quite sure whether in this court or in other courts, reference has been made to the resolutions upon which the British North America Act was founded. What degree of importance should be attached to them has not been stated, but at all events it is reasonable for judges to look at them and if they do find that they throw any light on the subject they should avail themselves of that light."

Relying upon this authority, counsel in the *Reference re Representation in the House of Commons*, 33 Can. S.C.R. 475, quoted at length from the documentary and historical evidence with respect to the circumstances under which the Quebec Resolutions were adopted upon which the Confederation of the Provinces of Canada was based.

Juris-prudence generally. Onus Probandi.

In re Branch Lines (C.P.R. v. James Bay Rly Co.), 36 Can. S.C.R. 42.

The general principles applicable to the admissibility of this class of evidence is thus expressed by Nesbitt, J.

"The general rule which is applicable to the construction of all other documents is equally applicable to statutes, and the interpreter should so far put himself in the position of those whose words he is interpreting as to be able to see what those words related to. He may call to his aid all those external or historical facts which are necessary for this purpose and which led to the enactment, and for those he may consult contemporary or other authentic works and writings. This, however, does not justify a departure from the plain reasonable meaning of the language of the Act. The best and surest mode of expounding an instrument is by construing its language with reference to the time when and circumstances under which it was made, and next to such method of exposition is the rule that if an Act be fairly susceptible of the construction put upon it by usage, the courts will not disturb that construction. The authorities for these statements are too well known to render lengthy citation necessary. I refer, however, to Read v. The Bishop of Lincoln (1892), A.C. 644; Herbert v. Purchase (L.R. 3 P.C. 605, at p. 648); Maxwell on Statutes (3 ed.), pp. 32-39, inclusively, pp. 423 and following; Broom's Legal Maxims (7 ed.), pp. 516-579. As to reference to House of Commons records for purposes of historical exposition, see The Attorney-General of British Columbia v. The Attorney-General of Canada (14 Can. S.C.R. 345, pages 361-369; 14 App. Cas. 295, page 305); The Fisheries Case (26 Can. S.C.R. 444); pages 456-465 et seq.; In re Representation in the House of Commons (33 Can. S.C.R. 475, pages 497, 581-593)."

Onus Probandi—Pleadings.

Union Bank of Halifax v. Indian & General Investment Trust, 40 Can. S.C.R. 510.

The plea of purchase for value without notice must be proved in its entirety by the party offering it; it is not incumbent on the opposite party to prove notice after the purchase for value is established.

Where a conversation over the telephone was relied on as proof of notice, the evidence of the party asserting that it took place, and giving the substance of it in detail, must prevail over that of the other party who states only that he does not recollect it.

Porter v. Purdy, 41 Can. S.C.R. 471.

A lease for years provided that on its termination the lessor, at his option, could renew or pay for improvements.

When it expired the lessor notified the lessee that he would not renew and that he had appointed a valuator of the improvements requesting her to do the same, which she did. The valuation was made and the amount thereof tendered to the lessee which she refused on the ground that valuable improvements had not been appraised, and refusing to give up possession when demanded the lessor brought ejectment. By her plea to the action the lessee set up the invalid appraisement and claimed that as the lessor's option could not be exercised until a valid appraisement had been made he was not entitled to possession. By a plea on equitable grounds she again set up the invalid appraisement and asked that it be set aside and the lessor ordered to specifically perform the condition in the lease for renewal and for other and further relief. S. 68. Procedure.

It was held, Idington, J., dissenting, that s. 289 of the Supreme Court Act of New Brunswick did not authorize that court to grant relief to the lessee under her equitable plea; that such a plea to an action of ejectment must state facts which would entitle the defendant to retain possession; which the plea in this case did not do.

PROCEDURE.

68. Proceedings in appeals shall, when not otherwise provided for by this Act, or by the Act providing for the appeal, or by the general rules and orders of the Supreme Court, be as nearly as possible in conformity with the present practice of the Judicial Committee of His Majesty's Privy Council. R.S., c. 135, s. 39.

For practice of the Judicial Committee, *vide* Preston on Privy Council Appeals, and Safford & Wheeler, Privy Council Practice.

Vide also notes to s. 59, *supra*.

Following the practice of the Privy Council, in *Foran* v. *Handley*, 1892, the Registrar vacated an order dismissing an appeal, and granted a further extension for filing the case, where satisfactory reason for the delay was shewn.

69. Except as otherwise provided, every appeal shall be brought within sixty days from the signing or entry or pronouncing of the judgment appealed from. 50-51 V., c. 16, s. 57.

Appeals otherwise provided for are:—

Criminal appeals. Criminal Code, s. 1024, *infra*, p. 815.

Exchequer Courts appeal. Exchequer Courts Act, s. 82, *infra*, p. 749.

S. 69.

Appeal in 60 days.

Election appeals. Controverted Elections Act, s. 65, *infra*, p. 781.

Appeals under the Winding-up Act. Winding-up Act, s. 104, *infra*, p. 807.

Appeals under the Railway Act, vide infra, p. 791.

A form of notice of appeal will be found, infra, p. 628.

In the Province of Quebec, time always runs from the pronouncing of the judgment.

In appeals "the date from which time begins to run is always the date of the pronouncing of the judgment unless an application is made to the court appealed from to review some decision made by the Registrar on the settlement of the minutes, or some substantial question affecting the rights of the parties has not been clearly disposed of by the judgment as pronounced, and the determination of this has delayed the settlement of the minutes." *County of Elgin* v. *Robert*, 36 Can. S.C.R. 27.

In this judgment all the earlier decisions of the court are reviewed, namely: *O'Sullivan* v. *Harty*, 13 Can. S.C.R. 431; *Walmsley* v. *Griffith*, 13 Can. S.C.R 434; *Martley* v. *Carson*, 13 Can. S.C.R. 439; *Martin* v. *Sampson*, 26 Can. S.C.R. 707.

This section applies to appeals from the judgment of the Court of Appeal for Ontario under s. 48 (e), *supra*. *Canadian Mutual* v. *Lee*, 34 Can. S.C.R. 224.

The provisions of this section also apply to appeals *per saltum*. *Barrett* v. *Syndicat Lyonnais du Klondyke*, 33 Can. S.C.R. 667. A judge of the court appealed from in such cases has no power to extend the time for bringing the appeal, nor has a judge of the Supreme Court such power. *Barrett* v. *Syndicat Lyonnais du Klondyke*, 33 Can. S.C.R. 667.

Temiscouata Rly. Co. v. Clair, 38 Can. S.C.R. 230.

The court refused to entertain a motion to quash the appeal on the ground that it had not been taken within the sixty days limited by the statute and that an order by a judge of the court appealed from after the expiration of that time was *ultra vires* and could not be permitted under s. 42 (now sec. 71) of the Supreme and Exchequer Courts Act, R.S.C. 135.

Armstrong v. Beauchemin, 8 Que. P.R. 128.

It was held that if a security bond given to guarantee the costs of an appeal to the Supreme Court is found insufficient

by the Registrar of that court and a delay is granted by him to furnish another bond, a judge of the Court of King's Bench can enlarge the delays for perfecting the appeal. Overruled by *Barrett* v. *Syndicat Lyonnais du Klondyke, supra*, 420.

S. 69. Appeal in 60 days.

Tabb v. Grand Trunk Rly. Co., 8 O.L.R. 281.

A judge of the Court of Appeal has no jurisdiction to extend the time for the allowance of the security on a pending appeal to the Supreme Court in a case where no such appeal can be brought without leave. But the full Court of Appeal or the Supreme Court can grant leave or allow the appeal under s. 42 (now sec. 71) of the Supreme Court Act, R.S.C. 1886, s. 135, notwithstanding the expiration of the time limited by s. 40 of that Act, as amended by 50-51 V., c. 16, s. 57 (D), and Schedule A. Overruled by *Goodison Thresher Co.* v. *McNab, infra.*

Hamilton Steamboat Co. v. McKay, 15 O.L.R. 184.

Time for allowing appeal extended, and the security approved of and allowed, under s. 71 of the Supreme Court Act, R.S.C. 1906, c. 139, although this might have been done by a single judge of the Court of Appeal, since the failure to come within the proper time, under s. 69 arose from the impression that leave to appeal was necessary, and no court was sitting during that time to which the application for leave could have been made. Also leave to appeal granted, if necessary, *valeat quantum*, under s. 48 (*e*) of the Supreme Court Act.

Goodison Thresher Co. v. McNab, 42 Can. S.C.R. 694.

After the expiration of sixty days from the signing or entry or pronouncing of a judgment of the Court of Appeal for Ontario, the Supreme Court of Canada is without jurisdiction to grant special leave to appeal therefrom, and an order of the Court of Appeal extending the time will not enable it to do so.

Great Northern Rly. Co. v. Furness, Withy & Co., 40 Can. S.C.R. 455.

Application for approval of the security on an appeal to the Supreme Court of Canada was made within the time limited by the statute, but the hearing of the application was not completed until afterwards, and the judge made

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Appeal in 60 days.

an order, after the expiration of sixty days from the rendering of the judgment appealed from, approving of the security offered by the appellants.

It was *Held*, Idington, J., dissenting, that although the record did not show that the judge had expressly made an order to that effect he impliedly extended the time by accepting the security offered, and that this was a sufficient compliance with the statute.

An objection that the security approved was not such as contemplated by the 75th and 76th sections of the Supreme Court Act (the amount thereof being insufficient for a stay of execution), was not entertained for the reason that the amount in controversy was sufficient to bring the case within the competence of the court and it was immaterial whether or not execution could be stayed. *The Attorney-General of Quebec* v. *Scott*, 34 Can. S.C.R. 282, and *The Halifax Election Cases*, 37 Can. S.C.R. 601, referred to.

In re Howard, Oct. 11th, 1909.

In a *habeas corpus* appeal although notice of appeal was given within 60 days from judgment, no case was filed until after that date. The appeal was quashed for want of jurisdiction.

Roblee v. Rankin, 11 Can. S.C.R. 137.

The plaintiff's demurrer to the defendant's plea was allowed by the full Court of Nova Scotia on the 5th February, 1883. On the 19th March, plaintiff obtained a rule absolute authorizing the prothonotary to compute debt and damages for which final judgment might be entered. No rule for judgment on the demurrer or other rule, except the rule to compute, was taken out by the respondent, nor was any judgment signed until the 2nd day of May, 1883. An application to quash the appeal for want of jurisdiction, made on the ground that time for appeal should run from the date of the judgment on the demurrer and that the present appeal was too late, was dismissed.

Robertson v. Wigle, 15 Can. S.C.R. 214.

Where a judgment of the Maritime Court was handed to the Registrar by the judge and not pronounced in open court, it was held by the Supreme Court that the time for giving notice of appeal would run from the date of the entry of the judgment and not from the date of delivery to the Registrar.

Vacation, Holidays.

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Appeal in 60 days.

The delay prescribed by this section is not suspended during the vacations of the Court. *News Printing Co.* v. *McRae*, 26 Can. S.C.R. 695.

When the last of the 60 days falls on a Sunday or statutory holiday, the security must be allowed not later than the next earlier juridical day. There is no express decision of the Supreme Court on this point, but it was so held by the Court of Appeal for Ontario in the case of *Goyeau* v. *Great Western Rly. Co.* (1879), Can. Law Journal, Vol. 15, p. 107, where the decision is thus reported:—

"Burton, J., after conferring with the other judges, held the last of the 30 days limited by sec. 25 of the Supreme Court Act for the allowance of the appeal being a Sunday did not give the palintiff the following day to procure his appeal to be allowed, and is not a special circumstance warranting an order enlarging the time for such allowance under section 26 of the Act."

Habeas corpus.

In re Smart, 16 Can. S.C.R. 396.

Held, that this section applies to habeas corpus appeals not arising out of a criminal charge.

Judgment en délibéré pronounced after 60 days had expired.

Attorney-General v. Scott, 34 Can. S.C.R. 282.

Held, that the defendants could not be prejudiced by the delay of the judge in deciding upon an application until after the expiration of the 60 days allowed for bringing an appeal. *Vide McCrae* v. *White, supra*, p. 412; *Couture* v. *Bouchard, supra*, p. 413; *St. James Election Case, supra*, p. 413.

An order allowing the security for an appeal to the Supreme Court is one way of bringing the appeal within the provisions of this section, and the order may be made by a judge of the court below or of the Supreme Court. The Registrar has all the powers of a judge of the Supreme Court in such matters. *Fraser* v. *Abbott*, Cass. Dig. 695; *Taylor* v. *Queen*, 1 Can. S.C.R. 65; *Walmsley* v. *Griffith*, 13 Can. S.C.R. 434; *Vaughan* v. *Richardson*, 17 Can. S.C.R. 703; *News Printing Co.* v. *McRae*, 26 Can. S.C.R. 695.

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Appeal in 60 days.

When the judge of the court below has made an order allowing the security, he is *functus officio*, and the appeal is then subject to the jurisdiction of the Supreme Court. Orders made in the cause by the court below after the allowance of the security will be disregarded by the Supreme Court: *Lakin* v. *Nuttall*, 3 Can. S.C.R. 685; *Walmsley* v. *Griffith*, Cass. Dig. 697; *Starrs* v. *Cosgrave Brewing and Malting Co.*, Cass. Dig. 697.

Ontario and Quebec Rly. Co. v. Marcheterre, 17 Can. S.C.R. 141.

An appellant may apply to a judge of the Supreme Court to settle the case and approve security on appeal, notwithstanding that he may have already applied to a judge of the court below who has refused the application.

City of Montreal v. Layton. (*not reported*).

The Chief Justice:

The plaintiff's declaration alleges that he is the owner of a number of cases of frozen canned eggs of the value of $ that they have been illegally seized by the defendant's officers, who were about to destroy them asked for an injunction, and for a declaration that the plaintiff was the owner of the same. The defendant's plea ignores the allegation that the plaintiff was the owner and, alleging that the eggs were unfit for human food, they had been seized and directed to be destroyed under the "Health Act." The trial judge adjudged and declared that the plaintiff was the proprietor of the eggs in question and made the injunction perpetual. An appeal was taken to the Court of Appeal which, on Dec. 30th, 1911, affirmed the judgment below and again adjudged and declared the plaintiff proprietor of the eggs in question and that the injunction should be perpetual.

The City of Montreal instituted an appeal to the Privy Council, but, on the 25th February, launched a motion for an order desisting from that appeal and asking for leave to appeal to the Supreme Court. This was granted by Mr. Justice Archambault on the 7th March, who recites that, considering that the application to allow the appeal to the Supreme Court was presented on the 25th February, in 60 days from the pronouncing of the judgment, and that on the 4th March the City of Montreal had filed with the Clerk the *désistement* of their appeal to His Majesty in Council, allowed the *désistement* and the appeal to the Supreme Court upon the ordinary conditions as to security. The bail bond was allowed by Mr. Justice Gervais.

The grounds of the present motion appear to be that the appeal was not launched within the 60 days required by the Supreme Court Act. This point seems to be covered by the decisions of the Court, first, in McRae v. White (9 Ont. Practice, 288), in which a judgment was given on the 24th March. The statute at that time required that the appeal should be taken within 30 days. The application for leave was made within 30 days but not granted until the 1st May, and the bond filed on the

22nd May. Counsel objected that the bond had not been filed and allowed within 30 days. Patterson, J., after consultation with Burton, J., held that the delay being the act of the Court the time for filing the bond must count from the granting of leave to appeal, as no delay took place in applying for such leave. S. 69. Appeal in 60 days.

In Attorney-General for Quebec v. Scott (34 Can. S.C.R. 282) the judgment was pronounced on the 25th September and notice of appeal given on the 3rd November, when the application was made, but 60 days had elapsed before this motion was disposed of. It was held that the appellant could not be prejudiced by the delay.

If, however, the present case does not fall within these earlier decisions, there is the case of Great Northern Co. v. Furness-Withy & Co. (40 Can. S.C.R. 455) There the application for approval of the security was made within 60 days, but the hearing of the application was not completed until afterwards, and the judge made an order after the 60 days approving of the security. The Court held that although the record did not shew that the judge had expressly made an order to that effect, he *impliedly* extended the time for accepting the security offered, and that this was a sufficient compliance with the statute. This case is clearly distinguishable from Verrett's case (42 Can. S.C.R. 156). There the only question in issue was the extent to which the plaintiff's exclusive franchise was infringed or encroached upon. It might be that, as a result of the infringement, he would suffer damage eventually, but actual damage was fixed by him at $85. We were not called upon to consider the damage resulting to the Defendants as a consequence of the judgment declaring that they had encroached on the Plaintiff's franchise: the jurisdiction of the Court could not be determined by such consideration. Here, I repeat, the Plaintiff seeks to prevent the destruction of a quantity of eggs which he values at $100,000 and to succeed he must establish that, as he alleges, his interest to prevent their destruction is because he is the owner, so that the main point in issue is the issue of ownership of an object valued at $100,000. The difficulty with me arises out of the fact that an appeal has been allowed to the judicial committee and security put in to prosecute that appeal. I do not think that the Chief Justice was competent to authorize a withdrawal of that appeal once it was allowed and allow another appeal here. Under the Quebec practice an appeal to the Privy Council takes the case out of the jurisdiction of the Court of Appeal and, heretofore, it has been considered impossible for that court to make any order in the case until the appeal to the Judicial Committee has been properly disposed of. The cases are all collected in Mathieu, Rapports Révisés, vol. 18, pp. 406 and 556. See also 16 L.C.J. p. 100. I distinguish this case from Maueau v. Pacaud (9 R.L. 678). There the *désistement* was from a judgment from which an appeal was taken and it was properly filed in the court in which it had been delivered.

I would allow the motion.

The motion will be dismissed without costs, the Court being equally divided.

S. 60.

Appeal in 60 days.

Davies, J.:

The respondent seeks to quash this appeal on the grounds of want of jurisdiction.

The main grounds relied upon by Mr. Dalo Harris were, first, that there was no "matter in controversy" in the action amounting to $2,000 within the 46th section of the "Supreme Court Act;" and, secondly, that there was an appeal pending to the Privy Council from the same judgment from which this appeal was taken.

On the first ground it seems to me that the facts of the case themselves afford an answer. The respondents claimed to be the owners of a large quantity of eggs which they held in store for sale in the City of Montreal amounting in value to many times the two thousand dollars jurisdiction limit.

The appellants, claiming that these eggs were unfit for human food and, as such, dangerous to the public health, if bought by the public and consumed, seized and took possession of the eggs *for the purpose of destroying the same*. They justified the seizure under the authority of Provincial and Municipal laws.

The question in the action is squarely raised whether the appellants has the *right to seize and destroy* the respondent's eggs on the grounds alleged. The matter in controversy directly involves the right to seize and take for the purpose of destruction property worth more than $2,000 and, therefore, seems to be clearly within the Act.

As to the objection that no appeal lay to this court because there was, at the time it was taken, an appeal pending to the Privy Council, I was at first disposed to think it was fatal. A closer examination of the facts and of the rules of the Privy Council have convinced me to the contrary.

The initial step towards bringing such an appeal was, it is true, taken by the present appellant by an application to the Court of King's Bench for leave to appeal which that court granted. No further step was taken, however, towards transmitting the record to the Privy Council or perfecting the appeal.

The appellant changed its mind, filed a *désistement* of the appeal proceedings to the Privy Council, and applied to have the security required for an appeal to this court instead of that to the Privy Council perfected. The respondent had full notice of all that was done and was represented at the various stages of the proceedings before the security was perfected and the appeal allowed.

Rule 32 of the Judicial Committee Rules, 1908, provides for the withdrawal of an appeal by an intending applicant who has obtained leave to appeal from the court appealed from and "who has not lodged his petition of appeal."

No application to the Judicial Committee or any of its officers is required. The appellant can withdraw the appeal of his own motion. The procedure he is to adopt is "to give notice in writing to that effect to the Registrar of the Privy Council." This procedure was not strictly followed, it is true, by the appellant. The necessary notice was not given to the Registrar. But a *désistement* was filed in the court appealed from instead, and such steps were taken by the appellant as evidenced beyond question his intention to withdraw his appeal and precluded the

possibility of his afterwards asserting his right to prosecute it. As the withdrawal of the partly perfected appeal is left entirely to the appellant himself and does not require or contemplate any action or order of the Privy Council or any of its officers, I think the failure to give the notice was, under the circumstances of this case, an irregularity merely and that non-compliance with it formally, where the respondent could not possibly be prejudiced in his rights, was not fatal to the bringing of an appeal to this court by the appellant instead of to the Privy Council. S. 69. Appeal in 60 days.

I would, therefore, dismiss the motion to quash, but under the circumstances without costs, and would require an undertaking from appellant that the notice required by Rule 32 of the Judicial Committee Rules be immediately forwarded.

Idington, J.:

This motion to quash the appeal herein should be allowed on the ground that it cannot in principle be distinguished from that allowed in the case of La Compagnie D'Aquedue de la Jeune-Lorette v. Verrett, 42 Can. S.C.R. 156.

Here the appellants in course of executing an order of the health authorities for the destruction of a large quantity of eggs, were restrained by the injunction of the court, which injunction has been upheld by the Court of Appeal.

There the appellant sought relief from judgment enjoining it from operating its water-works in a certain district and ordering the demolition or removal of its pipes and works constructed therein.

There it was made by affidavit to appear that the destruction of that part of the utility there in question involved the destruction of property exceeding two thousand dollars in value.

Here it appears the appellant asserts the right to deal with property alleged to be of the value of over two thousand dollars but which if the contention of fact it sets up be correct is of no value.

There, the question of binding a future right might have helped to maintain the appeal. This case has no such direct or collateral aid. Indeed it seems a weaker case of right to appeal.

I there thought the right of appeal existed, but the majority of the court having held otherwise, I feel bound thereby, and would therefore, and for that reason alone, allow this motion to quash, with costs. I have not in this view thought it necessary to consider other objections taken to the jurisdiction.

Duff, J.: I agree that the motion should be dismissed.

Anglin, J.:

I am satisfied that in this action the determination of the right to possession of property asserted by the respondent to be worth $100,000 is directly in controversy. Upon the decision of this question depends the plaintiff's right to the injunction he seeks. This fact distinguishes the present case from La Compagnie D'Aqueduc de la Jeune-Lorette v. Verrett (42 Can. S.C.R. 156), and brings it within the opinion expressed by myself and concurred in by my brother Duff in Shawinigan Hydro-Electric v. Shawinigan Water and Power Co. (43 Can. S.C.R. 650), at page 662, and the cases there cited from volume 38 of the Supreme Court Reports. The objection to our jurisdiction based on the clause (c) of section 46 of the "Supreme Court Act," in my opinion, cannot prevail.

S. 69.

Appeal in 60 days.

But, having regard to the Privy Council Rules of 1908 (Nos. 2, 11 and 32), and to the fact that an appeal by the defendants to the Judicial Committee had been formally allowed, leave therefor having been obtained from the Court of King's Bench and security approved, and that there had been no withdrawal of that appeal under Privy Council Rule 32, although an order purporting to allow its discontinuance had been procured from a judge of the Court of King's Bench, I am of the opinion that that appeal was still pending and that although the record in this action was still *de facto* in the possession of the Court of King's Bench, the appeal, and, therefore, the action was under the control and subject to the rules of the Privy Council, when the order purporting to allow an appeal by the defendants to this Court was obtained. I, therefore, think, with respect, that the learned judge who pronounced this latter order had not at the time jurisdiction to make it, the case then being in the Court of King's Bench.

It has been suggested that the defendant should now be allowed to give the notice of the withdrawal of his appeal prescribed by Rule 32 of the Privy Council, and upon his undertaking to do so the orders of the learned Chief Justice of the King's Bench and of Mr. Justice Gervais, extending the time for appeal and allowing the appeal to this Court, should be treated as if made after that step had been taken since there appears to be little doubt that the defendants will upon application readily obtain another order or other orders to the same effect after they shall have complied with the Privy Council practice in regard to withdrawal. But in view of the fact that we have not the power to extend the time for appealing to this Court, I think this disposition of the matter is not practicable and that, while such a course may appear to be technical, we have no alternative except to allow the plaintiff's motion to quash with costs, without prejudice to the defendants taking the steps indicated by the Privy Council Rule No. 32, and thereafter again applying to the Court of King's Bench, or a Judge thereof, for an order extending the time for appealing and allowing their appeal to this Court, should they be advised to further prosecute it.

Brodeur, J..

Les intimés alléguaient dans leur déclaration qu'ils étaient propriétaires de marchandises valant $100,000 et concluaient à ce que leur droit de propriété fût reconnu et à ce que défense fût faite à la défenderesse appelante de les troubler dans la possession paisible de ces marchandises.

Ils ont réussi dans leur demande en Cour Supérieure et en Cour d'Appel.

Le 30 décembre dernier (1911) l'appelante a obtenu de la Cour d'Appel la permission de porter la cause au Conseil Privé, et elle a dans les délais voulus, savoir le 9 février 1912, fourni cautionnement.

Rien de plus cependant ne paraît avoir été fait pour poursuivre effectivement cet appel. L'appelante n'a pas pris les mesures nécessaires pour faire préparer et transmettre la copie du dossier. La requête en appel n'a pas été déposée au Conseil Privé et les intimés n'y ont pas produit de comparution.

Le 4 de mars 1912, l'appelante a fait, signifier aux intimés un désistement de son appel au Conseil Privé et l'a produit au greffe de la Cour d'Appel. S. 69. Appeal in 60 days.

Elle a obtenu en même temps permission d'un juge de la Cour d'Appel de porter la cause en Cour Suprême en fournissant cautionnement.

Les intimés demandent maintenant que l'appel à la Cour Suprême soit renvoyé pour différents raisons qui peuvent se résumer à deux.

Ils prétendent:

1. Que l'action n'est pas de celles qui puissent être portées devant ce tribunal;

2. Que l'appel au Conseil Privé étant encore pendant, la Cour Suprême ne peut pas entendre la cause.

Sur le premier point il suffira, je crois, pour en disposer de citer la section 46 du ch. 139 ss. c de l'acte de la Cour Suprême, qui dit:

"Nul appel ne peut être interjeté à la Cour Suprême d'aucun jugement rendu dans la province de Québec dans une action, poursuite, cause, matière ou autre procédure judiciaire à moins que l'affaire en litige..... ce ne s'élève à la somme ou valeur de $2,000."

La valeur des marchandises en litige est portée dans la déclaration à $100,000.

Les intimés demandent à en être déclarée propriétaires et en même temps à faire enjoindre à l'appelante de ne pas le troubler dans la possession paisible de ces biens.

Les conclusions de l'action n'exigeaient pas une condamnation pécuniaire, il est vrai; mais les allégations d'une déclaration et ses conclusions ne forment qu'un tout.

La question en litige était de savoir si les demandeurs sont propriétaires de biens valant $100,000 et si la défenderesse a le droit de l'en déposséder.

Le jugement qui a été rendu sur cette demande est dans une poursuite où l'affaire en litige s'élève à plus de deux mille dollars et est par conséquent susceptible d'être portée en appel devant la Cour Suprême.

Les décisions rendues dans les causes de Turcotte v. Dansereau, 26 Can. S.C.R. p. 578; King v. Dupuis, 28 Can. S.C.R. p. 388; Côté v. Richardson, 38 Can. S.C.R. p. 41, me justifient d'en venir à la conclusion à laquelle j'en suis arrivé.

Je pourrais ajouter aussi la cause de Shawinigan and Shawinigan, 43 Can. S.C.R. p. 650, où trois des honorables juges de cette Cour ont déclaré que dans une action intentée dans le but d'empêcher la vente d'un bien valant $40,000, cette cour avait juridiction.

Les intimés ont invoqué la cause de la Cie d'Aqueduc de Lorette & Verrett, 42 Can. S.C.R. p. 156, mais la valeur de l'objet en litige n'apparaissait pas dans les plaidoiries et c'est la raison qui a déterminé cette cour à déclarer qu'elle n'avait pas jurisdiction.

Le second point soulevé par les intimés nous amène à considérer si le désistement produit en cour d'appel par la Cité de Montréal a mis fin à son appel au Conseil Privé.

Il est toujours permis à une partie de se désister des actions qu'elle institue, des appels qu'elle fait et des jugements rendus en sa faveur.

Les instances peuvent se terminer sans qu'il intervienne de jugement et parmi ces instances se trouve celle où le demandeur les abandonne purement et simplement en produisant un désistement.

Il n'y a pas de forme spéciale requise pour faire cette procédure.

S. 69.

Appeal in 60 days.

Sous les dispositions de l'ancienne loi, dont nous avons conservé dans notre Code les principes, on pouvait se désister, 1, soit en signifiant un simple acte à son adversaire, 2. soit par une requête demandant qu'il soit donné acte du désistement. Et des praticiens plus formalistes ne se contentaient pas de cette signification ou de cette requête mais faisaient recevoir le désistement en justice. "Mais cette réception," dit Pigeau, "é tait inutile, l'acte du désistement étant suffisant pour empêcher celui qui l'a signifié de poursuivre sur sa demande."

Appliquant ces principes à la cause actuelle, je dis que la Cité de Montréal ayant fait signifier son désistement aux intimés elle a donné lieu à la formation d'un contrat judiciaire qui mettait fin à l'appel au Conseil Privé.

Dans une cause de Nadeau & Pacaud, 9 R.L. p. 678, nous trouvons des faits analogues à celle-ci et le désistement a été déclaré valable.

Il s'agissait d'un jugement interlocutoire rendu par la Cour Supérieure: l'appelant avait obtenu de la Cour d'Appel permission d'appeler. Immédiatement après cette permission, l'intimé produisit en Cour Supérieure un désistement de son jugement. La Cour d'Appel a décidé que ce désistement avait pleine force et effet.

On a cité la section 32 des règles du Conseil Privé pour démontrer que le desistement aurait dû être trans mis au Conseil Privé.

Je crois que cette disposition ne s'applique qu'au cas où la copie du dossier (transcript) est rendue en Angleterre et no pas à une cause où aucun document n'a été transmis.

La section 34 de ces mêmes règles, ainsi que l'ordre en conseil impérial du 26 juin 1873, confirme ma manière de voir sur ce point.

De plus dans une cause de Seal v. Dossee, 9 Moore P.C. p. 411, il a été décidé ceci:

"The Judicial Committee have no jurisdiction to entertain any application in an appeal until the petition in appeal is lodged."

Et McPherson, Privy Council Practice, p. 97, dit:

"Where no leave to appeal has been granted here (in England), until the petition of appeal is lodged, the Privy Council have no jurisdiction to entertain any application and therefore if an extension of time for the prosecution of the appeal is sought the petition of appeal should first be lodged."

Quand maintenant cette requête en appel doit-elle être produite? Safford & Wheeler "Privy Council Practice," p. 811, disent que cette requête ne peut être logée au bureau du Conseil Privé avant l'arrivée du dosser (transcript). McPherson, loc. cit. p. 81, dit la même chose.

Il est bien vrai que la règle 32 permet de se désister au Conseil Privé avant la présentation de la requête en appel, mais cette disposition, si on l'examine à la lumière des citations que je viens de faire, ne s'applique qu'au cas où le Registraire a le transscript devant lui et où il a alors des documents sur lesquels il peut se guider. Prétendre que le désistement devrait être produit au Conseil Privé avant que la copie du dossier n'y soit parvenue me paraîtrait impossible.

L'Appelante avait donc raison de produire son désistement au greffe du tribunal où se trouvait le dossier. Ce désistement a mis fin à l'appel et par conséquent la Cour d'Appel avait plain pouvoir de recevoir le cautionnement pour porter la cause ici si l'appelante était dans les délais voulus pour appeler: et si les délais étaient expirés, la Cour d'Appel avait alors le droit d'exercer, sous les dispositions de l'article 71 de l'acte de la Cour Suprême, la discrétion qui lui est conférée d'accorder l'appel.

La motion des intimés doit donc être rejeté.

In this case the appellant sent to the Registrar of the Judicature Act of Ontario, *vide* Holmested & Langton. The Privy Council a notice of withdrawal of his appeal, but his London agents were informed by the Registrar that the Privy Council, not having received the Record nor anything to indicate that an appeal was pending, it was not a case requiring a notice to be given under section 32 of the Privy Council Rules.

S. 70. Notice of appeal.

70. No appeal upon a special case, or from the judgment upon a motion to enter a verdict or non-enit upon a point reserved at the trial, or from the judgment upon a motion for a new trial, shall be allowed, unless notice thereof is given in writing to the opposite party, or his attorney of record, within twenty days after the decision complained of or within such further time as the court appealed from, or a judge thereof, allows. R.S., c. 135, s. 41.

This section is a reproduction of R.S., c. 135, s. 41, with the following alterations made by the Commissioners for the Revision of the Statutes:—

The word "of" in the second line in the old section has been changed to "or." The former reading was clearly a clerical error.

In line 4, the words in the old section "upon the ground that the judge has not ruled according to law" have been eliminated to conform to the amendment made to 24 (d) of the Supreme and Exchequer Courts Act, now 38 (b), by 54-55 V. c. 25, s. 2.

The notice in this section required to be given within 20 days of the decision complained of must be 20 clear days, that is, exclusive of the day on which the decision was rendered and the day on which the notice is served.

Sedgwick v. Montreal Light, Heat & Power Co., 41 Can. S.C.R. 639, C.R. [1910] A.C. 485.

An appeal lies to the Supreme Court of Canada from a judgment of the Court of Review which is not appealable to the Court of King's Bench, but is susceptible of appeal to His Majesty in Council. By 8 Edw. VII. c. 75 (Que.), the amount required to permit of an appeal to His Majesty in Council was fixed at $5,000 instead of £500 as theretofore.

It was held that said Act did not govern a case in which the judgment of the Court of Review was pronounced before it came into force.

By s. 70 of the Supreme Court Act notice must be given of an appeal from the judgment, *inter alia* "upon a motion for a new trial."

S. 70.

Notice of appeal.

Held, that such provision only applies when the motion is made for a new trial and nothing else and notice is not necessary where the proposed appeal is from the judgment on a motion for judgment *non obstante* or, in the alternative, for a new trial.

Joseph Jones v. The Toronto & York Radial Rly. Co. March 21st. 1912.

In this case a motion was made to the Supreme Court to quash the appeal under the following circumstances:

The plaintiff's action was brought to recover damages occasioned through the negligence of the defendants, their servants or agents. At the close of the plaintiff's case counsel for defendants moved formally for a non-suit. The Court reserved judgment on this motion. The same thing happened at the close of the defence. After the jury had made their findings, the trial judge dismissed the action. The plaintiff gave notice of appeal to the Divisional Court in which he asked to set aside the judgment pronounced by the trial judge upon the findings of the jury or for a new trial, or for such other judgment as to the Court may seem right. The Divisional Court set aside the judgment below and directed judgment to be entered for the plaintiff for the amount found as damages by the jury. An appeal was then taken by the defendants to the Court of Appeal. The reasons of appeal set out the grounds upon which the defendants contended the judgment of the trial judge was right. The Court of Appeal allowed the appeal, reversed the judgment of the Divisional Court and restored that of the trial judge. The defendants contended on the present motion that no notice of appeal was given as required by section 70 of the Supreme Court Act. The Court, following *Sedgewick v. Montreal Light, Heat & Power Co.* 41 Can. S.C.R. 639, C.R. (1910) A.C. 485 dismissed the motion with costs.

The other cases in which a notice of appeal has to be given are:—

(*a.*) Criminal Appeals, to the Attorney-General of the Province within 15 days after the affirmance of the conviction, or such further time as the Supreme Court or a judge thereof allows. Criminal Code, sec. 1024, *infra*, p. 813.

(*b.*) Exchequer Appeals, including Admiralty cases. Notice of setting down the appeal must be given within 10 days. Exchequer Court Act, sec. 82, *infra*, p. 749.

If the appeal is by the Crown, a notice takes the place of a deposit under the Act. Exchequer Court Act, s. 85, *infra*, p. 760.

(c.) Election Appeals. Notice of setting down the appeal for hearing must be given within three days. Controverted Elections Act, s. 67, *infra*, p. 785. S. 70. Notice of appeal.

The notice is not an initiation of the appeal, and cannot be set aside before the security has been given. *Smith* v. *Smith*, 11 Ont. P.R. 6. And see as to effect of notice, *Reg.* v. *McGauley*, 12 Ont. P.R. 259; *Ex parte Saffrey*, 5 Ch. D. 365, Cass. Prac. 62.

It will be noticed that the section neither gives to the Supreme Court or a judge thereof power to extend the time for giving notice of appeal under this section.

Vaughan v. Richardson, 17 Can. S.C.R. 703.

In this case the solicitors for the defendants did not obtain authority from the defendants to appeal from the judgment below in time to give notice of appeal within 20 days from the pronouncing of the judgment. The application to the judge below was not for an extension of time to give the notice, but for leave to appeal, and the order was limited to such leave. The plaintiffs moved to quash the appeal for want for jurisdiction, owing to the notice of appeal not having been given. *Held*, that the giving of the notice was a condition precedent to the Supreme Court's jurisdiction; that the time for giving the notice might have been extended by the court below after the 20 days have expired, and no notice having been given, the appeal must be quashed for want of jurisdiction.

Rollands v. Canada Southern Rly. Co., 13 Ont. P.R. 93.

The defendants appealed to the Court of Appeal from an order of a Divisional Court discharging an order *nisi* to enter judgment for the defendants or for a new trial, on the ground, among others, that the trial judge should have withdrawn the case from the jury, or should have directed them otherwise than he did. The Court of Appeal dismissed the defendants' appeal, and the defendants sought to appeal from such dismissal to the Supreme Court of Canada.

Held, that the judgment of the Court of Appeal came within s. 24 (*d*) of the Supreme and Exchequer Courts Act, R.S.C. c. 135, as "a judgment upon a motion for a new trial upon the ground that the judge has not ruled according to law"; and that the proposed appeal was governed by the necessity for the notice of appeal within twenty days prescribed by s. 41 of the Act.

S. 71.

Extending time for appeal.

The judgment of the Court of Appeal was delivered on the 5th of March, 1889. On the 16th March the solicitors for the defendants wrote to their clients suggesting an appeal, but they received no instructions until the 2nd April, and took no step until the 3rd April. No explanation was offered for the delay or neglect except the production of a telegram to the solicitors from an officer of the defendants giving instructions to appeal, and suggesting that the matter has been overlooked by another officer.

The judges in the Divisional Court and Court of Appeal were unanimous in deciding against the defendants.

Held, that under these circumstances the time for giving the required notice should not be extended.

Draper v. Radenhurst, 14 Ont. P.R. 376. Case. Prac., 2nd ed., 62.

The "special case" mentioned in section 41 has no reference to the case prepared, under Cons. Rule 413, for an appeal to the Court of Appeal for Ontario. Therefore, the latter court overruled an objection to a bond for security for costs of an appeal to the Supreme Court on the ground that notice should have been given under said section, it being contended that every appeal from that court is on a "special case."

Smyth v. McDougall, 1 Can. S.C.R. 114.

Held, that when a case has, by consent of parties, been turned into a special case, and the judge's minutes of the evidence taken at the trial agreed to be considered as part of the said special case, the court has no power to add anything thereto, except with the like consent, and has no power to order any further evidence to be taken.

71. Notwithstanding anything herein contained the court proposed to be appealed from, or any judge thereof, may, under special circumstances, allow an appeal, although the same is not brought within the time hereinbefore prescribed in that behalf.

2. In such case, the court or judge shall impose such terms as to security or otherwise as seeme proper under the circumstances;

3. The provisions of this section shall not apply to any appeal in the case of an election petition. R.S., c. 135, s. 42.

Vanghan v. Richardson, 17 Can. S.C.R. 703.

Held, per Strong, J., that the words "allow an appeal" in section 42, now section 71, simply mean the settlement of the case and the approval of the security.

Held, per Ritchie, C.J., and Strong,- J., that the judge having power to extend the time for bringing the appeal may do so even after the time within which the appeal should be brought has expired. S. 71. Allowance of appeal.

Allowance of appeal.

The use of the expression "allow an appeal in this section has given to rise to a misapprehension with respect to the power of a judge of the court below, and applications under this section in the Province of Quebec frequently ask the judge below to grant leave to appeal, as if the appeal could only be taken by leave, whereas the right to appeal depends solely upon the case being one in which an appeal lies under the sections of the statute conferring an appellate jurisdiction upon the Supreme Court. The judge below has, therefore, no jurisdiction to grant leave, nor is leave necessary. All that this section does is to authorize a judge of the court below to allow the security which the appellant offers, and to extend the time for the giving of the security where the appeal has not been brought within the 60 days prescribed by section 69, *supra.* Although there are expressions in some of the earlier decisions of the court which might warrant the conclusion that a judge of the court below might extend the time in which the appeal should be brought, and the Register of the Supreme Court in Chambers in the same case allow the security, it is now definitely determined by the decision in *Barrett* v. *Syndicat Lyonnais du Klondyke,* 33 Can. S.C.R. 667, *supra,* p. 420, that this cannot be done, and that the only jurisdiction the judge below has to extend the time for bringing the appeal is in a case where it is proposed to have the security allowed in the court below. The Registrar can only allow the security where the application is made within the 60 days provided by section 69, *supra,* and where the period so limited has expired a judge of the court below alone has power to allow the security.

In *Ontario & Quebec Rly. Co.* v. *Marchetcrre,* 17 Can. S.C.R. at p. 142, Strong, J., says, with reference to this section: "As the delay for appealing prescribed by the statute *and which I have no power to enlarge,* will elapse before the sittings of the Court", etc.

In *Canadian Mutual* v. *Lee,* 34 Can. S.C.R. 224, it was held "that the time for bringing an appeal cannot be extended by the Supreme Court after expiration of the 60 days from the pronouncing or entry of the judgment appealed from".

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Extending time for appeal.

In *Goodison* v. *McNab*, 42 Can. S.C.R. 694, it was held: "After the expiration of sixty days from the signing or entry or pronouncing of a judgment of the Court of Appeal for Ontario, the Supreme Court of Canada is without jurisdiction to grant special leave to appeal therefrom, and an order of the Court of Appeal extending the time will not enable it to do so.

Montreal v. Montreal Street Rly. Co., Q.R. 11 K.B. 325.

The appellant allowed the delay of 60 days from the date of judgment rendered by the Court of King's Bench to elapse without applying for leave to appeal to the Supreme Court. Subsequently it obtained leave to appeal to the Privy Council. It now moved for leave to appeal to the Supreme Court, and offered to desist from its appeal to the Privy Council if the present motion was granted. It was held that the "special circumstances" referred to in s. 42 of the Supreme and Exchequer Courts Act, are circumstances which would make it unreasonable to impute the failure to act within the prescribed time to the negligence of the party seeking the appeal, e.g., illness, absence, ignorance of the rendering of the judgment, inability owing to poverty to find sureties within the prescribed delay. but not circumstances which did not prevent the application from being made within the proper delay.

An order extending time may be made as well after as before the time has expired limited for bringing the appeal. *Vide Gilbert* v. *The King*, 38 S.C.R. 207, *infra*, p. 816; *Great Northern R.W. Co.* v. *Furness, Withy*, *supra*, p. 421, *Re West Peterborough Election*, 41 S.C.R. 410, *infra*, p. 764, *City of Montreal* v. *Layton*, *supra*, p. 424.

The Court of Appeal for Ontario has held that no appeal lies to that court from a judgment of a judge of that court extending the time for appealing. *Neil* v. *Travellers' Ins. Co.*, 9 Ont. App. R. 54; *Re Central Bank of Canada*, 17 Ont. P.R. 395 (Cass. Prac 63).

Wherever power is given to a legal authority to grant or refuse leave to appeal, the decision of that legal authority is final and conclusive. *Ex parte Stevenson*, 3 Times L. R. 486 (Cass. Prac. 63).

There would seem to be no power in either court to extend the time for bringing an appeal under "The Dominion Controverted Elections Act" (Cass. Prac. 63).

S. 71. Extending time for appeal.

As to what are "special circumstances" within the meaning of this section, *vide Ex parte Gilchrist*, 17 Q.B.D 528; *Bradley* v. *Baylis*, 8 Q.B.D. 195. See *Langdon* v. *Robertson*, 12 Ont. P.R. 139, approving of *Sievewright* v. *Leys*, 9 Ont. P.R. 200; *Re Gabourie, Casey* v. *Gabourie*, 12 Ont. P.R. 252; *Platt* v. *Grand Trunk Rly. Co.*, 12 Ont. P.R. 380.

No uniform rule can be deduced from the cases, but if any rule can be laid down it seems to be that to do justice in the particular case is above all other considerations, as was said in *Re Gabourie, supra*. In *Re Manchester Economic Building Society*, 24 Ch. D. 488, in which application for special leave to appeal was made after the expiration of the time fixed, Brett, M.R., says, at p. 497: "I know of no rule other than this, that the court has power to give the special leave, and, exercising its judicial discretion, is bound to give the special leave, if jurisdiction requires that that leave should be given" (Cass. Prac. 64).

Oppenheimer v. Brackman, 32 Jan. S.C.R. 699.

A judge of the Supreme Court of British Columbia, whether or not he sits as a member of the court constituted to hear the appeal, is "a judge of the court proposed to be appealed from" within the meaning of this section, and has the power to allow an appeal.

Leave granted after appeal in the Supreme Court has been quashed.

Brussels v. McCrae, unreported, (1904).

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

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Extending time for appeal.

Smith v. Hunt, 5 O.L.R. 97.

Application to extend time for leave to appeal refused, as applicant did not show there was a *bona fide* intention to appeal while the right existed, and the Court not being impressed with applicant's merits.

Costs of motion for leave.

The Registrar will tax the costs ordered to be paid by the court or judge below in granting leave to appeal or extending time, but where the order extends the time for appealing for the purpose of the proposed appellant making an application in the Supreme Court for leave, such an order being without jurisdiction, the Registrar will have no power to tax the costs although granted by the order, the Master being, as far as the Supreme Court is concerned, *coram non judice*. Holding of the Registrar in *Goodison* v. *McNab*, after advising with Anglin, J.

Order allowing appeal—grounds for.

Bank of Montreal v. Demers, 29 Can. S.C.R. 435.

Held, the Supreme Court will not inquire into the facts and circumstances which moved the judge of the court below to extend the time for bringing an appeal to the Supreme Court under this section.

72. No writ shall be required or issued for bringing any appeal in any case to or into the court, but it shall be sufficient that the party desiring so to appeal shall, within the time herein limited in the case, have given the security required and obtained the allowance of the appeal.

2. Whenever error in law is alleged, the proceedings in the Supreme Court shall be in the form of an appeal. R.S., c. 135, s. 43.

Allowance of the appeal.

The proceedings subsequent to the allowance of the security are governed by the Supreme Court Rules, when not provided for by the Act itself. The following résumé, adapted from the introduction to Cassels' Practice, 1888, sets out in a concise form the proceedings which have to be taken before an appeal is ripe for hearing:—

Having given the required notice of appeal, or intention to appeal, the next point which arises for consideration is as to security. The approving of the security is a mode of allowing the appeal, and when given the appeal has been brought and is then within the jurisdiction of the Supreme Court. Now section 69 of the Act provides that every appeal (certain exceptions being provided for) "shall be brought within sixty days from the signing or entry or pronouncing the judgment appealed from." Does the time run from the signing or entry or pronouncing of the judgment? (See notes to section 69 for the cases decided on this point.) The application to have security approved may, under section 69, be made either in the court below or in the Supreme Court, and there are certain cases in which special leave to appeal must be obtained from the Supreme Court or a judge thereof —for instance, appeals under the Winding-up Act, and certain appeals from the Exchequer Court. If the sixty days be too short a time to perfect the security an application must be made under section 71 of the Act based upon the "special circumstances" required by that section. It should be borne in mind that such an application must be made to the "court appealed from or a judge thereof." Having elected in which court to make the application for approval of the security, the bond should be prepared and steps taken, according to the usual practice of the court to be applied to, to have the bond approved. In the Supreme Court four days' clear notice should be given to the opposite party of the intention to apply, and the necessary instructions sent to the Ottawa agent, who should be regularly appointed pursuant to the requirements of Rule 20. The appointment of an agent at the earliest moment is an important step in the appeal. It is entirely irregular to communicate with the Registrar of the Court as to any proceedings in appeal. All applications, not strictly applications which should be made to the full Court, are now made to the Registrar sitting as a Judge in Chambers under the provisions of Rule 83. There are but two exceptions in such rule.

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After the security has been approved of, the appellant has 40 days within which to settle and print the case (Rule 9). No special rules have been made by the Supreme Court as to the practice to be adopted on settling the case. The statute (section 73) provides that it shall be stated by the parties, or, in the event of difference, be settled by the court appealed from or a judge thereof. The appellant's solicitor can send to the solicitor for the respondent a draft of the

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case, and the respondent's solicitor can return it within a reasonable time with such suggestions or alterations as he may think advisable, and the draft can be sent from one to the other until finally signed as agreed upon, or until a difference arises which can be settled only by an application to a judge. Or an agreement can be signed by the solicitors as to what documents, specifying them clearly, the case shall contain. Although unnecessary material should be carefully omitted, the parties cannot by consent waive the printing of any part of the record. An order must be obtained from the Registrar before this can be done. As to what should be inserted see section 73 of the Act and notes. Upon the appellant's solicitor will then fall the duty of printing the case. The rules of the court regulating the form and style of the case should be closely followed. The provisions of rule with respect to index (Rule 12) must be carefully complied with. It may happen that the length of the case, or other circumstances, makes it evident that with reasonable diligence it will not be possible to overtake the printing within the 40 days, after security has been allowed. The solicitor for the appellant, to avoid an application on the part of the respondent to dismiss the appeal for want of prosecution, should then apply in the Supreme Court, in Chambers, for further time, giving the usual four clear days' notice of the application to his opponent and filing an affidavit in the Supreme Court in support of his application. When printed, a copy of the case should be submitted to the proper officer of the court below, who, upon being satisfied that it is the case stated by the parties or settled by the judge, and paid the usual fees, should certify and transmit it to the Registrar of the Supreme Court, with a certified copy of the bond given as security. (See Rule 10.) The case should be filed in the office of the Registrar of the Supreme Court twenty clear days before the first day of the session at which it is to be brought on for hearing (Rule 37), and shall be accompanied by all the exhibits and documentary evidence filed in the cause (see Rule 14). At least fifteen days before the first day of the session notice of hearing must be served. (See Rule 18.)

Each party has in the meantime prepared and printed a correct but complete statement of the facts of the case and the reasons and authorities upon which he intends to rely. This document is called a factum. The factums of both parties should be deposited with the Registrar at least fifteen days before the first day of the session. (Rule 29.)

As to what the factum should contain and how it should be printed, see Rule 30. The appeal must be inscribed by the appellant for hearing; that is, a request must be filed with the Registrar to place it on the list of appeals for hearing, at least fourteen days before the first day of the session at which the appeal is to be heard. (Rule 37.) The inscription cannot be made unless the appellant's factum has been deposited. If the respondent has failed to deposit his factum within the time limited by the rule in that behalf, the appellant inscribes *ex parte*, but this *ex parte* inscription will be opened up in a proper case and the respondent permitted to file his factum. The appeal is then placed on the proper list by the Registrar, and will be called by the court when reached. *Vide* also notes to sec. 71 *supra*. S. 73. Case.

73. The appeal shall be upon a case to be stated by the parties, or, in the event of difference, to be settled by the court appealed from, or a judge thereof; and the case shall set forth the judgment objected to and so much of the pleadings, evidence, affidavits and documents as is necessary to raise the question for the decision of the Court. R.S., c. 135, s. 44.

The case.

Vide rules 1, 2, 3, 4, 5, 6, 7, 8 and 9 *infra*, and notes thereto, and note to section 72, *supra*.

Reasons for judgment.

Attorney-General v. City of Montreal, 13 Can. S.C.R. 372.

Per Ritchie, C.J.—The printed case filed should contain the reason for judgments of courts below.

Mayhew v. Stone, 26 Can. S.C.R. 58.

Per Taschereau, J.—Where a court had pronounced judgment in a cause before it, and after proceedings in appeal had been instituted certain of the judges filed documents with the prothonotary purporting to be additions to their respective opinions in the case, such documents were improperly allowed to form part of the case on appeal and could not be considered by the appellate court.

Canadian Fire Ins. Co. v. Robinson. 9th Oct., 1901.

When the appeal was called for hearing counsel for the appellant applied for leave to file, as part of the case on

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appeal, the notes of reasons for a dissenting judgment in the court below, which had not been delivered in time for printing as part of the record. A certificate by the clerk of appeals was annexed to a printed copy of the notes, stating that they were a correct copy, and that, owing to the judge's absence from Canada, they had been unable to obtain the notes from him at an earlier date. The application was opposed by counsel for the respondents. The court allowed the notes to be filed, and it was stated, by His Lordship the Chief Justice, that the court was always disposed to permit the filing of notes of the reasons for judgment of judges in the court below when they could be obtained.

In re Paul Daly, deceased, Feby. 22nd, 1907.

In this case after one day's argument it was noticed by the court that no formal judgment was ever issued by the Probate Court. It was conceded that in the appellate court below the written judgment of the probate judge had been treated as if it was the decree of the court. The Supreme Court held that under the circumstances the judgment of the probate judge must for the purposes of the appeal be treated as the formal decree of the probate court.

Formal judgment.

Bank of British North America v. Walker. 24th Dec., 1881.

An original case, purporting to be an appeal from a judgment of the Supreme Court of British Columbia overruling the demurrers of the defendants to certain counts of the declaration, contained no formal order or judgment of the court overruling demurrers. Upon application of the agent for appellants' solicitors, the agent of the respondents' solicitors consenting, it was ordered that the Registrar be at liberty to file the case as received without the formal order, and that the appellants might attach within six weeks from that date the said formal order to the case and copies.

Per Ritchie, C.J., in Chambers.

Wright v. Synod of Huron, Cout. Dig. 1101.

During the hearing of the appeal, the attention of appellant's counsel was called to the fact that the case was defective on account of the omission from the record of the

decree of the Court of Chancery. The argument was allowed to proceed on counsel undertaking to have the decree added to the case before judgment should be rendered. S. 73. Case.

Wallace v. Souther, Cont. Dig. 1102.

A case cannot be filed unless it contains the formal judgment of the court appealed from. The appeal may, by consent, be placed at the foot of the roll to permit the adding of the rule of the court below. Improper reflections upon the conduct of the judges in the court below will be ordered to be struck out of the factum, and subject the solicitor to the censure of the court and loss of his costs.

St. Stephen v. Charlotte, Cont. Dig. 1104.

Before the hearing, attention was drawn to the fact that the formal judgment or order of the court below was not in the printed "case." Upon counsel undertaking to have it taken out, printed and added to the "case," the court consented to hear the appeal, but the Chief Justice intimated that in future no appeal would be heard if the "case" did not contain the formal judgment of the court below.

Reid v. Ramsay, Cont. Dig. 1101.

A case cannot be filed or appeal entertained where it does not appear by the printed record that judgment has been formally entered.

Kearney v. Kean, Cont. Dig. 1101.

An incomplete case cannot be received by the Registrar, but where such a case was filed, the hearing of appeal was allowed to stand over till the case was prefected by the addition of the formal judgment of the court below.

Case generally.

Exchange Bank of Canada v. Gilman, 17 Can. S.C.R. 108.

The case in appeal should not contain matter that was not before the trial court.

Roberts v. Piper, Oct. 6, 1910, not reported.

C. T. W. Piper, one of the respondents in this appeal, was the plaintiff in a damage action against some of the present appellants. The judgment at the trial in this action

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was subject to objection admitted as evidence on the trial of the present case. This judgment was appealed to the Full Court in British Columbia. When the case for the present appeal was settled in British Columbia, the respondents asked to have included in the record the judgment of the full court in the other case. This was refused by Mr. Justice Gallagher. The respondents then applied to the Supreme Court for leave to add this judgment to the case but the application was refused.

Bing Kee v. Yick Chong, May 3rd, 1910.

A certain agreement—a plan and some photographs were used at the trial but not filed or made exhibits, and were not part of the case on appeal to the full court. An application to have these documents made part of the record in the appeal to the Supreme Court was refused after argument.

Red Mountain Rly Co. v. Blue, 39 Can. S.C.R. 390, C.R. [1909] A.C. 210.

An application having been made to the Supreme Court to add to the case in appeal a map or plan on file in the Dominion Department of Railways and Canals, which was not known of when cause was argued in the courts below, and which plan, if admitted, would conclusively conclude the rights of the parties, the Supreme Court held that under the well settled jurisprudence of the Court there was no power to add to the case what was not before the court below. On appeal to the Judicial Committee of the Privy Council, without expressing an opinion on the power of the Supreme Court of Canada held that the committee had such power and this evidence being admitted the appeal was allowed. (1909) H.C. 361.

If section 91 *infra* and following of the Supreme Court Act stood alone it would be reasonable to infer that the Parliament of Canada in establishing the Supreme Court as a court of appeal as well as a court of error contemplated that the court should admit evidence on the appeal not before the courts below in a proper case; but as pointed out by the Chief Justice in his judgment in *Red Mountain Rly. Co.* v. *Blue*, 39 Can. S.C.R., at p. 392, C.R. [1909] A.C. 210, this is not consistent with s. 73 of the Supreme Court Act which says: "The appeal shall be upon a case to be stated by the parties or in the event of difference to be settled by the court appealed from or a judge thereof." And the uniform

jurisprudence of the Supreme Court is against the admission of such evidence. In the case above cited the Judicial Committee said that "It is not necessary to decide whether the Supreme Court of Canada was precluded by law from admitting this document (a plan discovered only after the appeal was taken to the Supreme Court) and the point was not fully argued before their Lordships. But it is at least clear that the Judicial Committee of the Privy Council is not so precluded, but on the contrary has power to admit and look at the document."

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The obvious impropriety of admitting new evidence on an appeal not before the court below is well stated by Lord Selborne in the House of Lords in *Banco de Portugal* v. *Waddell*, 5 App. Cas. at p. 171, quoting from Lord Lyndhurst in *Attwood* v. *Small*, 6 Cl. & F. 232.

"I think, therefore, the general rule ought to prevail in this case, namely, that as this evidence was not tendered in the court below it ought not to be offered before the appellate tribunal. And I must add that in the whole of my experience, which extends over a considerable period of time, such a thing never has happened as that this House has allowed any evidence to be introduced which was not used in the Court below."

Safford & Wheeler, at p. 850 say: "The Privy Council is a court of last resort and it ought not to be called upon without the most urgent necessity to perform the functions of a court of first instance. For this reason it is unwilling to entertain any point which has not been duly raised and considered in the court appealed from. The Judicial Committee may direct further evidence to be taken or remit the case for re-hearing."

At. p. 858: "When additional evidence has been tendered only on an application to review and the refusal to review is not appealed from, the Judicial Committee will not admit such evidence. Certain documents put in evidence before a subordinate court were suppressed by the judge of that court, so that the reviewing court from which the appeal came to the Privy Council, had no opportunity of considering them. The Judicial Committee in such circumstances remitted the case to the court below that evidence might be taken into consideration."

In the House of Lords the rule is that the Court will proceed on the facts proved at the trial and will not allow new question of fact to be raised. *Huxley* v. *W. London Ry. Co.* 14 App. Cas. 26.

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The conclusion to be drawn would appear to be that when a piece of evidence is offered to the appellate tribunal which, if admitted, is conclusive of the appeal, as for example the plan referred to in the above case of the *Red Mountain Rly. Co.* v. *Blue*, which came from the Department of Railways and Canals at Ottawa, the appellate tribunal instead of directing a new trial may admit the evidence and finally dispose of the case.

Ancient Order of United Workman v. Turner, 44 Can. S.C.R. 145.

When this case was called counsel for appellant applied to postpone hearing and for an order to further examine a witness for the purpose of the appeal. He is directed to proceed with his argument on the merits in the meantime and this application would receive further consideration, but judgment was pronounced on the merits without reference to his application.

Evans v. Evans, Oct., 1912.

An application was made to the Registrar sitting as a judge in Chambers for an order granting commission to take evidence in Wales to be used upon a pending appeal to the Supreme Court of Canada from the Supreme Court of Alberta. The motion was refused on the merits, and as to the power to grant a commission the Registrar said:

"I am not prepared to hold in view of the recent decision of the Judicial Committee in the *Red Mountain* v. *Blue* (1909), A.C. 361, C.R. [1909] A.C. 210, that the Supreme Court will not now under certain circumstances, allow evidence to be used in this court which was not tendered in the courts below, but it appears to me that the application must be dismissed on the ground that the evidence which the defendant now desires to use should have been obtained in the courts below and that having elected to go down to trial without such evidence, and further having elected to prosecute an appeal from the judgment against him at the trial to the full court the application which he now makes cannot be granted." On application to Mr. Justice Anglin, the Registrar's order was affirmed.

Carrier v. Beader, Cout. Dig. 1101.

Per Gwynne, J., in Chambers.—No application should be made with respect to the contents of the "case," or to dispense with printing any part of it, until it has been

settled by agreement between the parties, or by a judge of the court below, pursuant to the statute. S. 74. Transmission of case.

Barnard v. Riendean, 11th March, 1901.

The court drew attention to the impropriety of printing parts of the case on appeal in italics merely for the purpose of emphasizing particular phrases or paragraphs. Such a practice may be permitted in factums, but never in the printed case.

May v. McArthur, 3rd April, 1884.

Certain portions of the case had been italicized in the printing. The prothonotary certified that the printed case was the case agreed upon and settled by the parties. No affidavit was produced to contradict this certificate or to shew that the italics had been improperly used.

Objection to case overruled.

The case to be printed so as to procure a certain degree of uniformity and all that is required is a substantial compliance with rule 8.

Ritchie, C.J., in Chambers.

Rex v. Love. 14th Nov., 1901. Cont. Dig. 1105.

On 21st May, 1901, a motion for a rule was refused, and on 14th November following, the case being inscribed for hearing on an appeal from a judgment refusing mandamus to compel a magistrate to commit a person accused of forgery for trial after the accused had been tried summarily and discharged by him. As no printed case or factums were filed, the court refused to hear the appeal and ordered that it should be struck off the roll.

74. The clerk or other proper officer of the court appealed from shall, upon payment to him of the proper fees and the expenses of transmission, transmit the case forthwith after such allowance to the Registrar, and further proceedings shall thereupon be had according to the practice of the Supreme Court. R.S., c. 135, s. 45.

Neither the statute nor the rules expressly provide that the case which is to be certified to the Registrar of the Supreme Court by the Registrar or clerk of the court appealed from shall be a printed case, and in recent years the practice has obtained of receiving the certified case from

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the clerk of the Territorial Court of the Yukon Territory typewritten, and the agents for the solicitors have had the printing done in Ottawa. *Vide* notes to Rule 9 *infra*, p. 491.

SECURITY AND STAYING EXECUTION.

75. No appeal shall be allowed until the appellant has given proper security, to the extent of five hundred dollars, to the satisfaction of the court from whose judgment he is about to appeal, or a judge thereof, or to the satisfaction of the Supreme Court, or a judge thereof, that he will effectually prosecute his appeal and pay such costs and damages as may be awarded against him by the Supreme Court.

2. This section shall not apply to appeals by or on behalf of the Crown or in election cases, in cases in the Exchequer Court, in criminal cases, or in proceedings for or upon a writ of habeas corpus. R.S., c. 135, s. 46. 50-51 V., c. 16, s. 57.

Great Northern Rly. Co. v. Furness, Withy & Co., 40 Can. S.C.R. 455.

An objection that the security approved was not such as contemplated by the 75th and 76th sections of the Supreme Court Act (the amount thereof being insufficient for a stay of execution), was not entertained for the reason that the amount in controversy was sufficient to bring the case within the competence of the court and it was immaterial whether or not execution could be stayed. *The Attorney-General of Quebec* v. *Scott*, 34 Can. S.C.R. 282, and The Halifax Election Cases, 37 Can. S.C.R. 601, referred to.

MacLaughlin v. Lake Erie & Detroit River Rly. Co., Cout. S.C. Cas. p. 297.

In this case it was held that it was the duty of the Registrar not to allow a bond as security for costs, however unimpeachable in form, if he was of the opinion there was no jurisdiction in the court to hear the appeal.

By the term "proper security," security with proper sureties is to be understood; *Powell* v. *Washburn*, 2 Moo. P.C.C. 199, but if security for costs be taken by the court appealed from upon notice to the respondent and without objection upon his part, it cannot afterwards be questioned by him, unless new circumstances arise, and not even in that case, if he does not object on the first opportunity. *Ibid.*

It is a common practice now to accept as security the bond of a Guarantee Company (Annual Practice, 1912, p.

827). In the Supreme Court only companies licensed by the Government of Canada are accepted unless by consent of parties. S. 75. Security.

It has not been the practice in the case of a bond furnished by a security company to require that the appellant should be a party.

The provisions of this section must be strictly complied with.

Holstan v. Cockburn, 1904.

In this case the appellants, on consent of the respondents, had a bond for $250 allowed by a judge of the court below as security for their appeal to the Supreme Court. On the case reaching the Registrar he referred the matter to the Chief Justice to determine whether or not such a bond was a sufficient compliance with section 46, now section 75. The bond was disallowed, the Chief Justice in his judgment, saying:—

"Though it would seem that as a general rule the giving of security is an enactment in favour of the adverse party, and that consequently the adverse party may waive it expressly, or impliedly, yet, under the Supreme Court Act, that is not so. Under sections 40, 43 and 46 (now sections 69, 72 and 75 respectively), the case is taken out of the jurisdiction of the Provincial Court only by the approval of the security. It is only by that Act that the Supreme Court acquires jurisdiction. That is why rule 6 requires that the case contain a certificate that the security has been given. *Fraser* v. *Abbott*, Cass. Dig. 695; *In re Cahan*, 21 Can. S.C.R. 100. *Whitman* v. *The Union Bank*, 16 Can. S.C.R 410, might be read as opposed to that view. But the statute is, to my mind, clear, and the clerk of the Provincial Court has no authority whatever, as a general rule, to certify a case (rule 1) when no security has been given. Our Registrar should, therefore, refuse to receive such a case. The security, of course, must be as required by the statute."

Subsequently, a case was certified to the Registrar from the Court of Appeal for Ontario in which the Grand Trunk Rly. Co. were appellants, and the security allowed by a judge of the Court of Appeal was the undertaking of the appellant's solicitor. On the strength of the decision in *Holsten* v. *Cockburn*, the Registrar refused to receive the case until the security required by the statute had been given.

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

An appeal was sought from the refusal of the Supreme Court of Nova Scotia to admit the appellant as an attorney of the court. There being no person interested in opposing the application or the appeal, no security for costs was given. *Held*, that the court had no jurisdiction to hear the appeal except in cases specially provided for, no appeal can be heard by this court unless security for costs has been given as provided for by this section.

Order allowing security required.

McDonald v. Abbott, 3 Can. S.C.R. 278.

The following certificate was filed with the printed case, as complying with rule 6 of the Supreme Court Rules: "We, the undersigned, joint prothonotary for the Superior Court of Lower Canada, now the Province of Quebec, do hereby certify that the said defendant has deposited in our office, on the twentieth day of November last, the sum of five hundred dollars, as security in appeal in this case, before the Supreme Court, according to section thirty-first of the Supreme Court Act, passed in the thirty-eighth year of Her Majesty, chapter second. Montreal, 17th January, 1878. Hubert, Honey & Gendron, P.S.C." *Held*, on motion to quash appeal, that the deposit of the sum of $500 in the hands of the prothonotary of the court below, made by appellant, without a certificate that it was made to the satisfaction of the court appealed from, or any of its judges, was nugatory and ineffectual as security for the costs of appeal.

Proper obligees not named in bond.

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

S. brought an action against J. and issued a writ of capias. Bail was given, and special bail entered in due course, but the bail-piece was not filed, nor judgment entered against J. for some months after. On application to a judge in Chambers, an order was made for the discharge of the bail on account of delay in entering up judgment, and the full Court refused to set aside such an order. An appeal was brought to the Supreme Court of Canada, intituled in the suit against J. from the judgment of the full Court, and the bond for security for costs was given to J. *Held*, that as the bail, the only parties really interested in the appeal, were not before the Court, and were not entitled to

the benefit of the bond, the appeal must be quashed for want of proper security. S. 75.

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Objections to security—how taken.

Whitman v. Union Bank of Halifax, 16 Can. S.C.R. 410.

If objection is made to the form of a bond for security for costs on appeal to the Supreme Court, it should be by application in Chambers to dismiss, and if not so made the objection will be held to be waived

Appeals in forma pauperis.

Fraser v. Abbott, Cout. Dig. 111.

Held, tae Supreme Court or a judge thereof has no power to allow an appeal in *forma pauperis* or to dispense with the giving of the security required by the statute.

Dominion Cartridge Co. v. Cairne, Cass. Prac. 68.

Sedgewick, J., refused an application for a certified copy of the record without payment of the court fees, on the ground of the applicant's poverty.

No power to increase security.

Archer v. Severn, 12 Ont. P.R. 472.

The Court of Appeal has no discretion to increase the amount of security on appeal to the Supreme Court of Canada fixed by R.S.C. c 135, s. 46, at $500 because of the number of respondents.

Bonsack Machine Co. v. Falk, Cout. Dig. 46. (Q.R. 9 Q.B. 355.)

Upon application to file a bond of security for costs of an appeal to the Supreme Court of Canada, several respondents who had appeared separately in the Superior Court and in the Court of Appeal, urged that they were respectively entitled to separate security bonds for each of four appellants, *i.e.*, four bonds of $500 each. *Held*, per Hall, J., that leave to appeal should be granted on the furnishing of a single bond for $500. *Archer* v. *Severn*, 12 Ont. P.R. 472, followed.

Form of bond.

The form of bond set out on page 220 of Cassels' Supreme Court Practice, 2nd edition, is incorrect. The

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words in the fourth line, "jointly bound," should have been firmly bound;" and the word "by" at the end of the 6th line should have been "binds." A proper form of Bond will be found at p. 637.

Jamieson v. London and Canadian L. and A. Co., 18 Ont. P.R. 413.

A bond filed as security for costs of an appeal to the Supreme Court of Canada stated that the sureties were jointly and severally held and "jointly" bound, instead of "firmly" bound, and "we bind ourselves and each of us by himself," instead of "bind himself." *Held*, that it must be disallowed for uncertainty as to whether it could be properly construed as a joint and several bond.

Young v. Tucker, 18 Ont. P.R. 449.

A bond filed as security for costs of an appeal to the Supreme Court of Canada was disallowed on the ground of substantial error in the form—"by" instead of "binds" in the operative part *Jamieson* v. *London and Canadian L. and A. Co.*, 18 P.R. 413, followed.

Davidson v. Fraser, 17 Ont. P.R. 246.

The condition in a bond filed upon an appeal to the Supreme Court of Canada was to " pay such costs and damages as shall be awarded *in case the judgment shall be affirmed.*" *Held*, that this was not in substance the same as the statutory condition to " pay such costs and damages as may be awarded agninst the appellant hy the Supreme Court"; and the italicised words words added a condition not required by the Supreme Court Act, and hy which the respondents ought not to be hampered.

Robinson v. Harris, 14 Ont. P.R. 373.

In an appeal to the Supreme Court of Canada, although it is not necessary that the appellant should be a party to the appeal bond, if he is made a party, and does not execute the bond, the respondent is entitled to have it disallowed. In an appeal bond, where the object was not only to secure payment of the costs which might be awarded by the Supreme Court of Canada under section 46 of R.S.C. c. 135, but also under section 47(e) to procure a stay of execution of the judgment appealed from as to the costs thereby awarded against the appellant, the condition was "shall effectually prosecute the said appeal and pay such costs and damages as may be awarded against the appellant by the

Supreme Court of Canada, and shall pay the amount by the said-mentioned judgment directed to be paid, either as a debt or for damages or costs," etc *Held*, that this did not cover the costs awarded against the appellant by the judgment appealed from. S. 75. Security.

Molsons Bank v. Cooper, 17 Ont. P.R. 153.

The condition of a bond filed by the defendants as security for the costs of an appeal to the Supreme Court of Canada, was that if the defendants "shall effectually prosecute their said appeal and pay such costs and damages as may be awarded against them by the Supreme Court of Canada, then their obligation shall be void; otherwise to remain in full force and effect." *Held*, that the bond was not irregular. (2) The affidavit of execution of such a bond need not be intituled in the cause. (3) A surety in such a bond, when justifying in the sum sworn to "over and above what will pay all my just debts," need not add "and every other sum for which I am now bail."

Officer of the court may be surety.

Wilkins v. Maclean, 7 C.L.T. Occ. N. 5.

It is not a valid objection to a surety to a bond for security for costs to the Supreme Court of Canada that he is an officer of the court appealed from.

Application of section generally.

The application to have the bond as security allowed should be made in Chambers, and on notice, and be accompanied by a copy of the bond.

McNab v. Wagler, February 22nd, 1884.

Motion on behalf of defendant for approval of security and allowance of appeal.

Held, that a similar application having been made to Gwynne, J., in Chambers, and refused, and the application being in any event one which should be made in Chambers, the application could not be entertained.

Ontario and Quebec Rly. Co. v. Marcheterre, 17 Can. S.C.R. 141.

Although an application to allow the security has been refused by a judge of the court below, the appellant may make a similar application to a judge of the Supreme Court.

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London and Canadian Loan and Agency Co. v. Morris, Cass. Prac. 68.

As a municipality has the ordinary right of suing and being sued, it can, as incident to such right, properly join in a bond of security under this section given in a suit in which it was a party. Per Taylor, C.J., 1 West L.T. 210.

Bank of Hamilton v. Halstead, Cass. Prac. (2d ed.) 69.

The bond should not provide for security for anything but the costs of the appeal, as required by section 46. Thus, where the condition of the bond was that appellants should "effectually prosecute their said appeal and pay such costs and damages as may be awarded against them by the Supreme Court of Canada, and shall pay the amounts by said judgment respectively directed to be paid, either as a debt or for damages or costs or the part thereof as to which the said judgments may be affirmed if they or either of them be affirmed only as to part, and all damages awarded against the said Bank of Hamilton on such appeal," the Registrar refused to approve of it.

Bazinet v. Gadomy, 1892. Cass Prac. (2d ed.) 69.

A bond, conditioned to pay costs "in case the appeal should be dismissed," was refused. No such condition is attached to the security by section 46 (now 75), and a respondent is not obliged to accept it.

Laine v. Beland, 1896.

A bond was refused for a similar defect.

Liscombe Falls Co. v. Bishop, 24 C.L.T., Occ. N. 186.

Held by Ritchie, J.,(NS.) that form of bond in Cassels' Practice is also defective in not setting forth to whom the penalty is payable, and also in not stating that the bond is signed and sealed by the obligors.

The objection taken in the cases to the form of bond given in Cassels' Practice, has been corrected in the form given in the Appendix.

McFarlane v. Dickson, 1 Ch. Ch. 377.

The bond and the affidavits of execution and justification were all entitled in the name of the original plaintiffs, one of whom had died, and both were named as obligees in the bond.

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Campbell v. Royal Canadian Bank, 6 O.P.R. 43.

An appeal bond is properly intituled in the cause in the court below.

Weir v. Matheson, 2 Ch. Ch. 73.

The bond should be styled in the Court of Error and Appeal. The style of the cause in the court below, if adopted, should be the style in full, and the parties should be described as they become appellants and respondents, but they may be given in the same order as in the style of the original cause.

Saunders v. Furnivall, 2 Ch. Ch. 159.

There should be two sufficient sureties, and if one die or become insolvent, another will be ordered to be substituted. *Brigham* v. *Smith*, 1 Ch. Ch. 334, overruled on this point.

Norval v. Canada Southern Rly. Co., 7 O.P.R. 313.

Where the statutory requirements are observed with respect to bonds given upon appeal, the bond will not be disallowed on the ground that the sureties are "standing sureties" of the appellants, in the absence of satisfactory evidence of their insufficiency.

Mileon v Carter, 69 L.T. 735.. Cass. Prac. 69.

When the order of the provincial court granting leave to appeal made no provision as to costs in case of dismissal for want of prosecution ("effectually prosecute his appeal") the Judicial Committee of the Privy Council held that the said court had power to correct the omission in its order.

McManamy v. City of Sherbrooke, 13 Legal News 290. Cass. Prac. 70.

When an appeal from the Court of Queen's Bench for Lower Canada has been regularly allowed, and the case is before the Supreme Court, the Superior Court has no power to suspend by injunction, proceedings on the appeal.

Wheeler v. Bisck, M.L.R. 2 Q.B. 159. Cass. Prac. 70.

Held, that personal security is sufficient, and that the sureties need not justify on real estate.

Where it is desired to include in the same bond security for the costs of the appeal to the Supreme Court and also

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security to stay execution under the next section, the application to allow the bond should be made in the court below.

Although no express provision is made therefor, in the statute or rules, the practice obtains in the Supreme Court of allowing *viva voce* examination of sureties on an application for the approval of the bond; both parties will be permitted to file affidavits in respect to the sufficiency of any security offered.

The tariff of fees provides that where security is given by a deposit of money there shall be paid in stamps one per cent. on the amount of the deposit and $2.00 on the order. A form of notice of motion to allow the security will be found *infra*, p. 629.

When the security is allowed an order is made in the form set out page 639, *infra*.

The Interpretation Act, R.S., c. 1, s. 34, s.-s. (27), reads as follows: "'Sureties' means sufficient sureties, and the expression 'security' means sufficient security, and wherever these words are used one person shall be sufficient therefor, unless otherwise expressly ordered."

Winding-up Act cases.

Where leave to appeal has been granted under the provisions of the Winding-up Act, security for costs must be given in accordance with this section.

As to security in Election Appeals, *vide*, p. 781, *infra*.

As to security in Exchequer Appeals, *vide*, p. 756, *infra*.

As to security in Railway Appeals, *vide*, p. 791, *infra*.

76. Upon the perfecting of such security, execution shall be stayed in the original cause: Provided that,—

(a.) If the judgment appealed from directs an assignment or delivery of documents or personal property, the execution of the judgment shall not be stayed, until the things directed to be assigned or delivered have been brought into court, or placed in the custody of such officer or receiver as the court appoints, nor until security has been given to the satisfaction of the court appealed from, or of a judge thereof, in such sum as the court or judge directs, that the appellant will obey the order or judgment of the Supreme Court;

(b.) If the judgment appealed from directs the execution of a conveyance or any other instrument, the execution on the judgment shall not be stayed, until the instrument has been executed

and deposited with the proper officer of the court appealed from, to abide the order or judgment of the Supreme Court; S. 76. Staying execution.

(c.) If the judgment appealed from directs the sale or delivery of possession of real property, chattels real or immoveables, the execution of the judgment shall not be stayed, until security has been entered into to the satisfaction of the court appealed from, or a judge thereof, and in such manner as the said last mentioned court or judge directs, that during the possession of the property by the appellant he will not commit, or suffer to be committed, any waste on the property, and that if the judgment is affirmed, he will pay the value of the use and occupation of the property from the time the appeal is brought until delivery of possession thereof, and also, if the judgment is for the sale of property and the payment of a deficiency arising upon the sale, that the appellant will pay the deficiency;

(d.) If the judgment appealed from directs the payment of money, either as a debt or for damages or costs, execution thereof shall not be stayed, until the appellant has given security to the satisfaction of the court appealed from, or of a judge thereof, that if the judgment or any part thereof is affirmed, the appellant will pay the amount thereby directed to be paid, or the part thereof as to which the judgment is affirmed, if it is affirmed only as to part, and all damages awarded against the appellant on such appeal.

2. If the court appealed from is a Court of Appeal and the assignment or conveyance, document, instrument, property or thing, as aforesaid, has been deposited in the custody of the proper officer of the court in which the cause originated, the consent of the party desiring to appeal to the Supreme Court, that it shall so remain to abide the judgment of the Supreme Court, shall be binding on him and shall be deemed a compliance with the requirements in that behalf of this section;

3. In any case in which execution may be stayed on the giving of security under this section, such security may be given by the same instrument whereby the security prescribed in the next preceding section is given. R.S., c. 135, s. 47.

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Execution shall be stayed.

The meaning to be attached to this expression is fully discussed in the judgment of Chancellor Spragge in *Dundas* v. *Hamilton & Milton Road Co.*, 19 Gr. at p. 456:

"In this case there are cross-applications, one by the plaintiff for a sequestration against the defendants, for not obeying the decree of the Court of Appeal, which directed the removal of a bridge which obstructs the navigation of the Desjardins Canal; the other by defendants, The Road Company, for stay of proceedings pending an appeal to the Privy Council. . . .

"The words of C.S.U.C. cap. 13, sec. 60, are: 'Upon the perfecting of such security execution shall be stayed in the original cause.' What is directed by the Court of Appeal in this cause does not fall within the exceptions enumerated in the 16th and referred to in the 61st section of the Act. The only question therefore is, whether the process applied for by the plaintiff—a sequestration—is an execution within the meaning of the Act.

"In this case it is the process of the Court to enforce a decree against a corporate body, and so is final process. But it should not be held to be a process of 'execution' unless the process by which a like decree is enforced against an individual party would be an execution within the meaning of the Act. The process against an individual party would be an order to commit, and this may still be followed by attachment and sequestration.

"In the case of Gamble v. Howland (3 Gr. 308), I quoted the definition of an execution by Bacon, that it is 'the obtaining actual possession of a thing recovered by judgment of law;' and by Coke, that it is '*fructus finis et effectus legis.*' Both of these are speaking of common law executions: but it is evident that, in our Court of Appeal Act, the word execution is applied in the same sense to decrees of this Court. The exceptions enumerated in section 16 shew this conclusively. I do not see how I can hold that process by which a decree is enforced which directs the removal of a bridge is less an 'execution' than the like process to enforce a decree directing the assignment or delivery of documents or personal property; or a decree directing the execution of a conveyance or other instrument; or a decree directing the sale or delivery of real property or chattels real."

Dawson v. Macdonald, 15th January, 1884.

While the proceedings were going on on the opposition of the 30th December, 1880, another writ of execution was issued in the original cause to collect the costs awarded to respondents by the Supreme Court of Canada on the 10th June, 1880. To this writ the appellant Dawson filed a second opposition on the 18th January, 1881. This opposition was dismissed by the Superior Court, and the judgment of that court was confirmed by the Court of Queen's Bench.

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The latter court refused an appeal from the judgment on this second opposition, on the ground that the amount in dispute was not sufficient to authorize an appeal.

Dawson thereupon moved before the Supreme Court of Canada for an order to suspend the proceedings under the execution to which the opposition of the 18th January, 1881, was filed, and for leave to appeal from the judgment of said opposition.

Held, that there was no ground for staying the execution. The court had properly dismissed the appeal on the case presented, and that was a final decision in itself, and it was no ground for staying the execution that there were other proceedings in the court below which might possibly shew that the defendant should have succeeded in the original action.

Motion refused with costs.

Dawson v. Macdonald, Cout. Dig. 1135.

The judgment of the Supreme Court must be entered and sent to the court below before defendant can have recourse to a proceeding by *requête civile*. A *requête civile* does not stay execution as a matter of course. The defendant would have to apply to the Superior Court or a judge thereof for an order. A judge in Chambers should not grant an order staying execution of a judgment, especially when defendant has had ample time to apply to the full Court. (Per Taschereau, J.)

Agricultural Ins. Co. of Watertown, N.Y. v. Sargent, 16 O.P.R. 397.

The plaintiffs appealed to the Court of Appeal from a judgment of the High Court dismissing their action with costs, and gave the security for the costs of appeal required by section 71 of the Judicature Act, by paying $400 into court, and also gave the security required by rule 804(4) in order to stay the execution of the judgment below for taxed costs, by paying $322.14 into court. Their appeal was dismissed with costs. Desiring to appeal to the Supreme Court of Canada, they paid $500 more into court, and this was allowed by a judge of the Court of Appeal as security for the costs of the further appeal. *Held*, that execution was stayed upon the judgments of the High Court and Court of Appeal until the decision of the Supreme Court. *Semble*, that payment out of the moneys in court to the defendant of his costs of the High Court and Court

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of Appeal, upon the undertaking of his solicitors to repay in the event of the further appeal succeeding, could not properly be ordered. *Kelly* v. *Imperial Loan Co.*, 10 O.P.R. 499, commented on.

Veillcux v. Price & Ordway, Cout. Dig. 108. 5th May, 1903.

Application for completion of security bond on appeal from a judgment condemning V. to pay O. $37,500, and dismissing the intervention of P., who claimed half the money. It appeared that there was $30,400 deposited in the Quebec Bank to the credit of V., and his application was that this sum should be paid into court and that he should be required to give security only for the balance, instead of being obliged to give security for the whole sum in order to stay execution. The court held that it had no jurisdiction to make the order, and dismissed the application with costs.

77. When the security has been perfected and allowed, any judge of the court appealed from may issue his fiat to the sheriff, to whom any execution on the judgment has issued, to stay the execution, and the execution shall be thereby stayed, whether a levy has been made under it or not.

2. If the court appealed from is a court of appeal, and execution has been already stayed in the case, such stay of execution shall continue without any new fiat, until the decision of the appeal by the Supreme Court.

3. Unless a judge of the court appealed from otherwise orders no poundage shall be allowed against the appellant, upon any judgment appealed from, on which any execution is issued before the judge's fiat to stay the execution is obtained. R.S., c. 135, s. 48.

78. If at the time of the receipt by the sheriff of the fiat, or of a copy thereof, the money has been made or received by him, but not paid over to the party who issued the execution, the party appealing may demand back from the sheriff the amount made or received under the execution, or so much thereof as is in his hands not paid over, and in default of payment by the sheriff, upon such demand, the party appealing may recover the same from him in

an action for money had and received, or hy meane of an order or rule of the court appealed from. R.S., c. 135, e. 49. S. 80. Discontinuance.

79. If the judgment appealed from directs the delivery of perishahle property, the court appealed from, or a jndge thereof, may order the property to he eold and the proceeds to he paid into conrt, to ahide the jndgment of the Snpreme Conrt. R.S., c. 135, s. 50.

For decisions under the corresponding sections of the Judicature Act of Ontario, vide Holmested & Langton, The Judicature Act, 1905, edition, Rule 827, p. 1064.

DISCONTINUANCE OF PROCEEDINGS.

80. An appellant may discontinne his proceedings hy giving to the respondent a notice entitled in the Snpreme Court and in the canse, and eigned hy the appellant, hie attorney or solicitor, stating that he discontinnes such proceedings.

2. Upon such notice heing given, the respondent shall he at once entitled to the costs of and occasioned hy the proceedings in appeal; and may, in the conrt of original jnrisdiction, either sign judgment for such costs or ohtain an order from snch conrt, or a judge thereof, for their payment, and may take all further proceedinge in that conrt as if no appeal had been hrought. R.S., c. 135, e. 51.

The practice followed in case of discontinuing proceedings is to file the notice of discontinuance in the office of the Registrar and obtain an appointment to tax costs.

CONSENT TO REVERSAL OF JUDGMENT.

81. A respondent may consent to the reversal of the judgment appealed against, hy giving to the appellant a notice entitled in the Snpreme Court and in the cause, and signed hy the respondent, his attorney or solicitor, stating that he consente to the reversal of the jndgment; and thereupon the Conrt, or any jndge thereof, shall pronounce judgment of reversal as of conrse. R.S., c. 135, s. 52.

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Confedsration Life Ase. v. Wood, May, 1902.

Consent to reversal.

A condition in a policy of life insuranee provided that if any premium, or note given therefor, was not paid when due, the policy should be void. A note given, payable with interest, in payment of a premium provided that if it were not paid at maturity the policy should forthwith become void. On the maturity of the note, it was partly paid and an extension was grauted and on a part payment being again made, a further extension was granted. The last extension was overdue, and the balaiice on the note was unpaid at the death of the assured. A receipt by the company, given at the time of taking the note, was for the amount of the premium, lut at the bottom of the face of the receipt were these words: "Paid by note in terms thereof." While the note was running the policy was assigned for value, with the assent of the company to the plaintiff, to whom the receipt was delivered hy the assured.

The plaintiff filed a bill in equity as assignee of the policy, but his action was dismissed hy Barker, J., the judge in Equity. On appeal to the Supreme Court of New Brunwiek it was held hy a majority of three to two, that defendant was estopped hy the receipt and by the extensions of time for payment to the assured from setting up against the plaintiff that the policy was void for non-payment of the premium. On a further appeal to the Supreme Court of Canada a eonsent was filed by counsel for the respondent that the appeal should be allowed, each party to pay his own costs in the Supreme Court and in the court below, and the Supreme Court ordered judgment to be entered pursuant of the said eousent.

DISMISSAL FOR DELAY.

82. If an appellant unduly delays to prosscnte his appeal, or fails to bring the appsal on to be heard at the first sssion of the Snprems Court, after the appeal ie ripe for hearing, the respondsnt may, on notice to ths appellant, movs ths Snpreme Conrt, or a jndgs thereof in chambers, for the dismissal of the appeal.

2. Snch ordsr shall therenpon bs made as the said Court or jndge deems jnet. R.S., c. 135, e. 53.

Rule 5 gives an appellant 30 days in which to file his case, and this time may be extended under Rules 42 and 70. The appeal may be dismissed if there has been unreasonable delay by the appellant, and where the judge in

Chambers has exercised his discretion and dismissed the appeal, the Supreme Court will not interfere. S. 82. Dismissal for delay.

Whitfield v. The Merchants Bank, 4th March, 1885.

The case was filed on the 22nd October, 1885, the respondent's factums on the 8th November, 1884. The last day for filing factums in appeals to be heard the following session was the 30th. of January, 1885, and for inscribing, the 2nd February following. The appeal not being inscribed, the respondent's counsel gave notice of motion on the 9th February to dismiss appeal for want of prosecution. On the 14th the motion was heard. Appellant's agent stated that on the 2nd February he had made a search in the Registrar's office for the respondent's factum, and had been informed it had not been filed. He was therefore under the impression the respondent could not take advantage of the delay of the appellant.

Held, that the undue delay in filing appellant's factum and inscribing appeal had not been satisfactorily accounted for, and the appeal should be dismissed. Per Fournier, J., in Chambers, 16th February, 1885.

An application was made to the Court to rescind or vary the order of Fournier, J., and to allow the appllant to file his factum and inscribe appeal. Affidavits were filed, but merely to the effect: 1. That appellant's counsel thought that while the respondent was in default with regard to his factum, it could not be considered that there was any undue delay in the prosecution by appellant of his appeal; and 2. That the appeal was *bona fide* and serious.

Held, that the Court would not interfere with the order of the judge in Chambers.

Martin v. Roy, Jan., 1879.

A motion to dismiss appeal was referred by the Court to the Chief Justice in Chambers.

City of Winnipeg v. Wright, 13 Can. S.C.R. 441.

A party seeking an appeal obtained an extension of time for filing his case but failed to take advantage of the indulgence so granted, whereupon, on the application of the respondent, the appeal was dismissed by the judge in Chambers. On motion to rescind the order dismissing the appeal,

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Death of parties.

Held, Strong and Gwynne, J.J., dissenting that under the circumstances of the case the Court would not interfere by rescinding the judge's order and restoring the appeal.

In election appeals it was formerly considered that motions to dismiss for want of prosecution must be made to the Court; *North York Election Case*, Cass. Dig. p. 682, No 71; but in the *Halton Election Case*, 19 Can. S.C.R. 557, the Court referred such motion to a judge in Chambers, and since then the Registrar has heard them. *Chicoutimi and Saguenay Election Case*, Cass. Dig., p. 682, No. 72. Cass. Prac. p. 75.

Rule 44 provides as follows:

"Unless the appeal is brought on for hearing by the appellant within one year next after the security shall have been allowed, it shall be held to have been abondoned without any order to dismiss being required, unless the Court or a judge thereof shall otherwise order."

DEATH OF PARTIES.

83. In the event of the death of one of several appellants, pending the appeal to the Supreme Court, a suggestion may be filed of his death, and the proceedings may, thereupon, be continued at the suit of and against the surviving appellant, as if he were the sole appellant. R.S., c. 135, s. 54.

84. In the event of the death of a sole appellant, or of all the appellants, the legal representative of the sole appellant, or of the last surviving appellant, may, by leave of the Court or a judge, file a suggestion of the death, and that he is such legal representative, and the proceedings may thereupon be continued at the suit of and against such legal representative as the appellant.

2. If no such suggestion is made, the respondent may proceed to an affirmance of the judgment, according to the practice of the Court, or take such other proceedings as he is entitled to. R.S., c. 135, s. 55.

85. In the event of the death of one of several respondents, a suggestion may be filed of such death, and the proceedings may be continued against the surviving respondent. R.S., c. 135, s. 56.

86. Any suggestion of the death of one of several appellants or of a sole appellant or of all the appellants or of one of several respondents, if nntrne, may on motion he set aside hy the Conrt or a judge. R.S., c. 135, ss. 54, 55 and 56. S. 86. Death of parties.

87. In the event of the death of a soie respondsnt, or of all the respondsnts, the appsiiant may proceed, upon giving one month's notice of ths appeal and of his intention to continue the same, to the representative of the deceased party, or if no such notice can he givsn, then upon such notice to the parties interested as a jndge of the Suprems Court directs. R.S., c. 135, s. 57.

88. In ths event of ths death of a sole plaintiff or defendant before the judgment of the court in which an action or an appeal is pending is delivsred, and if such judgment is against the deceased party, his lsgal representatives, on sntering a suggestion of the death, shall he entitled to proceed with and prosecuts an appeal in ths Supreme Court, in the sams manner as if they wers ths original parties to ths suit. 52 V., c. 37, s. 3.

89. In the evsnt of the death of a sols plaintiff or sole defendant bsfors the judgment of the conrt in which an action or an appeal is pending is delivered, and if such judgment is in favour of such deceased party, ths othsr party, upon entering a suggestion of the death shall hs sntitled to prosecnts an appeal to ths Suprems Court against the legal representativss of such decsassd party, provided that the time limited for appealing shall not rnn until snch legal representatives are appointed. 52 V., c. 37, s. 4.

The above provisions applicable in the case of death of parties must be supplemented by Rule 36, which provides as follows:

"In any case not already provided for by the Act, in which it becomes essential to make an additional party to the appeal, either as appellant or respondent, and whether such proceeding becomes necessary in consequence of the death or insolvency of any original party, or from any other cause, such additional party may be added to the appeal by filing a suggestion as nearly as may be in the form provided for by section 43 (now 84) of the Act."

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Death of parties.

Judgment *nunc pro tunc.*

Merchants Bank v. Smith, 23rd May, 1884. Cass. Dig. 888.

The respondent, the assignee of an insolvent estate, having died between the day of hearing of the appeal and the day of rendering judgment, on motion of counsel for appellant the Court orders the judgment in appeal to be entered *nunc pro tunc* as of the date of hearing.

Merchants Bank of Canada v. Keefer, 12th January, 1885. Cass. Dig. 688.

On motion of appellant's counsel, judgment is directed to be entered *nunc pro tunc* as of the day of argument, one of the parties having died in the interval.

Ontario and Quebec Rly. Co. v. Philbrick, 26th May, 1886. Cass Dig. 888.

On motion of counsel for respondent, supported by affidavit shewing that one of the parties had died between the date of hearing and the date upon which judgment delivered, the Court directs judgment to be entered *nunc pro tunc* as of the day of hearing.

Muirhead v. Sheriff, 14 Can. S.C.R. 735.

In this case the plaintiff brought an action against the original defendant upon a contract of indemnity. After verdict and before entry of judgment the defendant died. Upon application of his executors leave was given them to file a suggestion of the death of the defendant in the proper office, and by another order leave was given the plaintiff to sign a judgment *nunc pro tunc* as of the date of the death of the defendant. Upon an appeal by the defendants to the Supreme Court a motion to quash was made by plaintiff on the ground that the judgment had not been revived against the executors and that the order granting leave to file a suggestion was a nullity. The motion was dismissed and appeal heard on the merits.

Lord Campbell's Act.

White v. Parker, 16 Can. S.C.R. 699.

In an action for negligence the plaintiff was non-suited and on motion to the full Court the non-suit was set aside and a new trial ordered. Between verdict and judgment the plaintiff died and a suggestion of his death was entered on the record. An appeal to the Supreme Court was quashed

on the ground that under Lord Campbell's Act, or its equivalent in New Brunswick, an entirely new cause of action arose on the death of P. and that the original action was entirely gone and could not be revived. S. 90. Entry of causes.

Adding parties.

McDougall v. La Banque d'Hochelaga, 39 Can. S.C.R. 318.

When the appeal first came on for hearing upon inscription *ex parte*, on suggestion by one of the creditors, not made a party to the appeal, the court ordered the postponement of the hearing in order that all interested parties might be notified.

ENTRY OF CAUSES.

90. The appeals set down for hearing shall be entered by the Registrar on a list divided into five parts, and numbered as follows:—Number one, Election Cases; Number two, Western Provinces Cases; Number three, Maritime Provinces Cases; Number four, Quebec Province Cases; Number five, Ontario Province Cases; and the Registrar shall enter all Election Appeals on part numbered one, all appeals from the Yukon Territory and the Provinces of British Columbia, Alberta, Saskatchewan and Manitoba on part numbered two, all appeals from the Provinces of Nova Scotia, New Brunswick and Prince Edward Island on part numbered three, all appeals from the Province of Quebec on part numbered four, and all appeals from the Province of Ontario on part numbered five; and such appeals shall be heard and disposed of in the order in which they are so entered, unless otherwise ordered by the court. 7-8 Ed. VII., c. 70.

Section 90 as it appears in the Revised Statutes, Chap. 139, was repealed and the above section substituted by 7-8 Edw. VII. c. 70.

Pursuant to this section, cases from the most distant provinces are placed at the head of the list of the part to which they belong, thus, in the Maritime appeals, the order which usually obtains is, 1st, Prince Edward Island appeals; 2nd, Nova Scotia appeals; and 3rd, New Brunswick appeals.

In Western provinces cases the order is, 1st, Yukon appeals; 2nd, British Columbia appeals; 3rd, Alberta appeals; 4th, Saskatchewan appeals; 5th Manitoba appeals.

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Evidence.

Where special circumstances make it desirable, the Court will place any case in such a position in the part to which it belongs, as proves most suitable, and Election appeals, with consent of both parties, have been set down among the appeals from the province in which the case arose.

The Court has frequently refused to remove a case from the part to which it belongs and place it in another part.

Vide addenda et corrigenda.

EVIDENCE.

91. All persons authorized to administer affidavits to be used in any of the superior courts of any province, may administer oaths, affidavits and affirmations in such province to be used in the Supreme Court. R.S., c. 135, s. 91.

Vide notes to section 73, *supra*, p. 444, and Rule 8, *infra*, p. 488.

92. The Governor in Council may, by commission, from time to time, empower such persons as he thinks necessary, within or out of Canada, to administer oaths, and take and receive affidavits, declarations and affirmations in or concerning any proceeding had or to be had in the Supreme Court.

2. Every such oath, affidavit, declaration or affirmation so taken or made shall be as valid and of the like effect, to all intents, as if it had been administered, taken, sworn, made or affirmed before the Court or before any judge or competent officer thereof in Canada.

3. Every commissioner so empowered shall be styled "a commissioner for administering oaths in the Supreme Court of Canada." R.S., c. 135, s. 92.

93. Any oath, affidavit, affirmation or declaration, administered, sworn, affirmed or made out of Canada, before any commissioner authorized to take affidavits to be used in His Majesty's High Court of Justice in England, or before any notary public, and certified under his hand and official seal, or before the mayor or chief magistrate of any city, borough or town corporate in Great Britian or Ireland, or in any colony or possession of His Majesty, out of Canada, or in any foreign country, and certified under the common seal of such city, borough or town corporate, or before a

judge of any court of sopreme jurisdiction in any colony or posses- S. 94.
sion of His Majesty or dependency of the Crown ont of Canada, Evidence.
or before any consul, vice consul, acting consul, pro-consul or consular agent of His Majesty exercising his functions in any foreign place, and certified nnder his official seal, concerning any proceeding had or to be had in the Snpreme Conrt, shall be as valid and of like effect, to all intents, as if it had been administered, sworn, affirmed or made before a commissioner appointed under this Act. R.S., c. 135, s. 93.

94. Every document purporting to have affixed, imprinted or snbscribed thereon or thereto, the signature of any commissioner appointed nnder this Act, or the signature of any person authorized to take affidavits to be used in any of the superior courts of any province, or the signature of any such commissioner authorized to receive affidavits to be used in His Majesty's High Court of Jostice in England, or tho signature and official seal of any such notary public, or the signature of any such mayor or chief magistrate, and the common seal of the corporation, or the signature of any sucb judge, and the seal of the court of the signature and official seal of any soch consul, vice-consul, acting consul, pro-consul or consular agent, in testimony of any oath, affidavit, affirmation or declaration, having been admfnistered, sworn, affirmed or made by or hefore him, shall he admitted in evidence witbout proof of any such signature or seal heing the signature or signature and seal of tbe person whose signatnre or signature and seal the same pnrport to he, or of tbe official cbaracter of snch person. R.S., c. 135, s. 94.

95. No informality in tbe beading or other formal requisites of any affidavit, declaration or affirmation, made or taken hefore any person under any provision of this or any otber Act, shall be an objection to its reception in evidence in the Supreme Court, if the court or judge hefore whom it is tendered thinks proper to receive it; and if the same is actnally sworn to, declared or affirmed hy the person making the same hefore any person duly authorized thereto, and is received in evidence, no snch informality shall he set np to defeat an indictment for perjnry. R.S., c. 135, s. 95.

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Evidence.

96. If any party to any proceeding had or to he had in the Snpreme Court is desirone of having therein the evidence of any pereon, whether a party or not, or whether reeident within or out of Canada, the Conrt or any jndge thereof, if in its or his opinion it is, owing to the ahsence, age or infirmity, or the dietance of the residence of snch person from the place of trial, or the expense of taking his evidence otherwise, or for any other reason, convenient so to do, may, upon the application of ench party, order the examination of any such pereon upon oath, hy interrogatories or otherwise, hefore the Regietrar of the Conrt, or any commiesioner for taking affidavite in the Court, or any other person or persons to ue named in snch order, or may order the issne of a commission nnder the eeal of the Conrt for such examination; and may, hy the same or any euhseqnent order, give all ench directions touching the time, place and manner of snch examination, the attendance of the witneeees and the production of papere thereat, and all matters connected therewith, as appears reasonahle. R.S., c. 135. e. 96.

97. Every person anthorized to take the examination of any witness, in pursnsnce of any of the provicions of this Act, shall take snch examination upon the oath of the witneee, or upon affirmation, in any case in which affirmation inetead of oath is allowed hy law. R.S., c. 135, e. 97.

98. The Snpreme Court, or a jndge thereof, may, if it is concidered for the ends of jnetice expedient eo to do, order the further examination, hefore either the Court or a jndge thereof, or other person, of any witnese; and if the party on whoee hehalf the evidence is tendered neglecte or refuses to attend snch further examination, the Conrt or judge, in ite or his diecretion, may decline to act on the evidence. R.S., c. 135, s. 98.

99. Snch notice of the time and place of examination as is prescrihed in the order, shall he given to the adveree party. R.S., c. 135, s. 99.

100. When any order is made for the examination of a witneee, and a copy of the order, together with a notice of the time

and place of attendance, signed hy the person or one of the pereons to take the examination, has heen duly served on the witness within Canada, and he has heen tendered hie legal feee for attendance and travel, his refusal or neglect to attend for examination or to ansuer any proper qnestion pnt to him on examination, or to prodnce any paper which he has heen notified to produce, shall be deemed a contempt of court and may he punished hy the eame procees as other contempts of court; Provided that he shall not be compelled to produce any paper which he would not he compelled to prodnce, or to answer any qneetion which he would not he bonnd to answer in conrt. R.S., c. 135, e. 100.

101. If the parties in any case pending in either of the said conrts consent, in writing, that a witness may he examined within or ont of Canada hy interrogatories or otherwise ench consent and the proceedings had thereunder ehall he ae valid in all respects as if an order had heen made and the proceedings had thereunder. R.S., c. 135, s. 101.

102. All examinations taken in Canada, in pursuance of any of the provisions of this Act, shall he returned to the Court; and the depositions, certified nnder the hande of the pereon or one of the persons taking the eame, may, without fnrther proof, he nsed in evidence, saving all just exceptions. R.S., c. 135, s. 102.

103. All examinatione taken out of Canada, in pursnance of any of the provisions of this Act, shall he proved hy affidavit of the dne taking of snch examinatione, eworn hefore some commiesioner or other person anthorized under this or any other Act to take ench affidavit, at the place where such examination has heen taken, and shall he retnrned to the Court; and the depositions so returned, together with such affidavit, and the order or commiesion, closed under the hand and seal of the person or one of the persons anthorized to take the examination, may, without fnrther proof, he used in evidence, saving all just exceptions. R.S., c. 135, s. 103.

104. When any examination hae heen retnrned, any party may give notice of snch return, and no ohjection to the examina-

S. 105. Sheriff.

tion heing read shall havs effect, unless taken within the time and in ths manuer prescrihed hy geusral ordsr. R.S., c. 135, s. 104.

GENERAL PROVISIONS.

105. Ths process of ths Court shall rnn thronghout Canada, and shall he tested in the uame of the Chief Justice, or in case of a vacancy iu the office of chief jnstice, in the uams of the senior pnieus jndge of the Conrt, and shall he directed to the eheriff of auy county or other judicial divisiou into which any province is divided.

2. The sheriffs of the said respective counties or divisious shall he deemed and taken to he ex officio officers of the Supreme Court, and shall perform the duties and fuuctions of sheriffe in connection with the Court.

3. In any case where the sheriff is disqualified, such process shall be directed to any of the corouers of the county or district. R.S., c. 135, s. 105;—50-51 V., c. 16, e. 57.

106. Every commissioner for administering oaths in the Supreme Court, who resides within Canada, may take and receive acknowledgments or recognizauces of hail, and all other recognizances in the Supreme Court. R.S., c. 135, s. 106;—50-51 V., c. 16, s. 57.

107. Au order iu the Supreme Court for payment of money, whether for coete or otherwise, may he enforced hy such writs of execution as the Conrt prescrihes. 50-51 V., c. 16, s. 57.

For procedure under this section, see Rule 120 *et seq. infra*, p. 603.

108. No attachment as for contempt shall iesne in the Supreme Court for the non-payment of money only. 50-51 V., c. 16, s. 57.

109. The jndges of the Snpreme Court, or any five of them, may, from time to time, make geueral rules aud orders:—

(a) For regulating the procedure of and in the Supreme Court, and the hringing of cases hefore it from conrts appealed from or otherwise, and for the effectual execution and working of this Act, and the attainment of the intention aud ohjects thereof;

S. 109.
Registrar's jurisdiction.

(b) For empowering the Registrar to do any such thing and transact any euch husiuess as ie epecified in such rules or orders, and to exerciee auy authority aud juriedictiou in respect of the same as ie now or may be hereafter done, transacted or exercised by a judge of the Court eitting in chambere in virtue of any statute or custom or hy the practice of the Court;

(c) For fixing the feee aud costs to he taxed and allowed to, aud received aud taken by, and the rights aud duties of the officers of the Court;

(d) For awardiug and regulatiug costs iu such Court iu favour of and againet the Crown, as well as the suhject;

(e) With reepect to mattere comiug withiu the juriediction of the Court, in regard to refereucee to the Court hy the Goveruor iu Council, and in particular with reepect to investigations of queetioue of fact iuvolved iu auy euch refereuce.

2. Such rulee aud ordere may extend to any matter of procedure or otherwiee uot provided for hy this Act, hut for which it is found neceseary to provide, iu order to eneure the proper working of this Act and the hetter attaiument of the ohjecte thereof.

3. All euch rulee which are not incousistent with the exprese provisioue of thie Act ehall have force aud effect ae if herein enacted.

4. Copies of all euch rulee and orders ehall he laid hefore both Houses of Parliameut at the eessiou uext after the making thereof. 50-51 V., c. 16, e. 57;—54-55 V., c. 25, e. 4.

Pursuant to the powers conferred by this section, the Court passed General Order 83, *infra*, p. 578, conferring upon the Registrar all the authority and jurisdiction of a judge in Chambers, except in matters of *habeas corpus* and *certiorari*.

It is questionable whether the powers conferred upon the Registrar of a judge in Chambers apply to any case in which jurisdiction ie conferred upon a judge of the Supreme Court by some statute other than the Supreme Court Act, *e.g.*, the Winding-up Act, the Railway Act. Jurisdiction has been exercised under the Winding-up Act, hut more recently,

S. 110.

Moneys payable to Crown.

the Registrar, having doubts as to his jurisdiction, has in all such cases had the applications made to a judge of the Supreme Court in Chambers.

110. Any moneys or costs awarded to the Crown shall be paid to the Minister of Finance, and he shall pay out of any unappropriated moneys forming part of the Consolidated Revenue Fund of Canada, any moneys or costs awarded to any person against the Crown. 50-51 V., c. 16, s. 57.

111. All fees payable to the Registrar under the provisions of this Act shall be paid by means of stamps, which shall be issued for that purpose by the Minister of Inland Revenue, who shall regulate the sale thereof;

2. The proceeds of the sale of such stamps shall be paid into the Consolidated Revenue Fund of Canada. R.S., c. 135, s. 111.

Rules of the Supreme Court of Canada

ORDER AFFIRMING JURISDICTION.

R. 1.
Affirming jurisdiction.

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

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

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

Rule 1.

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

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

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

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

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

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

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

Ville ds St. Jean v. Molleur, 40 Can. S.C.R. 139.

The declaration in an action by a municipality claiming forfeiture of the franchise for non-fulfilment of the obligation imposed in respect thereof alleged in five counts as many different grounds for such forfeiture. The defendant demurred generally to the declaration and specifically to each count. The demurrer was sustained as to the three counts and dismissed as to the other two. A motion to affirm the court's jurisdiction made to the registrar was refused on the ground that the judgment below on the de-

murrer only affected some of the counts of the declaration and that there still remained three issues which required to be tried and disposed of by the court of first instance, and under the jurisprudence of the court this was not a final judgment and therefore not appealable. On appeal to the Court the judgment of the registrar was reversed and the jurisdiction affirmed. Rule 1.

Labrosse v. Langlois, 41 Can. S.C.R. 43.

An action having been brought against the makers and indorser of a note for $2,000 the makers sued the indorser in warranty claiming that no consideration was given for the note and asking that the indorser guarantee them against any judgment given in the main action. They also asked that an agreement under which the makers were to become liable for $3,000 be declared null. The two actions were tried together and judgment given for the plaintiff in the action on the note, while the action in warranty was dismissed. The registrar held that the amount in dispute was the $2,000 note, and that no issue was raised in the pleadings as to the validity of the agreement which was a collateral matter which could not be taken into consideration in estimating the amount in dispute for the purpose of determining the jurisdiction of the court. On appeal to the Court the Registrar's judgment was affirmed.

Clarke v. Goodall, 44 Can. S.C.R. 284.

The plaintiff by his writ claimed to have it declared that he was entitled to receive from the defendant $20,000 shares of stock in the Lawson Mine and for an injunction restraining the defendant from selling or disposing of same. An interim injunction was granted which by consent was dissolved upon payment into court of $5,000. Subsequently a statement of claim was delivered in which plaintiff alleged that the defendant in fraud of plaintiff had attempted to sell the stock in question, and claimed to have a declaration from the Court that under the agreement he was entitled to the stock in question, but no claim made for injunction. The trial judge declared the agreement valid, and referred the cause to a referee of the court to assess the damages and reserved costs and further directions until after the referee should have made his report. The referee made a report from which an appeal was taken to Mr. Justice Meredith who reduced the damages. From this a further appeal was taken to the Divisional Court where the damages were in-

Rule 1.

creased. This judgment was affirmed by the Court of Appeal. The defendant now launched a motion before the Registrar to affirm the jurisdiction of the Supreme Court to entertain an appeal from the Court of Appeal.

The registrar held that the action was one which under the old distinction which obtained between actions in law and equity could only have been brought by a bill in equity and therefore the case fell under s. 38 of the Supreme Court Act which gave a right of appeal whether the judgment below was final or interlocutory if the action was in the nature of a suit or proceeding in equity. On appeal to the Court this judgment was reversed, the Court holding the action was only a common law claim, and that the indorsement on the writ indicating a claim for equitable relief, which was abandoned in the statement of claim, and the fact that the trial judge had reserved further directions, did not make it a judicial proceeding in the nature of a suit in equity.

Windsor, Essex, &c., Rly Co. v. Nelles, 1 D.L.R. 156.

The respondents sued certain individuals, as well as the present appellants claiming specific performance of an agreement, or damages for the breach thereof, and the action was tried by Mr. Justice Clute and judgment pronounced 16th March, 1907, in favour of plaintiffs. In this judgment the court directed that in a certain event there should be a reference to a local master. An appeal was taken from this judgment to the Court of Appeal, where judgment was given April 21st, 1908, varying in some respects the judgment below. The reference then went on before the master who made a report, 7th April, 1909, which was varied on appeal by the Chief Justice of the Common Pleas Division, dated January 2nd, 1911. A motion was then made to the Chancellor by way of further directions and for judgment against the defendants pursuant to the report as varied, which was granted. An appeal was then taken to the Court of Appeal from both the judgment of the Chancellor and also from the judgment of the Common Pleas Division, when one judgment was given dismissing both appeals.

A motion was then made to the registrar to affirm the jurisdiction of the Supreme Court. The registrar held that an appeal lay from the judgment of the Chancellor which undoubtedly was a final judgment, but held that no appeal lay from the judgment of the Court of Appeal so far as it affirmed the judgment of the Chief Justice of the Common

Pleas, following *Clarke* v. *Goodall*, *supra*. On appeal the judgment of the Registrar was affirmed. Rule 1.

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

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

A form of Notice of Appeal will be found in the Appendix B., *infra*, p. 628.

A form of Notice of Motion to allow security will be found in the Appendix B., *infra*, p. 629.

A form of Notice of Motion by the appellant for an order affirming the jurisdiction will be found in the Appendix B., *infra*, p. 630.

A form of Order allowing the security will be found in the Appendix B., *infra*, p. 631.

A form of Order affirming the jurisdiction of the Court will be found in the Appendix B., *infra*, p. 631.

A form of Bond for security for costs will be found in the Appendix B., *infra*, p. 637.

A form of Affidavit of execution of Bond will be found in the Appendix B., *infra*, p. 638.

A form of Affidavit of justification of sureties will be found in the Appendix B., *infra*, p. 638.

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

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

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

A form of Notice of Motion by the respondent excepting to the jurisdiction of the Court, will be found in the Appendix B., *infra*, p. 632.

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

This Rule provides for an appeal from the Registrar to the Court by any party dissatisfied with the Registrar's decision on the question of jurisdiction. The party so dissatisfied should promptly serve a notice of appeal upon the opposite party, as this will have the effect of staying all further proceedings until the question of jurisdiction has been disposed of by the Court.

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

If the party against whom the appeal is being taken is of the opinion that the motion is made for the purpose of

delay or is frivolous and without merit, he may serve a notice of motion at least four clear days before the return day thereof and returnable before a Judge sitting in Chambers, asking that the motion by way of appeal should not operate as a stay of proceedings. If the Judge grants this application, it will be the duty of the appellant to proceed with the printing of his case and factum, and to have the appeal ripe for hearing at the session for which it would be set down in accordance with the Rules. Rule 88 provides that appeals from the Registrar to a judge shall be brought on for hearing on a Monday, and a list is prepared at the beginning of the year fixing the Judges' Rota which can always be obtained from the Registrar's Clerk so that the solicitor launching a motion to remove the stay of proceedings will know the Judge before whom the motion should be made. Rule 3.

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

A form of Notice of Appeal from the Registrar's order in matters of jurisdiction, will be found in the Appendix B., *infra*, p. 633.

A form of Notice of Motion to remove stay of proceedings will be found in the Appendix B., *infra*, p. 633.

A form of Order removing stay of proceedings, will be found in the Appendix B., *infra*, p. 635.

Rule 4. Whsn the appellant has not, within the time ahove limited, applied to have the jurisdiction of the Conrt affirmed, any respondent who desires to ohject to the jnrisdiction of the Conrt to hear the appeal shall, in ths Yukon Territory within thirty days, and in all other cases within fiftsen days after ths security has been approvsd hy the cc irt hslow, or within such tims as may be extsnded hy a Jndgs of ths Snpreme Court in Chamhers, ssrve the appellant, his sollcitor or agent, with a notics of motion to quash the appeal rstnrnabls at the thsn present, or on the first day of the nsxt ensning Session of ths Conrt, and in default thereof, in the evsnt of ths appeal heing quashed the respondsnt may, in ths discretion of the Conr' he ordsred to pay all or part of the costs of the appsal.

Rule 1 provided for an application being made by the appellant to determine the question of jurisdiction. Rule 2

Rule 4.

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

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

In the past it has been usual for the Judges below in hearing applications to approve the security, to hear argument upon the jurisdiction, of the Supreme Court, and when the opinion that there was no jurisdiction, to refuse to allow the security. Its determination proved futile, because the appellant immediately renewed his application to have his security approved to the Registrar of the Supreme Court, who held himself bound to deal with the motion without regard to the view of the Judge below, and on the other hand, the fact that the Judge below held that the case was appealable, and allowed the security, did not weigh with the Supreme Court if at the hearing, or upon a special motion to quash, the matter of its jurisdiction was raised before the Court.

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

The latter part of this Rule places primarily the obligation upon the respondent to move to quash the appeal at the earliest moment possible, as in default of his doing so, he may, in the discretion of the Court, even if he succeeds in quashing the appeal at the hearing, lose his own costs of the motion, and also be ordered to pay the costs which the

appellant has incurred by reason of the motion to quash not having been made promptly. Rule 5.

This is in accord with the practice which obtains in the Privy Council. Safford & Wheeler say (p. 724): "If an appeal is incompetent the respondent should move on petition to dismiss and not wait till the hearing. The objection that the appeal is incompetent owing to no special leave having been obtained ought to be taken at the earliest moment, but may be entertained at any stage of the appeal, and is not unfrequently taken when the appeal is called on before the arguments commence. Leave may sometimes then be granted *nunc pro tunc*."

The Supreme Court has no power to grant leave *nunc pro tunc* if the application is made more than 60 days after the judgment below; in such case it has, however, allowed the appeal to stand pending an appeal by the appellants to the Court of Appeal. *Vide supra*, p. 435.

Tanguay v. Price, 42 Can. S.C.R. 133.

The Court of its own motion raised the question of its jurisdiction and in quashing the appeal did so without costs because the respondent had not moved to quash as provided by the Supreme Court Rules.

Brompton Pulp & Paper Co. v. Bureau, Nov. 7th, 1911. Supreme Court Minute Book, p. 284, is to the same effect.

Vide Genereux v. Bruneau, supra, p. 294.

A form of Notice of Motion to Quash for want of jurisdiction, will be found in the Appendix B., *infra*, p. 635.

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

This Rule provides for a stay of proceedings where a motion to quash has been made by the respondent with a similar provision to that contained in Rule 2, permitting an application to a Judge of the Court to remove the stay and to require the appellant to proceed in perfecting his appeal, where, in the opinion of the Judge, the grounds for the appeal are not of sufficient weight to warrant a delay in the hearing of the main appeal.

Rule 6. A form of Notice of Motion to remove stay of proceedings will be found in the Appendix B., *infra*, p. 634.

CASE TO CONTAIN REASONS FOR JUDGMENT.

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

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

"Rule 1. The first proceeding in appeal in this Court shall be the filing in the office of the Registrar of a case pursuant to section 29 of the Act (now 73) certified under the seal of the Court appealed from.

"Rule 2. The case in addition to the proceedings mentioned in the said section 29 (now s. 73) shall invariably contain a transcript of all the opinions or reasons for their judgment delivered by the Judges of the court or courts below, or an affidavit that such reasons cannot be procured, with a statement of the efforts made to procure the same."

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

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

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

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

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

(e) Motions to dismiss under s. 82.

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

"73. The appeal shall be upon a case to be stated by the parties, or, in the event of difference, to be settled by the Court appealed from, or a judge thereof; and the case shall set forth the judgment objected to and so much of the pleadings, evidence, affidavits and documents as is necessary to raise the question for the decision of the Court." Rule 6.

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

A form of Certificate as to settlement of case, as to security and as to reasons for judgment will be found in the Appendix B, *infra*, p. 635.

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

A form of certificate of the Registrar or Clerk of the Superior Court will be found in the Appendix B, *infra*, p. 636.

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

The opinions of the judges must appear in the printed case, although they have been issued in the regular reports of the Court appealed from. The Registrar will not receive a case in which the reasons are not printed, if they could be obtained in time to be included when the case was printed.

Rule 6. **Attorney-General v. City of Montreal, 13 Can. S.C.R. 359.**

The printed case filed should contain the reasons for judgments of court below. Per Ritchie, C.J.

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

Mayhew v. Stone, 26 Can. S.C.R. 58. Per Taschereau, J.

Where a Court has pronounced judgment in a case before it and after proceedings in appeal had been instituted certain judges filed documents with the prothonotary purporting to be additions to their respective opinions in the case, *Held* that such documents were improperly allowed to form part of the case in appeal and could not be considered by the appellate Court.

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

Canadian Fire Ins. Co. v. Robinson, 9th Oct., 1901, Cont. Dig., 1105.

When the appeal was called for hearing counsel for the appellant applied for leave to file, as part of the case on appeal, the notes of reasons for a dissenting judgment in the court below which had not been delivered in time for printing as part of the record. A certificate by the Clerk of Appeals was annexed to a printed copy of the notes stating that it was a correct copy and that, owing to the Judge's absence from Canada, he had been unable to obtain the notes from him at an earlier date. The application was opposed by counsel for the respondents. The Court allowed the notes to be filed, and it was stated by His Lordship the Chief Justice, that the Court was always disposed to permit the filing of notes of the reasons for judgment of judges in the court below when they could be obtained.

Contents of Case.

Carrier v. Bender, Cont. Dig. 1101.

Per Gwynne, J., in Chambers. No application should be made with respect to the contents of the "case" or to dispense with printing any part of it, until it has been settled by agreement between the parties, or by a judge of the court below, pursuant to the statute.

As to dispensing with printing *vide* notes to Rule 14, *infra*, 514.

Exchequer Court and Railway Commissioners. Rule 7.

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

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

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

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

Bank of B. N. A. v. Walker, Cont. Dig. 1101.

Per Ritchie, C.J., in Chambers. In a British Columbia appeal from a judgment over-ruling demurrers an original case did not contain the formal order or judgment of the Court. Upon application, the agent of the respondents' solicitors consenting, it was ordered that the Registrar be at liberty to file the case as received without the formal order, and that the appellants might attach the formal order to the case and copies within six weeks from that date.

St. Stephen v. County of Charlotte, Cont. Dig. 1104.

Before the hearing, attention was drawn to the fact that the formal judgment or order of the court below was not in the printed "case." Upon counsel undertaking to have it taken out, printed and added to the "case," the Court consented to hear the appeal, the Chief Justice intimated that, in future, no appeal would be heard if the "case" did not contain the formal judgment of the court below.

Rule 8.

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

Re Daly, Daly v. Brown, 39 Can. S.C.R. 122.

Per Davies, J. The formal judgment not having been printed in case, the court said: "I would have been strongly inclined to urge that in accordance with the practice of the Court the appeal should have been dismissed or stand over until the record was properly completed and the decree actually taken out."

Vide notes to section 73, *supra*.

CASE MAY BE REMITTED TO COURT BELOW.

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

Correction of Case.

Although the case in appeal has been settled by the court below, a party dissatisfied by the omission of what he considers necessary material, may apply to a judge in Chambers of the Supreme Court to have the case remitted for correction.

Parker v. Montreal City Passenger Rly. Co., Cout. Dig. 1101.

Per Fournier, J., in Chambers. Where it appeared that certain papers which a judge of the court below had directed should form part of the case had been incorrectly printed, especially the factum of the respondent in said Court, which had been translated and in which interpolation had been made, the Registrar was directed to remit the case to the court below to be corrected.

In a proper case the Court itself will, at the hearing, direct the appeal to be remitted to the trial Court for the purpose of completing the record, but it is too late to make such an application after the appeal has been argued and stands for judgment.

The appeal must be heard upon the case as settled and certified to the Supreme Court. Rule 8.

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

At the hearing application on behalf of the appellant was made to have an affidavit added to the case filed. Per Ritchie, C.J., "The case has been settled and you cannot now amend it by adding what would be equivalent to new evidence."

Similar application to file a power of attorney referred to in a will which was the subject matter in dispute in the action was refused.

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

The Supreme Court in determining an appeal is bound by the case as transmitted as forming the material upon which the hearing was based; steps to amend should be taken before the decision on the appeal, and an application to amend the case after a judgment by the Supreme Court ordering a new trial comes too late.

Ætna Ins. Co. v. Brodie, Cass. Dig. (2nd ed.) 673.

Respondent (plaintiff) moved the full Court to have the case amended by adding his evidence when examined as a witness on behalf of appellant (defendant). For appellant it was contended that under Art. 251 of the Code of Civil Procedure, the evidence could not be considered, a declaration having been filed excluding it from the record. *Held*, that the application should have been made in Chambers, and not to the Court, and that, in any event, the evidence could not properly be made part of the case.

McCall v. Wolff, Cass. Dig. (2nd ed.) 673.

A judge of the court below having certified that the examination of one D. was made part of the case *quantum valeat*, *Held*, that the case must be remitted to the Court below to be settled in accordance with the statute and practice of the Court. It should appear clearly, whether the examination did or did not form a part of the case.

Davidson v. Tremblay, Cont. Dig. 1104.

The respondent had recovered damages for the death of his son, alleged to have been caused by the appellant's fault, and in the course of the argument of an appeal to the Supreme Court of Canada, the attention of the Court was

Rule 8.

directed to the absence of proof of record as to the relationship between the deceased and the plaintiff, and it was contended on behalf of the appellant that he had no *locus standi*. The hearing was enlarged for a day and upon the re-assembling of the Court, application was made on behalf of the respondent to have the cause remitted to the trial Court for the purpose of completing the record so as to include the judgments on motions in the courts below to reject the evidence put in on that point. The Court, after hearing counsel for both parties, ordered that the case should be remitted to the trial Court for the purpose of receiving evidence as to the relationship of the plaintiff and the identity of the deceased, and no other evidence, but as a condition precedent to such indulgence, that the plaintiff should pay to the defendants, appellants, the costs incurred by them in the Court of Queen's Bench, appeal side, and in the Superior Court for Lower Canada, such costs to be paid within a time limited, and in default, the appeal to stand allowed, and the action to be dismissed with costs to the defendants in all the Courts without further order, said costs to be taxed at the diligence of said respondents the record being retained in the Supreme Court office for the time mentioned, when, if it appeared that the costs had been taxed and paid, then that the record should be remitted to the trial Court for the purposes above mentioned. Gwynne, J., dissented and King, J., while concurring as to remitting the record, did not feel disposed to make the plaintiff pay the costs of the Court of Queen's Bench.

City of Montreal v. Hogan, 31 Can. S.C.R. 1.

On the hearing of the appeal objection was taken for the first time to the sufficiency of plaintiff's title, whereupon he tendered a supplementary deed to him of the lands in question. *Held*, following *Exchange Bank of Canada* v. *Gilman*, 17 Can. S.C.R. 108, that the Court must refuse to receive the document as fresh evidence cannot be admitted upon an appeal.

Mineral Products Co. v. Continental Trust Co., May, 1906.

In this case a lease which was not put in evidence at the trial, was referred to in a mortgage which formed part of the documentary evidence in the case. The Court thought the lease should be before it for the purpose of properly determining the issues in question on the appeal. Counsel

for the respondent consented, to avoid the case being sent back for new trial, that the Court should treat the lease as part of the record. Rule 9.

Vide notes to sec. 73, *supra*.

MOTION TO DISMISS FOR DELAY.

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

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

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

Section 82 of the Supreme Court Act provides as follows:

"82. If an appellant unduly delays to prosecute his appeal, or fails to bring the appeal on to be heard at the first session of the Supreme Court, after the appeal is ripe for hearing, the respondent may, on notice to the appellant, move the Supreme Court or a Judge thereof in Chambers, for the dismissal of the appeal.

"2. Such order shall thereupon be made as the said Court or Judge deems just."

The immediate consequence of failing to file the case with the Registrar of the Supreme Court within the 40 days after security has been allowed, is that the appellant lays himself open to a motion to dismiss for want of prosecution. If,

Rule 10.

therefore, the appellant sees that it will be impossible to print his case within the time given by the Rule, and has been unable to obtain or is unwilling to ask the consent of the respondent to any extension of time, he must apply before the expiry of the 40 days if possible, to the Registrar of the Supreme Court in Chambers, for further delay. The application should be on the usual four clear days' notice and be supported by affidavit, setting forth the reasons for making it. See Rules 54, 55, 56 and 57.

Motions to dismiss appeals ought not to be brought before the Court, but in the first instance should be made to a Judge in Chambers. *Martin* v. *Roy*, Cass. Dig. (2nd ed.), 682; *Halton Election Case*, 19 Can. S.C.R. 557; *Chicoutimi & Saguenay Election Case*, Cout. Dig. 1111.

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

In election appeals it was formerly considered that motions to dismiss for want of prosecution must be made to the Court; *North York Election Case*, Cass. Dig. 682, No. 71; but in the *Halton Election Case*, 19 Can. S.C.R. 557, the Court referred such a motion to a Judge in Chambers, and since then the Registrar has heard them. *Chicoutimi and Saguenay Election Case*, Cass. Dig. 682, No. 72; Cass. Prac. 75.

Herbert v. Donovan, Cont. Dig. 1103.

Motion on behalf of respondent to dismiss appeal for want of prosecution. The judgment of the Court of Appeal was pronounced 30th June, 1885. On 3rd July following appellant put in his bond for security for costs, which was allowed, but being under the impression that the time of vacation did not count, he took no steps to further prosecute his appeal. Notice of motion to dismiss was given 17th September, 1885, and was shortly afterwards heard before Henry, J., in Chambers, who held, that under the circumstances, the time for filing the case should be extended to 10th October, then instant. Motion dismissed without costs.

CERTIFICATE OF SECURITY GIVEN.

Rule 10. The case shall be accompanied by a certificate under the seal of the court below, stating that the appellant has given proper security to the satisfaction of the Court whose judgment is appealed from, or of a Judge thereof, and setting forth the nature

of the security to the amount of five hundred dollars as required by the said Act, and a copy of any bond or other instrument by which security may have been given, shall be annexed to the certificate. Rule 11.

A form of Certificate as to Security will be found in the Appendix, *infra*, p. 635, where it forms part of the certificate as to settlement of the case.

Vide notes to Rule 6, *supra*, p. 484.

S. 75. of the Supreme Court Act provides as follows:

"75. No appeal shall be allowed until the appellant has given proper security, to the extent of five hundred dollars, to the satisfaction of the Court from whose judgment he is about to appeal, or a Judge thereof, or to the satisfaction of the Supreme Court, or a Judge thereof, that he will effectually prosecute his appeal and pay such costs and damages as may be awarded against him by the Supreme Court.

"2. This section shall not apply to appeals by or on behalf of the Crown or in election cases, in cases in the Exchequer Court, in criminal cases, or in proceedings for or upon a writ of *habeas corpus*."

A form of Bond for Security for costs will be found in the Appendix, *infra*, p. 637.

A form of Affidavit of Execution will be found in the Appendix, *infra*, p. 638.

A form of Affidavit of Justification will be found in the Appendix, *infra*, p. 638.

Vide notes to section 75, *supra*, p. 448.

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

Rule 11. The case shall be printed by the party appellant, and twenty-five printed copies thereof shall be deposited with the Registrar for the use of the Judges and officers of the Court.

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

In most of the Provinces there are Rules of Court requiring the appellant to print for the purposes of any appeal to the highest appellate tribunal in the Province, a sufficient number of copies of the record or case in appeal to permit

Rule 11. of at least 25 copies being preserved by the Registrar of such Court so as to be available to either party in the event of the case being carried to the Supreme Court of Canada. In some of the Provinces, however, notably Quebec, the Registrar of the appellate Court frequently fails to enforce the rule, and as a result, when an appeal is taken, the appellant is unable to obtain a sufficient number of copies to comply with the rule of the Supreme Court which requires 25 printed copies to be filed. This has led to numerous applications to the Registrar of the Supreme Court for leave to deposit a smaller number of copies than that provided for by this rule, and where the cost of reprinting would be excessive, he has in the past frequently made orders dispensing with its provisions. Such orders, however, have sometimes occasioned inconvenience in the Registrar's office where the copies of the case have been distributed to the Judges more than once owing to the appeal not being disposed of when first called at the hearing. As a result the Registrar has been instructed to rigidly enforce this rule, except under very exceptional circumstances. It is therefore desirable that the members of the profession in the different provinces interested should exert their influence in the way of requiring a strict compliance with the local rules in this regard.

As pointed out in a note to Rule 9, the Rules of the Supreme Court contemplate that the case certified by the Registrar or Clerk of the court below should be a printed case, although the rule in this respect has been relaxed in appeals from the Yukon Territory, owing to the difficulty of complying with it.

Sub-section 2.

This is a new provision. The old Rules were defective in not providing that the appellant should furnish the respondent with a copy of the case, and except as a matter of courtesy or upon an application to the Registrar, the respondent was not in a position to obtain a copy of the case for the preparation of his factum or to be used on the argument. Without such a copy, it was impossible to properly refer to the page of the printed case, where the evidence was to be found to which counsel preparing the factum desired to call attention. The appellant should promptly comply with the demand of the respondent's solicitor as otherwise the hearing of the appeal may be delayed

by reason of the respondent being unable to file his factum wi'hin the time provided for by Rule 29. Rule 12.

Rex v. Love, 14th November, 1901. Cout. Dig. 1105.

In this matter an application was made to a Divisionnl Court of the High Court of Justice for Ontario in the name of the King, on the prosecution of Thomas Ratcliffe, for a rule *nisi* calling upon the Police Magistrate of the City of London to show cause why he should not bind over said Ratcliffe under s. 595 of the Criminal Code, 1892, to prefer and prosecute an indictment against one James Burns on the charge of perjury, preferred by the said Ratcliffe, upon which the Police Magistrate had acquitted and discharged Burns on the ground that he had no jurisdiction under s. 791, of the Code to summarily adjudicate upon the case. The Divisional Court refused the Rule *nisi* and an appeal from such refusal to the Court of Appeal for Ontario was dismissed. (*Rex* v. *Burns*, 1 O.L.R. 341). The private prosecutor thereupon, had the proceedings certified by the Registrar of the Court of Appeal and filed in the Supreme Court, but the same were not printed, nor were any printed copies of factums filed. Upon the case being called in the Supreme Court, November 14th, 1901, counsel appeared for the private prosecutor and no one contra. The Chief Justice (oral): "The appeal must fail, for if this is a criminal appeal there is no jurisdiction in the Court, as the Court of Appeal was unanimous in its judgment. On the other hand, if it is a civil appeal, it is not properly before the Court as the case and factums have not been printed."

FORM OF CASE.

Rule 12. The case shall be in demy quarto form. It shall be printed on paper of good quality, and on one side of the paper only with the printed pages to the left, and the type shall be pica, and the size of the case shall be eleven inches by eight and one-half inches, and every tenth line shall be numbered in the margin. Where evidence is printed there shall be a head-line on each page, giving name of witness, and shewing whether the evidence is examination-in-chief, cross-examination, or as the case may be. All exhibits shall be grouped together and printed in chronological order. All pleadings, judgments, and other documents shall be printed in full unless dispensed with by the Registrar. The title

Rule 12. page shall contain the name of the Court and Province from which the appeal comes, and the style of the cause, putting the appellant's name first, as follows:

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

and

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

The names of solicitors and agents may also be added.

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

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

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

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

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

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

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

"8. The case shall be in *demy quarto* form. It shall be printed on paper of good quality, and on one side of the paper only, and the type shall be small pica leaded, and the size of the case shall be eleven inches by eight and one-half inches, and every tenth line shall be numbered in the margin. An index to the pleadings, deposition, and other principal matters shall be added."

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

It has been thought desirable to require that the type shall be the same as is required in appeals to His Majesty in Council. Rule 12.

This Rule as to size of type is frequently ignored by practitioners for various reasons, sometimes because the local printer had not this kind of type on hand. This excuse cannot be received.

Beatty v. Matheweon, June 4th, 1908.

The acting Chief Justice calls the attention of appellant's counsel to the fact that the type in the printed cases is smaller than that provided by the new rules and that he is scarcely able to read it, and that in future the rule will be strictly enforced, and that in no case will the registrar receive the case when it does not conform thereto unless the leave of the Court or a judge is obtained.

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

Printing of the Evidence.

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

Exhibits.

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

Rule 12.

tiff's exhibits, or necessary for some other reason to complete the evidence as to the transaction in question.

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

This provision that exhibits must be printed in chronological order has been overlooked more frequently than any other rule with respect to the printing of the case.

Glindinning v. McLeod, May 29th, 1908.

The Court ordered the exhibits in case to be rebound in chronological order and that the registrar refuse hereafter to accept case or factum which fails to comply with new rules. Minute Book, p. 58.

Non-compliance with this provision has frequently resulted in the appellant being compelled to reprint a large part of his case. Even when the non-compliance appears to be of slight importance, the solicitor's fee for supervising printing has been disallowed in whole or in part. This provision is not a mere unnecessary technicality, but is of very considerable importance. Where exhibits refer to one another, *e.g.*, letters, time is saved in reading the case by the judges if the documents follow one another in chronological order.

Proceedings, Judgments, &c.

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

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

Use of Italics. Rule 12.

May v. McArthur, Cout. Dig. 1101.

Certain portions of the case had been italicized in the printing. The prothonotary certified that the printed case was the case agreed upon and settled by the parties. No affidavit was produced to contradict this certificate or to shew that the italics had been improperly used. Objection to case over-ruled. The case is to be printed so as to procure a certain degree of uniformity and all that is required is a substantial compliance with Rule 8. Ritchie, C.J., in Chambers.

Barnard v. Riendeau, Cout. Dig. 1105.

The Court drew attention to the impropriety of printing parts of the case on appeal in italics merely for the purpose of emphasizing particular phrases or paragraphs. Such a practice may be permitted in factums, but never in the printed case.

Title Page.

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

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

Rule 12.

has frequently entailed difficulty in preparing the formal judgment of the Court.

A form of Title Page will be found in the Appendix, *infra*. p. 641.

Index.

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

A form of Index will be found in the Appendix, *infra*. p. 642.

Ontario Appeals. The Supreme Court has consented to accept cases with printing on both sides of the page.

Privy Council appeals—procedure.

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

The new Privy Council Rules are printed in the appendix as C. 1, at p.

The Registrar of the Supreme Court received the following letters from the Registrar of the Privy Council:—

Privy Council Office, Downing Street,
London, S. W.
5th January, 1907.

"Sir,—

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

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

I am, Sir,

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

The Registrar of the Supreme Court of Canada."

Privy Council Office, Downing Street, Rule 12.
London, S. W.

Sir,— 4th September, 1911.

I am desired by the Lords of the Judicial Committee to draw attention to the advantage there is to litigants in having the Records in Appeals to His Majesty in Council printed in Canada rather than in London.

The Court appealed from is, in their Lordships' opinion, in a better position to exercise control over the printing than is possible here, where the facts may at any time be imperfectly understood; and, as a result, records can often be better arranged and their bulk effectively reduced.

Moreover, as you are aware, Canadian litigants generally prefer their appeals to be heard during the month of July, and in consequence there is sometimes a difficulty in satisfying the demand for appointments in the Privy Council Office to examine the proofs, coming as it does at one particular period of the year.

In conclusion, I am to refer to Sir Edward Hope's letter of the 5th January, 1907, in which he stated that "their Lordships of the Judicial Committee are prepared to accept the Records as printed for the Canadian Courts, with the necessary additions bringing the Case up to date, as the Records in Appeal in the Privy Council, if the former Courts adopt the form of printing now prescribed for Privy Council Records."

I have the honour to be,
Sir,
Your obedient Servant,
(Signed) CHARLES NEISH,
Registrar of the Privy Council.

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

The provisions for an appeal direct from the Provincial Courts in each Province to His Majesty in Council are set out, *supra*, p. 60. If in any such case it is desired to have the printing done in Canada, particulars as to the same will be found, *infra*, p. 505.

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

A form of Petition for special leave will be found in the Appendix, C. 6, *infra*, p. 691.

A form of Affidavit to be lodged with the petition will be found in the Appendix, C. 7, *infra*, p. 694.

Rule 12. *Petition—What to Contain.*

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

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

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

Canada Central Rly. Co. .. Murray, 8 Can. S.C.R. 313.

To an action on the common counts brought by T. M. and W. M. against the C. C. R. Co. to recover money claimed to be due for fencing along the line of the railway, the C. C. R. Co. pleaded never indebted and payment. The contract was signed on behalf of the C. C. R. Co. by one F., who controlled nine-tenths of the stock, and the C. C. R. Co. denied that F. had any power to contract on their behalf. A general verdict was found for T. M. and W. M. for $12,218.00. The Supreme Court held that it was properly left to the jury to decide whether the work performed of which the C. C. R. Co. received the benefit was contracted for by the company through the instrumentality of F. or whether they adopted and ratified the contract, and that the verdict could not be set aside on the ground of being against the weight of evidence.

Ritchie, C.J., and Taschereau, J., dissenting, held that there was no evidence that F. had any authority to bind the company.

The C. C. R. Co. then applied for leave to appeal to the Privy Council (8 App. Cas. 574) and in refusing leave Lord Watson said:—

"Now the questions raised appear to their Lordships to involve no issue except an issue of fact; that the Judges below have differed upon a question of fact with regard to an ordinary coutract of employment does not seem to be any reason for perniitting an appeal having regard to the terms of the statute which now regulates these appeals.

"Their Lordships are also desirous in this case to lay down the rule that they will in future expect parties who are petitioning for leave to bring an appeal before the Board to state suc-

cintly, but fully, in their petition, the grounds upon which they make that remand. They certainly expect that parties will confine themselves in future to the petition, and will not wander into extraneous matter, such as the record and proceedings over which this Board, until an appeal is permitted and the papers are sent to England by the proper authorities, have no control, and which they cannot accept on an *ex parte* statement, which an application of this kind is. Rule 12.

"Their Lordships will humbly report to Her Majesty that this petition ought to be dismissed."

Dumonlin v. Langtry, 57 L.T. 317.

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

"The questions of law involved in the action are, no doubt, of considerable importance to the litigants who are represented at the bar; and are also calculated to attract the attention of the public. At the same time their Lordships cannot regard these questions as being of general importance in the strict and proper sense of that term. Their determination, one way or another, will not affect other interests than those of the parties to the action. It will not be decisive of any general principle of law. In these circumstances the question which their Lordships have to consider is this: whether the case is in itself of such importance, or of such nicety, as to require that this Board, in the interests of justice, should review the unanimous determination of nine Judges of the Canadian Courts."

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

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

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

Duty of Solicitor Where Petition is Unintentionally Misleading.

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

The least that a petitioner can do, who has in fact misled their Lordships by presenting a petition not stating the true

Rule 12.

nature of the question raised in the court below, would be to come forward to say that he did not know, that he could not by ordinary inquiry have known, what the grounds of the judgment were, and therefore to excuse himself for not having brought the proper materials before the Committee.

Duty of Respondent Where the Petition is Misleading.

Ram Sabuk Bose v. Monmohini Dossee, L.R. 2 I.A. p. 71.

At p. 81 their Lordships say:—

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

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

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

Caviat.

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

A form of Caviat will be found in the Appendix, C. S. *infra*, p. 695.

Printing Record in Canada.

Rule 12.

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

The first step is the obtaining from the Registrar of the Supreme Court of a certified copy of the record in the Supreme Court, and if only part of the case in the Supreme Court has been printed, the solicitor should notify the Registrar of all documents of which he desires certified copies.

Rules 17 and 18 of the Privy Council Rules, Appendix C. 1 (*infra*, p. 668), provide as follows:

"17. The Registrar, as well as the parties and their Agents, shall endeavour to exclude from the Record all documents (more particularly such as are merely formal) that are not relevant to the subject-matter of the Appeal, and, generally, to reduce the bulk of the Record as far as practicable, taking special care to avoid the duplication of documents and the unnecessary repetition of headings and other merely formal parts of documents; but the documents omitted to be printed or copies shall be enumerated in a list to be placed after the index or at the end of the Record.

"18. Where in the course of the preparation of a Record one party objects to the inclusion of a document on the ground that it is unnecessary or irrelevant, and the other party nevertheless insist upon its being included, the Record, as finally printed (whether abroad or in England), shall, with a view to the subsequent adjustment of the costs of and incidental to such document, indicate, in the index of papers, or otherwise, the fact that, and the party by whom, the inclusion of the document was objected to."

In a letter to the writer from the Registrar of the Privy Council, January 8th, 1909, he calls special attention to these two rules.

When the solicitor has satisfied himself that all the material for the record is complete, he should proceed in the preparation of the Index, which is a matter requiring the greatest care. The attention of the writer has been called to this point by Mr. Hope, the Registrar of the Privy Council, in a letter in which, referring to the approved form of index to be found in the Appendix, C. 9, *infra*, p. 696, he says:

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

Rule 12. *Index.*

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

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

The documents themselves should be set out in chronological order [illegible]t, the pleadings in the cause; 2nd, the evidence in the order in which it was given in the Court of first instance, setting out the name of the witness and showing the page on which his examination, cross-examination or re-examination may be found: following this should appear the exhibits, set out as near as may be in chronological order. Next should appear the judgment of the trial Judge and reasons for judgment, and notice of appeal to the Court *in banc*. Having thus included all the documents and evidence in the Court of first instance, there will follow the proceedings in the Court *in banc*, with the formal judgment and reasons for judgment in that Court, and notice of appeal, appeal bond, and certificate of the Clerk of the Full Court with respect to the case on appeal to the Supreme Court of Canada. Following this will be the proceedings in the Supreme Court of Canada, including the factums, formal judgment and reasons for judgment, with a certificate of the Registrar verifying the transcript record on the appeal to the Privy Council; and finally, the order granting leave to appeal in the Privy Council. For form *vide infra*, p. 696.

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

It will be noted that this provision differs from what prevails in the Supreme Court, where it is required that the exhibits be printed in *chronological* order.

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

If the parties disagree as to the contents of the record, an application should be made to the Registrar of the Supreme Court to settle the same, and if the respondent is unnecessarily long in returning the draft, the appellant may similarly apply to the Registrar of the Supreme Court for an order calling

upon him to explain the reasons for the delay, and if neces- Rule 12.
sary make an order authorizing the appellant to proceed with the printing.

Rule 23 (*infra*, p. 673) provides as follows:

"23. As soon as the Appellant has obtained the type-written copy of the Record bespoken by him, he shall proceed, with due diligence, to arrange the documents in suitable order, to check the Index, to insert the marginal notes and check the same with the index, and generally, to do whatever may be required for the purpose of preparing the copy for the Printer, and shall, if the Respondent has entered an Appearance, submit the copy, as prepared for the Printer, to the Respondent for his approval. In the event of the parties being unable to agree as to any matter arising under this Rule, such matter shall be referred to the Registrar of the Privy Council, whose decision thereon shall be final.

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

The provision with respect to printing is as follows:

"Schedule A

"Rules as to Printing.

"I. All Records and other proceedings in Appeals or other matters pending before His Majesty in Council or the Judicial Committee which are required by the above Rules to be printed shall henceforth be printed in the form known as Demy Quarto (i.e., 54 ems in length and 42 in width).

"II. The size of the paper used shall be such that the sheet, when folded and trimmed, will be 11 inches in height and 8½ inches in width.

"III. The type to be used in the text shall be Pica type, but Long Primer shall be used in printing accounts, tabular matter and notes.

"I. The number of lines in each page of Pica type shall be 47 or thereabouts, and every tenth line shall be numbered in the margin.

"V. The price in England for the printing by His Majesty's Printer of 50 copies in the form prescribed by these rules shall be 38s. per sheet (eight pages) of Pica with marginal notes, not including corrections, tabular matter, and other extras."

The Rules of the Privy Council of 24th March, 1871, which has been repealed by the new rules, contained a specimen sheet shewing the type required to be used in printing the Record and Case, but this has not been carried into the new rules. At the same time it is desirable and perhaps

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necessary that in a general way this specimen sheet should be followed. It is therefore printed in Appendix C. (10) at p. 702.

The practice obtains in England now contained in Rule 26, *infra*, p. 674, of submitting to the respondent's solicitor the first proofs of the printed record, and it is desirable that this practice should be followed where the record is printed in Canada, and *pulls* of the subsequent revises should also be sent to the respondent's solicitor, and when the revise is in book form he should return it to the appellant's solicitor marked "approved for press", with the date.

The appellant should have a sufficient number of copies struck off to allow of 40 being transmitted to the Registrar of the Privy Council, under Rule 13, and 6 copies supplied to each party who has entered an appearance (Rule 27).

The 40 copies must be delivered to the Registrar of the Supreme Court, to be forwarded by him to the Registrar of the Privy Council.

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

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

Rules 13, 14 and 15 provide as follows:

"13. Where the Record is printed abroad, the Registrar shall, at the expense of the Appellant, transmit to the Registrar of the Privy Council 40 copies of such Record, one of which copies he shall certify to be correct by signing his name on, or initialling every eighth page thereof and by affixing thereto the seal, if any, of the Court appealed from.

"14. Where the Record is to be printed in England, the Registrar shall, at the expense of the Appellant, transmit to the Registrar of the Privy Council one certified copy of such Record, together with an Index of all the papers and exhibits in the case. No other certified copies of the Record shall be transmitted to the Agents in England by or on behalf of the parties to the Appeal.

"15. Where part of the Record is printed abroad and part is to be printed in England, Rules 13 and 14 shall, as far as practicable, apply to such parts as are printed abroad and such as are to be printed in England respectively."

Record partly printed in Canada. Rule 12.

In the appeal of *Bow, McLachlin* v. *Ship* "Camosun" the record or case in the Supreme Court was printed in accordance with the Privy Council rules. The transcript record therefore which was transmitted to England to be printed there consisted of this printed case and factums together with a copy of the judgment of the Supreme Court and reasons in typewritten manuscript. In forwarding the same the Registrar said:

"I beg to enclose herewith transcript record in the above appeal. You will notice that the case in the Supreme Court has been printed in accordance with the rules of the Privy Council and the parties are desirous of using this printing as part of the printed case on appeal to be incorporated along with the balance of the transcript record which is to be printed in England. It would appear to me that they are entitled to do this, under the Order of Her Majesty in Council of the 13th June, 1853, which refers to the record of proceedings being printed or *partly printed* abroad. I am also sending you by express thirty-seven copies of the printed case, which is all the appellants are able to furnish me."

In reply to this, on Oct. 28th, 1908, Mr E. S. Hope said:

"As regards the prints of part of the Record I have to say that as they are printed in accordance with the rules of the Privy Council the parties are entitled to use them on the hearing of the appeal as part of the record. Some inconvenience may be caused by the fact that the 'case in appeal' the 'factums' and the part now in manuscript are separately paged (the present index, e.g., will have to be supplemented), but the London solicitors will doubtless be able, after consultation with this Department, to do what is necessary to meet their Lordships' convenience in the matter."

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

The Case—Privy Council Appeals.

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

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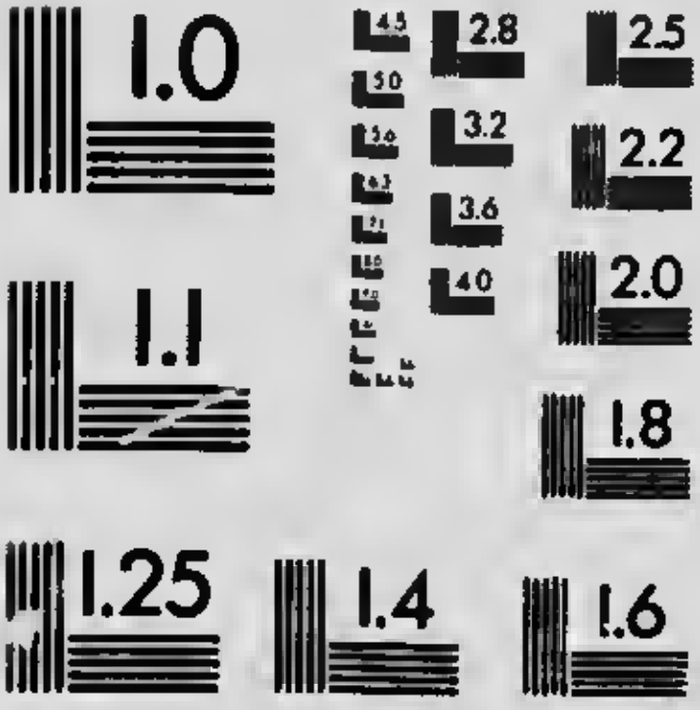

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case may be, and should show the orders made below, and in conclusion, the reasons or grounds of appeal should be shortly set forth. The party (appellant or respondent) should state the facts as they were proved in the Court below. He may also, if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

Specimen Case.

A specimen of a typical appellant's and respondent's case in the appeal of *Barrett* v. *Syndicat Lyonnais du Klondike* will be found in the Appendix C. (11), (12), *infra*, p. 706, 716, and in forwarding these to the writer Mr. Hope says as follows:

"With respect to the cases, it is a matter of frequent comment among London practitioners how much longer the cases drawn in Canada are than those drawn in England. Of the enclosed two cases, that of the appellant (which was settled in England) is rather shorter than the average, while that of the respondents (which was settled in Canada and which, though dealing with the same appeal, is double the length of the appellant's case), is rather above the average—the average length of Privy Council cases being about eight pages. In many appeals the cases appear to be modelled on the "Factums" filed in the Supreme Court, the result being that large portions of the Record are printed several—sometimes five—times over, viz., in the record proper in each of the factums, and in each of the cases. I may mention that large extracts from the record are not allowed on taxation as part of the "drawing" of cases. It is probable that the factums serve a different purpose from the "cases", and it might therefore save a good deal of trouble and expense if you could point out that, under the existing practice, the object of the Privy Council "cases" is not to present a complete argument of the case on one side or the other (which is reserved for the hearing), but merely to present, for the convenience of their Lordships, a short statement of the facts and proceedings in the Courts below, to emphasize or refer to (not re-print) the salient parts of the evidence or judgments, and to direct attention to the legal points at issue.

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

Lodging Case. Privy Council Appeals. Rule 12.

Each party after lodging 40 copies of his case with the Registrar must forthwith give notice thereof to the other side, and Rule 66 makes provision for filing a *case notice* when the other side has not lodged his case.

Costs in Privy Council Appeals.

Where the King's Order gives a successful appellant his costs in connection with the appeal to the Privy Council incurred in Canada, the practice obtains in the Privy Council Office of not taxing such costs in England, but reserving them to be taxed by the Registrar of the Supreme Court. These costs will, in addition to the usual costs taxable in England where the work is done there, include certain other items which necessarily are incurred in Canada in connection with such appeals.

A Form of the ordinary Bill of Costs taxed in the Privy Council to a successful appellant, will be found in the Appendix C. 13, *infra*, p. 735, and in the Appendix C. 14, *infra*, p. 742, will be found a form of bill of a successful appellant's costs incurred in Canada which in the King's order are expressly directed to be paid by the unsuccessful party.

In addition to this there will be found in the Appendix C. 15, *infra*, p. 743, a Bill of Appellant's Costs incurred in Canada in an Admiralty case, which has been revised by one of the taxing officers in the Privy Council. Certain items taxed off were held to be not properly party and party costs, and the reasons for the reduction will be found in the *Observations* of the Taxing Officer following the Bill. *Vide*, p. 747: *infra*.

Costs in Privy Council for printing done in Canada.

The following correspondence between the Registrar of the Supreme Court and the Registrar of the Privy Council gives some further information with respect to the costs in the Privy Council where the printing is done in Canada:—

March 19, 1909.

Sir Edward Hope,
Registrar of the Privy Council,
Whitehall,
London, England.

My dear Sir Edward,

There seem to be some doubts amongst Canadian lawyers who are accustomed to have the conduct of appeals to the Privy

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Council, with respect to the effect of the new Rule No. 76. You will remember that you wrote to me on the 5th January, 1907, encouraging the printing of records in Canada in cases of appeals, and as I had your letter printed in my book on the Supreme Court Rules, p. 36, it has led to an increase by practitioners in printing the records and cases in appeals in this country, instead of having the printing done under the supervision of English solicitors. Solicitors now inquire of me, in view of Rule 76, what provision there would be for getting allowed upon the taxation of the costs of the appeal, the expense and fees attendant upon the printing in Canada. It has been your practice to make provision in the King's Order for the costs in Canada in a clause which, in the Barrett v. Syndicat Lyonnais case, May 9th, 1907, read as follows: "And the respondents are to pay to the appellant his costs of this appeal incurred in Canada, and the sum of . . . . incurred in England."

Such costs, where the printing is done in England, are comparatively trifling, but would be very substantial if incurred in Canada. I have always had some doubt as to what my jurisdiction has been in taxing the costs of a Privy Council appeal incurred in Canada, as the King's Order does not specify the officer who shall tax the costs, my own view being that in so taxing, I have had delegated to me inferentially, the authority of the taxing officer in England. I do not see how the fact that, as Registrar of the Supreme Court, I am a taxing officer with respect to appeals in this Court, would give me authority to tax costs incurred in the appeal to the Privy Council.

I would be glad if you can assure me that in working out the new Rules it is proposed that the costs in the Colony will be always covered by the King's Order, where the successful party is given the costs incurred in England, and would humbly suggest that the King's Order should expressly provide that the costs in the Colony should be taxed by the taxing officer of the court appealed from according to the tariff which prevails in the Privy Council, where the work has been performed in England.

Yours very sincerely,
(Sgd.) E. R. CAMERON

Privy Council Office, Downing Street,
London, S. W.
2nd April, 1909.

Dear Mr. Cameron,

I am in receipt of your letter of the 19th ultimo. The question of the taxation of the costs of Canadian Appeals is a difficult one, and has become increasingly so within quite recent times, in proportion as the work done in Canada in connection with Privy Council Appeals has increased. I may say at once that their Lordships do not in the least desire to discourage Canadian lawyers from doing, in Canada, whatever work, relating to Privy council Appeals, they find can be more satisfactorily done in Canada than in England. But the difficulty of taxing Canadian bills of costs is thereby inevitably made more complicated, and it would seem highly desirable, in the interests of all parties concerned, that a clear understanding should be arrived at with regard to the best way of dealing with this matter.

There are three classes of items in Privy Council Bills of Costs: (1) those relating to work done entirely in England (e.g., retainer of, and instructions to, English Counsel, the items connected with the hearing of the Appeal, and others); (2) those relating to work done entirely in the Colony (e.g., the items relating to the obtaining leave to appeal; where there is an appeal as of right, the printing of the Record, where it is printed in the Colony, etc.); and (3) those which relate to work done partly in England, partly in the Colony. The first two classes of items create no great difficulty. It is in connection with the third class that the main difficulty arises. These items relate principally to "Cases" which are drawn in Canada, but settled in consultation with English Counsel in England, and thereafter printed in England. The practice in regard to the "Cases" has hitherto been to treat them entirely as though they had been drawn, settled and printed in England, and to allow the successful party the fees on that footing. In some instances, the actual items allowed are, from the nature of the circumstances, only allowed as a tentative, but, on the whole, probably quite fair method of estimating the amount which the losing party ought to pay: this being the real object of a taxation. The question suggests itself whether any better way of dealing with this matter can be devised, and that brings me to the difficulty raised by your letter. The King's Orders on Appeals always contemplate the taxation by the proper officer of the Court appealed from, and the payment by the losing party of the costs of the Appeal properly incurred in the Colony, and the clause you cite in Barrett's case is intended to cover these costs. I understand that in the Australian Courts it is the practice to make the King's Order a Rule of Court, and to tax the costs of the Appeal incurred in the Colony as any other costs are taxed in the Court in question. The only difference between Canadian and other Colonial Courts at present is that the proportion of costs of Appeals incurred in the Colony is usually much larger in Canada than elsewhere. But I cannot see any objection, on principle, to the costs of Canadian "Cases", which are drawn, settled and printed, in Canada, being taxed in Canada together with the other costs of the Appeal. Care must, however, be taken against such costs being inadvertently taxed twice over, first in England, and then in Canada. Rule 12.

I can answer the last paragraph of your letter by saying that the new Rules are not intended in any way to disturb the existing practice of providing by the King's Order for the taxation and payment of *all* costs properly incurred in Appeals, both those incurred in Canada and those incurred in England, and that there is no objection to using in the King's Order the words "costs of this Appeal incurred in Canada, such costs to be taxed by the Taxing Officer of the said Court." As to the scale of taxing, I have always understood that the Taxing Officer of the Court appealed from applied the scale of his own Court, and there might be some difficulty in adapting the English scale to the circumstances of the different Colonial Courts.

The principal difficulty arises, as I have already said, where the case is drawn in Canada, and settled and printed in England.

Rule 13.

Their Lordships always desire to meet the wishes of the Colonial practitioners and clients as far as practicable, and would be glad of any suggestions calculated to remove any inconveniences which have arisen, or may be likely to arise.

Believe me,
Yours very sincerely
(Signed) E. S. Hope.

CASE NOT TO BE FILED UNLESS RULES COMPLIED WITH

Rule 13. The Registrar shall not file the case without the leave of the Court, or a Judge, if the foregoing order has not been complied with, nor if it shall appear that the press has not been properly corrected, and no costs shall be taxed for any case not prepared in accordance with this order.

It is the duty of the appellant to avoid unnecessary expense, and the costs of any printed material not properly required, or of printing done in an unnecessary expensive style, will be disallowed on taxation.

The printing should average from forty to forty-seven lines to the page, and not be uselessly leaded or paragraphed. The price paid should be a reasonable price, and the affidavit of disbursements, in addition to stating that the printing charges have been paid, should state that such charges are usual and reasonable in the locality in which the work has been done.

For Form of Affidavit of Disbursements *vide infra*, p. 626.

DISPENSING WITH PRINTING ORIGINAL RECORD.

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

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

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

"RULE 10. Together with the case, certified copies of all original documents and exhibits used in evidence in the Court of first instance, are to be deposited with the Registrar, unless their

production shall be dispensed with by order of a Judge of this Court; but the Court or a Judge may order that all or any of the originals shall be transmitted by the officer having the custody thereof to the Registrar of this Court, in which case the appellant shall pay the postage for such transmission." Rule 14.

The old Rule which required certified copies of original documents and exhibits to be deposited with the Registrar, was never put in practice, and where it was considered necessary or desirable that the originals should be produced for the inspection of the Court, an order was obtained from the Registrar directing the Registrar, Clerk or Prothonotary of the court appealed from to forward the original record to the Supreme Court. In preparing the present rules, it was thought better that in all cases the original material in the Court appealed from should be transmitted to the Registrar along with the certified case. It will be the duty, therefore, of the appellant's solicitor to praecipe these papers from the custodian of them in the Court below, and to attend in the office of the Registrar after the case has been disposed of, and pay the necessary charges for their transmission back.

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

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

The Court announces that the practice of printing by consent of solicitors only such part of the settled case as they think necessary and by the same consent providing that the original record be sent to the Supreme Court and used on the appeal, is *entirely irregular*, and that in the absence of an order of this Court dispensing with printing, the Court will hereafter look only at the printed case.

NOTICE OF HEARING OF APPEAL.

Rule 15. After the filing of the case, a notice of the hearing of the appeal shall be given by the appellant for the next following session of the Court as fixed by the Act, or as specially convened for hearing appeals according to the provisions thereof, if

Rule 16. **sufficient time shall intervene for that purpose, and if between the filing of the case and the first day of the next ensuing session there shall not be sufficient time to enable the appellant to serve the notice as hereinafter prescribed, then such notice of hearing shall be given for the session following the then next ensuing session.**

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

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

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

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

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

SPECIAL NOTICE CONVENING COURT—FORM OF.

Rule 16. The notice convening the Court for the purpose of hearing election or criminal appeals, or appeals in matters of habeas corpus, or for other purposes under the provision of the Act in that behalf, shall, pursuant to the directions of the Chief Justice or Senior Puisne Judge, as the case may be, be published by the Registrar in the Canada Gazette, and shall be inserted therein for such time before the day appointed for such special session as the said Chief Justice or Senior Puisne Judge may direct, and may be in the form given in Form A, of the Schedule to these Rules.

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

This Rule has been passed to carry out the provisions of Rule 17, section 34 of the Supreme Court Act.

FORM OF NOTICE OF HEARING.

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

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

WHEN TO BE SERVED.

Rule 18. The notice of hearing shall be served at least fifteen days before the first day of the session at which the appeal is to be heard.

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

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

Nor does it apply to Exchequer appeals, or to appeals from the Board of Railway Commissioners, where the statute (R.S. c. 140, s. 82; and R.S. c. 37, s. 56, ss. 4) provides for a ten-day notice of hearing being given.

HOW NOTICE OF HEARING TO BE SERVED.

Rule 19. Such notice shall be served on the attorney or solicitor, who shall have represented the respondent in the Court below, at his usual place of business, or on the booked agent, or at the elected domicile of each attorney or solicitor at the City of Ottawa, and if such attorney or solicitor shall have no booked agent or elected domicile at the City of Ottawa, the notice may be served by affixing the same in some conspicuous place in the office of the Registrar, and mailing on the same day a copy thereof prepaid to the address of each attorney or solicitor.

Rule 20.

2. Where the validity of a Statute of the Parliament of Canada is brought in question in an appeal to the Supreme Court, notice of hearing, stating the matter of jurisdiction raised, shall be served on the Attorney-General of Canada.

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

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

C.P.R. v. Ottawa Fire Ins. Co., Feb. 19th, 1907.

After argument and judgment reserved, the Court gave the following directions: "The argument at bar raised some important questions as to the powers of the provincial legislatures to incorporate companies and as to what, if any, limitations upon that power are contained in the words "provincial objects" in s.s. 11, s. 92 of the B.N.A. Act. It also raised other questions of public importance as to the effect and meaning of the existing Dominion legislation authorizing licenses to be issued permitting provincial insurance companies to carry on their business throughout Canada. As these questions involve the powers alike of the Dominion Parliament and provincial legislatures to legislate, we think that the case upon these points should be reargued and that the Attorney-General of the Dominion and the Attorneys-General of the several provinces should be notified so that such of them as desired might be heard upon the question of the powers of the respective governments they represent."

"THE AGENT'S BOOK."

Rule 20. There shall be kept in the office of the Registrar of this Court, a book to be called "The Agent's Book," in which all advocates, solicitors, attorneys and proctors practising in the said Supreme Court may enter the name of an agent (such agent being himself a person entitled to practise in the said Court), at the said City of Ottawa, or elect a domicile at the said City.

There has been great laxity in complying with the pro- Rule 20.
visions of this Rule by lawyers who only occasionally have cases in the Supreme Court, and a neglect in this regard may often lead to serious consequences, as in default of a solicitor having an Ottawa agent, notice of motion may be sufficiently served under Rule 55, by posting the same in the office of the Registrar.

An agent should keep a general supervision over the procedure in an appeal; see that the appeal is duly entered and the fee paid on entering it; attend to the depositing of the factum and the inscribing of the appeal; keep his principal advised with reference to all interlocutory applications; be present in Court to hear judgment and notify his principal of the result; take out and serve on the agent of the other party an appointment to tax costs and settle the minutes of the judgment, and attend the taxation and settlement. Sometimes questions arise on the settlement of the minutes requiring a thorough acquaintance on the part of the agent with the nature of the appeal and the judgment. It is not very satisfactory to find after a judgment has been entered that an important provision has been omitted necessitating an application to the full Court at a considerable expense. Cass. Prac., 2nd ed., p. 139.

Conducting business with the Registrar's office by correspondence is an irregular practice. A solicitor should appoint an agent as required by the Supreme and Exchequer Court Rules.

Wallace v. Burkner, May 2nd, 1883.

In this case the appellant had no Ottawa agent, and mailed, addressed to the Registrar of the Court, his bond as security for the costs in connection with his appeal. The papers were not received so as to permit of the security being allowed within the time fixed by the Statute. The point having been taken during the argument, the appeal was struck from the list with costs.

A written authority should be filed with the Registrar authorizing either him or a solicitor to enter the name of the agent in the agent's book, when the principal does not enter the name himself. Per Ritchie, C.J., in Chambers.

The authority must be in writing and filed in the Registrar's office. No special form is required. The following is sufficient:

"I hereby authorize you to enter your name as my agent in the 'agent's book' of the Supreme Court of Canada, and

Rule 21. to act as such agent in all appeals to that Court in which I may be concerned (or in the following appeal, viz.,——), dated, etc."

The authority may be revoked by a subsequent one and a new entry in the book.

The practice obtains of allowing in an ordinary case $20 to the appellant's agent and $15 to the respondent's agent, unless the appeal has been inscribed more than once, in which case both agents are entiled to the fee of $20. Where the solicitors for the appellant or respondent practice in the City of Ottawa, the practice obtains of allowing half fees in such case.

SUGGESTION BY APPELLANT OR RESPONDENT WHO APPEARS IN PERSON.

Rule 21. In case any appellant or respondent who may have been represented by attorney or solicitor in the Court below shall desire to appear in person in the appeal, he shall immediately after the allowance by the Court appealed from, or a Judge thereof, of the security required by the Act, file with the Registrar a suggestion in the form following:

"A. vs. B.

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

(Signed) C.D."

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

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

Counsel for respondent moves for order to review taxation and to have counsel fee allowed to respondent, an advocate who argued appeal in person. Refused, Fournier and Henry, JJ., dissenting.

IF NO SUGGESTION FILED.

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

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

Rule 23.

Rule 23. When an appellant or respondent has appeared in person in the Court below, he may elect to appear by attorney or solicitor in the appeal, in which case the attorney or solicitor shall file a suggestion to that effect in the office of the Registrar, and thereafter all papers are to be served on such attorney or solicitor as hereinbefore provided.

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

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

Rule 24. An appellant or respondent who appears in person may, by a suggestion filed in the Registrar's office, elect some domicile or place at the City of Ottawa, at which all notices and papers may be served upon him, in which case service at such place of all notices and papers shall be deemed good service.

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

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

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

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

Rule 26.

CHANGING ATTORNEY OR SOLICITOR.

Rule 26. Any party to an appeal may, on an ex parte application to the Registrar, obtain an order to change hie attorney or eolicitor, and after eervice of euch order on the oppoeite party, all eervicee of noticee and other papers are to he made on the new attorney or eolicitor.

One attorney's name only should appear on record. In an application to change the name of solicitor, it was shewn that Messrs. A. and B. appeared on the case as solicitors and that A. had died. It was desired to have the name of B. alone inserted as solicitor. Application refused by the Chief Justice of the Supreme Court as unnecessary; *Gilmour & Rankin* v. *Bull*, 1 Kerr N.B. 94, referred to. *The Exchange Bank* v. *Springer*, 24th February, 1887. Cass. Prac., 2nd ed., p. 141.

SUBSTITUTIONAL SERVICE.

Rule 27. Where pereonal eervice of any notice, order or other document ie required hy theee Rulee, or otherwiee, and it is made to appear to the Court or a Judge in Chambere that prompt personal service cannot he effected, the Conrt or Jndge in Chambers may make snch order for snbstitutional or other service, or for the snbstitntion of notice for service by letter, puhlic advertisement, or otherwise, ae may he just.

This Rule is new. It is adapted from O. 67, r. 6 of the Rules of the Supreme Court (England), and with reference thereto it is said at p. 1224 (1912 edition), that there is doubt whether this rule has any application for service out of the jurisdiction. But if it has, it is limited in terms to cases where the writ of summons could be personally served as a matter of law.

Formerly there was no special provision for substitutional service.

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

One of the following methods is usually followed in making the substitutional service: Rule 27.

1. Service on a person.
2. By leaving a copy of the document at the residence or place of business of the person desired to be served.
3. By advertisement and through the post.

A form of Order will be found in the Appendix, *infra*, p. 621.

Proof of Service by Letter.

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

Effect of Service under Order.

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

Service upon Other Persons.

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

The order for service was made in the following cases:

Upon general agents (*Jones* v. *Cargill*, 11 L.T. 566); special agents (*Hobhouse* v. *Courtney*, 12 Si. 140); upon relations of a mortgagor who had absconded, the mortgagee undertaking to ask for a sale at trial (*Wolverhampton, etc., Co.* v. *Bond*, 29 W.R. 599). On solicitors who have acted for defendant in the subject-matter of the suit (*Hornby* v. *Holmes*, 4 Ha. 306; *Jay* v. *Budd* (1898), 1 Q.B. p. 16; cf. *Margrett* v. *Emmanuel*, 6 Times Rep. 453; on a former solicitor of defendant (Seton, p. 4, F. 3); on solicitor who had acted for defendant in another action, but who sent back the writ saying he did not intend to act for the defendant in any further litigation (*Watt* v. *Barnett*, 3 Q.B.D. 183, 363), in which case, however, the defendant so served was allowed after judgment to re-open the case on showing that he had had no notice of the proceedings and had a good defence. Where the defendant was in India, and his solici-

Rule 28.

tors refused to accept service on the ground that they had no instructions, an order was made for substituted service upon defendant's managing clerk at his offices and upon his solicitors, defendant to have six weeks to appear (*Armitage* v. *Fitzwilliam*, W.N. (75) 238; cf. *Jay* v. *Budd* (1898), 1 Q.B. 12 (C.A.); *Tottenham* v. *Barry*, 12 C.D. 797); on *feme covert* when husband out of jurisdiction (Seton p. 4. F. 3 (n.); *Bank of Whitehaven* v. *Thompson*, W.N. (77) 45); on person in communication with defendant (*Dicker* v. *Clarke*, 11 W.R. 635).

Election Cases.

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

AFFIDAVITS OF SERVICE.

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

FACTUMS TO BE DEPOSITED WITH REGISTRAR.

Rule 29. At least fifteen days before the first day of the session at which the appeal is to be heard, the parties appellant and respondent shall each deposit with the Registrar, for the use of the Court and its officers, twenty-five copies of his factum or points of argument in appeal.

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

The factum should be as complete as possible, but the Court has never refused leave to counsel to hand in for the use of the Judges a printed list of authorities cited at the hearing not already mentioned in the factum. An additional argumentative factum is never, or very rarely, received, and would not be accepted by the Registrar for distribution among the Judges without special leave of the Court. The additional list of authorities should be printed and copies sent to the Registrar as soon as possible after the argument of the appeal. The factum should not contain irrelevant

matter, or reproduce documents already printed in the case, when a reference to them will answer the purpose. Cass. Prac., 2nd ed., 143. Rule 30.

Criminal Appeals; Habeas Corpus Appeals.

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

Election Appeals.

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

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

Exchequer Appeals.

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

References by the Governor in Council.

Factums are required. Rule 80.

References by the Board of Railway Commissioners.

Factums are required. Rule 80.

Appeals from the Board of Railway Commissioners.

Factums are required. Rule 81.

CONTENTS OF FACTUM.

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

Part 1. A concise statement of the facts.

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

Rule 30. **Part 3. A brief of the argument setting out the points of law or fact to be discussed, with a particular reference to the page and line of the case and the authorities relied upon in support of each point. When a statute, regulation, rule, ordinance or by-law is cited, or relied on, so much thereof as may be necessary to the decision of the case shall be printed at length.**

In the Judicial Committee of the Privy Council what is called a *case* corresponds with factum in the Supreme Court. The provisions with respect to the case will be found printed, *infra*, p. 509. Safford & Wheeler, p. 871, say the practice in the Privy Council is to require, where there are a number of respondents, that when the interests are substantially the same they shall be represented by the same solicitor. Similarly Rule 64 of the Judicial Committee Rules provides that "Two or more respondents may at their own risk as to costs lodge separate cases in the same appeal."

In the first edition of this work it was said: "The number of appeals set down for hearing has largely increased during recent years. Treating the legal year as beginning on the 1st September, the cases heard in the Supreme Court in 1903-4 were 103; in the year 1904-5, 106; in 1905-6, 130; and in 1906-7, 140. With the organization of the new Provinces and the natural increase of business throughout the country, the work of the Court may reasonably be anticipated to increase in the future. The Judges, therefore, have had to consider the necessity of economizing the time to be allowed for the hearing of each appeal, and as a result of their inquiry and consideration, they have concluded, that if factums are prepared with greater care, the time allotted to counsel for addressing the Court could be very materially reduced. Accordingly, by this Rule very special provisions are made with respect to the preparation of the factum, and by Rule 38, the time allotted to counsel for argument, without special leave of the Court, is fixed at three hours for each side."

The provisions as to the contents of the factum are largely modelled upon the corresponding provisions of the Supreme Court of the United States, and in the first edition of this work, published immediately after the new rules came into force, it appeared to the writer that the best assistance he could give to counsel in preparing the factum in accordance with these Rules, was to furnish him with a well-prepared factum in an appeal to the United States Supreme Court; but after five years' experience it is possible to give a model

Canadian factum of appellant and respondent which fully comply with the requirements of this rule. *Vide* Appendix, *infra*, p. 646, 654. Rule 30.

Contents of Factum.

Vernon v. Oliver, 11 Can. S.C.R. 156.

The plaintiff's factum containing reflections on the conduct of the Judges of the Court below, was ordered to be taken off the files as scandalous and impertinent.

Coleman v. Miller, 23 February, 1882, Cass. Dig. 2nd. ed., 683.

Objections to a factum as containing unnecessary matter may be urged at the hearing.

Wallace v. Souther, Cout. Dig. 1102.

Improper reflections upon the conduct of the Judges in the Court below will be ordered to be struck out of the factum and subject the solicitor to the censure of the Court or loss of his costs.

Fairman v. City of Montreal, 13th Mch., 1901, Cout. Dig. 1105.

The Court drew attention to the uselessness of translations of the notes of reasons for judgment in the Courts below which were stated to be quite irregular. The judgments and reasons for judgment as printed in the case are the proper material to be read by the Court on an appeal.

The translations of factums and the judgments or opinions of the Judges of the Courts below may be ordered by any judge of the Supreme Court when deemed necessary.

Bing Kee v. Yick Chong, April, 1910.

In this case a motion was made in Chambers to strike from factum a reference to certain evidence. The following judgment was given by

Idington, J.:

"The case was inscribed within the terms of consent to extension and must stand on the list.

The factum cannot be treated as a nullity because it has included what it should not.

The appellant, however, should not include in his factum evidence which formed no part of the case in the court below and forms no part of the case settled for appeal here.

Although no precedent can be found for my dealing with such complaint of a factum, I think the power exists and ought to be exercised.

Rule 30.

I suggested counsel for the appellant undertaking not to use any part of the factum covering material not included in the appeal book unless and until permitted by the full Court upon a substantive motion for such permission, to be heard as the court may direct the factum might stand.

Counsel having assented to this an order may go dismissing the motion—costs to be costs in the appeal to the respondent in any event.

I do not wish to make of such merciful dealing a precedent, but there have been so many offenders putting into factums what should not have appeared therein, and omitting therefrom much that ought to have been found therein, and others disregarding the order in which the rules provide for the material appearing, and yet all escaping punishment, that I look on this as if a first offence.

I have to call attention to the rule empowering the Registrar to reject factums not conforming to the rules."

Penalty for non-compliance with Rule.

Rule 30, February Session, 1908. The Chief Justice calls attention of counsel to the fact that no attempt has been made in the Quebec appeals to comply with the new rule as to factums, and that in such cases hereafter when this occurs, costs should be disallowed.

Printing Statutes and Rules.

Green v. Blackburn. June 12th, 1908. Minute Book.

The presiding judge points out that the appellant's factum does not reprodnce *in extenso* the articles of the statute upon which his case depends as required by the new rule as to factums, and that hereafter it will be required that this be strictly complied with.

In *Smith* v. *Sugarman*, May 10th, 1910, the Court announces that hereafter an appropriate punishment to be inflicted upon solicitors for not printing in their factums statutes and rules relied on, will be to disallow all costs of such factums.

In *Alberta Rly., etc., Co.* v. *The King*, March 2nd, 1911, the same direction given, and also in *Winnipeg* v. *Brock*, Oct. 17th, 1911.

Filing Factum.

Dawson v. McDonald, 13th December, 1879, Cass. Dig., 2nd ed., 683.

Motion to dismiss appeal refused, but appellant requiring further indulgence to file factum ordered to pay costs of motion.

Other Cases. Rule 30.

O'Brien v. The Queen, 10th June, 1878, Cass. Dig., 2nd ed., 686.

Motion to have appeal heard at the then present session, notwithstanding case and factum of appellant not filed 30 days before the first day of session, and factum not yet filed of behalf of the Crown. Counsel for Crown consenting. Refused.

Appeal submitted on Factums.

Lawless v. Sullivan, Cout. Dig. 1118.

By consent of both parties an appeal may be submitted on factums and reporter's notes of a former argument before the Court.

Charlevoix Election Case, Valin v. Langlois, 7th June, 1879, Cass. Dig., 2nd ed., 684.

Court refuses to allow appeal to be submitted on the factums, but decides it must be orally argued.

McKenzie v. Kittridge, 18th June, 1879. Cass. Dig., 2nd ed., 684.

Where a re-hearing became necessary owing to a change in the personnel of the Court, the Judge who had not heard the appeal consenting, and counsel for all parties desiring it, the Court assented to the appeal being submitted on the factums.

Muirhead v. Sheriff, 2nd June, 1886, Cass. Dig. 2nd ed., 684.

On application of counsel for appellants, counsel for respondent assenting, the Court consented to have appeal submitted on factums without oral argument.

Hall Mines v. Moore, Cout. Dig. 123.

The appeal had been regularly inscribed on the roll for hearing at the May sittings of the Supreme Court of Canada, and on the 18th May, 1898, the case being called in the order in which it appeared upon the roll, no person appeared on behalf of the appellant. Counsel appeared for the respondent and asked that the appeal should be dismissed for want of prosecution. The Court referred to the fact that the case had been called in its proper place on the roll on the previous day and allowed to stand over because counsel were not present on the part of the appellant, and the appeal was

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dismissed with costs. On 20th May, 1898, application by motion was made on behalf of the appellant to have the appeal reinstated and restored to its place on the roll for hearing on such terms as the Court might deem appropriate, the ground stated for requesting such indulgence being that counsel for the appellant were under a misapprehension as to the time when the hearing was to take place. The motion was opposed by counsel for the respondent, who objected that proper notice of the motion had not been given as required by the rules of practice. The Court refused to hear the motion or to make an order staying the issue of the certificate of the judgment already rendered dismissing the appeal, but under the circumstances, the motion was dismissed without costs.

It was subsequently remarked by the Chief Justice with respect to this case that had an application been made on behalf of the appellant to have the appeal disposed of upon the factums, the Court would not have dismissed the appeal.

Parker v. Montreal City Passenger Rly. Co., Cout. Dig. 1102.

When an appeal inscribed for hearing *ex parte* was called, counsel for respondents asked leave to be heard and to be allowed to deposit factum. Counsel for appellant consented. The application was granted.

Western Counties Rly. Co. v. Windsor & Annapolis Rly. Co., 6th Feb., 1879, Cass. Dig., 2nd ed., 683.

A point is raised at the hearing not in factum, and counsel for respondent therefore objects that he is not prepared to argue it. The Court adjourns hearing for a week.

Levis Election Case, Belleau v. Dussault, Cont. Dig.. 1119.

When the appeal was called for hearing, counsel for the appellant appeared, no one appearing on behalf of the respondent. It appeared that the appellant's factum had not been filed until the morning of the day on which the appeal was so called, instead of three clear days before the first day of the session, as required by Rule 54. The Court refused to hear the appellant *ex parte* as the case was thus irregularly inscribed.

Lord v. Davidson, Cout. Dig. 1102.

When an appeal inscribed for hearing *ex parte* was called, counsel for respondent asked leave to be heard.

although his factum had not been deposited within the time provided by the rules. Counsel for appellant consented. *Held*, that the rules respecting factums must be strictly complied with and the Registrar should not receive factums tendered after the time fixed in the rule. Counsel for respondent was heard, but this case was not to be considered a precedent. Rule 30.

Whitfield v. Merchants Bank of Canada, Cout. Dig. 1103.

The rules respecting factums must be strictly complied with, and the Registrar should not receive factums tendered after the delay specified in the rule. Default by the respondent to file a factum does not justify a similar default on the part of the appellant or relieve him from the consequences of a motion to dismiss under S. C. Rule 26 (now 32).

FACTUMS IN UNITED STATES SUPREME COURT.

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

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

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

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

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

(3) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point. When a statute of a State is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length."

Rule 30. The following are decisions of the United States Supreme Court on Rule 21:—

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

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

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

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

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

By the uniform course of decision, no exceptions to rulings at a trial can be considered by the Supreme Court, unless they were taken at the trial, and were also embodied in a formal bill of exceptions presented to the Judge at the same term, or within a further time allowed by order entered at that term, or by standing rule of Court, or by consent of parties; and, save under very extraordinary circumstances, they must be allowed by the Judge and filed with the clerk during the same term. (Michigan Ins. Bank v. Eldred, 143 U. S. 293, 298; Waldron v. Waldron, 156 U. S. 361, 378.)

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

The Supreme Court has repeatedly held that where a party upon a trial excepts to a ruling of the Court, but does not stand upon such exception, and acquiesces in the ruling and elects to proceed with the trial, he thereby waives his exception,

(Campbell v. Haverhill, 155 U. S. 610, 612); where, for example, Rule 30.
at the close of the plaintiff's evidence, on a trial before a jury, the defendant moves the Court to direct a verdict for him on the ground that the plaintiff has not shown sufficient facts to warrant a recovery, and the motion is denied, and the defendant excepts to the ruling of the Court, the exception fails, if the defendant does not rest his case, but afterwards introduces evidence. (Robertson v. Perkins, 129 U. S. 233; Accident Ins. Co. v. Crandall, 120 U. S. 527, 530; Grand Trunk Rail way Co. v. Cummings, 106 U. S. 700).

And when the statute of a State dispenses, by its provisions, with exceptions and bills of exceptions, this will not control the proceedings in the United States Courts, either in civil or criminal cases, inasmuch as the power to review any judgment or decree of a Court of the United States depends upon the acts of Congress and the Rules of practice which the Supreme Court recognizes as essential in the administration of justice. (St. Clair v. United States, 154 U. S. 134, 153).

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

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

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

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

Rule 30. appears from the bill of exceptions, or otherwise, in the record, that the facts were such as to make them material to the issue that was tried. (New York, &c., v. Madison, 123 U. S. 524, 526).

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

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

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

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

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

HOW TO BE PRINTED.

Rule 31.

Rule 31. Tha factum or points for argumant in appeal shall he printed in tha aame form and manner as hereiuhefora provided for wlth ragard to the caae in appeal, and ahall uot be received by the Registrar unleee the requirements hereinbefore contained, as regarda the case, are all complied with.

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

Rnle 32. If the appellant doee not deposit hie factum or points for argument in appeal within the time limlted hy Ruie 29, th.e respondent shall he at liberty to move to diemies the appeal on the ground of nndue delay under the provisions of the Act in that behalf.

APPELLANT MAY INSCRIBE EX PARTE IF FACTUM NOT FILED.

Ruie 33. If the respondent faile to deposit hie factum or pointe for argument in appeal within the said prescrihed perlod, the appellant may set down or lnacrihe the cause for hearing ex parts.

SETTING ASIDE INSCRIPTION EX PARTE.

Rule 34. Such aetting down or lnecription ex parte may he set aside or discharged upou au application to a Judge in Chambera sufficiently supported by affidavits.

REGISTRAR TO SEAL UP FACTUMS FIRST DEPOSITED.

Ruls 35. The factum or pointa for argument in appeal first deposited with t'e Registrar ehall be kept hy him under seal, and shall in no case he commnnicated to the opposite party until the latter shall himself bring in and depoeit his own factum or poiute.

Rule 36.

INTERCHANGE OF FACTUMS.

Rule 36. Ae soon ae hoth parties shall have depoeited thei: eaid factnm or points for argument in appeal, each party ehall, at the requeet of the other, deliver to him three copiee of hie said factnm or points.

REGISTRAR TO INSCRIBE APPEALS FOR HEARING

Rule 37. Appeals shall he set down or inecrihed for hearing in a hook to he kept for that purpose hy the Registrar, at least fourteen daye before the first day of the eeseion of tne Court fixed for the hearing of the appeal. But no appeal shall be so inecrihed which shall not have heen filed twenty clear days before said firet day of said seseion, without the leave of tne Court or a Judge in Chamhers.

By section 32 of the Supreme Court Act, the regular sessions always begin on a Tuesday. The case, therefore, should be filed not later than the third Tuesday preceding the opening of the session (20 clear days). The factums, under Rule 29, should be deposited not later than the third Saturday preceding the opening of the session, and the appeal should be inscribed on the third Monday preceding—that is the Monday following the last day for depositing the factums. If the respondent has failed to deposit his factum the appeal must be inscribed for hearing *ex parte*. This inscription *ex parte* can only be vacated on application supported by affidavit accounting for the delay. A mere consent on the part of the appellant or his solicitor would not be sufficient. (Cass. Prac., 2nd ed., 145).

The respondent cannot inscribe the appeal even though the appellant make default in inscribing. His remedy is by motion to dismiss for want of prosecution. See section 82 of the Supreme Court Act, and notes thereon (Cass. Prac., 2nd ed., 146).

There are special rules relating to the inscription of election appeals, exchequer appeals, criminal appeals, and appeals in matters of *habeas corpus*, and Board of Railway Commissioners.

Rule 37.

Election Appeals.

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

The Registrar will inscribe for hearing after hearing the application provided for in Rule 70. *Vide* Election Act, *infra*, p. 763.

Exchequer Appeals.

The inscription in Exchequer appeals is also by the Registrar, and not by the solicitor. (Exchequer Court Act, R.S., c. 140, s. 82). *Vide* Exchequer Court Act, *infra*, p. 749.

Criminal and Habeas Corpus Appeals.

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

Board of Railway Commissioners.

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

Election appeals take precedence on the inscription list. On special application criminal and *habeas corpus* appeals have been given an early hearing during the session. Exchequer appeals have been placed in the several lists according to the respective provinces in which the cases were tried. Cass. Prac., 2nd ed., 147. *Vide* Railway Act, *infra*, p. 790.

Ex Parte Inscription.

Kearney v. Kean; Domville v. Cameron, Cout. Dig. 1118.

On an appeal being heard *ex parte*, the Court requires an affidavit proving service of notice of inscription for hearing.

Appeal Perfected After Day of Inscription.

Bank of Toronto v. Les Cure, etc., de La Ste. Vierge, Cout. Dig. 1119.

In an appeal perfected after the day for inscribing, an application was made by counsel for appellant, counsel for

Rule 38.

respondent consenting, to have appeal heard at the session of the Court then proceeding. *Held*, that the appeal must come on in the regular way the following session, there being no circumstances shewn to induce the Court to interfere to expedite the hearing.

Grip Printing & Pub. Co. v. Butterfield, Cout. Dig. 1120.

Counsel for appellant moves for leave to inscribe appeal for hearing, though the case had been filed after the time limited for inscribing, all parties being desirous of having appeal heard and consenting. Motion refused.

Striking an Appeal from the List.

Parker v. Mortreal City Passenger Rly. Co., Cout. Dig. 1120.

A motion to strike an appeal off the list of appeals inscribed for hearing must be on notice.

Vide notes to section 90.

COUNSEL AT HEARING.

Rule 38. Except by leave on special grounds no more than two counsel on each side shall be heard on any appeal, and but one counsel shall be heard in reply. Three hours on each side will be allowed for the argument, and no more, without special leave of the Court. The time thus allowed may be apportioned between the counsel on the same side at their discretion.

Former Rule 32 read as follows:

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

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

Coleman v. Miller, Cout. Dig. 1106.

The Court heard a third counsel for appellants, notwithstanding the Rule 32, as the laws of two provinces were in question, and there was a cross-appeal. It was stated that the practice permitted under the special circumstances should not be considered a precedent.

Russell v. Lefrancois, Cout. Dig. 1106.

When one counsel from Quebec and one from Ontario had been heard for respondent, a third counsel (from Quebec) was heard on French authorities applicable.

Jonee v. Fraeer, Cout. Dig. 1107.

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On special application, third counsel was heard, intricate questions of law having to be argued, there being a cross-appeal and counsel stating that the Court of Queen's Benelt for Lower Canada had also relaxed its rule which forbids the hearing of more than two counsel on each side. The Court stated that the fact of there being a cross-appeal was not itself suffieient ground to cause the Court to depart from its rule.

In the Privy Counell the practice is to hear two counsel on each side and no more, and to allow the appellant's counsel to begin and also to reply. If there are several parties in one appeal who are in different interests, the practice is to hear them by separate counsel, but if they are in the same interest the court requires them to arrange so as to be heard by the same counsel. *Macpherson*, P.C. Prac., p. 125.

Power of counsel to bind client.

Counsel has complete authority over the suit, the mode of conducting it and all that is incident to it, assenting to a verdict; agreeing not to appeal; consenting to refer, or to a compromise, unless he has received positive instructions to the contrary. (*Vide* Annual Practice, 1912, Vol. II., p. 464.) The same authority is vested in a solicitor.

Respondent not appearing.

It is unsatisfactory to the court when the respondent does not appear and take part in the argument, but nevertheless when it is satisfied that all parties have had notice of the proceedings and an opportunity of attending, then the court does not hesitate to entertain the case and to pronounce judgment. *Strachan* v. *Dougall*, 7 Moo. P.C. 365.

Three Hours for Argument.

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

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

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

Rule 38.

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

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

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

The practice in the Supreme Court is to delay making an application for additional time until counsel has exhausted what is given him by the rules.

Counsel—Right to Begin.

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

Inasmuch as the statutes should *prima facie* be considered within the jurisdiction of the Legislature passing them, any one attacking a statute should begin. Therefore counsel for Dominion Government was first heard.

In re "Liquor License Act, 1883," Cout. Dig. 1106.

Where a question of legislative jurisdiction is raised, the party attacking the validity of an Act should begin. In the case in question, counsel for the provinces were first heard. Only one counsel was heard in reply for all the provinces.

In re "Canada Temperance Act, 1878," (County of Perth), Cout. Dig. 1106, 28th Oct., 1884.

Question whether the Canada Temperance Act, 1878, section 6, had been complied with, and whether proclamation should issue under section 7. (See "Canada Temperance Act, 1878," 3.)

The Court directs the parties seeking to sustain the affirmative, and wishing to shew that the proclamation should issue, to begin.

In re Representation in the House of Commons, 33 Can. S.C.R. 475. Rule 38.

A reference was made by the Governor-General in Council to the Supreme Court as follows:

"In determining the number of representatives in the House of Commons to which Nova Scotia and New Brunswick are respectively entitled after each decennial census, should the words 'aggregate population of Canada,' in sub-section 4 of section 51 of the British North America Act, 1867, be construed as meaning the population of the four original provinces of Canada or as meaning the whole population of Canada including that of provinces which have been admitted to the Confederation subsequent to the passage of the British North America Act?"

The provinces of New Brunswick and Nova Scotia attacked the construction placed upon sub-section 4 of section 51 of the B.N.A. Act, and the Attorney-Generals of the other provinces of Canada were notified of the hearing and counsel for the Province of Ontario and the Province of Quebec were heard on the argument. Counsel for the provinces were first heard. *Vide* also notes Rule 80.

Foreign Counsel.

Halifax City Rly. Co. v. The Queen, Cont. Dig. 1118.

Counsel residing in the State of New York wishing to be heard on behalf of appellants in an appeal pending before the Supreme Court of Canada was refused.

But in *The Ship "Calvin Austin"* v. *Lovitt*, 35 Can. S.C.R. 616, a member of the Massachusetts Bar was heard on behalf of the appellants.

Illness of Counsel.

Consumer's Cordage Co. v. Connolly, 11th Oct., 1900. Cont. Dig. 1120.

On the calling of the case in the order as inscribed on the roll for hearing, it was shewn that leading counsel for the appellant had been taken suddenly ill and was unable to be present in court. The hear ig was consequently postponed till a subsequent day during the session, in accordance with the usual practice of the Court in such cases.

Adamson v. Adamson; Quebec Ins. Co. v. Eaton, Cont. Dig. 1107.

Motion to postpone hearing till the following session on the ground of unexpected illness of counsel retained. Granted.

Rule 38.

Counsel Leading.

No rule has been laid down as to whether senior or junior counsel shall first address the Court. In cases from the Province of Quebec it was the practice for the junior counsel first to address the Court, but in *Dumphy* v. *Martineau*, June 10th, 1908, before calling upon counsel, the presiding judge stated that at the last session of the court the Chief Justice had pointed out how it was desirable in Quebec cases that the practice which obtains in appeals from the other provinces of Canada should be followed and that the senior in all cases should precede the junior in addressing the court. Mr. Lafluer expresses his approval of the rule suggested and states that as soon as the view of the Supreme Court becomes known to the Bar of Quebec it would be complied with, but in the present appeal counsel had prepared their respective arguments in view of the opening and statement of their case being presented by the junior counsel.

Barthe v. Huard, Nov. 3rd, 1909.

The Court following the previous decision affirm the above ruling as to order in which counsel shall address the Court.

Jones v. Burgess, Mar. 13th, 1911.

A different rule prevailing in New Brunswick, and counsel stating he had been taken by surprise, the rule is waived in this instance.

Motions.

As a rule only one counsel on each side is heard on the argument of a motion.

Other Cases.

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

An application was made on behalf of respondent to have an appeal postponed to a lower position on the list of cases inscribed for hearing, a consent in writing signed by the solicitors for both parties was filed and it was shewn that respondent's counsel was seriously ill and unable to attend at the time when the hearing on the appeal would be likely to come on in its position upon the roll. It was accordingly directed by the Chief Justice that the case should be placed in a lower position upon the roll than that in which it had been inscribed.

Halifax City Rly. Co. v. The Queen, Cont. Dig. 1106. Rule 39.

The appellants do not appear by counsel at the hearing, but Mr. O'B. appears and states that he is the president and proprietor of the railway company, appellants, and wishes to be heard on their behalf. Refused. Appeal ordered to stand over till next session.

POSTPONEMENT OF HEARING.

Rule 39. The Court may in its discretion postpone the hearing until any future day during the same session, or at any following session.

The power of altering the order of hearing appeals is reserved to the Court by section 90 of the Supreme Court Act. This applies only to changing the order of the list for the session at the time being held. The above rules goes further and provides for the postponement of an appeal to any following session. If both parties consent to the postponement of the hearing of an appeal on the list, counsel can either notify the Court when the appeal is called or inform the Registrar in writing of their wish to withdraw the appeal, and the Registrar will inform the Court when the appeal is called. As a rule when an appeal is merely withdrawn it should be re-inscribed for hearing by the appellant on the usual *praecipe* filed with the Registrar. When the Court directs an appeal to stand for hearing at a subsequent session, no re-inscription is required, as the Registrar will place the appeal on the list, in accordance with the direction of the Court. Cass. Prac., 2nd ed., 148.

If the case does not contain the formal judgment of the Court below, or the reasons of the Judges of the Court below, or the certificate or affidavit required by Rule 6, that such reasons could not be procured, or a proper index, or is in any other respect imperfect, the Court may direct the postponement of the hearing. *Kearney* v. *Kean*, Cont. Dig. 1101; *Lewin* v. *Howe*, 14 Can. S.C.R. 722; or place it at the foot of the list to permit missing matter to be added. *Wallace* v. *Souther*, Cont. Dig. 1102.

If it appears that the respondent has taken an appeal to the Privy Counsel from the same judgment, the Court will postpone the hearing until such appeal is decided. *McGreevy* v. *McDougall*, Cont. Dig. 74; *Eddy* v *Eddy*, Cont. Dig. 130; *Bank of Montreal* v. *Demers*, Cont. Dig. 131; *Ottawa Electric* v. *City of Ottawa*, 5th Nov., 1906.

Rule 40.

DEFAULT BY PARTIES IN ATTENDING HEARING.

Rule 40. Appeals shall be heard in the order in which they have been set down, and if either party neglect to appear at the proper day to support or reelet the appeal, the Court may hear the other party, and may give judgment without the intervention of the party so neglecting to appear, or may postpone the hearing upon such terms as to payment of costs or otherwise as the Court shall direct.

If neither party be represented when the appeal is called for hearing, it will be struck out of the list. If the appellant be not represented and counsel for respondent asks for the dismissal of the appeal, it will be dismissed with costs. *Burnham* v. *Watson*; *Scott* v. *Queen*; *Western Ass. Co.* v. *Scanlan*, Cout. Dig. 1111. If respondent's counsel instead of asking for dismissal of the appeal, asks for the postponement of the hearing to the following session, the request will usually be granted.

In *Titus* v. *Colville*, 18 Can. S.C.R. 709, the Court reinstated an appeal dismissed for non-appearance of counsel for appellant, but refused to do so in *Foran* v. *Handley*, 24 Can. S.C.R. 706.

Hall Mines v. Moore, Cout. Dig. 123.

The appeal had been regularly inscribed on the roll for hearing at the May sittings of the Supreme Court of Canada, and on the 18th May, 1898, the case being called in the order in which it appeared upon the roll, no person appeared on behalf of the appellant. Counsel appeared for the respondent and asked that the appeal should be dismissed for want of prosecution. The Court referred to the fact that the case had been called in its proper place on the roll on the previous day and allowed to stand over because counsel were not present on the part of the appellant, and the appeal was dismissed with costs. On 20th May, 1898, application by motion was made on behalf of the appellant to have the appeal reinstated and restored to its place on the roll for hearing on such terms as the Court might deem appropriate, the ground stated for requesting such indulgence being that counsel for the appellant were under a misapprehension as to the time when the hearing was to take place. The motion was opposed by counsel for the respondent, who objected that proper notice of the

motion had not been given as required by the rules of practice. The Court refused to hear the motion or to make an order staying the issue of the certificate of the judgment already rendered dismissing the appeal, but, under the circumstances, the motion was dismissed without costs. Rule 41.

It was subsequently remarked by the Chief Justice with respect to this case that had an application been made on behalf of the appellant to have the appeal disposed of upon the factums, the Court would not have dismissed the appeal.

JUDGMENTS—HOW TO BE SIGNED.

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

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

A form of Judgment allowing appeal will be found in the Appendix at page 622.

A form of Judgment dismissing appeal will be found in the Appendix at page 623.

ENTRY OF JUDGMENT.

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

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

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

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

Rule 44. **Rnle 44. Where the snccessful party neglects or refuses to ohtain an appointment to settle the minntes of judgment, the Registrar may give the conduct of ths procsedings to the opposite party.**

Rule 45. The Registrar mey adjonrn any appointmsnt for settling ths draft of any judgment or ordsr to snch time as hs may think fit, and the partiss who attended the appointment shall be hound to attend such adjonrnment without further notice.

Ruls 46. Notwithstanding the preceding Rules, ths Rsgistrar shall in any case in which the Court or s Jndgs may think it expedisnt, eettle eny judgment or ordsr without making any appointment, and without notice to auy party.

Rnis 47. Any party dissatisfied with the minutes of judgment as settled hy ths Registrar may move the Court to vary the minutes as settled, upon esrving the solicitor for ths opposite party with two clear days' notice of hie motion, and ths said motion shall he hronght on for heering at the nearsst convenient session of the Conrt, but the seid motion shall not etay the entry of the judgment, if the Registrar is of ths opiniou that the motion is frivolous or would unrsasonehly prejudice the snccessful party, unlese a Judge of the Snpreme Court shall otherwise order. Such a motion shall he hased only on the ground that the minutes as settled do not in eome one or more reepects epecified in the notice of motion accord with the judgment pronounced hy the Court.

Settling Minutes of Judgment.

The former rules made no special provision as to the practice to be observed in settling minutes of judgment, and as in the Province of Quebec the miutes are settled by the Court without the intervention of the solicitors, practi*ioners from that province were often of the impression that the minutes will be settled, signed and entered by the Registrar as a matter of course after the judgment has been pronounced.

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

In some instances, under the old rules, the Court has, upon a motion to vary the minutes as settled by the Registrar, amended or varied its judgment as originally pronounced. Rule 47.

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

This rule embodies the practice which obtains in England which has been expressed as follows:

"If after the Registrar has settled the minutes there is any difficulty or dispute, an application should be made to the court which made the order and before the order is passed and entered, by motion, to vary the minutes, stating the matters objected to. (*General Share, etc., Co.* v. *Wetley*, 20 C.D. 130; *British Dynamite Co.* v. *Krebs*, 25 W.R. 846.) On such motion the only question to be argued is what was the actual order made, unless both parties consent to something being added, or it cannot be ascertained what order was made and then the case may be put in the paper to be argued again. W.N. (76) 296, per Bowen Lord Justice, *S. Wales, etc., Co.* v. *Davies*, 31 Sol. Jour. 110. When it is desired to add something to the judgment as pronounced by the court, an application should be made to the court under rule 61.

Consent Judgment.

In drawing up a judgment the registrar may by consent permit such alterations to be made in it as he believes the court would sanction, and these are binding on the parties. (*Davenport* v. *Stafford*, 8 Beav. 503. *Blake* v. *Harvey*, 29 C.D. 827.)

The Supreme Court has frequently given judgment without argument in terms of consent minutes. Such a judgment acts as an estoppel. *Re S. American, etc., Co.* (1895), 1 Ch. 37; *Stewart* v. *Kennedy*, 15 App. Cas. 108; *Wilding* v. *Sanderson* (1897) 2 Ch. 534; *Law* v. *L.* (1905) 1 Ch. 140. But it may be set aside on any ground that would invalidate an agreement (*Huddersfield B. Co.* v. *Lister* (1895) 2 Ch. 273; and if consent is given by mistake, it may be withdrawn at any time before the judgment is passed and entered: *Holt* v. *Jesse*, 3 C.D. 177; *Lewis's* v. *L.*, 45 C.D. 281; *Hickman* v. *Berens* (1895) 2 Ch. 638; *Stewart* v. *Kennedy*, 15 App. Cas. 75, 106; but when a final judgment has been passed and entered the Court cannot set it aside unless a

Rule 47.

fresh action is brought for that purpose, although it has been so entered by mistake. *Ainsworth* v. *Wilding* (1896), 1 Ch. 673; *Huddersfield B. Co.* v. *Lister*, *supra*.

As to when the mistake is on one side only, *vide Mullins* v. *Howell*, 11 C.D. 763, and cases cited (1912) Annual Practice, p. 463 (Vol. 11.).

Even after the final judgment has been signed and entered and transmitted to the Court below, the Supreme Court has power to amend such judgment, and will do so if it is clear, that by oversight or mistake an error has occurred. *Vide* notes to section 2 of Supreme Court Act, *supra*, p. 1.

Bickford v. Grand Junction Rly. Co., Cout. Dig. 1122.

A motion to vary minutes was referred to Strong, J., in Chambers, to be subsequently heard *pro forma* before the Court.

Consumers' Cordage Co. v. Connolly, Cout. Dig. 1165.

A motion was made before the Court to vary the minutes as settled by the Registrar by reciting special features as to the proceedings (see 31 Can. S.C.R. 246-247), for the purposes of a proposed appeal to the Privy Council. The Chief Justice took no part, but the remainder of the Court (Taschereau, Gwynne, Sedgwick and Girouard, JJ.), were of the opinion that the applicant should take nothing by his motion and refused to interfere with the minutes as settled, stating, however, that the Registrar should grant a certificate to the applicant shewing the nature of the proceedings had for the purpose of being used upon the appeal to the Privy Council.

Note.—The Privy Council granted a new trial on terms, otherwise the Supreme Court order to be set aside and the judgment of the Court of Review to stand.

Maclaren v. Attorney General of Quebec.

In this case an appeal to the Supreme Court was dismissed, the Court being equally divided in opinion, but a majority of the judges in their reasons had expressed the opinion that the Gatineau River was neither navigable nor floatable. The Registrar in settling the minutes of judgment, provided simply that the appeal was dismissed, the Court being equally divided. The appellants thereupon moved the Court to vary the minutes of judgment asking

that in lieu of the provisions made by the Registrar the following be substituted: "Doth declare and adjudge that the Gatineau River is neither navigable nor floatable, and to that extent this Court modifies the said judgment of the Court of King's Bench and restores that of the said Superior Court of the Province of Quebec sitting in the District of Ottawa, but this Court being equally divided on the other questions involved in this appeal, the said appeal in other respects stands dismissed without costs." Rule 48.

The application to vary the minutes was dismissed with costs.

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

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

"To Do an Act."

A judgment in the K. B. D. for recovery of a sum of money is not within this Rule, nor can a subsequent order be made limiting the time for payment so as to ground execution by sequestration (*Hulbert* v. *Cathcart* (1894), 1 Q.B. 244). An order to pay costs is not an order "requiring any person to do an act," and need not be indorsed or personally served under this rule (*Re* Denkin (1900), 2 Q.B. 478).

"Memorandum."

This memorandum must be indorsed on all orders which are required to be served, whether personally or not (*Hamp-*

Rule 49.

den v. *Wallis*, 26 C.D. 746); but not on merely prohibitive orders (*Sclous* v. *Croydon Local Board*, 53 L.T. 209; *Hudson* v. *Walker*, 64 L.J. Ch. 204).

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

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

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

Attachment refused because the affidavit served with the notice of motion omitted to state that the copy order served was duly endorsed with the memorandum prescribed by this rule (*Stocklon Football Co.* v. *Gaslon* (1895), 1 Q.B. 335).

Attachment refused in a divorce action for non-compliance with an order for payment of taxed costs, &c., because the order was no indorsed as required by this rule (*Pace* v. *P.*, 67 L.T. 383).

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

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

Where an order for possession named no time within which possession was to be given, and no memorandum pursuant to this rule could be indorsed, attachment ordered to issue, but to lie in the office for a week (*Re* Higgs' Mortgage, W.N. (94) 73).

Omission to fix Time.

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

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

An order containing a positive undertaking to "forth- Rule 50.
with" do a certain act should be served in accordance with this rule (*Halford* v. *Hardy*, 81 L.T. 721; *Carter* v. *Roberts* (1903), 2 Ch. 312).

Service Within Time Fixed.

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

Where Service Unnecessary.

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

ADDING PARTIES BY SUGGESTION.

Rule 50. In any case not already provided for by the Act, in which it becomes essential to make an additional party to the appeal, either as appellant or respondent, and whether such proceeding becomes necessary in consequence of the death or insolvency of any original party, or from any other cause, such additional party may be added to the appeal by filing a suggestion which may be in the Form C in the Schedule to these Rules.

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

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

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

In *Guest* v. *Dick*, Oct., 1897, the executrix of a respondent who had died pending the appeal, was substituted for him, and a suggestion allowed to be filed by appellant.

Rule 50.

And where the appellant had made an assignment in insolvency after the appeal had been taken, his assignee was added as an appellant, the sureties to be bond for security for costs filing a consent and an undertaking to be bound by the bond, notwithstanding the change of parties. *Ostrom* v. *Sills*, March, 1898, 28 Can. S.C.R. 485. Cass. Prac., 2nd ed., 150.

Merchants Bank v. Smith, 23rd May, 1884. Cass. Dig. 888.

The respondent, the assignee of an insolvent estate, having died between the day of hearing the appeal and the day of rendering judgment, on motion of counsel for appellant the Court orders the judgment in appeal to be entered *nunc pro tunc* as of the date of hearing.

Merchants Bank of Canada v. Keefer, 12th Jannary, 1885, Cass. Dig. 688.

On motion of appellant's counsel, judgment is directed to be entered *nunc pro tunc* as of the day of argument, one of the parties having died in the interval.

Ontario and Quebec Rly. Co. v. Philbrick, 26th May, 1886. Cass. Dig. 688.

On motion of counsel for respondent, supported by affidavit shewing that one of the parties had died between the date of hearing and the date upon which judgment delivered, the Court directs judgment to be entered *nunc pro tunc* as of the day of hearing.

Muirhead v. Sheriff, 14 Can. S.C.R. 735.

In this case the plaintiff brought an action against the original defendant upon a contract of indemnity. After verdict and before entry of judgment the defendant died. Upon application of his executors leave was given them to file a suggestion of the death of the defendant in the proper office, and by another order leave was given the plaintiff to sign judgment *nunc pro tunc* as of the date of the death of the defendant. Upon an appeal by the defendants to the Supreme Court a motion to quash was made by plaintiff on the ground that the judgment had not been revived against the executors and that the order granting leave to file a suggestion was a nullity. The motion was dismissed and appeal heard on the merits.

Lord Campbell's Act, Rule 50.

White v. Parker, 16 Can. S.C.R. 699.

In an action for negligence the plaintiff was non-suited and on a motion to the full Court the nonsuit was set aside and a new trial ordered. Between verdict and judgment the plaintiff died and a suggestion of his death was entered on the record. An appeal to the Supreme Court was quashed on the ground that under Lord Campbell's Act, or its equivalent in New Brunswick, an entirely new cause of action arose on the death of P. and that the original action was entirely gone and could not be revived.

Duncan v. Midland; Hughes v. Midland, Mar. 9th, 1908.

This was a motion to quash a by-law which was refused and such judgment affirmed by the Court of Appeal. After motion for leave to appeal had been given in the Supreme Court, Duncan notified the Supreme Court and his solicitor that he was opposed to any appeal being taken. The solicitor filed a request by Hughes to be substituted in the Supreme Court. The court held without a new mandate or authority the appeal in this court could not go on. It being admitted by counsel that the motion to substitute must fail, that motion was dismissed with costs. The other motion was dismissed, costs reserved.

Dumoulin v. Langtry, 13 Can. S.C.R. 258.

In the first place the Chancery Division of the High Court having pronounced against the pretentions of the plaintiff. He refused to permit any further appeal. The churchwardens applied to the Court of Appeal for leave to appeal on the ground that they had an interest as *cestui qui trustent*, which was refused. An application was made to Strong, J., in Chambers, for leave to appeal *per saltum*, who held that the churchwardens had an interest, but would not overrule in Chambers the Court of Appeal, and gave leave to renew the applicatioin to the full court. It was held that the appeal should be allowed upon proper indemnity being given by the churchwardens to the plaintiff, but on the merits it was held the churchwardens were not *cestui que trustent* and had no interest whatever in the subject-matter in appeal.

Rule 51. *Adding parties.*

In the *Quebec, North Shore Turnpike Road Trustees* v. *The King*, Cout. S.C. Cas. 316, where an action was brought by a bondholder and the other bondholders were not represented in Court, it was ordered that the appeal should not be now heard, but that the judgment appealed from should be opened and cause remitted to the court below for the purpose of having representation therein of all necessary parties according to the practice of the said court before final judgment should be given by the Court. More fully reported in same case, 38 Can. S.C.R. 62.

In considering the merits of a case at the hearing it appeared to the court that if they should reverse a certain order the effect would be to open the accounts at present closed between certain executors and the mortgagees, and the effect might be to affect injuriously the interests of the executors, who had not been served with notice of the appeal. The appeal was directed to stand over that intimation might be given to the executors that if they wished to be heard upon it the Judicial Committee would hear them before expressing an opinion, but if they did not wish to appeal, the Committee would be ready to dispose of the appeal without further argument. *Gordon* v. *Horsfall*, 5 Moo. P.C. 303.

SUGGESTION MAY BE SET ASIDE.

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

SERVICE OF NOTICE.

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

DETERMINING QUESTIONS OF FACT ARISING ON MOTION.

Rule 53. Upon any motion to set aside a suggestion, the Court or a Judge thereof may in their or his discretion, direct evidence to be taken before a proper officer for that purpose, or may direct that the parties shall proceed in the proper Court for that purpose, to have any question tried and determined, and in such case all proceedings in appeal may be stayed until after the trial and determination of the said question.

MOTIONS.

Rule 54.

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

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

Statutes, Rules and Ordinances.

Finsetb v. Ryley Hotel, Oct. 25, 1910.

Motion for leave to appeal. At the conclusion of the argument the Chief Justice says that hereafter where provincial statutes are relied on upon motions to the court, six copies of all such Acts or the sections in question must be filed along with the motion papers.

The notice of motion or the affidavit filed in support should disclose in a general way the ground upon which the motion is based. This rule, read in connection with Rule 56, shews clearly that the notice of motion and affidavits are to be filed in the office of the Registrar at least four clear days before the return day. One object of these rules is to afford an opportunity to the judge who will deal with the application or the Court, as the case may be, to become aware of the grounds before the motion is called. Non-compliance with the rule will subject the applicant to the dismissal of the motion or payment of the costs of the person shewing cause consequent upon the motion being enlarged.

NOTICE OF MOTION, HOW SERVED.

Rule 55. Such notice of motion may be served upon the solicitor or attorney of the opposite party by delivering a copy thereof to the booked agent, or at the elected domicile of such solicitor or attorney to whom it is addressed, at the City of Ottawa. If the solicitor or attorney has no booked agent, or has elected no domicile at the City of Ottawa, or if a party to be served with notice of motion has not elected a domicile at the City of Ottawa, such notice may be served by affixing a copy thereof in some conspicuous place in the office of the Registrar of this Court.

Rule 56.

As pointed out in the note to Rule 20, it is very important that solicitors practising in the Supreme Court should appoint Ottawa agents, as neglect to do so may sometimes lead to very serious results where notices of motion are served by affixing a copy in the Registrar's office. It is not the practice, however, to dispose of motions where the notice has been so served, unless some other steps have been taken to bring home to the solicitor or the party interested, express notice that the application will be made.

AFFIDAVITS IN SUPPORT OF MOTION.

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

SETTING DOWN MOTIONS.

Rule 57. Motions to be made before the Court are to be set down in a list or paper, and are to be called on each morning of the session before the hearing of appeals is proceeded with.

In carrying out the provisions of this Rule it is necessary that a copy of the notice of motion and the affidavit be filed in the office of the Registrar four clear days before the day upon which the motion is to be brought on to be heard. The party showing cause to the motion is entitled to object to the motion being heard if the affidavits have not been filed before the service of the notice of motion.

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

The Chief Justice has instructed the Registrar that no motions should be placed upon the daily motion paper when the Court is in session unless the material to be used has been filed as required by the Rules and the motion properly set down.

It is the duty of the solicitor desiring to present a motion to the Court to enter the same upon a special list prepared for the purpose kept in the office of the Registrar's clerk, the day before the motion is to be heard, so that copies may be made for the use of the Court before the motion is called. It is the practice of the Court to take up the motions in the order in which they appear upon the motion paper.

EXAMINATION ON AFFIDAVIT.

Rule 58.

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

This Rule is new.

Discretion of Court.

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

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

Foreigner Resident out of Jurisdiction.

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

"*A Notice in Writing.*"

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

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

A motion by the defendant to take affidavits filed by the plaintiff off the file on account of the non-production of the

Rule 59. deponent for cross-examination before an examiner, was refused as irregular, the proper course being to object to the affidavits being read (*Meyrick* v. *James*, 46 L.J., Ch. 570). In the absence of the deponent from illness, the defendant was held entitled to insist on his affidavit being withdrawn, or the cause standing over (*Nason* v. *Clamp*, 12 W.R. 973; and see *Re* Sykes, 2 J. & H. 415.

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

"For Cross-Examination."

If the counsel for the opposite party refuses to cross-examine the deponent when produced, the counsel for the party producing him may examine him *viva voce* (*Glossop* v. *Heston, &c., Board* 26 W.R. 433).

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

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

Cross-Examination on Affidavit Filed for Use in Chambers.

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

"Expenses."

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

APPEAL ABANDONED BY DELAY.

Rule 59. Unless the appeal is brought on for hearing by the appellant within one year next after the security shall have been allowed, it shall be held to have been abandoned without any order to dismiss being required, unless the Court or a Judge shall otherwise order.

INTERVENTION.

Rule 60.

Rule 60. Any person interested in an appeal between other parties may, by leave of the Court or a Judge, intervene therein upon such terms and conditions and with such rights and privileges as the Court or Judge may determine.

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

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

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

Art. 1237 reads as follows:

"Interventions, continuance of suits, changes of attorney and other incidental proceedings, take place in appeal upon petition, according to the formalities prescribed by the Court."

The following decisions are taken from Martineau & Delfausse, Code of Civil Procedure, Vol. I, p. 783.

The Court of Appeal may order a third party interested in the issue to be called into the case, and the record to be sent to the Court below for that purpose. C.A. 1866. Joubert & Rascony, 12 J., 228; 17 R.J.R. 476.

Where parties shew sufficient legal interest in the subject matter of the appeal, they will be allowed to intervene and obtain an order of suspension of the case in appeal until judgment be rendered on proceedings instituted in the Court below by petitioners, provided due diligence be used in the prosecution of such proceedings. C.A. 1883. Riddell & Evans & Hannan, 27 J., 184.

A motion by respondent to oblige the Eastern T. Bank to intervene, and to become appellants instead of Maher, on the grounds that Maher, who was the party in the Court below, was really appealing for the bank, was rejected. C.A. 1879. Maher & Aylmer 2 L.N. 378.

Generally those who have an interest may appeal; even those not parties to the suit may intervene to prosecute the appeal. And so a notary whose minutes is attacked *en faux* and who has been examined as a witness on the inscription *en faux* and declared he had no interest in the suit, will be allowed to intervene in order to appeal from the judgment declaring his deed to be *faux*. C.A. 1879. Defoy & Forte, 3 L.N. 36.

Rule 61.

Une personne qui, bien que n'étant pas partie à un procès, y est intéressée, peut, en son propre nom, interjeter appel de jugement qui l'a décidé. C.A. 1893. Roland & La Caisse d'Economie Notre-Dame, 4 R.J.O. 314.

Le défendeur en garantie, dans le cas de garantie formelle, peut appeler en son nom personnel du jugement rendu sur l'action principale, lors même qu'il n'a pas pris le fait et cause du défendeur principal. C.A. 1892. Robert & Lavoilette & Desjardins, 1 R.J.O. 286.

Une partie intéressée dans un appel, pour soutenir le jugement attaqué, alors même que l'intimé s'est désisté du jugement porté en appel.

Un désistement ne peut avoir d'effet qu'entre les parties et ne peut porter préjudice aux tiers intéressés dans le jugement au sujet duquel il est fait. C.A. 1893. Choquette & Pelletier, 4 R.J.O. 303.

Un désistement n'est valable qu'en autant qu'il a été signifié à toutes les parties dans la cause.—Un désistement non signifié à toutes les parties ne met pas fin à l'instance et ne peut empêcher une partie d'intervenir pour protéger ses droits en appel. C.A. 1901. McNally & Préfontaine & Picken, 3 R.P. 401.

RE-HEARING.

Rule 61. There shall be no re-hearing of an appeal except by the leave of the Court on a special application, or at the instance of the Court.

The rehearing referred to in this Rule simply means a re-argument of an appeal, and the Rule is intended to cover cases where after judgment is pronounced it is found that the judgment has not dealt with all the matters in issue in the appeal or conditions have arisen after the delivery of the judgment which make it necessary to provide in the formal judgment for matters not specially covered by the judgment as pronounced in Court or by the reasons for judgment. Such applications heretofore were made by motions to vary the minutes as settled by the Registrar. As pointed out in the note to Rule 47, this procedure was irregular, and is now expressly discountenanced by the latter part of that Rule.

DISCONTINUANCE.

Rule 62.

Rule 62. When a notice of discontinuance has been given by an appellant to a respondent, the latter shall be entitled to have his costs taxed by the Registrar without any order, unless the notice of discontinuance is served after the appeal has been inscribed for hearing in the Supreme Court. In the latter event, such order shall be made by the Court as to costs and otherwise as to the Court may seem meet.

This Rule is new, and is based upon S. 80 of the Supreme Court Act which reads as follows:

"80. An appellant may discontinue his proceedings by giving to the respondent a notice entitled in the Supreme Court and in the cause, and signed by the appellant, his attorney or solicitor, stating that he discontinues such proceedings.

2. Upon such notice being given, the respondent shall be at once entitled to the costs of and occasioned by the proceedings in appeal; and may, in the court of original jurisdiction, either sign judgment for such costs or obtain an order from such Court, or a Judge thereof, for their payment, and may take all further proceedings in that Court as if no appeal had been brought. R.S., c. 135, s. 51."

The first part of the Rule deals with a case where the notice of discontinuance has been filed before the appeal has been inscribed for hearing. In this case, upon the filing of the notice, the respondent can obtain an appointment from the Registrar to tax costs, and no order is necessary in the Supreme Court dismissing the appeal.

If, however, the appeal has been inscribed, the effect of the notice of discontinuance is that the respondent may, upon notice, apply to the Court to dismiss the appeal with costs. Such an order was made by the Court in the appeal of *Great Northern Rly Co.* v. *Royal Trust Co.*, 4th March, 1907.

Discontinuance when motion to quash is pending.

Canada Car Co. v. Poirier, Oct. 6th, 1909.

In this case respondent served notice of motion to quash in August, returnable on the first day of October session following. On the 2nd day of October a notice of discon-

Rule 63. tinnnnce wns served and filed. The respondent proceeded with his motion and the following judgment was given next day:

"Motion to quash granted, costs to be taxed at $25.00. It would be proper to observe that it will not be necessary hereafter to come to this Court with such motions when notice of discontinuance has been filed. It will be the function of the Registrar."

Order 26, r. 1 of the English Supreme Court Rules relating to discontinnnnce is as follows: "The plaintiff may at any time before receipt of the defendant's defence or after the receipt thereof, before taking any other proceeding in the action (save any interlocutory application) by notice in writing, wholly discontinue the action against all or any of the defendants."

Under this rule it has been held that one of two or more plaintiffs cannot discontinue without the consent of the others; and if he declines to proceed, the usual order is to strike him out as plaintiff and add him as defendant upon the terms of security being given for the costs of the original defendants. *Re* Matthews (1905), 2 Ch. 460.

When the appeal has been inscribed leave to discontinue will only be granted upon terms just to all interests and parties concerned. *Vide* cases collected in (1911) Annual Practice, p. 408.

RULES APPLICABLE TO EXCHEQUER APPEALS.

Rule 63. The foregoing Rules shall be applicable to appeals from the Exchequer Court of Canada, except in so far as the Exchequer Court Act has otherwise provided.

The procedure in Exchequer Court appeals differs in the following respect from that in ordinary appeals:

Security.

In ordinary appeals, the security is $500 (Supreme Court Act, R.S., c. 139, s. 75); whereas by the Exchequer Court Act (R.S. c. 140, s. 82, ss. 1), the security is $50. This security is given by obtaining from the Registrar of the Supreme Court an authority directed to the Bank to receive the money and the payment therein of the $50 in accordance with the provisions of Rule 104.

Rule 63.

Time for Giving Security.

In ordinary appeals the time allowed for giving security is 60 days (Supreme Court Act, s. 69), whereas in Exchequer appeals, the security must be given in 30 days. (Exchequer Court Act, R.S., c. 140, s. 82, ss. 1).

Inscription.

In ordinary appeals under Rule 37, the inscription is by the appellant and must be made fourteen days before the first day of the session of the Court fixed for the hearing of the appeal. In Exchequer appeals it is the duty of the Registrar to inscribe the appeal for the nearest convenient time, according to the Rules in that behalf of the Supreme Court. (Exchequer Court Act, R.S., c. 140, s. 82, ss. 2).

This section of the Exchequer Court Act differs from the corresponding section of the old Act, R.S.C., c. 135, s. 40, as amended by 50-51 V. c. 16, which required the Registrar to inscribe the appeal for the first day of the next session of the Court even when the deposit on the appeal was made immediately preceding the beginning of the session. *Vide Poirier* v. *The King*, *infra*, p. 755.

The Act itself required formerly that the appellant should give ten days' notice that the appeal had been set down, which was sometimes impossible to comply with if the appeal was inscribed for the first day of the next session. The Commissioners for the revision of the Statutes have made the section workable by redrafting the clause so as to provide that the appeal shall be set down, not for the first day of the next session, but for the nearest convenient time, and the time within which the notice of appeal is required to be given runs from the setting down of the appeal and not from the date of the deposit.

As the statute now stands, in Exchequer Court cases no appeal will be inscribed by the Registrar unless the provisions with respect to filing the case and factums have been complied with.

Notice of Hearing.

Rule 18 provides that in ordinary cases the notice of hearing shall be served at least 15 days before the first day of the session. In Exchequer appeals, as above mentioned, the notice of hearing shall be given within ten days after the appeal is set down, and the party is not entitled to wait until 15 days before the first day of the session.

Rule 64. The Exchequer Court Act makes provision (R.S., c. 140, s. 82, ss. 2) for the Supreme Court or a Judge, extending the time for giving the notice of the hearing. *Vide* Exchequer Court Act Appendix "D," *infra*, p. 749, and notes thereto.

RULES NOT APPLICABLE TO CRIMINAL APPEALS NOR HABEAS CORPUS.

Rule 64. Ths forsgoing Rules shall not, excspt as hereinhefore provided, apply to criminal appeals, nor to appsals in matters of habeas corpus under section 62 of the Act.

CASE IN CRIMINAL APPEALS AND HABEAS CORPUS.

Ruls 65. Criminal appcals may he heard on a written case certified nnder ths seal of ths Court appealed from and in which case shall he included all judgmsuts and opinions pronounced in the Courts helow. Ths appellant shall also fils six type-written or printed copies of the cass with a memorandum of ths points for argument sxcept in so far as dispsnsed with hy ths Registrar.

2. In appeal in haheas corpus cases under sec. 62 of the Act, a printed or typewritten cass containing the material hefore the Judge appealed from, and the judgment of ths said Jndge, together with a memorandum of ths pcints for argument, except is so far as dispsnsed with hy the Registrar, shall he filed.

This Rule differs somewhat from the former Rule 47, respecting criminal and *habeas corpus* appeals, iu providing that in criminal appeals the appellant shall file six typewritten or printed copies of the case and also six copies of a factum or points for argument, except in so far as dispensed with by the Registrar.

In *habeas corpus* appeals, uuder s. 62 of the Act, one printed or typewritten case, with a factum or points for argument, is all that is required.

The ouly appeal in *habeas corpus* cases under s. 62 is the appeal from a single Judge to the full Court.

WHEN CASE TO BE FILED.

Rule 66. Iu crimiual appeals and in appeals in cases of habeas corpus, nndsr section 62 of the Act, unless the Court or Judge in

Chambers shall otherwise order, the case shall be filed fifteen clear days before the day of the session of the Court at which the appeal is proposed to be heard. Rule 67.

Former Rule 48 provided that in criminal appeals from all the Provinces except British Columbia, the case should be filed at least one month before the first day of the session for which it was set down to be heard, and in British Columbia appeals two months before the said day.

By the present Rule, this has been altered, and if the case is filed 15 days before the day of the session at which the appeal is proposed to be heard, it will be sufficient.

It is to be noted that the 15 days is not 15 days before the first day of the session of the Court, but 15 days before the particular day of the session on which the appeal is to be heard.

NOTICE OF HEARING IN CRIMINAL APPEALS AND IN APPEALS IN MATTERS OF HABEAS CORPUS.

Rule 67. In cases of criminal appeals and appeals in matters of habeas corpus, under section 62 of the Act, notice of hearing shall be served at least five days before the day of the session at which the appeal is proposed to be heard.

Under former Rule 49, in criminal appeals and appeals in matters of *habeas corpus*, under s. 62 of the Act, a very lengthy notice of hearing was required, namely, two weeks in Ontario and Quebec; three weeks in Nova Scotia, New Brunswick and Prince Edward Island; one month in Manitoba; and six weeks in British Columbia.

This unreasonably delayed the hearing of appeals of this character, and was inconsistent with the provisions of s. 65 of the Act which provides as follows:

"An appeal to the Supreme Court in any *habeas corpus* matter shall be heard at an early day, whether in or out of the prescribed sessions of the Court."

And also the provisions of s. 1024, ss. 3, of the Criminal Code, which provides as follows:

"3. Unless such appeal is brought on for hearing by the appellant at the session of the Supreme Court during which such affirmance takes place, or the session next thereafter if the said Court is not then in session, the appeal shall be held

Rule 68. to have been abandoned, unless otherwise ordered by the Supreme Court or a Judge thereof."

The present Rule only requires that 5 days' notice should be given and the notice may be given for any day in the session of the Court.

ELECTION APPEALS.

Rule 68. Except as otherwise provided by the Dominion Controverted Elections Act, and by the three following Rules, the Supreme Court Rules shall, so far as applicable, apply to appeals in controverted election cases.

S. 66 of the Controverted Elections Act, R.S.C., c. 7, reads as follows:

"66. Upon such deposit being so made, the said clerk or other proper officer shall make up and transmit the record of the case to the Registrar of the Supreme Court of Canada, who shall set down the said appeal for hearing by the Supreme Court of Canada at the nearest convenient time, and according to the rules of the Supreme Court of Canada in that behalf."

In some of the provinces, notably Quebec, the clerks or prothonotaries fail to transmit with the record a proper certificate stating clearly that the documents which accompany it constitute the record required to be forwarded to the registrar, pursuant to the provisions of s. 66 of the Controverted Elections Act, R.S.C. c. 7. What is frequently sent is simply a list of documents contained in the "dossier." In the appeal *re Three Rivers Election, Bureau* v. *Normand*, the question arose upon a motion to quash for want of prosecution, whether the record forwarded to the registrar was a compliance with the statute so that it should be taken to have been received by the registrar when first it reached his office or only when later on a proper certificate came to hand upon the registrar's demand. The matters were referred to Mr. Justice Anglin, who after consulting with the other judges, held that the record received from the prothonotaries should be taken as a legal compliance with the statute although the better practice in all cases was to insist upon having the record accompanied by a proper certificate such as was subsequently obtained. A proper form of certificate will be found in the Appendix on p. 640.

Former Rule 50, which dealt with Election appeals, expressly provided that the foregoing Rules should not apply in

controverted election cases. The present Rule brings election cases into harmony with other appeals, except in the matters provided by the three next following Rules, and the special provisions of the Dominion Controverted Elections Act. Rule 68.

The particulars in which the procedure in Election appeals differs from ordinary appeals are the following:

Security.

The security is not given in the Supreme Court, but in the Election Court, under the Dominion Controverted Elections Act, R.S., c. 7, s. 65, which reads as follows:

"65. The party so desiring to appeal shall within eight days from the day on which the decision appealed from was given, deposit with the clerk of the Court with whom the petition was lodged or with the proper officer for receiving moneys paid into Court, at the place where the hearing of the preliminary objections, or where the trial of the petition took place, as the case may be, if in the Province of Quebec, and at the chief office of the Court in which the petition was presented, if in any other Province, in cases of appeal other than from a judgment, rule, order or decision on any preliminary objection, the sum of three hundred dollars, and in such last mentioned cases, the sum of one hundred dollars, as security for costs, and also a further sum of ten dollars as a fee for making up and transmitting the record to the Supreme Court of Canada; and such deposit may be made in legal tender or in the bills of any chartered bank doing business in Canada. 54-55 V., c. 20, s. 12.

Inscription.

Differing from the ordinary cases, the appeal is not inscribed by the party appellant but by the Registrar, who is directed by s. 66 of the said Act to set the appeal down for hearing at the nearest convenient time according to the rules of the Supreme Court.

Notice of Hearing.

By s. 67 of the Act, the notice of hearing shall be given within three days after the appeal has been set down by the Registrar.

Rule 69. *Factums.*

Former Rules 53 and 54, read as follows:

"53. The factum or points for argument in appeal in controverted election appeals, shall be printed as hereinbefore provided in the case of ordinary appeals."

"54. The points for argument in appeal or factum in controverted election cases shall be deposited with the Registrar at least three days before the first day of the session fixed for the hearing of the appeal, and are to be interchanged by the parties in manner hereinbefore provided with regard to the factum or points in ordinary appeals."

Under the present Rule, factums are filed and exchanged at the same time and in the same manner as obtains in ordinary appeals.

The other provisions with respect to the procedure in Election appeals are contained in the three next following Rules.

Rule 69. In controverted election appeals the party appellant shall obtain from the Registrar, upon payment of the usual charges therefor, a certified copy of the record or of so much thereof as a Judge in Chambers may direct to be printed, and shall have forty (40) copies of the said certified copy printed in the same form as herein provided for the Case in ordinary appeals, and immediately after the completion of the printing shall deliver to the Registrar thirty (30) of such printed copies, twenty-five (25) thereof for the use of the Court and its officers and five (5) thereof for the use of the respondent, and to be handed by the Registrar to the respondent or his solicitor or hooked agent upon application made therefor.

2. For printing in election appeals the same fees shall be allowed on taxation as for printing the Case in ordinary appeals.

The practice which obtains in the Registrar's office is to permit the solicitors for the appellant to copy in the office of the Registrar's clerk the case directed to be printed under Rule 71 infra.

FIXING TIME OF HEARING.

Rule 70. As soon as the Registrar shall have received the record duly certified by the clerk of the Election Court, the appellant shall apply on notice to a Judge in Chambers to have a day

fixed for the hearing and to have the appeal set down, and on one week's default the respondent may move to dismiss the appeal. Rule 71.

In order of time, this Rule should precede Rule 69.

It is the duty of the solicitor for the appellant to apply promptly to the Registrar to have a day fixed for the hearing and to have the appeal set down, and if it is desired to dispense with the printing of a part of the record, to make an application in regard to this at the same time.

To avoid a motion to dismiss the appeal under this Rule, it will be necessary that the appellant's solicitor should keep closely in touch with the clerk of the Election Court so as to be informed promptly as soon as the record has been transmitted to the Registrar of the Supreme Court, and to notify his Ottawa agents of this fact.

Upon the solicitors for the parties appearing before the Registrar, under this Rule, the Registrar will set the appeal down for hearing at such a date as will permit of the printing of the case and the factums being ready.

ORDER DISPENSING WITH PRINTING OF RECORD OR FACTUM IN ELECTION APPEALS.

Rule 71. In election appeals a Judge in Chambers may, upon the application of the appellant or respondent, make an order dispensing with the printing of the whole or any part of the record, and may also dispense with the delivery of any factum or points for argument in appeal.

Under former Rule 54, the appellant alone had power to move to dispense with the printing of the whole or part of the record. By this rule the respondent has the same privilege.

It was held, *Brassard* v. *Langevin*, 1 Can. S.C.R. 201, that where, under the former rule, the appellant failed to apply for an order dispensing with the printing, which might save a great deal of useless expense, he might, even if he succeeded, have to pay the cost of printing the unnecessary matter.

As the present rule gives the right to apply to both the appellant and respondent, it is probable that this decision is no longer applicable.

The Court will only dispense with the printing of the entire case and factums in exceptional cases, for instance where it is urgent that the appeal should be heard promptly, and there is not sufficient time in which to have the printing done.

Rule 72.

HABEAS CORPUS.

Rule 72. Applications for writs of habeas corpus ad subjiciendum shall be made by a motion for an order which, if the Judge so direct, may be made absolute ex parte for the writ to issue in the first instance; or the Judge may direct a summons for the writ to issue, and the Judge in his discretion may refer the application to the Court. Such summons and order may be in the Forms D and E respectively set out in the Schedule to these Rules. **Vide p. 611, infra.**

This and the following rules dealing with *Habeas Corpus* matters, are new and have been adapted from the practice which obtains in the Crown office in England.

S. 62 of the Supreme Court Act reads as follows:

"62. Every Judge of the Court shall except in matters arising out of any claim for extradition under any treaty, have concurrent jurisdiction with the courts or judges of the several Provinces, to issue the writ of *habeas corpus ad subjiciendum*, for the purpose of an inquiry into the cause of commitment in any criminal case under any Act of the Parliament of Canada.

"2. If the Judge refuses the writ or remands the prisoner, an appeal shall lie to the Court. R.S., c. 135, s. 32."

At the time of the publication of the writer's book on Supreme Court Practice, it was thought that the only jurisdiction the full Court had in such matters was sitting in appeal upon the refusal of a single Judge of the Court to grant a writ or to remand the prisoner under this section. Recently, however, it has been held, *in re* Richard, 38 Can. S.C.R. 394, Idington and Maclennan, JJ., dissenting, that on an application to a Judge for a writ of habeas corpus, he may refer the same to the Court which has jurisdiction to hear and dispose of it. This rule has been passed since the above decision *in re Richard*.

Habeas Corpus ad Subjiciendum.

This writ is issued for protecting the liberty of the subject by examining into the legality of commitments for criminal or supposed criminal matters, or for any other forcible detentions, including impressments; also for admitting to bail prisoners legally committed. This writ is the great constitutional remedy for all manner of illegal confinement, and is a high prerogative writ, which at common law issues not only during the sittings, but also in vacation. It is the legal process

which is employed for the summary vindication of the right of personal liberty when illegally restrained, and extends to all cases of illegal imprisonment, whether claimed under public or private authority. *Rex* v. *Mead*, 1 Burr. 542. Rule 72.

The writ is supposed to have been in use before the date of Magna Charta. Parliament, by 16 Car. I., c. 10, interfered to strengthen and protect its efficacy, and to do away with other abuses which had crept in, passed the Habeas Corpus Act, 31 Car. II., c. 2.

Secs. 3, 4, and 5 of this Act provide:

"That on complaint and request in writing by or one behalf of any person committed or detained other than persons convicted or in execution for any crime (unless for treason or felony plainly expressed in the warrant, or upon suspicion of any felony, or as accessory before the fact to any felony), attested and subscribed by two witnesses that were present at the delivery of the copy of the warrant of commitment and detainer, the Lord Chancellor or any of the Judges *in vacation*, upon viewing a copy of the warrant, or affidavit that a copy has been denied to be given, shall (unless the party has neglected for two whole terms to apply for a habeas corpus for his enlargement), award a habeas corpus for such prisoner returnable immediately before himself or some other judge, and within two days after the party shall be brought before him, shall discharge such party, if bailable, upon giving security by himself, and one or more surety or sureties in any sum having regard to the quality of the prisoner and the nature of the offence, to appear and answer in the Court in which the offence is properly cognizable. Every such writ to be marked "per statutum tricesimo primo Caroli secundi regis". Any officer refusing to make a return to the writ, or refusing or neglecting to deliver within six hours after demand by the prisoner, or on his behalf, a copy of the warrant of commitment and detainer, renders himself liable to a penalty of £100 for the first offence and to forfeit his office, and of £200 for a second offence to be recovered by action against such officer, his executors or administrators."

"The procedure on the common law writ was amended by 56 Geo. III. c. 100.

By sec. 1 of this Act the Judges are required to award this writ in vacation time, where any person shall be confined or restrained of his or her liberty, *otherwise than for some criminal or supposed criminal matter*, and except persons imprisoned for debt or by process in any civil suit, upon complaint made to them, by or on behalf of the person so confined or restrained, if it shall appear by affidavit or affirmation that there is a probable and reasonable ground for such complaint. By sect. 2, wilful disobedience to such writs is declared to be a contempt of the Court under the seal of which such writs

Rule 72.

shall have issued, and the Judges are empowered to issue warrants for apprehending parties guilty of such disobedience in order to their being punished for the same; and it is provided that writs issued in vacation may be made returnable in Court in the next term; and writs issued in term may be made returnable before a Judge in vacation.

By sect. 3, although a return to a writ of habeas corpus may be good and sufficient in law, the Judge before whom such writ may be returnable may examine into the truth of the facts set forth in such return by affidavit or affirmation, and in case such judge may consider it doubtful whether the material facts set forth be true or not, he may admit the prisoner to bail with one or more sureties to appear in Court in the next term, and may also remit the matter to the Court to examine into, in a summary way by affidavit or affirmation, and to order and determine touching the discharging, bailing, or remanding the party.

Sect. 4 provides for the like proceeding being had for controverting the truth of the return to any such writ granted by and returnable before the Court itself.

Sect. 6 applies the provisions of sect. 2 of this Act to all writs of habeas corpus awarded in pursuance of the Act of 31 Car. 2, c. 2."

The writ is used to obtain the discharge of prisoners from custody on commitment, whether civil or criminal, for some illegality or informality in such commitment, or for want of or excess of jurisdiction. It does not in general lie when the party is in execution on a criminal charge after judgment on an indictment, according to the course of common law. *Ex parte Lees*, E.B.E. 828.

Nor does it lie in cases of commitments by any Court of Record for a contempt, or by the House of Lords or Commons for a contempt or breach of privilege; as they are commitments in execution, and need not specify the particulars of the offence, every Court being held to be the proper judge of what does or does not constitute a contempt. This also applies where colonial legislatures are vested with the same privileges as the English Houses of Parliament, and have committed any one for contempt.

Affidavits.

The application must be supported by an affidavit by the person restrained, showing that such application is made at his instance, and that he is illegally restrained, or there must be

an affidavit by some other person that he is so coerced as to be unable to make one. Rule 73.

Warrant of Commitment.

When the application is on behalf of a prisoner detained in custody of any gaoler of a prison, or other officer, the application must be supported by a copy of the warrant or commitment, verified by affidavit, which copy such gaoler or other officer is bound by sect. 5 of 31 Car. II, c. 2, to deliver within six hours after demand, made by the prisoner or any person on his behalf, under heavy penalties.

Dispensing with Prisoner's Attendance.

It has always been the practice in the Supreme Court, where a writ of *habeas corpus* has been ordered to issue, to dispense with the prisoner's attendance before the Judge making the order. In the order for the writ of *habeas corpus* made *in re* Smitheman, 35 Can. S.C.R. 189, the following clause was inserted:

"And it is also further ordered that the production of the body of the within named William Smitheman in pursuance of the said writ, be dispensed with upon his solicitors signing upon said writ an indorsement dispensing with the production of the body of the said William Smitheman."

Rule 73. If a summons for the writ to issue is granted, a copy thereof shall be served upon the Attorney-General of the Province in which the warrant of commitment was issued, and shall be returnable within such time as the summons shall direct.

Rule 74. On the argument of the summons for a writ to issue, the Judge may in his discretion, direct an order to be drawn up for the prisoner's discharge instead of waiting for the return of the writ, which order shall be a sufficient warrant to any gaoler or constable or other person for his discharge.

Rule 75. The writ of habeas corpus shall be served personally, if possible, upon the party to whom it is directed; or if not possible, or if the writ be directed to a gaoler or other public official, by leaving it with a servant or agent of the person confining or restraining, at the place where the prisoner is confined or restrained, and if the writ be directed to more than one person.

Rule 76. the original delivered to or left with such principal person, and copies served or left on each of the other persons in the same manner as the writ. Such writ of habeas corpus may be in the Form F set out in the Schedule to these Rules.

For Form *vide* p. 612, *infra*.

Rule 76. If a writ of habeas corpus be disobeyed by the person to whom it is directed, application may be made to the Judge or the Court on affidavit of service and disobedience, for an attachment for contempt. The affidavit of service may be in the Form G set out in the Schedule to these rules.

For Form *vide* p. 612, *infra*.

Rule 77. The return to the writ of habeas corpus shall contain a copy of all the causes of the prisoner's detention endorsed on the writ, or on a separate schedule annexed to it.

Rule 78. The return may be amended or another substituted for it by leave of the Court or a Judge.

Rule 79. When a return to the writ of habeas corpus is made, the return shall first be read, and motion then made for discharging or remanding the prisoner, or amending or quashing the return.

REFERENCES.

Rule 80. Whenever a reference is made to the Court by the Governor in Council or by the Board of Railway Commissioners for Canada, the case shall only be inscribed by the Registrar upon the direction and order of the Court or a Judge thereof, and factums shall thereafter be fyled by all parties to the reference in the manner and form and within the time required in appeals to the Court.

References to the Supreme Court by the Governor in Council are authorized by s. 60 of the Supreme Court Act.

References may also be made to the Supreme Court by the Board of Railway Commissioners, or by the Governor in Council, R.S. c. 37, s. 55.

The procedure to be adopted in carrying out the provisions of this rule is for the party having the carriage of the reference to apply to the Court to fix a day for the hearing and to direct what parties shall be served with notice, and be entitled to file factums and take part in the argument. The object of the rule is to provide that all parties affected by the reference should have an opportunity of being heard. Rule 80.

References by the Governor in Council.

There was no express rule with respect to the procedure to be adopted in connection with the hearing of references from the Governor in Council, until the present rule was passed in 1905. Previous to that date there was no uniformity with respect to the procedure.

In the Reference *re* Representation in the House of Commons, April 21st, 1903, at the opening of the Court the Registrar read an order of the Governor in Council referring certain questions of law to the Supreme Court for their opinion. Thereupon the Honourable C. Fitzpatrick, Attorney-General for Canada, stated that all the Provinces of Canada had been notified of the reference, and stated the names of those who proposed to appear, and the counsel who should represent them. The hearing opened by Counsel for the Province of New Brunswick first being heard: he was followed by the representatives of the other provinces, and lastly by the Attorney-General of Canada. Counsel for New Brunswick was heard in reply.

Counsel on References.

Where the Governor-General refers to the Supreme Court some question of law, with one exception, the uniform practice is that the representative of the Attorney-General of Canada is first heard. He also has the reply after counsel for all the interests have presented their arguments. This was the practice adopted in

Reference *re* Liquor Laws, May 1st, 1904;
Reference *re* Sunday Legislation, Feb. 21st, 1905;
Reference *re* Provincial Fisheries, Oct. 9th, 1905;
Reference *re* Grand Trunk Pacific Railway, Dec., 1909;
Reference *re* Criminal Code, May 16th, 1910.

The exception above referred to arises where the question for determination is as to whether a certain Act of the Parliament of Canada already passed is *intra vires*.

Rule 80.

In the Reference *re* Ferries, May 2nd, 1905, the Court directed counsel appearing for the Attorney-General of Ontario to open, as the validity of a Federal statute was impugned.

This practice, however, was not followed in the somewhat analagous case of the Reference *re* Railway Act, where by 4 Edw. VII., c. 31, s. 1, an amendment was made to the Railway Act, but the 2nd section provided that upon the passing of the Act the Governor in Council should submit to the Supreme Court the question of the competence of Parliament to enact the said amendment, and the section further provided that if the legislation should be held *intra vires*, the Governor in Council should issue a proclamation naming a day when the Act should come into force. The question was submitted to the Supreme Court, when the Deputy Attorney-General opened the matter on behalf of the Attorney-General of Canada, and was followed by counsel for the Grand Trunk Rly. and the railway employees. The Deputy Attorney-General was heard in reply.

Re Sunday Legislation, Oct. 30th, 1904.

Counsel for Attorney-General of Canada applied for directions as to what parties shall be represented on the hearing and receive notice.

The following order made: The Attorney-General of Canada to give notice (reference inserted at length in notices) to the Attorney-General of each province and Lieutenant-Governor of the Northwest Territories and Commissioner of the Yukon, and by advertisement to be inserted twice in the Official Gazette, that the application will be made to the Supreme Court on the 14th November to have reference set down for hearing at a date then to be fixed by the Court, and that the Court will on the said 14th November next be also asked to direct what person or persons or what class of persons shall be entitled to be heard thereupon.

On 14th November, counsel for the Attorney-General moved to have reference inscribed and for a direction as to interests to be represented upon argument and filed affidavits shewing service and publication of notice as directed by the Court. The Court directed that the following interests be represented: The Province of Ontario; The Grand Trunk Railway Co.; The Toronto, Hamilton & Buffalo Rly. Co.; The Canadian Copper Co.; The Lord's Day Alliance.

Reference re Marriage, March 11th, 1912.

Rule 81.

Newcombe, K.C., Deputy Minister of Justice, asked to have the reference set down and a direction given as to what parties should be served with notice of hearing. The Court directed that notice be at once given to the Attorneys-General of the different Provinces of Canada, and the Commissioner of the Yukon Territory; that factums be filed so as to be exchanged, ten days previous to the first day of the next session, when the appeal would be heard.

The conclusion to be drawn from these cases appears to be that after the order of Reference has reached the Registrar, the representative of the Attorney-General should apply either with or without notice to parties interested, to have the cause set down and for a direction from the Court as to what parties should receive notice, and how that notice should be given. If the Attorney-General has in advance given notice to all parties who ought to receive the same, the Court may proceed to fix a date for hearing and give directions as to who shall filed factums and be represented on the argument. If the application by the Crown is *ex parte* or without full representation of parties interested, the Court will then direct the application to be heard at a future date and in the meantime that notice of such application should be given to such parties as it deems desirable, and in such manner as it deems proper, and on such future date the Court will direct the reference to be set down and what parties should be heard, and such other matters with respect to the proceedings as it deems advisable.

APPEALS FROM BOARD OF RAILWAY COMMISSIONERS.

Rule 81. Whenever an appeal is taken from any decision of the Board of Railway Commissioners for Canada pursuant to the provisions of the Railway Act, the appeal shall be upon a case to be stated by the parties, or in the event of difference, to be settled by the said Board or the Chairman thereof, and the case shall set forth the decision objected to, and so much of the affidavits, evidence and documents as are necessary to raise the question for the decision of the Court.

2. All the Rules of the Supreme Court from 1 to 62, both inclusive, shall be applicable to appeals from the said Board of Railway Commissioners for Canada, except in so far as the Railway Act otherwise provides.

Rule 82.

The Railway Act, R.S. c. 37, s. 56, confers an appellate jurisdiction upon the Supreme Court from the order or decision of the Board where a question of the jurisdiction of the Board is involved, and leave to appeal has been granted by a Judge of the Supreme Court.

The first proceeding upon an appeal after leave granted under section 56, is the filing in the office of the Registrar of a case certified under the seal of the Board. The practice in this respect is substantially the same as obtains in ordinary appeals. The parties agree as to the contents of the case and the appellant has the same printed and certified to the Registrar of the Supreme Court by the Secretary of the Board of Railway Commissioners. If the parties are unable to agree, the case is settled by the Board or the Chairman thereof.

THE REGISTRAR'S JURISDICTION.

Rule 82.- The transaction of any business and the exercise of any authority and jurisdiction in respect of the same, which by virtue of any statute or custom, or by the practice of the Court, was, on the 23rd day of June, 1887, or might thereafter be done, transacted or exercised by a Judge of the Court sitting in Chambers, except the granting of writs of habeas corpus and adjudicating upon the return thereof, and the granting of writs of certiorari, may be transacted and exercised by the Registrar.

The Supreme Court Act, R.S. c. 139, s. 109, authorizes the Judges of the Supreme Court to confer upon the Registrar all the powers, authority and jurisdiction that might be exercised in Chambers by a Judge of the Court. Pursuant to this statute, a General Order was passed on the 17th October, 1887.

It has been thought desirable to include in the Rules everything contained in the General Orders, and the provisions of the former General Order No. 83 are now contained in the Rules 82 to 89, both inclusive.

The object of these rules is to relieve the Judges of the Court, so far as possible, from dealing with interlocutory applications, and wherever in the rules motions may be made to a Judge in Chambers, they should be made returnable before the Registrar, as Rule 142 expressly provides that the expression "Judge of the Supreme Court in Chambers" or "Judge in Chambers" shall include the Registrar sitting in Chambers.

Rule 83. In case any matter shall appear to the said Registrar to be proper for the decision of a Judge, the Registrar may refer the same to a Judge, and the Judge may either dispose of the matter, or refer the same back to the Registrar, with such directions as he may think fit. Rule 83.

Rule 84. Every order or decision made or given by the said Registrar sitting in Chambers shall be as valid and binding on all parties concerned, as if the same had been made or given by a Judge sitting in Chambers.

Rule 85. All orders made by the Registrar sitting in Chambers shall be signed by the Registrar.

Rule 86. Any person affected by any order or decision of the Registrar, except as otherwise in these Rules provided, may appeal therefrom to a Judge of the Supreme Court.

Except as otherwise in these Rules Provided.

The exceptions here referred to are the provisions under Rules 1 to 4, which provide for an appeal from a Judge in Chambers to the full Court, where the question of jurisdiction is raised.

Rule 87. All appeals from the Registrar to a Judge of the Court shall be by motion on notice setting forth the grounds of objection, and served within four days after the decision complained of, and two clear days before the day fixed for hearing the same, or served within such other time as may be allowed by a Judge of the said Court or the Registrar.

It will be noted that under this Rule, appeals from the Registrar to a Judge of the Court may be made upon a two days' notice, whereas in all other motions, four days' notice is required. *Vide* Rule 54 *supra*.

Rule 88. Appeals from the Registrar to a Judge of the Court shall be brought on for hearing on the first Monday after the expiry of the delays provided for by the next preceding Rule, or so soon thereafter as the same can be heard, and shall be set down not later than the preceding Saturday in a book kept for that purpose in the Registrar's office.

Rule 89.

Although Monday is the day provided by this Rule for hearing appeals from the Registrar, the practice obtains, where the parties consent and a Judge can be conveniently obtained, to bring the appeals on from the Registrar's decision at once. This often saves counsel who come from a distance from making two trips to Ottawa.

Rule 89. For the transaction of business under these Rules, the Registrar, unless absent from the city, or prevented by illness or other necessary cause, shall sit every juridical day, except during the vacations of the Court, at 11 a.m., or such other hour as he may specify from time to time by notice posted in his office.

FEES TO BE PAID REGISTRAR.

Rule 90. The fees mentioned in Form H set out in the Schedule to these Rules shall be paid to the Registrar by stamps to be prepared for that purpose.

Form H. in the Schedule to these Rules expressly dispenses with the fees being paid in *habeas corpus* and criminal appeals.

Vide infra, p. 613.

Appeals in forma pauperis.

The Supreme Court or a Judge thereof has no power to allow an appeal *in forma pauperis* or to dispense with the giving of the security required by the statute. *Fraser* v. *Abbott*, 22nd February, 1878, and 16th March, 1878.

Where leave to appeal is granted in *forma pauperis* by the Privy Council this will entitle the appellant to obtain the transcript record without the payment of any fees.

Dominion Cartridge Co. v. McArthur, 7th Oct., 1902, Cont. Dig. 1165.

On 7th October, 1902, present: Sir Henry Strong, C.J., and Taschereau Sedgewick, Girouard, Davies and Mills, JJ. A motion was made for an order directing the Registrar of the Supreme Court of Canada to transmit the record to the Registrar of Her Majesty's Privy Council, on an appeal by the respondent, without the payment of the fees in stamps as required by the statute and rules of practice of the Court.

After hearing counsel for the parties the motion was allowed and the order made as applied for, the Chief Justice stating that as this was an extraordinary case in which the Judicial Committee of the Privy Council had granted special leave to appeal in *forma pauperis*, the ordinary rules could not apply. Rule 91.

COSTS.

Rule 91. Costs in appeal between party and party shall be taxed pursuant to the tariff of fees contained in Form I set out in the Schedule to these Rules. *Vide infra*, p. 614.

There is no provisions for the taxation of costs as between solicitor and client. *Vide Boak* v. *Merchants Marine Ins. Co.*, 3rd June, 1879.

The Supreme Court Act, s. 71, authorizes a judge of the court appealed from to extend time for appealing, and s. 75 gives power to the same judge to allow the security for an appeal. In *Iredale V. Loudon*, Dec. 30th, 1907, the Hon. the Chief Justice of the Court of Appeal for Ontario made an order allowing the appellant's security, and by the same order extended the time for serving notice of appeal and allowing as good service a notice of appeal previously served. The order provided that the costs of the application be costs in the appeal. The order was intituled in the Court of Appeal for Ontario. After conference with Mr. Justice Duff, the Registrar was directed to recognize orders as to costs made by the courts below in the above matters and tax the costs thereof in the same way as interlocutory costs in the Supreme Court.

Hamburg Packet Co. v. The King, 39 Can. S.C.R. 621.

It was held that costs in the Supreme Court are payable to the client, and if as between him and his counsel or solicitor there are no costs payable of the appeal to the counsel or solicitor, no costs will in such case be taxed against the unsuccessful party.

Wilson v. Davies.

Following this judgment the registrar refused to tax to successful party costs of a solicitor and counsel who represented such party in the Supreme Court under an agreement between the client and a guarantee company, and subsequently followed this case in *Ponton* v. *The City of Winnipeg*.

Rule 91.

where there was a statute of the Province of Manitoba authorizing the city to tax against unsuccessful party costs in suit although the City Solicitor was paid by salary.

Ponton v. City of Winnipeg, 41 Can. S.C.R. 366.

S. 468 of the charter of the City of Winnipeg (1 & 2 Edw. VII., c. 77), provides that where the city solicitor is engaged at a stated salary, the city has the right, in law suits and proceedings, to recover and collect "lawful costs" in the same manner as if such solicitor were not receiving such salary. The Corporation enacted a by-law appointing its solicitor at an annual salary and, in addition thereto, that he should be entitled, for his own use, to such lawful costs as the corporation might recover in actions and proceedings, except disbursements paid by the city. Upon the taxation of the costs awarded to the respondent on an appeal to the Supreme Court of Canada (41 Can. S.C.R. 18), it was held that the statute and contracts above recited applied to costs awarded on said appeal and that, on the taxation, the usual fees to counsel and solicitor should be allowed. *Hamburg-American Packet Co.* v. *The King* (39 Can. S.C.R. 621), distinguished.

Increased Counsel Fee.

Except by consent, the Registrar will not, when taxing costs, hear any application for increased counsel fee, unless notice of such application has been given to the solicitor for the opposite party. Applications for increased counsel fee should be made to the Registrar in Chambers, and not to the Court.

Beamish v. Kaulbach, 5th June, 1879.

An application for increased counsel fee is not one for the full Court, but should be made to a Judge in Chambers.

Printing Unnecessary Matter.

L'Heureux v. Lamarche, 12 Can. S.C.R., at p. 465.

Cost of printing unnecessary and useless matter in case not allowed on taxation.

A form of Bill of Appellant's Costs will be found in the Appendix at p. 623, *infra*.

A form of Bill of Respondent'a Costs will be found in the Appendix at p. 625, *infra*.

A form of Affidavit of Disbursements will be found in the Appendix at p. 626, *infra*.

A form of Sheriff's Account will be found in the Appendix at p. 627, *infra*. Rule 93.

Rule 92. The Court or a Judge may direct a fixed sum for costs to be paid in lieu of directing the payment of costs to be taxed.

It is under this Rule that costs are allowed on interlocutory applications.

Rule 93. In any case in which by the order or direction of the Court, or Judge, or otherwise, a party entitled to receive costs is liable to pay costs to any other party, the Registrar may tax the costs such party is so liable to pay, and may adjust the same by way of deduction or set-off, or may, if he shall think fit, delay the allowance of the costs such party is entitled to receive until he has paid or tendered the costs he is liable to pay; or such officer may allow or certify the costs to be paid, and direct payment thereof, and the same may be recovered by the party entitled thereto, in the same manner as costs ordered to be paid may be recovered. This rule shall not apply to appeals from the Province of Quebec.

This Rule, and the six following Rules are new, and are adapted from the corresponding English Order 65.

This Rule, however, does not apply to the Province of Quebec. Art. 553 of the Code of Civil Procedure reads as follows:

"Every condemnation to costs involves, by the operation of law, distraction in favour of the attorney of the party to whom they are awarded."

Costs, therefore, being the property of the solicitor, are not the subject of set off in that Province.

"*By Way of Deduction or Set-Off.*"

Where several points are in dispute, and each party succeeds on some of them, the costs may be set off one against the other, and the plaintiff or defendant ordered to pay the balance (*Bankart* v *Tennant*, L.R. 10 Eq. 141, 150; and see *Knight* v. *Pursell*, 28 W.R. 90; *Badische Anilin* v. *Levinstein*, 29 C.D. 366; *Jenkins* v. *Jackson* (1891), 1 Ch. 89. Costs

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payable under different orders in the same suit, and notwithstanding change of solicitors (*Robarts* v. *Buee*, 8 C.D. 198), or in two suits in which the same estate is being administered (*Lee* v. *Pain*, 4 Hare, 255), may be set off against each other; but the costs of two independent proceedings in different Courts cannot be set off against each other (*Collett* v. *Preston*, 15 Beav. 458; *Wright* v. *Mudie*, 1 Sim. & Stu. 266; Ex p. Griffin, 14 C.D. 37); thus, the costs of appeal from a County Court to a Divisional Court cannot be set off against the costs of a bankruptcy appeal to a Divisional Court, though both Courts belong to the K. B. D. (*Re* Bassett (1896), 1 Q.B. 219); and costs in interpleader proceedings cannot be set off against costs in the action (*Barker* v. *Hemming*, 5 Q.B.D. 609). Chitty, J., refused to set off costs of an application to remove a County Court action into the C. D. against the costs of the action. (*Hassell* v. *Stanley* (1896), 1 Ch. 607.) See, too, *David* v. *Rees* (1904), 2 K.B. 435.

Where the C.A. dismissed an action, and remitted a cross action for trial, but the order was silent as to any set-off of costs, an application for stay of taxation and for set-off of the costs which might be ordered to be paid by plaintiffs in the cross-action against costs payable to them in the original action was refused, the Court declining to deprive the party of the present right to costs given to him by the order of the C. A. (*Automatic Weighing Machine Co.* v. *Combined Weighing Co.*, 37 W.R. 636). The fact that two actions are consolidated makes no difference, provided the costs sought to be set off are recoverable under an order prior to the order for consolidation (*Bake* v. *French* (1907), 1 Ch. 428).

Costs which a party is ordered to pay personally may be set off against costs to which he is entitled to receive out of a fund in favour of the party to whom he is liable (*Batten* v. *Wedgwood, &c., Co.*, (1884), 28 C.D. 317). Where a party entitled under an order to costs out of the estate, appealed from an interlocutory order, and his appeal was dismissed with costs, the C.A. refused to order the costs of the respondent of the appeal to be set off against the costs payable to the appellant under the previous order. (*Re Crawshay*, 45 C.D. 318).

Solicitors' Lien.

The costs may be directed to be set off without regard to the lien of the solicitors, which only extends to the ultimate balance (*Bawtree* v. *Watson*, 2 Keen, 713; *Cattell* v. *Simons*, 6 Beav. 304).

Morried Woman. Rule 94.

Costs paynhle by a married woman out of her separate estate may be a set-off against costs payable to her personally. A judgment against her, though limited, is a personal one (*Pelton* v. *Harrison* (1892), 1 Q.B. 118; and cf. *Holtby* v. *Hodgson*, 24 Q.B.D. 103; hut the death of her husband does not convert a judgment limited to her separate estate in the form of *Scott* v. *Morley*, 20 Q.B.D. 120, into a judgment upon which the widow can be personally called upon to pay (*Re Hewett* (1895) 1 Q.B. p. 332, per Vaughan Williams, J.).

Set-off of Debt Against Costs.

See *Pringle* v. *Gloag*, 10 C.D. 676; *Meynall* v. *Morris* (1911), 104 L.T., 667.

Forms of Direction as to Set-off.

See Seton, 248-252.

Rule 94. The Registrar may, whsnever he deems it advisable, ressrvs any qnestion arising on the taxation of costs for the opinion of a Jndgs.

Rule 95. Ths Registrar ehall, for the purpose of any proceeding befors him, have power and anthority to administer oaths and examine witnessee, and ehall in relation to the taxation of costs have anthority to dirsct the production of such hooks, papers and documsnts as hs shall deem necessary.

Rule 96. Any person who may he dissatisfied with the allowance or disallowance hy the Registrar, in any hill of costs taxed by him, of the whole or amy part of any items, may, at any time before the certificate or allocatur is signed, or ench sarlier time as may in any case he fixed hy the Rsgietrar, dsliver to ths othsr party interssted thersin, and carry in hsfore the Registrar, his objection in writing to snch allowance or disallowance, spscifying therein hy a list, in a short and conciss form, the items or parts thereof ohjscted to, and the gronnds and reasons for snch ohjections, and may therenpon apply to ths Registrar to review tht taxation ia respect of the same. Ths Registrar may, if he shall think fit, issue, pending the consideration of snch objections, a certificate

Rule 97. **of taxation or allocatur for or on acconnt of the remainder of the hill of costs, and snch fnrther certificate or allocatnr as may be necessary shall he issned hy the Registrar after his decision npon snch ohjections.**

Grounds and reasons for objections.

Objection to Principle of Taxation.

This Rule applies only where specifie objeetions are made as to the allowanee or disallowanee of partieular itcms, and not where the general prineiple on whieh the taxation has proeeeded is objeeted to (*Sparrow* v. *Hill*, 7 Q.B.D. 362; *Re Fletcher & Dyson*, 19 Times Rep. 682). And where there has been a refnsal to tax, and a certifieate given that there is nothing to tax, the Court has jurisdiction to vary or discharge the eertifieate on summons without objeetions being earried in (*Re Castle*, 36 C.D. 194). See, however, *Craske* v. *Wade*, 80 L.T. 380.

No Review on Points not Raised by Objections.

Points not raised in the written objeetions before the taxing officer eannot be raised on summons to review (*Re Nation*, 57 L.T. 648; *Shrapnel* v. *Laing*, 20 Q.B.D. p. 334, per Lord Esher, M.R.; *Strousberg* v. *Sanders*, 38 W.R. 117).

Rule 97. Upon snch application the Registrar ehall recoasider and review his taxation upon snch ohjections, and he may, if he shall think fit, receive further evidence in respect thereof.

This Rulc differs from the eorresponding English Rule in not requiring the Registrar to state the grounds and reasons of his decision.

Rule 98. Any party who may he dissatisfied with the certificate or allocatnr of the Registrar as to any item which may have been objected to as aforesaid, may within two days from the date of the certificate or allocatur, or euch other time as the Registrar at the time he signs the certificate or allocatnr may allow, appeal to a Jndge of the Supreme Court from the taxation as to the said item, and the Jndge may therenpon make snch order as to him may seem just; hut the certificate or allocatnr of the Registrar ehall be final and conclusive as to all matters which shall not have heen objected to in manner aforeeaid.

Appeal to a Judge of the Supreme Court. Rule 98.

A form of Notice of Motion will be found in the Appendix, *infra*, p. 629.

Cases Where Review Directed—Discretion of Taxing Officer.

The certificate of the taxing officer will not generally be reviewed on a mere question of *quantum* (*Re Catlin*, 18 Beav. 508; *Friend* v. *Solly*, 10 Beav. 329; *Alsop* v. *Lord Oxford*, 1 My. & K. 564); or of *quoties* (*Re* Brown, L.R. 4 Eq. 464); but only where the taxing officer has acted on some mistaken principle, or where there has been some irregularity in the proceedings before him (*Fenton* v. *Crichett*, 3 Mad. 496; *Russell* v. *Buchanan*, 9 Sim. 167; and see *Turnbull* v. *Janson*, 3 C.P.D. 264; *The Neera*, 5 P.D. 118; *Hargreaves* v. *Scott*, 4 C.P.D. 21; *Brown* v. *Sewell*, 16 C.D. 517; *Ager* v. *Blacklock*, 56 L.T. 890; *Budgett* v. *B.* (1895), 1 Ch. 202; *Oliver* v. *Robbins*, 43 W.R. 137).

In a proper case, however, the taxation may be reviewed even upon a question of *quantum*, *e.g.*, where there has been a very exorbitant charge (*Smith* v. *Buller*, L.R. 19 Eq. p. 474, per Malins, V.C.).

Where the Court has delegated to the taxing officer the decision of a question as to costs, the matter is within his discretion, and there can be no appeal from his decision, unless he has failed to exercise his discretion at all (*Boswell* v. *Coaks*, 36 C.D. 444).

"Final and Conclusive."

Objections need not be carried in where the ground of review is that the taxing officer has proceeded on a wrong principle, and specific items are not objected to, but the Court has jurisdiction to vary or discharge the certificate (*Re* Castle, 36 C.D. 194; *Sparrow* v. *Hill*, 7 Q.B.D. 362; *Re* Fletcher & Dyson, 19 Times Rep. 682). Where, however, in taxing a bill of costs in an action where judgment on a counterclaim had been given for the plaintiff, the master disallowed the whole of the costs incurred by the plaintiff in meeting the counterclaim upon the merits and in detail, it was held that objections must be carried in (*Craske* v. *Wade*, 80 L.T. 380). Where a party carried in objections to the disallowance of items before the taxing-master which were allowed, and the opposite party carried in no objections to the allowance of such items, but applied to review the taxation, it

Rule 99. was held that objections ought to have been carried in, and the application was refused (*Strousberg* v. *Sanders*, 38 W.R. 117). A point not raised in the objections carried in before the taxing-master cannot be taken upon the hearing in review (*Re* Nation, 57 L.T. 648; *Shrapnel* v. *Laing*, 20 Q.B.D. 334).

Rule 99. Snch appeal shall be heard and determined by the Jndge npon the evidence, which shall have been bronght in before the Rgistrar and no fnrther evidence shall be received upon the hearing thereof, nulsee the Judge shall otherwise direct and the costs of snch appsal sball be in the diecretion of the Jndge.

Cases.

See *Sturge* v. *Dimsdale*, 9 Beav. 170, where the Court, having communicated with the taxing officer as to the proceedings in his office, refused to receive an affidavit by the parties as to what had taken place there; and see *Charlton* v. *C.*, 31 W.R. 237; *Hester* v. *H.*, 34 C.D. 617.

CROSS-APPEALS.

Rnle 100. It shall not, under any circumetances, be necessary for a respondent to give notice of motion by way of cross-appeal. bnt if a respondent intende npon the hearing of an appeal to contsnd that the decision of the Conrt below should be varied. hs shall, within fiftsen days aftsr ths eecnrity has been approved or ench fnrthsr time as may be prescribed by the Conrt or a Judge in Chambers, give notice of snch intsntion to all partiss who may be affected thersby. The omission to give snch notice shall not in any way interfere with the power of ths Conrt on tbe hearing of an appeal to treat the whole case as open, bnt may, in the discretion of the Conrt, be ground for an adjournmsnt of the appeal, or for spscial order as to coste.

This Rule contains an important change from the provision of former Rule 61, in that notice of cross appeal must be given within fifteen days after the security has been approved, and not fifteen days before the first day of the next session.

Mayor, etc., of Montreal v. Hall, 17th Nov., 1883, Cass. Dig., 2nd ed., 680.

Counsel for respondents, who has given notice of cross-appeal, moves for leave to proceed with cross-appeal, notwith-

standing original case not filed until that day by appellants, and the appeal has not been inscribed. Rule 100.

Counsel for appellants also moves to have principal appeal heard, the delay in inscribing and in filing factums having been an oversight.

Held, that if the cross-appellant desired to proceed with his cross-appeal he should have himself filed the original case. Both principal appeal and cross-appeal ordered to stand over.

Canadian Pacific Railway Co. v. Lawson, Cout. Dig. 74.

A rule was discharged so far as it asked a nonsuit, but was made absolute for a new trial. Held, on an appeal by defendant that although the plaintiff was entitled to recover, yet, as he had not appealed from the order for a new trial, the rule should be affirmed, and the appeal dismissed with costs.

Pilon v. Brunet, 5 Can. S.C.R. 319.

A motion to quash an appeal on the ground that it should not have been brought as a substantive appeal, but as a cross appeal, was dismissed. But the respondent, although successful in getting the judgment varied, was allowed only the costs of a cross-appeal taken under Rule 61 (now Rule 100).

City of Montreal v. Labelle, 14 Can. S.C.R. 741.

A respondent whose verdict must be set aside on the ground that it was awarded by way of *solatium* cannot be given substantial damages where he has failed to give notice of his intention to ask appropriate relief by way of cross-appeal.

Stephens v. Chausse, 15 Can. S.C.R. 379.

Plaintiff recovered $5,000 damages in an action for negligence but the verdict was reduced to $3,000 on appeal to the Queen's Bench on the ground that the assessment made by the trial Court included vindictive damages for which the defendant was not liable. The Supreme Court was of opinion that the amount awarded by the Superior Court at the trial was not unreasonable and could not be said to include vindictive damages, but, as there was no cross-appeal by the plaintiff, the Court would not interfere to restore the original judgment.

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Bulmer v. The Queen, 23 Can. S.C.R. 488.

A cross-appeal will be disregarded by the Court when Rules 62 and 63 of the Supreme Court rules have not been complied with (now covered by Rules 100 and 101).

Town of Toronto Junction v. Christie, 25 Can. S.C.R. 551.

Under the Ontario Judicature Act, R.S.O. 1887, c. 44, ss. 47 and 48, the Court of Appeal has power to increase damages awarded to a respondent without a cross-appeal, and the Supreme Court has the like power under its Rule No. 61 (now 100). Taschereau, J., dissented. Per Strong, C.J. Though the Court will not usually increase such damages without a cross-appeal, yet where the orginal proceedings were by arbitration under a statute providing that the Court, on appeal from the award, shall pronounce such judgment as the arbitrators should have given, the statute is sufficient notice to an appellant of what the Court may do and a cross-appeal is not necessary.

McNichol v. Malcolm, 1907.

In this case the plaintiff (respondent) Malcolm, brought an action against McNichol, appellant, and the Standard Plumbing Co., claiming $18,000 damages under the following circumstances: The defendant McNichol was plaintiff's landlord, and by the lease between them, covenanted to keep the premises heated up to 70 degrees above zero. During the winter the heating proved defective, and plaintiff gave notice to her landlord to have the heating made satisfactory. Upon examination of the premises, the landlord found it necessary to make a change in the radiators, and for that purpose called upon the Standard Plumbing Co., who were under contract with him in connection with the construction of the building, to put in the necessary plant for suitably heating the premises, to make the plaintiff's rooms satisfactory. In the course of installing the new radiators, the plaintiff's premises were flooded with steam and her stock in trade destroyed.

At the trial she recovered judgment against both defendants, but upon appeal to the full Court the judgment in her favour against the Plumbing Co. was set aside, and the action dismissed as against them without costs. Thereupon McNichol appealed to the Supreme Court. His notice of appeal, dated June 10th, 1907, concludes as follows: "And the said H. R. McNichol will ask that in case the action is not dismissed as against him, that he be granted indemnity from or relief over against his co-defendants."

The case on his appeal was certified to the Registrar of the Supreme Court on the 13th April, 1907. On the 18th April, the respondent Malcolm served upon the Standard Plumbing Co. the following notice of cross-appeal: Rule 100.

"Take notice that on the hearing of the appeal of the above named appellants, the plaintiff will contend that the decision of the Court of Appeal should be varied and the judgment of Chief Justice Dubuc entered at the trial of this action in the Court of King's Bench should be restored except as to damages by water. Dated this 18th day of April, 1907."

The Plumbing Co. filed a factum upon the cross appeal and appeared by counsel upon the argument, and took objection to the notice of cross-appeal, claiming that no security had been given the Plumbing Co. by the respondent Malcolm, and that her proceeding was a substantive appeal from the Court of Appeal and that no relief in the present appeal could be obtained against them. They also filed the following letter

"Winnipeg, May 14th, 1907.

"Messrs. Aikins, Robson & Co., Barristers, etc. City.
(Solicitor for McNichol).

Re Malcolm vs. McNichol.

"DEAR SIRS:—As there seems to be some doubt as to whether or not you propose to claim relief over against the Standard Plumbing Co. upon the hearing of the appeal in the Supreme Court, we would be glad if you would write us a note and state positively whether it is your intention upon the appeal to do so. We do not know that it will be necessary for us to appear on the appeal unless you intend to claim relief over against our clients. Please let us hear from you.

"Yours truly,
("Signed) Hough, Campbell & Ferguson,"
(Solicitors for Standard Plumbing Co.).

"Winnipeg, May 16th, 1907.

"Messrs. Hough, Campbell & Ferguson, Barristers,
Winnipeg, Man.

Re Malcolm vs. McNichol.

"DEAR SIRS:—We have your letter of the 14th. We are not claiming relief over against your clients at the hearing of the appeal in the Supreme Court, in accordance with the arrangement made between Mr. Aikins and Mr. Wilson when the case came up before the Court of Appeal, that the question of indemnity or relief over against your clients should not be taken up until the rights of the plaintiff against each of the defendants had been determined.

"Yours truly,
"(Signed) Aikins, Robson & Co."

The Court reserved judgment on the application of the Plumbing Co., heard the entire case on the merits, and gave

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judgment that the notice of cross-appeal was properly given, and dismissed the appeal of McNichol, but reversed the Court of Appeal below and allowed the cross-appeal against the Plumbing Co. with costs.

Coy v. Pommerenke, 44 Can. S.C.R. 543.

In this case an application was made to Mr. Justice Idington to set aside a notice of cross-appeal, when the following judgment was pronounced (not reported):

"The respondent Pommerenke brought an action against one Bate and three others, of whom appellant is one, alleging that Bate, who was his agent for sale of lands, had, with the assistance of these others, defrauded him.

"The trial judge exonerated one of these others, and gave judgment against Bate and two of these others.

"Bate made no appeal. The present appellant and another named Murison, appealed to the Court of Appeal. That Court relieved Murison, but held appellant liable along with Bate.

"On appellant giving notice of appeal to this Court, the respondent Pommerenke gave notice under Rule 100, by way of cross-appeal, claiming that the judgment against Murison should be restored.

"That notice is now moved against by Murison on the ground that he is in no way concerned in the appeal and cannot be reached by such a proceeding.

"It seems to me the decision of this court in the cases of Pilling and Lowell v. The Attorney-General of Canada is conclusively against this motion.

"Those appeals arose out of proceedings had in the Exchequer Court of Canada under an act for the winding-up of the Quebec Southern Rly. Co. The appellants Pilling and Lowell claimed, along with three others Lawton, Hasseltine and Bloom, to rank for the full amount of the bonds they alleged each to have become entitled to, but the referee only allowed to each the sum he had advanced. Pilling and Lowell both appealed to this court. The Attorney-General gave notice by way of cross-appeal to the five bondholders, claiming these bonds were worthless in law and no sum should be allowed any of the parties.

"After the case had been set down, Lawton Hasseltine, and Bloom who had not appealed, and whose judgment was sought to be thus upset by the cross-appeal, moved the Court to be dismissed from the appeal. Counsel put forward in argument substantially the same grounds as taken before me herein on behalf of Murison, cited the same cases, and in compliance with the direction of the court filed a written brief.

"The motion was directed to stand over until the argument of the appeal, which might, as the facts were very involved, illuminate the point; and the right of the Attorney-General to appeal at all was challenged.

"The judgment of the court was that the Attorney-General had a right to appear instead of, or for, the Minister of Railways and Canals, and to raise all the questions proper to be considered

upon such a cross-appeal, as against parties who did not appeal as well as against those who had appealed. Rule 100.

"So far as I can find, I was the only one agreeing in this judgment to give reasons touching the point now in question, of the extent to which a notice under Rule 100 might go.

"I find I put my reasons therefor as follows:

"'The other three parties, Lawton, Hasseltine, and Bloom, collocated for claims dependent on same title, did not appeal, but I fear the cross-appeal must be held to reach them also.

"They and those who have appealed all joined in one assertion of claim, one set of pleadings and issue, and therefore I do not see how this can be distinguished from the case of McNichol v. Malcolm, 39 Can. S.C.R. 265.'

"I had some doubt in that case by reason of the clearly distinct and separate interest each claimant had, though their title dependent on the same origin, and the proceedings to enforce same originated as stated in a joint pursuit, yet it might well have happened each had as he could have pursued his own remedy quite independentiy of the others.

"The motion made on behalf of these three parties, Lawton, Hasseltine nnd Bloom, to have the appeal quashed as against them waa in effect dismissed as judgment was given against the claims of the five bondholders.

"In short, that decision covera a case going far beyond what appears by way of objection here.

"It cannot be said that, because the other members of the court failed to deal with the point in opinions they gave, another view was held by them. It is clear beyond any douht the conclusion reached could not he so reached without overruling the objection.

"The motion must he dismissed without costs, as the decision upon which, and but for which, I might have had much doubt or difficulty is not reported."

When the case came on to be heard on the merits, the question of the right of the respondent to serve a notice of cross-appeal upon one of the defendants was again raised, but as the majority of the Court was of opinion to dismiss the cross-appeal on the merits it did not become necessary to determine the question of practice raised. The Chief Justice agreed with Mr Justice Anglin, who expressed doubts as to the right of the respondent to serve such a notice of cross-appeal, and even of the right of the judges, by rule, to authorize this being done in view of the provisions of s. 75 of the Supreme Court Act, "inasmuch as it would confer a right to launch and maintain what is in reality an independent appeal." Mr. Justice Davies disposes of the case without deciding the question of practice, and was disposed to distinguish the facts of that case from *McNichol* v. *Malcolm*, *supra*. Mr. Justice Idington affirmed the view he took when the matter came before him in Chambers, while Mr. Justice Duff did not deal with the question of practice.

Rule 100. *Cross appeals—Privy Council Cases.*

Every party who feels aggrieved by a decree ought to appeal against that part of it which he complains of. *Nana Narain Rao* v. *Hurree Punt Bhao*, 11 Moo. P.C. 36.

Where two or more parties appeal against one decree or where the same party appeals against several decrees, whether made in the same suit or in cross-suits, the Judicial Committee will, if the ends of justice seem likely to be furthered thereby, permit them to be consolidated and to come on for hearing upon one printed case on each side and a single appendix; and this permission may be given upon the application either of appellant or respondent. *Retenmeyer* v. *Obermuller*, 2 Moo. P.C. 93. *Campbell* v. *Dent*, 2 Moo. P.C. 292. *Colonial Bank* v. *Warden*, 5 Moo. P.C. 340. *Prinsep and East India Co.* v. *Dyce Sombre et al.*, 10 Moo. P.C. 232.

The date of the order for consolidation is considered as the date of both appeals, and the term from which time is thenceforth to be reckoned in the proceedings, and without a consolidation of the appeals, permission to lodge a single case and for a single hearing will be granted upon the application of the respondent, even where separate orders in separate proceedings are impunged, if the respondent in each case is the same and the orders in each case involve the same consideration. *In re Downie and Arrindell*, 3 Moo. P.C. 414.

In the Privy Council it is said: "Care will be taken not to make the consolidation absolute, if the rights of either party may be injuriously affected." Thus in an order made for the admission of a cross-appeal it was provided that the cross-appeal was to be prosecuted and come on for hearing on one printed case and on the same printed transcript record as the principal appeal, provided the same were duly proceeded with by the appellants, but if such principal appeal should be dismissed for non-prosecution, then the petitioners were to be at liberty to prosecute their cross-appeal as a separate cause. *Nana Narain Rao* v. *Hurree Punt Bhao*, 11 Moo. P.C. 36.

Notice of cross-appeal nunc pro tunc.

Toronto Rly Co. v. The King (1908), A.C. 260. C.R. [1908] A.C. 326.

"The respondents in their printed case asked that the judgment of the Court of Appeal might be set aside and the verdict of the jury restored. Some doubts having arisen

whether they were competent to do so on this appeal, without having first lodged a cross petition in that behalf, their Lordships, being of opinion that the necessary relief would undoubtedly have been granted to them if they had applied for it at the time when the appellants obtained special leave to appeal, allowed the respondents at the hearing to put in such a petition *nunc pro tunc*, and they will humbly advise His Majesty to grant this relief." Rule 100.

Cross-appeals—Court of Appeal Cases in England.

The present Rule 100 is substantially the same as English Order 58, Rule 6, which deals with appeals to the Court of Appeal. The following are the most recent English decisions under that Rule:

"Notice of Cross-appeal.—A respondent may give notice to a co-respondent that, on the hearing of the appeal he will ask for a variation of the order in his favour (*ex p. Payne*, 11 C.D. 539). The rule does not apply to the case of a respondent seeking to have an order varied on a point in which the appellant has no interest, but a formal notice of appeal must be given (*Re Cavander*, 16 C.D. 270, settling the doubt expressed in *Ralph* v. *Carrick*, 11 C.D. 873; *Hunter* v. *Hunter*, 24 W.R. 527).

"Even where the whole decree is appealed from the respondent must give notice of his intention to apply for a variation (*Harris* v. *Aaron*, 36 L.T. 43).

"Where plaintiff appeals from part of a judgment and respondent gives notice of cross-appeal, the judgment can be varied in plaintiff's favour on a point not mentioned in his notice of appeal (*Cracknall* v. *Janson*, 11 C.D. 1).

"Claim and Counterclaim.—Where the claim and counterclaim in an action are addressed to separate and distinct matters, and the defendant appeals against the order on the counterclaim, it is not proper for the plaintiff to appeal against the order on the claim by means of a cross-notice under this rule. He should give a substantive notice of appeal under r. 1. If, however, the judge has, with the acquiescence of the parties, linked the claim and counterclaim together, so that one decision disposes of them both, the cross-notice may be treated as a distinct notice of appeal (*National Society for Distribution of Electricity* v. *Gibbs* (1900), 2 Ch. 280)."

Rule 101. **Rule 101. The respondent who gives a notice of cross-appeal shall deposit a printed factum or points for argument in appeal with the Registrar in the manner hereinhefore provided as regards the principal appeal, and the parties npon whom such notice has heen served ehall also deposit their printed factnm in the manner hereinhefore providcd as regards the principal appeal. Factums on the croes-appeal shall he interchanged between the parties as hereinbefore provided as to the principal appeal. The factnm on the cross-appeal may he inclndea ir the factum on the main appeal.**

This Rule also varies considerably from former Rule [illegible]. Under the old practice the respondent who gave the notice of cross-appeal, was required, within two days after he had served his notice of cross-appeal, to deposit a printed factum, and the appellant was only allowed a week within which to deposit his printed factum in reply. It was quite impossible to print the factum in reply in the time allowed by the rule.

There is no good reason why a party intending to cross-appeal should not serve his notice within fifteen days after the security has been allowed. Under the present rules as to cross-appeals, the factums are required to be ready and deposited within the same time as the factums on the main appeal, and may be included therein if desired.

TRANSLATION OF FACTUM.

Rule 102. Any jndge may require that the factum or points for argument in appeal of any party shall be translated into the language with which snch Judge is most familiar, and in that case the Judge shall direct the Registrar to cause the same to be translated and shall fix the number of copies of the translation to be printed, and the time within which the same shall he deposited with the Registrar, and the party depositing snch factum shall thereupon cause the same forthwith to he printed at his own expense, and such party shall not be deemed to have deposited his factnm until the reqnired number of the printed copies of the translation shall have been deposited with the Registrar.

TRANSLATIONS OF JUDGMENTS AND OF OPINIONS OF JUDGES OF COURT BELOW.

Rule 103.

Rule 103. Any Judge may also require the Registrar to cause the judgments and opinions of the Judges in the Court below to be translated, and in that case the Judges shall fix the number of copies of the translation to be printed and the time within which they shall be deposited with the Registrar, and such translation shall thereupon be printed at the expense of the appellant.

PAYMENT OF MONEY INTO COURT.

Rule 104. Money required to be paid into Court shall be paid into the Bank of Montreal at its Ottawa agency, or such other bank as shall be approved of by the Minister of Finance.

2. The person paying money into Court shall obtain from the Registrar a direction, to the bank to receive the money.

3. The bank receiving money to the credit of any cause or matter shall give a receipt therefor in duplicate; and one copy shall be delivered to the party making the deposit, and the other shall be posted or delivered the same day to the Registrar.

4. The stamps for the fees payable on money paid into Court shall be affixed to the receipt directed by this Rule to be posted or delivered to the Registrar.

The procedure provided by former Rule 66 for payment of money into Court has been done away with, and that in force in the High Court of Justice for Ontario adopted. Under the old rule the Registrar was unable to efficiently supervise the affixing of stamps required to be obtained in such cases. Under the present rule the receipt from the Bank, which is required to be forwarded to the Registrar by the banker, shows the amount of money paid into Court and should have attached thereto the stamps required by the tariff of fees. Form II., Rule 90. *Vide infra*, p. 613.

The order or judgment below upon which the appeal to the Supreme Court is based should be filed with the Registrar before the authorization for payment in is signed.

In the case of *C.P.R.* v. *Ottawa*, an appeal from the Board of Railway Commissioners, the registrar having signed the usual authority to the Bank to receive the deposit as security for the appeal, and the question having been raised by the

Rule 105. registrar before the acting Chief Justice as to what would be the most convenient date for hearing the appeal, the Court being then in session, and the matter having been referred to the Court, the registrar was instructed that the order of the Board of Railway Commissioners allowing in this case an appeal on a question of law, should have been deposited with him before the authority to the Bank was signed.

PAYMENT OF MONEY OUT OF COURT.

Rule 105. If money is to be paid out of Court, an order of the Court or a Judge in Chambers must be obtained for that purpose upon notice to the opposite party.

HOW MADE.

Rule 106. Money ordered to be paid out of Court is to be so paid upon the cheque of the Registrar, counter-signed by a Judge.

FORMAL OBJECTIONS.

Rule 107. No proceeding in the said Court shall be defeated by any formal objection.

Section 95, of the Act, provides that:

"No informality in the heading or other formal requisites of any affidavit, declaration or affirmation, made or taken before any person under any provision of this or any other Act, shall be an objection to its reception in evidence in the Supreme Court or the Exchequer Court if the Court or Judge before whom it is tendered thinks proper to receive it: and if the same is actually sworn to, declared or affirmed by the person making the same before any person duly authorized thereto, and is received in evidence, no such informality shall be set up to defeat an indictment for perjury."

EXTENDING OR ABRIDGING TIME.

Rule 108. In any appeal or other proceeding the Court or a Judge in Chambers may by order, enlarge or abridge the time for doing any act, or taking any proceeding upon such (if any) terms

as the justice of this case may rsquire, and such order may be granted, although the application for ths same is not made until after the expiration of the time appointed or allowed. Rule 108.

This Rule differs from former Rule 70 in containing an express provision that the application may be made after the expiration of the time appointed or allowed by the Rules.

Gilbert v. Ths King.

Held, that the power given by s. 1024 of the Criminal Code, R.S. 1906, c. 146, to a Judge of the Supreme Court of Canada to extend the time for service on the Attorney-General of notice of an appeal in a Crown case reserved, may be exercised after the expiration of the time limited by the Code for the service of such notice.

Orders will not be granted under this rule simply on consent of parties or their solicitors. Some good reason must be afforded for an extension of the time provided by Rules.

Bickford v. Lloyd; Canada Southern Rly. Co. v. Norvell, Cout. Dig. 1115.

Under section 79 of the Supreme and Exchequer Courts Act (now section 109) and this Rule, a Judge of the Supreme Court in Chambers has power to extend the time for printing and filing case. Per Ritchie, C.J., in Chambers; per Fournier, J., in Chambers.

Bank of B.N.A. v. Walker, Cout. Dig. 1115.

On 12th October, 1881, the agent for defendants' solicitor applied for three months' further time to file the case and factums, shewing by affidavit that the day the order had been made by a Judge of the Supreme Court, allowing $500 to be paid into the Supreme Court of Canada as security for the costs of appeal, viz., 13th September, 1882, the $500 had been paid in; that the next day the papers had been mailed to the defendants' solicitor at Victoria, B.C., to enable him to prosecute his appeal; that a letter took about three weeks to reach Victoria from Ottawa; that he had on 7th October received a telegram (produced) from defendants' solicitor saying "Papers just received; get time extended," and that he verily believed unless three months' further time was granted to prepare and print case and factums and transmit them, grave injustice would be done. An order was thereupon made giving until 1st December then next to have case printed and

Rule 109. filed with the Registrar of the Supreme Court of Canada. Per Ritchie, C.J., in Chambers.

Where an order is made dismissing an action unless some act is done within a specified time, if the order is not appealed against the time for doing the act cannot be enlarged after it has expired for the action is dead (*Script Phonography Co.* v. *Gregg*, 59 L.J. Ch. 406; *Whistler* v. *Hancock*, 3 Q.B.D. 83; *King* v. *Davenport*, 4 Q.B.D. 402) The time for appealing against such an order may in a proper case be enlarged after it has expired *Burke* v. *Rooney*, 4 C.P.D. 226; *Carter* v. *Stubbs*, 6 Q.B.D. 116.)

NON-COMPLIANCE WITH RULES.

Rule 109. The Court or a Judge may, under special circumstances, excuse a party from complying with any of the provisions of the Rules.

REGISTRAR TO KEEP NECESSARY BOOKS.

Rule 110. The Registrar is to keep in his office all appropriate books for recording the proceedings in all suits and matters in the said Supreme Court.

ADJOURNMENT IF NO QUORUM.

Rule 111. If it happens at any time that the number of Judges necessary to constitute a quorum for the transaction of the business to be brought before the Court is not present, the Judge or Judges then present may adjourn the sittings of the Court to the next or some other day, and so on from day to day until a quorum shall be present.

COMPUTATION OF TIME.

Rule 112. In all cases in which any particular number of days not expressed to be clear days is prescribed by the foregoing Rules, the same shall be reckoned exclusively of the first day and inclusively of the last day, unless such last day shall happen to

fall on a Snnday, or a day appointed hy the Governor-General for a puhlic fast or thanksgiving, or any other legal holiday or non-juridical day, as provided hy the statntes of the Dominion of Canada. Rule 112.

This Rule is substantially the same as the Ontario Consolidated Rules Nos. 344 and 345, and for decisions respecting the application of the rule *vide* Holmested & Langton's Judicature Act, 1905, p. 552.

By Rule 143, the word "month" means "calendar month," where "lunar months" are uot expressly mentioned.

The Interpretation Act, Revised Statutes of Canada, 1906, c. 1, s. 34, sub-s. 11, d fines "holiday" as follows:

"(11) 'Holiday' includes Sundays, New Year's Day, the Epiphany, Good Friday, the Ascension, All Saints' Day, Conception Day, Easter Monday, Ash Wednesday, Christmas Day, the birthday or the day fixed by proclamation for the celebration of the birthday of the reigning sovereign, Victoria Day, Dominion Day, the first Monday in September, designated Labour Day, and any day appointed by proclamation for a general fast or thanksgiving."

And s. 31, sub-s. h, of the same Act provides as follows:

"(h) If the time limited by any Act for any proceeding, or the doing of anything under its provisions, expires or falls upon a holiday, the time so limited shall be extended to, and such thing may be done on the day next following which is not a holiday."

OTHER NON-JURIDICAL DAYS.

Rule 113. **Where any limited time less than six days from or after any date or event is appointed or allowed for doing any act or taking any proceedings, Sunday and other days on which the offices are closed shall not be reckoned in the computation of such limited time.**

The old rules were defective in that they contained no provision eliminating Sundays and holidays from the days to be reckoned in computing a less number of days than six. This rule is substantially the same as English Order 64, Rule 2.

Rule 114. *Limited Time.*

Where the limited period is not less than six days, Sundays and holidays are counted. *Ex parte Viney*, 4 C.D. 794.

In such cases it is only when the last day is Sunday that by the next rule an extension of time is given.

Rule 114. Where the time for doing any act or taking any proceeding expires on a Snnday, or other day on which the offices are closed, and hy rsason thereof snch act or proceeding cannot be done or taksn on that day, snch act or proceeding, shall so far as regards the time of doing or taking the same, he held to be duly done or taksn, if dons or taksn on the day on which the offices shall nsxt he open.

This Rule is new and reproduces English Order 64, Rule 7.

Rule 115. Servicee of notices, snmmonses, orders, and other procsedings, shall he effected hefors the honr of six in ths afternoon, sxcept on Saturdaye, whsn it shall he sffected hefore the hour of two in the afternoon. Ssrvice effected aftsr six in the afternoon on any wesk-day excspt Satnrday shall, for the purpose of compnting any period of tims snhsequent to ench service, be dsemed to havs heen sffected on ths following day. Service sffected after two in ths aftsrnoon on Satnrday shall for the like purposs he dssmsd to havs hesn effected on the folowing Monday.

This Rule is also new and reproduces English Order 64, Rule 11.

SITTINGS AND VACATIONS.

Rule 116. The office of the Suprsme Conrt shall he open between ths hovrs of ten o'clock in the forsnoon and four o'clock in ths afternoon (except on Saturdays, when it shall close at one o'clock), every day in ths ysar except statntory holidays and Long Vacation and Christmas Vacation.

2. During vacation ths offics shall hs open hetween the hours of ten o'clock in ths forsnoon and ons o'clock in ths afternoon.

This Rule is new. ss. 2 varies the former practice by requiring that the Registrar's office in vacation shall be open

from ten to one o'clock, instead of from eleven to twelve o'clock on each juridical day. Rule 117.

Chambers are not held in vacation, although in cases of urgency applications will be heard by the Registrar or a Judge of the Court.

CHRISTMAS VACATION.

Rule 117. There shall be a vacation at Christmas, commencing on the 15th day of December and ending on the 10th of January.

LONG VACATION.

Rule 118. The Long Vacation shall comprise the months of July and August.

VACATION IN COMPUTATION OF TIME.

Rule 119. The time of the Long Vacation or the Christmas Vacation shall not be reckoned in the computation of the times appointed or allowed by these Rules for the doing of any act.

The effect of this Rule is to stay all proceedings provided for by the Rules in appeals during Long and Christmas Vacations, but it is to be remembered that the Rule does not affect any of the provisions of the Supreme Court Act, and that it is still necessary under section 69 to bring an appeal within 60 days from the signing, entry or pronouncing of the judgment appealed from, even if part or all of the 60 days falls within vacation; and similarly, the rule does not dispense with the provisions as to time contained in section 70 of the Act.

WRITS.

Rule 120. A judgment or order for the payment of money against any party to an appeal other than the Crown, may be enforced by writs of fieri facias against goode, and fieri facias against land.

It is not the practice of the Court to issue a writ of execution to enforce the payment of costs except under special circumstances.

Rule 121.

Although full provisions are made for the issue of writs of *fieri facias*, the Supreme Court Act, R.S. c. 139, s. 58, expressly provides for the enforcing of the judgment of the Supreme Court by the Court of original jurisdiction. That section reads as follows:

"58. The judgment of the Court in appeal shall be certified by the Registrar of the Court to the proper officer of the Court of original jurisdiction, who shall thereupon make all proper and necessary entries thereof; and all subsequent proceedings may be taken thereupon as if the judgment had been given or pronounced in the said last mentioned Court.

This Rule, and the following 20 Rules formerly appeared as General Order No. 85, made on the 18th October, 1888.

Rule 121. A judgment or order reqniring any person to do any act other than ths payment of money or to ahstain from doing anything may he enforced hy writ of attachment, or hy committal

Rule 122. Writs of fieri facias against goods and lands shall he executed according to the exigency thereof, and may hs in the Form J set ont in the Schedule to these Rules. *Vide*, p. 615. *infra*.

Rule 123. Upon the return of the sheriff or other officer, as the case may he, of "lands or goods on hand for want of huyers," a writ of venditioni exponas may issue to compel the sale of the property seized. Such writ may he in ths Form K set out in the Schedule to these Rules. *Vide infra*, p. 616.

Rule 124. In ths mode of selling lands and goods and of advertising the same for sale, the sheriff or other officer is, except in so far as the exigency of the writ otherwise requires, or as is otherwise provided by these Rules, to follow the laws of his province applicahle to the execntion of similar writs issuing from the highest Court or Courts of original jurisdiction therein.

Rnle 125. A writ of attachment shall he executed according to the exigency thereof.

Rnle 126. No writ of attachment shall he issued without the order of the Court or a Jndge. It may he in the Form L set out in the Schedule to these Rnles. *Vide infra*, p. 617.

Rule 127. In these Rules the term "writ of execntion" shall inclnde writs of fieri facias against goods and against lands, attachment and all snbsequent writs that may issue for giving effect thereto. And the term "issuing execution against any party," shall mean the issning of any such process against his person or property as shall he applicahle to the case. Rule 127.

Rnle 128. Ail writs ehall be prepared in the office of the Attorney-General, or by the attorney or solicitor suing out the same, and the name and the address of the attorney or solicitor suing ont the same, and if issued through an agent, the name and residence of the agent aiso, shall he endorsed on such writ, and every such writ shall before the issuing thereof he seaied at the office of the Registrar, and a praecipe therefor shall he ieft at the said office, and therenpon an entry of issuing such writ, together with the date of sealing and the name of the attorney or soiicitor suing ont the same, shall be made in a hook to he kept in the Registrar's office for that pnrpose, and ali writs shall he tested of the day, month and year when issued. A praecipe for a writ may be in the Form M set out in the Schedule to these Rules. *Vide infra*, p. 617.

Rule 129. No writ of execntion shail he issued without the production to the officer hy whom the same shali be issned of the judgment or order upon which the execution is to issne, or an office copy thereof showing the date of entry. And the officer shali be satisfied that the proper time has elapsed to entitle the judgment creditor to execution.

Rule 130. In every case of execution the party entitled to execution may levy the interest, ponndage and fees and expenses of execntion over and above the sum recovered.

Rule 131. Every writ of execntion for the recovery of money shall be endorsed with a direction to the sheriff, or other officer to whom the writ is directed, to ievy the money really dne and payable and songht to he recovered nnder the judgment or order, stating the amount, and also to levy interest thereon if sought to be recovered, at the rate of five per cent. per annum, from the time when the judgment or order was entered np.

Rule 132. Rule 132. A writ of execution, if nnexecuted, shall remain in force for one year only, from its issne, nnless renewed in the manner hereinafter provided; hnt ench writ may, at any time hefore its expiration hy leave of the Conrt or a Judge, he renewed hy the party issning it for one year from the date of snch renewal, and so on from time to time during the continuance of the renewed writ, either hy heing marked in the margin with a memorandum signed hy the Registrar or acting Registrar of the Court, stating the date of the day, month and year of such renewal, or hy such party giving a written notice of renewal to the sheriff, signed hy the party or his attorney, and having the like memorandnm; and a writ of execntion so renewed shall have effect, and he entitled to priority according to the time of the original delivery thereof.

Rule 133. The prodnction of a writ of execution, or of the notice renewing the same, purporting to he marked with the memorandum in the last preceding Rule mentioned, showing the same to have heen renewed, shall he prima facie evidence of its having heen so renewd.

Rnle 134. As hetween the original parties to a jndgment or order, execution may issue at any time within six years from the recovery of the judgment or making of the order.

Rule 135. Where six years have elapsed since the jndgment or order, or any change hae taken place hy death or otherwise in the parties entitled or liahle to execution, the party alleging himself to he entitled to execntion may apply to the Conrt or a Judge for leave to isue execution accordingly. And the Court or Judge may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect. And the Court or Judge may impose such terms as to coste or otherwise as shall seem just.

Rule 136. Any party against whom jndgment has been given or an order mads, may apply to the Court or a Jndge for a stay of execution or other relief against snch a judgment or order and the Court or Jndge may give such relief and npon such terms as may he jnst.

Adams & Burns v. Bank of Montreal, 31 Can. S.C.R. 223. Rule 136.

Held that a Judge in Chambers of the Supreme Court will not entertain an application to stay proceedings pending an appeal from the judgment of the Court to the Judicial Committee of the Privy Council.

In the first edition of this work it was said: "I do not find that this Rule, although then in force as part of General Order No. 85, was called to the attention of the Court either in this or in any other case where applications were made to stay proceedings pending an appeal to the Judicial Committee."

In Union Investment Co. v. Elliott, May 5th, 1908, the point was taken, and *Adams & Burns* v. *Bank of Montreal* was overruled. In this and some later cases the order was made after the judgment had been transmitted to the court below, but in *Peters* v. *Perras,* 42 Can. S.C.R. 361, it was expressly held "that where the judgment has been certified to the court below the Supreme Court has no jurisdiction to grant a stay of execution."

A stay was granted in *Standard Fire Ins. Co.* v. *Thompson,* May 10th, 1909; *Byron White* v. *Star Milling Co.,* April, 1909; *Montreal Light, Heat & Power Co.* v. *Regan,* Oct. 20th, 1908; *re* Southern Counties Rly. Co., *Hodge* v. *White Claims,* March 4th, 1310.

Stay was refused in *Attorney-General* v. *Standard Trust,* as the judgment had been certified to the court below.

In *Larin* v. *Lapointe,* Dec. 30th, 1901, the Chief Justice made an order staying execution for five days within which security was agreed to be furnished to the satisfaction of the Registrar, and upon this being complied with a further stay was ordered until the application for leave was disposed of by the Privy Council, the application to be brought on at the earliest date possible. For form of order *vide* the next following case.

In **St. Anne Fish & Game Club v. Riviere-Ouelle Company,** Duff, J., made the following order:

"Upon the application of counsel for the respondent, in presence of counsel for the appellant, and upon hearing read the affidavit filed herein and what was alleged by counsel aforesaid:

"It is ordered that upon the above named respondent giving within one week from this date security sufficient to indemnify the appellant for the judgment debt, interest and costs herein to the satisfaction of the registrar of this court.

Rule 137. that all proceedings herein be stayed for a period of thirty days, except the settlement of the minutes of judgmeut, to afford the reepondent an opportunity of applying to the Judicial Committee of the Privy Council for leave to appeal.

"And it is further ordered that the respondent have leave to apply to this court for an extension of the said period of thirty days if substantial grounds for the delay in making the said application for leave to appeal arise or in the event of judgment upon the said application not being pronounced within the said thirty days.

"And it is further ordered that the costs of this application be costs to the appellant in any event."

Rule 137. Any writ may at any time be ameuded hy order of the Conrt or Jndge, upon snch conditione and terms ae to costs aud otherwise as may bo thought juet, and any amendment of a writ may he declared by the order authorizing the eame to have relation back to the date of ite issue, or to any other date or time.

Rule 138. Sheriffe and coronere shall he entiled to the fees and ponndage set out in Form N of the Schedule to theee Rules. Vide Form p. 618 infra.

Rule 139. Every order of a Judge iu Chambere may be enforced in the eame manner ae an order of the Conrt to the same effect, and it shall in uo caee be neceesary to make a Judge's order a rule or order of the Court before enforcing the same.

Rule 140. No execntion can isene on a jndgmeut or order against the Crown for the payment of money. Where, in any appeal, there may be a judgment or order against the Crown directing the payment of money for coste, or otherwise, the Registrar may, on the application of the party entitled to the money, certify to the Minieter of Finance, the tenor and purport of the judgment or order, and ench certificate ehall he by the Regietrar eent to or left at the office of the Miuister of Finance.

ACTING REGISTRAR.

Rule 141. In the ahsence of the Regietrar through illness or otherwise, the Chief Justice or acting Chief Justice may appoint

an acting Registrar to perform the duties of the Registrar, and all power and authorities vested in the Registrar may be exercised by the acting Registrar. Rule 142.

This Rule is new. During the illness of the late Registrar, Mr. Cassels, a General Order was passed by the Court authorizing the reporter to act as Registrar during his absence. This Rule makes a general provision for such a case.

INTERPRETATION.

Rule 142. In the preceding Rules unless the context otherwise requires, "Judge" or "Judge of the Court" means any Judge of the Supreme Court, and the expression "Judge of the Supreme Court in Chambers" or "Judge in Chambers" shall also include the Registrar sitting in Chambers under the powers conferred upon him by Rules 82 to 89 inclusive.

Rule 143. In the preceding Rules the following words have the several meanings hereby assigned to them over and above the several ordinary meanings, unless there be something in the subject or context repugnant to such construction, that is to say:

(1). Words importing the singular number include the plural number, and words importing the plural number include the singular number.

(2). Words importing the masculine gender include females.

(3). The word "party" or "parties" includes a body politic or corporate, and also His Majesty the King, and His Majesty's Attorney-General.

(4) The word "affidavit" includes affirmation.

(5). The words "the Act" mean "The Supreme Court Act."

(6) The word "month" means calendar month where lunar months are not expressly mentioned.

Appendix A. Schedule to Supreme Court Rules.

Appendix A.

SCHEDULE TO THE SUPREME COURT RULES.

FORM A.

NOTICE CALLING SPECIAL SESSION.

DOMINION OF CANADA. }

The Supreme Court will hold a special session at the City of Ottawa on the day of 19 , for the purpose of hearing causes and disposing of such other business as may be brought before the Court (or for the purpose of hearing election appeals, criminal appeals, or appeals in cases of *habeas corpus*, or for the purpose of giving judgments only, as the case may be).

By order of the Chief Justice, or by order of Mr. Justice

(Signed). E. R. C.
Registrar.

Dated this day of , 19,.

FORM B.

FORM OF NOTICE OF HEARING APPEAL.

IN THE SUPREME COURT OF CANADA. }

J. A., appellant, v. A. B., respondent. Take notice that this appeal will be heard at the next session of the Court, to be held at the City of Ottawa on the day of , 19 .

To A. B. or C. D. his solicitor,

E. F. Appellant's solicitor (or attorney, or appellant in person)

Dated this day of , 19 .

FORM C.

SUGGESTION OF DEATH, INSOLVENCY, &c.

A. v. B.

It is required owing (to the death, insolvency, or as the case may be) that be made a party (appellant or respondent) to this appeal.

(Signed). C. D.

FORM D.

SUMMONS FOR WRIT OF HABEAS CORPUS AD SUBJICIENDUM.

IN THE SUPREME COURT OF CANADA.

The Honourable Mr. Justice

(Style of Cause).

Upon reading the several affidavits of, &c., filed the day of , 19 , and upon hearing Mr. of counsel (or the solicitor for)

It is ordered that all parties concerned attend before me (or before the Honourable Mr. Justice or before the Court, as the case may be) at the Supreme Court Building, Ottawa, on the day of 19 , at the hour of in the noon, to show cause why a writ of *Habeas Corpus* should not issue directed to to have the body of before a Judge of the Supreme Court at the Supreme Court Building in the City of Ottawa, forthwith to undergo, &c.

Dated, &c.

FORM E.

ORDER FOR WRIT OF HABEAS CORPUS AD SUBJICIENDUM.

IN THE SUPREME COURT OF CANADA.

Upon reading the several affidavits of, etc., filed the day of 19 , and upon hearing counsel (or the solicitors) on both sides (or as the case may be)—

It is ordered that a writ of Habeas Corpus issue directed to to have the body of A. B. before me (or the Honourable Mr. Justice) at the Supreme Court Building in the City of Ottawa, on the day of at the hour of to undergo and receive, etc.

Dated, &c.

FORM F.

WRIT OF HABEAS CORPUS AD SUBJICIENDUM.

George, by the Grace of God, &c., to greeting

We command that you have in the Supreme Court of Canada before the Honourable Mr. Justice at the Supreme Court Building in the City of Ottawa, on the day of , the body of A. B. being taken and detained under your custody as is said, together with the day and cause of his being taken and detained, by whatsoever name he may be called therein: to undergo and receive all and singular such matters and things as Our Judge shall then and there consider of concerning him in this behalf: and have you there then this Our writ.

Witness, &c.

To be indorsed,

By order of Mr. Justice)
This writ was issued by &)

FORM G.

AFFIDAVIT OF SERVICE OF WRIT OF HABEAS CORPUS AD SUBJICIENDUM.

IN THE SUPREME COURT)
OF CANADA.)

I, A. B., of &c., make oath and say:

1. That I did on the day of 19 . personally serve C. D. with a writ of Habeas Corpus issued out of and under the seal of this Honourable Court, directed to the said C. D., commanding him to have the body of before ( ) immediately to undergo, &c. (describe the direction and mandatory part of the writ), by delivering such writ of Habeas Corpus to the said C. D., personally at in the Province of

Sworn, &c.

FORM II.

TARIFF OF FEES TO BE PAID TO THE REGISTRAR OF THE SUPREME COURT OF CANADA.

On entering every appeal	$10 00
On entering every judgment, decree or order in the nature of a final judgment	10 00
On entering every other judgment, decree or order	2 00
On filing every document or paper	10
Every search	25
Every appointment	50
Every enlargement of any appointment, or on application in Chambers	50
The foregoing items are not to apply to criminal appeals or appeals in matters of *habeas corpus* arising out of a criminal charge.	
On sealing every writ (besides filing)	2 00
Amending every document, writ or other paper	50
Taxing every bill of costs (besides filing)	1 00
Every allocatur	1 00
Every fiat	50
Every reference, inquiry, examination or other special matter referred to the registrar, for every meeting not exceeding one hour	1 00
Every additional hour or less	1 00
For every report made by the registrar upon such reference, etc.	1 00
Upon payment of money into court, or deposited with the registrar, every sum under $200.00	1 00
A percentage on money over $200.00 paid in at the rate of one per cent.	
Receipt for money	25
Comparing, examining and certifying transcript record on appeal to the Privy Council	10 00
Comparing any other document, paper or proceeding with the original on file or deposit in the registrar's office, per folio	2½
Ever other certificate required from registrar	1 00
Copy of any document, paper or proceeding or any extract therefrom, per folio	10
Every affidavit, affirmation or oath administered by registrar	25
Every commission or order for examination of witnesses	1 50

FORM I.

TARIFF OF FEES.—PARTY AND PARTY.

To be taxed between party and party in the Supreme Court of Canada:

On stated case required by section 73 of the Act when prepared and agreed upon by the parties to the cause, including attendance on the judge to settle the same, if necessary, to each party....	$25 00
Notice of appeal	4 00
On consent to appeal directly to the Supreme Court from the court of original jurisdiction.....	3 00
Notice of giving security.....	2 00
Attendance on giving security.....	3 00
On motion to quash proceedings under section 50 according to the discretion of the registrar to..	25 00
Subject to be increased by order of the Court or of a Judge in Chambers.....	
On *factums* in the discretion of the registrar to....	50 00
Subject to be increased by order of the Court or a Judge in Chambers.....	
For engrossing for printer copy of case as settled, when such engrossed copy is necessarily and properly required, per folio of 100 words.....	10
For correcting and superintending printing, per 100 words	05
On dismissal of appeal if case be not proceeded with, in the discretion of the registrar to.....	25 00
Subject to be increased by order of the Court or a Judge in Chambers.....	
Suggestions under sections 83, 84 & 85 including copy and service.....	2 50
Notice of intention to continue proceedings under section 87.....	4 00
On depositing money under section 66 of the Dominion Controverted Elections Act.....	2 50
Notice of appeal in election cases limiting the appeal to special and defined questions under section 67 of the Dominion Controverted Elections Act...	6 00
Allowance to cover all fees to attorney and counsel for the hearing of the appeal, in the discretion of the registrar to.....	200 00
Subject to be increased by order of the Court or a Judge in Chambers.....	

On printing *factums*, the same fees as in printing the case.

Besides the registrar's fees, reasonable charges for postages and disbursements necessarily incurred in proceedings in appeal will be taxed by the taxing officer.

Allowance to the duly entered agent in any appeal, in the discretion of the registrar, to $20 00

FORM J.

WRIT OF FIERI FACIAS.

CANADA, }
Province of } In the Supreme Court of Canada.

Between

A. B., (Plaintiff, *or as the case may be*)
Appellant.

AND

C. D., (Defendant, *or as the case may be*)
Respondent.

George, by the Grace of God of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith:

To the Sheriff of , *Greeting*

We command you that of the goods and chattels of C. D., in your bailiwick, you cause to be made the sum of and also interest thereon at the rate of six per centum per annum, from the day of [*day of judgment or order, or day on which money directed to be paid, or day from which interest is directed by the order to run, as the case may be*], which said sum of money and interest were lately before us in our Supreme Court of Canada, in a certain action [or certain actions, *as the case may be*], wherein A. B. is appellant, and C. D. and others are respondents [or in a certain matter there depending, intituled, "In the matter of E. F., *as the case may be*] by a judgment [or order, *as the case may be*], of our said court, bearing date the day of adjudged [or ordered, *as the case may be*], to be paid by the said C. D. to A. B., together with certain costs in the said judgment [or order, *as the case may be*] mentioned, and which costs have been taxed and allowed, by the taxing of our court, at the sum of , as appears by the certificate of the said taxing officer, dated the day of

. And that of the goods and chattels of the said C. D. in your bailiwick you further cause to be made the sum of [costs] together with interest thereon at the rate of per centum per annum, from the day of [*the date of the certificate of taxation. The writ must be so moulded as to follow the substance of the judgment or order*], and that you have that money and interest before us in our said court immediately after the execution hereof, to be paid to the said A. B., in pursuance of the said judgment [or order, *as the case may be*], and in what manner you shall have executed this our writ, make appear to us in our said court immediately after the execution thereof, and have there then this writ.

Witness the Right Honourable Sir Charles Fitzpatrick, G.C.M.G., Chief Justice of our Supreme Court of Canada, at Ottawa, this day of , in the year of our Lord, one thousand nine hundred and and in the year of our reign.

FORM K.

Writ of Venditioni Exponas.

CANADA, Province of } In the Supreme Court of Canada.

Between—

A. B., (Plaintiff, *or as the case may be*) Appellant.

AND

C. D., (Defendant, *or as the case may be*) Respondent.

George, etc. (*as in the writ of fieri facias*).

To the Sheriff of *Greeting:*

Whereas by our writ we lately commanded you that the goods and chattels of C. D. [*here recite the fieri facias to the end*], and on the day of you returned to us, at our Supreme Court of Canada aforesaid, that by virtue of the said writ to you directed, you had taken goods and chattels of the said C. D., to the value of the money and interest aforesaid, which said goods and chattels remained on your hands unsold for the want of buyers. Therefore we being desirous that the said A. B. should be satisfied his money and interest aforesaid, command you that you expose for sale and sell, or cause to be sold, the goods and chattels of the said C. D., by you, in form aforesaid, taken, and every part thereof, for the best price that can be gotten for the same, and have

the money arising from such sale before us in our said Supreme Court of Canada immediately after the execution hereof, to be paid to the said A. B. and have there then this writ.

Witness, etc. (conclude as in writ of *fieri facias*).

FORM L.

Writ of Attachment.

George, etc. (*as the writ of fieri facias*).

To the Sheriff of *Greeting:*

We command you to attach so as to have him before us in our Supreme Court of Canada, there to answer to us, as well touching a contempt which he it is alleged hath committed against us, as also such other matters as shall be then and there laid to his charge, and further to perform and abide such order as our said Court shall make in this behalf, and hereof fail not, and bring this writ with you.

Witness, etc. (*as in the writ of fieri facias*).

FORM M.

Præcipe for Writ.

Canada,
Province of } In the Supreme Court of Canada.

Between—

A. B., (Plaintiff, *or as the case may be*) Appellant.

AND

C. D., (Defendant, *or as the case may be*) Respondent.

Seal a writ of *fieri facias* directed to the Sheriff of to levy of the goods and chattels of C.D. the sum of $ and interest thereon at the rate of per centum per annum, from the day of [and $ costs, *or as the case may be, according to* the writ required].

Judgment [or order] dated day of

[Taxing Master's certificate, dated].

[X. Y., Solicitor for *party on whose behalf writ is to issue*].

FORM N.

SHERIFFS' AND CORONERS' FEES.

Every warrant to execute any process directed to the sheriff, when given to a bailiff	$ 75
Service of process, each defendant (no fee for affidavit services in such cases to be allowed unless service made or recognized by the sheriff	1 50
Serving other papers beside mileage	75
For each *additional* party served	50
Receiving, filing, entering and endorsing all writs, notices or other papers, each	25
Return of all process and writs (except subpœna) notices or other papers	50
Every search, not being a party to a cause or his attorney	30
Certificate of result of such search, when required (a search for a writ against lands of a party, shall include sales under writ against same party and for the then last six months)	1 00
Poundage on executions and on writs in the nature of executions where the sum made shall not exceed $1,000, six per cent.	
When the sum is over $1,000 and under $4,000, three per cent., when the sum is $4,000 and over, one and a half per cent., in addition to the poundage allowed up to $1,000, exclusive of mileage, for going to seize and sell; and except all disbursements necessarily incurred in the care and removal of the property.	
Schedule taken on execution or other process, including copy to defendant, not exceeding five folios.	1 00
Each folio above five	10
Drawing advertisements when required by law to be published in the *Official Gazette* or other newspaper, or to be posted up in a court house or other place, and transmitting same in each suit	1 50
Every necessary notice of sale of goods, in each suit.	75
Every notice of postponement of sale, in each suit.	25
The sum actually disbursed for advertisements required by law to be inserted in the *Official Gazette* or other newspaper.	

Bringing up prisoner on attachment or *habeas corpus*, besides travelling expenses actually disbursed, per diem	$6 00
Actual and necessary mileage from the court house to the place where service of any process, paper or proceeding is made, per mile	13
Removing or retaining property, reasonable and necessary disbursements and allowances to be made by the registrar.	
Drawnig bond to secure goods seized, if prepared by sheriff	1 50
Every letter written (including copy) required by party or his attorney respecting writs or process, when postage prepaid	50
Drawing every affidavit when necessary and prepared by sheriff	25
For services not hereinbefore provided for, the registrar may tax and allow such fees as in his discretion may be reasonable.	

CORONERS.

The same fees shall be taxed and allowed to coroners for services rendered by them in the service, execution and return of process, as allowed to sheriffs for the same services as above specified.

GENERAL ORDER.

It is hereby ordered that all the Rules and Orders of the Supreme Court of Canada now in force, except as hereinafter provided, be and the same are hereby repealed from and after the first day of September, 1907.

2. It is further ordered that the Rules, including the Schedule of Forms therein referred to and hereunto annexed, and Marked A, and initialed on each page thereof by the Registrar, be the Rules regulating the procedure of and in the Supreme Court of Canada and the bringing of cases before it from courts appealed from or otherwise.

3. It is further ordered that the said Rules shall not apply to any appeal in which the security shall have been allowed previous to the first day of September, 1907, but that

to such appeals the present Rules and General Orders of the Supreme Court of Canada shall be applicable.

Dated at Ottawa this Nineteenth day of June, A. D. 1907

Signed

C. FITZPATRICK, C. J.

D. GIROUARD, J.

L. H. DAVIES, J.

JOHN IDINGTON, J.

JAMES MACLENNAN, J.

LYMAN P. DUFF, J.

Appendix B.

FORMS IN MATTERS ARISING UNDER THE SUPREME COURT RULES.

ORDER FOR SUBSTITUTIONAL SERVICE.

IN THE SUPREME COURT OF CANADA.

BETWEEN

A. B. (Plaintiff or Defendant) - - *Appellant,*

AND

C. D. (Defendant or Plaintiff) - - *Respondent.*

BEFORE THE REGISTRAR IN CHAMBERS.

On the application of , upon hearing read the affidavit of filed, and upon hearing what was said by the solicitors for all parties,

It is ordered that service of a copy of this order and a copy of by sending the same by a prepaid post letter addressed to at (*or as the case may be*) shall be good and sufficient service of the said .

Dated the day of A.D. 19 .

(Signed)

Registrar.

JUDGMENT ALLOWING APPEAL.

In the Supreme Court of Canada.
day the day of , A.D., 19

Present:

THE RIGHT HONOURABLE SIR CHARLES FITZPATRICK, G.C.M.G., CHIEF JUSTICE.
THE HONOURABLE MR. JUSTICE DAVIES.
" " MR. JUSTICE IDINOTON.
" " MR. JUSTICE DUFF.
" " MR. JUSTICE ANGLIN.
" " MR. JUSTICE BRODEUR.

(*If any judge has been absent when judgment was ren-dered add* THE HONOURABLE MR. JUSTICE being absent, his judgment was announced by THE HONOURABLE THE CHIEF JUSTICE, *or* MR. JUSTICE , pursuant to the statute in that behalf).

Between
A. B. (plaintiff or defendant), Appellant;

AND

C. D. (defendant or plaintiff), Respondent.

The appeal of the above named appellant from the judg-ment of the Court of King's Bench for the Province of Que-bec (appeal side) (*or* of the Court of Appeal for Ontario, *or as the case may be*), pronounced in the above cause on the day of in the year of our Lord , reversing the judgment of the Superior Court for the Province of Quebec sitting in and for the District of , (*or* of the King's Bench Division of the High Court of Justice for Ontario, *or as the case may be*) rendered in the said cause on the day of in the year of our Lord , having come on to be heard before this Court* on the day of in the year of our Lord , in the presence of counsel as well for the appellant as the respondent, when upon and upon hearing what was alleged by counsel afore-said, this Court was pleased to direct that the said appeal should stand over for judgment, and the same coming on this day for judgment, this Court did order and adjudge that the said appeal should be and the same was allowed

that the said judgment of the Court of King's Bench for the Province of Quebec (appeal side) (*or* of the said Court of Appeal for Ontario *or as the case may be*) should be and the same was reveraed and set aside, and that the said judgment of the Superior Court for the Province of Quebec sitting in and for the District of (*or* of the King'a Bench Division of the High Court of Justice for Ontario, *ar as the case may be*) should be and the same was restored.

And this Court did further order and adjudge that the said respondent should and do pay to the said appellant the costs incurred by the said appellant as well in the said Court of King's Bench for the Province of Quebec (appeal side) (*or* in the said Court of Appeal for Ontario, *ar as the case may be*) as in thia Court.

*Note.—If a judge has died while the case stands *en delibéré* add the words "constituted as above with the addition of the Honourable Mr. Justice ————, since deceased."

JUDGMENT DISMISSING APPEAL.

(Formal parts as in preceding down to** then proceed as follows:)

that the said judgment of the Court of King's Bench for the Province of Quebec (appeal side) (*or* of the Court of Appeal for Ontario, *ar as the case may be*) should be and the same was affirmed and that the said appeal should be and the same was dismissed with costs to be paid by the said appellant to the said respondent.

BILL OF APPELLANT'S COSTS.

In the Supreme Court of Canada,

Between Appellant,

and

Respondent.

Bill of Appellant's Costs.

	Fees	Payments
Notice of appeal.....	$	4 00
[In election appeals, when notice limits appeal		6 00]

	Fees	Payments
Notice of giving security	$2 00	
Attendanee on giving seeurity and paid (ineluding where a Bond of a seeurity company is given the reasonable fee eharged by such company)	3 00	
Fee on speeial ease	25 00	
[Not taxable in election appeals.]		
Engrossing and superintending printing of special ease, fos. at 15 eents per folio		
[Not taxable in eleetion appeals.]		
Paid printer as per affidavit		
Paid elerk on transmission, etc., of original ease, or record in an eleetion appeal		
Paid forwarding copies of ease		
Paid filing ease with Registrar		$10 00
Engrossing and superintending printing of faetum, fos. at 15 eents per folio		
Paid printer as per affidavit		
Fee on faetum [in the discretion of Registrar to]		50 00
Paid, seareh and inseribing appeal		35
Allowanee to eover fees to eounsel and solieitor on hearing [in the diseretion of the Registrar, to]	200 00	
Paid postages, telegrams, etc		
Allowanee on aeeount of agent's fees under Rule 82 [in the diseretion of the Registrar, to]		20 00
Paid, seareh for particulars, to draft minutes		25
Paid entry of judgment		10 00
Paid taxation and appointment		1 50
Allocatur		1 00
Paid filings [10 eents on eaeh filing]		
Paid certified copy of judgment		
[$1.00, and 10 eents a folio.]		
Registrar's postage		
Total fees		
Total disbursements		
Taxed off		
Taxed at		

BILL OF RESPONDENT'S COSTS.

In the Supreme Court of Canada,

Between

Appellant,

and

Respondent.

Bill of Respondent's Costs.

	Fees	Payments
Attendance on giving security	$ 3 00	
[Not taxable in election appeals.]		
Fee on special case	25 00	
[Not taxable in election appeals.]		
Engrossing and superintending printing of factum, folios at 15 cents per folio		
Paid printer as per affidavit		
Fee on factum [in the discretion of Registrar, to]	50 00	
Allowance to cover fees to counsel and solicitor on hearing [in the discretion of Registrar, to]	200 00	
Paid postages, telegrams, etc		
Allowance on account of Agent's fees under Rule 82 [in discretion of Registrar, to]		20 00
Paid search for particulars, to draft minutes		25
Paid entry of judgment		10 00
Paid taxation and appointment		1 50
Allocatur		1 00
Paid filings [10 cents on each filing]		
Paid certified copy of judgment		
[$1.00, and 10 cents for each folio.]		
Registrar's postage		
Total fees		
Total disbursements		
Taxed off		
Taxed at		

AFFIDAVIT OF DISBURSEMENT.

In the Supreme Court of Canada,

Between Appellant,

and

Respondent.

I, of the of in the Province of (*occupation*) make oath and say:

1. That I am (*a member of the firm of, etc., or a clerk in the office of, etc.*), the attorneys or solicitors for the above named and as such have a personal knowledge of the facts hereinafter deposed to.

2. That on behalf of the said (*appellant or respondent*) I have paid of the of in said Province printers, the sums following for the work mentioned, viz.:

DATE PAID.	PRINTING DONE.	AMOUNT PAID.
	("Case in Appeal." "Appellant's or Respondent's Factum.")	
	Total, $	

amounting in all to the sum of dollars.

3. That in addition to the foregoing I have paid the following sums in this appeal, viz.:

4. That with regard to the foregoing disbursements, I believe that the amount so paid for printing is fair and reasonable, and the usual and lowest price for which that class of work can be done in the said of and that the foregoing amounts further paid as aforesaid were reasonable and proper disbursements in this appeal.

Sworn before me at the of in the Province of this day of A.D. 19 } (Sgd.)

A Commissioner in the

SHERIFF'S ACCOUNT.

IN THE SUPREME COURT OF CANADA.

SHERIFF'S ACCOUNT.

Under O. C. 7th June, 1883, *and* 49 *Vict.*, *c.* 135, *s.* 15.

The Government of Canada,
To the Sheriff of the County of Carleton. DR.

Date 19		$	Cts.
Please forward this account to the Registrar Supreme Court of Canada, Ottawa.	To actual attendance in person or by deputy on the Supreme Court at its sittings from the.....day of.....to the..... day of..... .....days at $5.00 per day .....Constables at $1.50 each per day for each day necessarily and actually engaged in attendance during the sittings of the Court, in all.....days.....		
	NAMES OF CONSTABLES TO ATTEND / NO. OF DAYS		

I CERTIFY that the above account, amounting to..... is correct.

.....
Sheriff.

I CERTIFY that I have examined this account and believe it to be correct.

.....
Registrar.

.....

.....

APPEAL RFOM TAXATION

NOTICE OF MOTION TO JUDGE IN CHAMBERS.

BETWEEN

A. B., (Plaintiff or Defendant) - - - *Appellant.*

AND

C. D., (Defendant or Plaintiff) - *Respondent.*

Take notice that a motion will be made before the presid ing Judge in Chambers in the Supreme Court Building at t City of Ottawa, on the day of A. D. 19 , at the hour of , that the objection of the applicant dated the day of 19 to the taxation of the costs under the judgment dated th day of 19 , may be allowed and that it may be referred back to the Registrar to vary his cer tificate accordingly; and that the said appellant (*or* respon dent *as the case may be*) may be ordered to pay to the appli cant the costs of this application and consequent thereupon Dated this day of A. D. 19 .

To E. F., Solicitors for appellant (*or* respondent *as the ca may be*).

(Signed) G. H.,
Solicitors for the respondent (*or* Ap pellant *as the case may be*).

NOTICE OF APPEAL TO SUPREME COURT.

IN THE COURT OF APPEAL FOR ONTARIO.

(*or as the case may be, giving the style of the Court i which the judgment to be appealed from has been rendered*)
Between

A. B., Plaintiff (appellant or respondent).

AND

C. D., Defendant (respondent or appellant).
(*or as the case may require.*)

Take notice, that A. B., the above named plaintiff, hereby appeals to the Supreme Court of Canada from the (judgment, decree, rule, order, or decision) pronounced (or pronounced and entered) in this cause (or matter) by this court (or by Mr. Justice ————) on the day of , 19 , whereby *(as the case may be.)*

The above form, altered to suit the circumstances of each particular case, would be applicable to most cases, but care should be taken to consider the wording of the section or rule requiring notice of appeal to be given and to vary the notice accordingly. For instance, in giving notice of intention to appeal, under section 84 of the Exchequer Court Act R.S., c. 140, from the decision of the Exchequer Court, the notice should state "that the Crown is dissatisfied with such decision, and intends to appeal against the same.

This notice of appeal must not be confounded with the notice of hearing required after an appeal is set down for hearing in the Supreme Court *(vide* Rules 15, 17, 18 and 19); nor with the notice to be given in Exchequer appeals under section 82 of the Act, nor with the notice to be given in election appeals, under section 67 of the Dominion Controverted Elections Act R.S., c. 7. These notices are given after the appeal has been set down for hearing in the Supreme Court of Canada and should be entitled in that Court and the style of cause should be the style in that Court, and by them the appeal may be limited to any special and defined question or questions.

NOTICE OF MOTION TO ALLOW SECURITY.

IN THE SUPREME COURT OF CANADA.

Between

A. B., (Plaintiff or Defendant) Appellant;

AND

C. D., (Defendant or Plaintiff) Respondent.

Take notice that a motion will be made before the Registrar at his chambers in the Supreme Court Building, in the City of Ottawa, on the day of A.D. 19 , at the hour of 11 o'clock in the forenoon, or so

soon thereafter as the application can be heard, for an order approving of the security tendered by the appellant that he will effectually prosecute his appeal and pay such costs and damages as may be awarded against him by the Supreme Court.

And take notice that in support of said application will be read the Bond of dated the day of (*or* the certificate of the Accountant of the Bank of at) and the affidavit of filed.

Dated at this day of

To E. F. of
Respondent's Solicitor.

(Signed) G. H.,
Appellant's Solicitor.

NOTICE OF MOTION FOR ORDER AFFIRMING JURISDICTION.

IN THE SUPREME COURT OF CANADA.

Between:

A. B., (Plaintiff or Defendant) Appellant:

AND

C. D., (Defendant or Plaintiff) Respondent.

Take notice that a motion will be made before the Registrar at his chambers in the Supreme Court Building, in the City of Ottawa, on the day of 19 , for an order affirming the jurisdiction of the Supreme Court of Canada to hear the appellant's appeal.

And take notice that in support of said application will read (set out in detail the material necessary to disclose the question of jurisdiction raised).

Dated at this day of

To E. F. of
Respondent's Solicitor.

(Signed) G. H., Appellant's Solicitor.

ORDER ALLOWING APPELLANT'S SECURITY.

IN THE SUPREME COURT OF CANADA.

Before the Registrar in Chambers.

the day of A.D. 19 19 .

Between:

A. B., (Plaintiff or Defendant) Appellant;

AND

C. D., (Defendant or Plaintiff) Respondent.

Upon the application of the above named appellant, upon hearing read the notice of motion and material therein referred to, and upon hearing what was alleged by Counsel for all parties,

It is ordered that the bond entered into the day of A. D. 19 , in which are obligors, and are obligees (*or* the sum of $500 paid into the Bank of as appears by the receipt of the said Bank, dated the day of *as the case may be*), duly filed as security that the appellant will effectually prosecute his appeal from the judgment of the Court of (*as the case may be*), dated the day of , and will pay such costs and damages as may be awarded against him by this Court, be and the same is hereby allowed as good and sufficient security.

And it is further ordered that the costs of this application be costs (in the cause, *or* to the appellant, *or* to the respondent *as the case may be*).

(Signed)

Registrar.

ORDER AFFIRMING OR REJECTING JURISDICTION OF THE COURT.

IN THE SUPREME COURT OF CANADA.

Before the Registrar in Chambers.

the day of A.D. 19 .

Between:

A. B., (Plaintiff or Defendant) Appellant;

AND

C. D., (Defendant or Plaintiff) Respondent.

Upon the application of the above named appellant and upon hearing read (*set out the material filed on the applica-*

tion), and upon hearing what was alleged by counsel for all parties.

It is ordered, adjudged and declared that the Supreme Court of Canada has (*or* has not, *as the case may be*) jurisdiction to hear and determine the appeal of the above named appellant from the judgment of the (*set out the name of the court appealed from*) bearing date the day of A. D. 19 in a certain cause in which was appellant and was respondent.

And it is further ordered that the costs of this application be costs (in the cause, *or* to the appellant, *or* to the respondent, *as the case may be*).

(Signed)

Registrar.

NOTICE OF MOTION BY THE RESPONDENT EXCEPTING TO THE JURISDICTION OF THE COURT.

IN THE SUPREME COURT OF CANADA.

Between:

A. B., (Plaintiff or Defendant) Appellant;

AND

C. D., (Defendant or Plaintiff) Respondent.

Take notice that a motion will be made on behalf of the respondent before the Registrar at his chambers in the Supreme Court Building, in the City of Ottawa, on the day of A. D. 19 , at the hour of 11 o'clock in the forenoon, or so soon thereafter as the application can be heard for an order refusing the security offered by the appellant on his appeal to the Supreme Court on the ground that the Court has no jurisdiction to hear the appeal.

And take notice that in support of said motion will be read (*the material necessary to raise the question of jurisdiction*).

Dated at this day of

To E. F.,
Appellant's Solicitor.

(Signed) G. H.,
Respondent's Solicitor.

NOTICE OF APPEAL FROM REGISTRAR'S ORDER IN MATTERS OF JURISDICTION.

IN THE SUPREME COURT OF CANADA.

Between:

A. B., (Plaintiff or Defendant) Appellant;

AND

C. D., (Defendant or Plaintiff) Respondent.

Take notice that the Court will be moved at the Supreme Court Building in the City of Ottawa, on the day of A. D. 19 , at the hour of 11 o'clock in the forenoon, or so soon thereafter as counsel can be heard, by way of appeal from the order of the Registrar, made on the day of A. D. 19 , whereby it was ordered, adjudged and declared that the Supreme Court of Canada had (*or* had not *as the case may be*) jurisdiction to hear and determine the appeal of the said from the judgment of the (*name of the Court appealed from*) bearing date the day of A. D. 19 , made in a certain cause in which was appellant and was respondent, on the ground (*set out the grounds of the appeal*).

And further take notice that on the said motion will be read (*set out the material used before the Registrar*).

Dated at this day of

To E. F., (Appellant's *or* Respondent's, *as the case may be*), Solicitor.

(Signed) G.H., (Respondent's *or* Appellant's, *as the case may be*), Solicitor

---

NOTICE OF MOTION TO REMOVE STAY OF PROCEEDINGS.

IN THE SUPREME COURT OF CANADA.

Between:

A. B., (Plaintiff or Defendant) Appellant;

AND

C. D., (Defendant or Plaintiff) Respondent.

Take notice that a motion will be made before the Honourable Mr. Justice or such other Judge of the Supreme

Court as may be sitting for him, at his Chambers in the Supreme Court Building, at the City of Ottawa, on the day of , at the hour of 11 o'clock in the forenoon, or so soon thereafter as the motion can be heard for an order removing the stay of proceedings in this appeal.

And take notice that on the return of the said motion will be read the notice of appeal given by the (appellant *or* respondent, *as the case may be*), from the order of the Registrar made herein, bearing date the day of A. D. 19 , whereby it was ordered, adjudged and declared that the Supreme Court of Canada had (*or* had not, *as the case may be*) jurisdiction to hear this appeal.

And further take notice that in support of said application will be read (*set out the material upon which the motion is based*).

Dated at this day of

To E. F., (Appellant's *or* Respondent's, *as the case may be*), Solicitor.

(Signed) G. H., (Respondent's or Appellant's, *as the case may be*), Solicitor.

ORDER REMOVING STAY OF PROCEEDINGS.

IN THE SUPREME COURT OF CANADA.

Before the Honourable Mr. Justice in Chambers.

the day of A. D. 19 .

Upon the application of , upon hearing read (*Affidavits or papers filed in support of the motion*), upon hearing what was said by Counsel for

It is ordered that the stay of proceedings herein be and the same is hereby removed.

And it is further ordered that the costs of this application be costs (in the cause, *or* to the appellant, *or* to the respondent, *as the case may be*).

(Signed) Judge.

NOTICE OF MOTION TO QUASH APPEAL FOR WANT OF JURISDICTION.

IN THE SUPREME COURT OF CANADA.

Between:

A. B., (Plaintiff or Defendant) Appellant:

AND

C. D., (Defendant or Plaintiff) Respondent.

Take notice that the Court will be moved in the Supreme Court Building, at the City of Ottawa, on the day of A. D. 19 , at the hour of 11 o'clock in the forenoon or so soon thereafter as counsel can be heard, for an order that the appeal of the above named appellant from the judgment of (*name of the court appealed from*) made on the day of A. D. 19 , in a certain cause in which was appellant and was respondent, be quashed for want of jurisdiction.

And take notice that in support of said motion will be read (*set out the material necessary to raise the question of jurisdiction.*)

Dated at this day of A. D. 19 .

To E. F., of
Appellant's Solicitor.

(Signed) G. H.
Respondent's Solicitor.

CERTIFICATE AS TO SETTLEMENT OF CASE, AS TO SECURITY, AND AS TO REASONS FOR JUDGMENT.

I, the undersigned Registrar (*or* Prothonotary, *or* Clerk) of the (*name of court*) do hereby certify that the foregoing printed document from page 00 to page 00, inclusive, is the case stated by the parties (*or* settled by the Honourable Mr. Justice , one of the Judges of the said Court) pursuant to section 73 of the Supreme Court Act and the Rules of the Supreme Court of Canada, in an appeal to the said Supreme Court of Canada, in a certain case pending in the said (*name of court*) between A. B., appellant, and C. D., respondent.

And I do further certify that the said A. B. has given proper security to the satisfaction of the Honourable Mr. Justice as required by the 75th section of the Supreme Court Act, being a Bond to the amount of $500 (*or* by the payment into Court of the sum of $500 to the credit of this cause, *as the case may be*), a copy of which security and a copy of the order of the Honourable Mr. Justice allowing the same is (or are *as the case may be*) hereto annexed (or may be found on pages 000 of the annexed case—*as the case may be*.)

And I do further certify that I have applied to the Judges of the (*court appealed from*) for their opinions or reasons for judgment in this case, and the only reasons delivered to me by the said Judges are those of the Honourable Mr. Justice

(*or*, that reasons have been delivered by none of the said Judges in response to my said application, *as the case may be*).

And I do further certify that I have received a certificate from the Clerk of the (*name of the court below*) to the effect that he had applied to the Judges of the said Court for their opinions or reasons for judgment and that the only reasons delivered to him were those of the Honourable Mr. Justice

(*or*, that reasons have been delivered by none of the said Judges in response to his said application, *as the case may be*).

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said (*name of court*) this (*date*).

CERTIFICATE AS TO REASONS FOR JUDGMENT, IN THE SUPERIOR COURT.

IN THE HIGH COURT OF JUSTICE
(*or*, in the Superior Court, *as the case may be*).

Between:

A. B., Plaintiff;

AND

C. D., Defendant.

I, E. F., Clerk (*or* Registrar, *as the case may be*), of the High Court of Justice (*or* Superior Court, *as the case may be*), hereby certify to the Registrar of the Court of Appeal (*

Court of King's Bench, appeal side, *as the case may be*), that I have applied to the Judge (*or* Judges, *as the case may be*), of this Court for his (or their, *as the case may be*) opinions or reasons for judgment in this case, and that the only reasons delivered to me were those of the Honourable Mr. Justice (*or* that reasons have been delivered by none of the said Judges in response to my said application, *as the case may be*).

Dated at this day of A. D. 19 .

(Signed) G. H.,
Clerk (*or* Registrar, *as the case may be*).

BOND FOR SECURITY FOR COSTS.

Know all men by these presents, that we, A. B., of the of in the county of and Province of , C.D., of the same place , and E. F., of the same place , are jointly and severally held, and firmly bound unto G. H. in the penal sum of $500 good and lawful money of Canada to be paid to the said G. H. his attorney, executors, administrators or assigns, for which payment well and truly to be made we bind ourselves and each of us binds himself, our and each of our heirs, executors and administrators firmly by these presents sealed with our seals and dated this day of A. D. 19 .

Whereas a certain action was brought in the Division of the High Court of Justice for Ontario (*or as the case may be*) by the said A. B., plaintiff, against the said G. H., defendant. And whereas judgment was given in the said Court against the said A. B., who appealed from the said judgment to the Court of Appeal for Ontario (*or as the case may be*). And whereas judgment was given in the said action in the said last mentioned Court on the day of A.D. 19 .

And whereas the said A. B. complains that in giving of the last mentioned judgment in the said action upon the said appeal manifest error hath intervened, wherefore the said A. B. desires to appeal from the said judgment of the Court of Appeal for Ontario (*or as the case may be*) to the Supreme Court of Canada.

Now the condition of this obligation is such, that if th
said A. B. shall effectually prosecute his said appeal and pa
such costs and damages as may be awarded against him b
the Supreme Court of Canada, then this obligation shall
void, otherwise to remain in full force and effect.

Signed, sealed and delivered in presence of } A B. (Seal). C. D. (Seal). E. F. (Seal).

AFFIDAVIT OF EXECUTION.

Province of
County of
To Wit:

I, X. Y., of the of in the Coun
of , and Province of , (*occupatio*
make oath and say:

1. That I was personally present and did see the with
instrument duly signed, sealed and executed by A. B., C.
and E. F., three of the parties thereto.
2. That the said instrument was executed at
3. That I know the said parties.
4. That I am a subscribing witness to the said inst
ment.

Sworn before me at the of in the County of and Province of this day of A.D. 19 . } X. Y.

(Signed) *A Commissioner, etc.*

AFFIDAVIT OF JUSTIFICATION BY SURETIES.

I, C. D., of the of , in the cou
of and Province of , make oath
say, That I am a resident inhabitant of the Province of
and am a freeholder in the of afores
and that I am worth the sum of $1,000, over and above w
will pay all my debts.

And I, E. F., of the of in the County of and the Province of , make oath and say, That I am a resident inhabitant of the said Province of , and am a freeholder in the of aforesaid, and that I am worth the sum of $1,000, over and above what will pay all my debts.

(Signed) C. D.
E. F.

The above named deponents, C. D. and E. F., were severally sworn before me at the of at the County of this day of A.D. 19 .

(Signed)

A Commissioner, etc.

NOTE.—Although it was held (*Wheeler* vs. *Black*, M.L.R. 2 Q.B. 159) in the Court of Appeal, Quebec, that the sureties need not justify on real estate, the question has never been adjudicated upon in the Supreme Court.

ORDER ALLOWING SECURITY FOR COSTS.

IN THE SUPREME COURT OF CANADA.

the day of A.D. 19 .

The Registrar in Chambers.

Between:

A. B., (defendant or plaintiff) Appellant;

AND

C. D., (plaintiff or defendant) Respondent.

Upon the application of the above named appellant, and upon hearing what was alleged by counsel for all parties, it is ordered that the sum of five hundred dollars paid into the Bank of Montreal as appears by its certificate duly filed (*or*, it is ordered that a certain bond bearing date the day of 19 , in which are

obligors and obligee filed) as security that the appellants will effectually prosecute their appeal from the judgment of the Court of (as the case may be), dated the day of A. D. 19 , and will pay such costs and damages as may be awarded against them by this Court, he and the same is hereby allowed as good and sufficient security.

(Signed)

Registrar.

CERTIFICATE AS TO CASE AND SECURITY IN ELEC TION CASES.

I, , Clerk (of the Court with whom the petitio was lodged and the security paid) do hereby certify that th foregoing documents from page 00 to page 00, inclusive, co stitute the record of the case provided by s. 66 of the Dominio Controverted Elections Act, on the appeal taken by the pe tioner (*or* respondent , *as the ca may be*) against the decision (order *or* judgment *as the ca may be*) of the Honourable Mr. Justice , dismissi the petition on the preliminary objections (*or* dismissing t preliminary objections to the petition, *as the case may be*), against the judgment of the Honourable Mr. Justice and the Honourable Mr. Justice , allowi *or* dismissing, *as the case may be*, the petition, &c.) in a certa Election petition depending in the said court between petitioner, and respondent.

And I do further certify that the said , above named petitioner (*or* respondent *as the case may* has given proper security for his appeal by paying into co to the credit of this cause the sum of $, and has paid the further sum of $ as a fee for making up transmitting the record pursuant to the provisions of the Act.

In testimony whereof I have hereupto subscribed my n and affixed the seal of the said court this da A. D. 19 .

(Signed)

Clerk of the (*name of the Co*

(TITLE PAGE.)

IN THE SUPREME COURT OF CANADA.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

(or as the case may be).

Between:

A. B., (plaintiff *or* defendant, *as the case may be*),
Appellant;

AND

C. D., (defendant *or* plaintiff, *as the case may be*).
Respondent.

APPEAL CASE.

E. F.,
Solicitor for the Appellant.

G. H.,
Solicitor for the Respondent.

J. K.,
Ottawa Agents for Appellant.

L. M.,
Ottawa Agents for Respondent.

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IN THE SUPREME COURT OF CANADA.

BETWEEN

THE SYNDICAT LYONNAIS DU KLONDIKE (Plaintiff)
Appellant

AND

THE CANADIAN BANK OF COMMERCE (Defendant)

AND

JOSEPH BARRETTE . . . . (Defendant)
Respondent

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APPENDIX B.

APPELLANT'S FACTUM

In the Supreme Court of Canada

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN :—

BRITISH COLUMBIA LAND & INVESTMENT AGENCY, LIMITED, (Defendant) Appellant.

and

HARRY Y. ISHITAKA, (Plaintiff) Respondent.

10

APPELLANT'S FACTUM

PART I.

STATEMENT OF FACTS.

This is an appeal from the judgment of the Court of Appeal for British Columbia, dated the 5th day of June, A.D. 1911, (p. 114, l.). allowing an

PART I.

STATEMENT OF FACTS.

This is an appeal from the judgment of the Court of Appeal for British Columbia, dated the 5th day of June, A.D. 1911. (p. 114. l.). allowing an appeal by the Plaintiff from the judgment of the Honourable Mr. Justice Morrison in the Supreme Court of British Columbia dismissing the action.

The action was brought to recover damages for wrongful seizure and sale of certain chattels.

These chattels were a logging outfit, situate in a remote part of the Province of British Columbia (p. 112, l. 20; p. 12, l. 20).

The defendant Company made the seizure and sale by virtue of the powers contained in a certain chattel mortgage dated the 29th of October, 1907 (Ex. 8, p. 83), given by one Frank Stubbs and one Harry Cook to the
10 Appellant.

The plaintiff admittedly made default in payment of the moneys secured, and on or about the 21st day of April, A.D. 1909, the defendant Company gave him notice (Ex. 1, p. 101; p. 54, l. 24; p. 14, l. 1), that it proposed to sell the mortgaged chattels by private sale on the 1st day of May, 1909, at 12 o'clock noon, for $1,500.00, being the best price obtainable. The mortgage gave to the Mortgagee the right to sell by private sale (p. 85, l. 3), without notice.

Prior to giving the notice the Company had agreed with one John R. Bowes to sell to him the goods comprised in the chattel mortgage for $1,500.00,
20 in case the plaintiff did not redeem before 12 o'clock on the 1st day of May, 1909, (Case p. 68, line 1).

It is alleged by the plaintiff that he was ready and willing to pay the amount necessary to redeem the mortgage prior to the said hour of the said

day and would have done so but for the refusal of the Company to receive it by alleging that the sale to Bowes had been made. The Company denies such refusal. This is the only question of fact involved.

The appellant conveyed the goods mentioned in the chattel mortgage to John R. Bowes, in pursuance of the agreement with him by Bill of Sale dated May 1st, 1909.

The trial judge (Morrison, J.) declared that the plaintiff was not in a position to meet his financial obligations and that there was not in fact any offer to redeem the mortgage.

Upon appeal this decision was over-ruled, the Chief Justice holding that the evidence established the fact alleged by the plaintiff, and that, although there was no actual tender of the money, yet that the necessity for tender had been waived by the statement that the goods had been sold. Mr. Justice Martin concurred with the Chief Justice. Mr. Justice Irving dissented upon various grounds.

From this judgment the defendant now appeals.

POINTS IN RESPECT OF WHICH THE COMPANY ALLEGES ERROR.

The Company contends as follows:—

(1) The judgment appealed from is erroneous with respect to the fact in controversy between the parties as aforesaid.

ERROR.

The Company contends as follows:—

(1) The judgment appealed from is erroneous with respect to the fact in controversy between the parties as aforesaid.

(2) Even if the judgment appealed from is right in this respect, yet there was in fact no tender of payment by the plaintiff and there was no waiver by the Company of the necessity for such tender.

(3) Even if the sale took place prior to the hour and day mentioned in the notice, yet the sale was valid inasmuch as the Company was not bound to await the expiry of time given voluntarily and without consideration.

(4) If the effect of the judgment appealed from is a holding that the sale by the Company was improvident (a construction that the Company denies) then the Company alleges that such finding was erroneous.

(5) If the effect of the judgment appealed from is a holding that the Company wrongfully seized goods not included in the mortgage (a construction that the Company denies) then the Company alleges that such finding was erroneous.

ARGUMENT.

The only question of fact involved in the present appeal is as to whether or not on the morning of the 1st of May a sufficient offer to pay the amount due upon the mortgage was made.

The only evidence of the existence of such an offer is that of Mr. Wallbridge, the solicitor for the plaintiff, who says that

"On the morning of the 1st of May I went to see Mr. Garrett (solicitor "for the Company) and if I remember right I asked Mr. Garrett for the "amount that was proper to redeem the chattel mortgage, and I was

"willing to give him a cheque for it. Mr. Garrett informed me—this
"was before noon—I am pretty sure it was early in the morning,
"because Saturday is a short day and I got at it as early as possible; it
"was early in the morning between half past nine and eleven and he
"told me then that the chattels had been sold." (Case, p. 32).

Mr. Wallbridge adds that he immediately returned to the office and made an entry in his book corroborative of what he said.

On the other hand Mr. Garrett says that he cannot recall having seen Mr. Wallbridge at all in the office on the 1st of May. (Case, p. 50, line 3 ff; p. 51, line 22, 34). What really happened, according to Mr. Garrett, was that Mr. Wallbridge instead of going to Mr. Garrett's office telephoned Mr. Garrett

"about making a tender"

and Mr. Garrett told him that it was then too late. This occurred, according to Mr. Garrett, not before but after twelve o'clock and Mr. Garrett gives as a reason in support of his statement that he knew that the plaintiff had until twelve o'clock to redeem and that he could not have said that the time had elapsed unless as a fact it actually had. (Case, p. 51, line 8 ff; line 28 ff). It is impossible to believe that Mr. Garrett would have told Mr. Wallbridge that the time had elapsed if, as a matter of fact, it had not. And Mr. Wallbridge supplies no possible reason for the absence of the quick rejoinder which he would most certainly have made if that statement had been made to him. He knew perfectly well that the plaintiff had until twelve o'clock to redeem and if his statement be correct that Mr. Garrett told him before twelve o'clock

the time had elapsed it, as a matter of
supplies no possible reason for the absence of the quick rejoinder which he would most certainly have made if that statement had been made to him. He knew perfectly well that the plaintiff had until twelve o'clock to redeem and if his statement be correct that Mr. Garrett told him before twelve o'clock

that he was too late, he leaves us in perplexity as to why he did not at once appeal to his watch. He appears to have made no reply.

There is not the least suggestion of collusion between the Company's solicitors and the purchaser of the goods, nor is there any reason to suppose that the Company would have assumed to make a sale if the plaintiff had offered to pay the money. It is to be noted too that Mr. Garrett said nothing to his partner, Mr. King, of any offer having been made by Mr. Wallbridge. (Case, p. 58, line 1-5). It is almost certain that such communication would have been made, for it was Mr. King who had general charge of the matter.

It is admitted that no tender was actually made of the amount due on the mortgage. It is said, however, that tender was made unnecessary by Mr. Garrett's statement that the property had already been sold. The Company contends that Mr. Wallbridge was not in a position to make a tender—that he had not been supplied with funds for that purpose, and that anything that Mr. Garrett may have said cannot have the effect of waiving a tender which was not actually in contemplation. All that Mr. Wallbridge says is that he was

> "willing to give them a cheque for $1,100.00, and if they said they "could not make up an exact statement to $25.00 or $50.00, I would "have given it."

It appears, however, that the amount due upon the mortgage was much more than $1,150.00, which Mr. Wallbridge says he was prepared to pay.

(Case p. 48, line 20-31 ; p. 49, linc 9-10). And at another part of his evidenee Mr. Wallbridge says :

> " I won't swear positively I was prepared to pay them $1,100 ; they " could not give a statement at the time anyway." (Case, p. 34, line 22).

The question as to what is nccessary in such a case is discussed in

In re Farley, Ex. parte Danks, 1852, 2 Deg., M. & G., 936 ; in whieh Lord Cranworth says :

> " Now, in order to make a tender I assume that the person pleading " the tender must either have actually produced the money, or have " been ready and able to produce it, and only be prevented from pro- " ducing it by the other party dispensing with his so doing."

The evidence shows that Mr. Wallbridge was neither ready nor able to produce the money, nor even a cheque for it.

See, also, Halsbury, vol. 7, p. 419-20, Note (q).

And, further, Mr. Wallbridge at best was prepared to give a eheque, and not cash. As stated by Mr. Justice Irving, in his dissenting judgment (p. 112, l. 3), a tender to a solicitor must be in cash and not by cheque as the solicitor is not authorized to receive a cheque.

The mortgage gave the Appellant the power to sell by private sale without notice on default in payment. and therefore no notice such as was given was necessary.

Hawkins v. Ramsbottom, (1814), Price, 138.

solicitor is not authorized to receive a cheque.

The mortgage gave the Appellant the power to sell by private sale without notice on default in payment. and therefore no notice such as was given was necessary.

Hawkins v. Ramsbottom, (1814). Price. 138.

And though the Appellant gave the notice no extension of time was given thereby, as there was no consideration for an extension, and the Appellant was not bound to await the expiry of the time mentioned therein:

Major v. Ward, 5 Hare, 598;

Williams v. Steru, 5 Q.B.D., 409.

There is no evidence to show that the goods were sold at an under-value; there is, in fact, no evidence to show what the value was at the time of the sale, except that of the purchaser, whose evidence is that $1,500.00 was a fair price; and it must be remembered that the goods were in a remote part of the Province where it would not be an easy matter to make a sale.

There was no evidence to show that goods, other than those covered by the mortgage, were sold. Those referred to in the bill of sale to the purchaser Bowes (ex. 7, p. 103) are included in the mortgage.

The Appellant relies on the reasons for judgment given by the Honourable Mr. Justice Irving, and submits that this appeal should be allowed and the action dismissed.

JOHN S. EWART,

Of Counsel for the Appellants.

APPENDIX B.

RESPONDENT'S FACTUM.

In the Supreme Court of Canada

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN :

BRITISH COLUMBIA LAND & INVESTMENT AGENCY, LIMITED, (Defendant) Appellant,

and

HARRY Y. ISHITAKA, (Plaintiff) Respondent.

RESPONDENT'S FACTUM

PART I.

STATEMENT OF FACTS.

Respondent was the owner of a logging outfit consisting of donkey

PART I.

STATEMENT OF FACTS.

Respondent was the owner of a logging outfit consisting of donkey engine, block, tackle, wire rope, etc., subject to a chattel mortgage held by

Appellant, same having been given by Cook & Stubbs, former owners of the outfit.

On April 21st, 1909, there was due on the chattel mortgage $1,284 (p. 46, l. 21-31), and on that date Appellant's solicitor gave notice to Respondent that Respondent had entered into possession of the logging outfit, and all the goods and chattels covered by the chattel mortgage, and that it proposed "to sell the same by private sale on the 1st day of May, 1909, at 12 o'clock, "noon, for the sum of $1,500, being the best price which it is able to obtain "for the same. And take further notice that unless all moneys due under "the said chattel mortgage are paid to the said British Columbia Land & In- "vestment Agency, Limited, on or before the 1st day of May, 1909, the said "sale will be consummated." See notice "Exhibit 1," p. 101.

Appellant had not taken possession when this notice was given, but they did before the end of April, and placed the property in charge of the intended purchaser, J. R. Bowes, who says that he thought the proposed purchase a very desirable bargain, and that he was naturally pretty anxious to close it. (P. 70, l. 1-10.)

The sale to Bowes was subject to Appellant being able to make title, that is to say, if Respondent redeemed before 12 o'clock, noon, on May 1st, 1909, the date fixed by Appellant for redemption, Bowes was to give up the property. (P. 71, l. 6-12.)

Respondent on receipt of the notice, arranged to redeem within the stipulated time, and on the morning of May 1st, 1909, his solicitor, Mr. Wall-

bridge, went to the office of Messrs. Livingston, Garrett & King, solicitors acting on behalf of the Appellant, prepared to redeem the mortgage. Mr. King, who had charge of the matter, was out when Mr. Wallbridge called, and Mr. Garrett, apparently overlooking the provision in the sale to Bowes protecting Respondent's rights to redeem, informed Mr. Wallbridge that he was too late, that the property had been sold. By reason of this, Respondent was prevented from redeeming, and Bowes obtained a good title under his "very desirable bargain."

Respondent's business of logging was stopped for the season by the loss of his outfit, and same being of the value of $3,500 to $4,000, in the way in which it was sold by Appellant, only realized $1,500, and Respondent not only lost the difference but also sustained serious damages by loss of the season's operations. Appellant, no doubt by mistake, seized and sold to Bowes certain property of Respondent's, not covered by the chattel mortgage. For the loss and damage sustained by Respondent the present action was brought. The action was tried before the Honorable Mr. Justice Morrison, who reserved his decision, and subsequently filed a decision dismissing Respondent's action. An appeal by Respondent to the Court of Appeal was heard by Macdonald, C. J. A., Irving, J. A., and Martin, J. A., and the appeal was allowed, and judgment ordered to be entered for Appellant for damages to be assessed. Irving, J. A., dissented from this decision.

The present appeal is from this decision of the Court of Appeal.

C. J. A., Irving, J. A., and Martin, J. A., and the appeal was allowed, and judgment ordered to be entered for Appellant for damages to be assessed. Irving, J. A., dissented from this decision.

The present appeal is from this decision of the Court of Appeal.

PART II.

ERROR IN JUDGMENT OF TRIAL JUDGE.

The learned Trial Judge erred:

(a) In finding that Respondent did not offer to redeem the chattel mortgage on the morning of May 1st.

(b) In not awarding Respondent damages sustained by reason of sale brought about by Appellant's preventing redemption, or in the alternative damages by reason of improper exercise by Appellant of their power of sale under the chattel mortgage.

(c) In not awarding Respondent damages for sale of goods of Respondent not included in the chattel mortgage.

PART III.

BRIEF OF ARGUMENT.

The decision of the learned Trial Judge as to whether or not Mr. Wallbridge was told before the time fixed for redemption that it was too late to redeem, that the property had been sold, is somewhat indefinite. Mr. Wallbridge testifies clearly that on the morning of May 1st he went to Messrs. Livingston, Garrett & King's office prepared to redeem, and that he was told by Mr. Garrett that it was too late, that the property had been sold. (See Mr. Wallbridge's evidence (p. 31, to p. 35, particularly p. 32, l. 17-38.)

Mr. Garrett does not contradict Mr. Wallbridge but says he has no recollection of his coming to see him on the morning of May 1st. See Mr. Garrett's evidence, p. 50, l. 3-7; and at p. 51, l. 23-24, he says: "I certainly cannot remember any such conversation with Mr. Wallbridge in the office at all."

At the conclusion of the trial the Judge practically gave judgment for Respondent reserving only the question of damages. He asked Appellant's counsel if the amounts claimed by Respondent as value of goods taken were correct, assuming Respondent was entitled to damages; and upon the correctness of such amounts being disputed, and contention made that the sale price was a reasonable price the Judge said, addressing Appellant's counsel, (p. 81, l. 23-31): "That will have to be considered in the view that I take of the "evidence, as to the conduct of your client. Take this proposition to your- "self; how could you say that Mr. Garrett's statement should be taken in "preference to Mr. Wallbridge's statement? I think that the preponderating "elements are in favor of my taking Mr. Wallbridge's testimony. That does "not say that the other man was not telling the truth at all. The only point "is as to these amounts, then the measure of damages. I do not feel like, "under all the circumstances, giving general damages or special damages."

The "or" no doubt should be "and."

At the conclusion of the argument before him the learned Trial Judge said: "As to the exact form of the decision, I will reserve that. What I say "now is that I feel that I am right to accept Mr. Wallbridge's version of what "took place at the time referred to." (P. 82, l. 26-29.)

The "or" no doubt should be "and."

At the conclusion of the argument before him the learned Trial Judge said: "As to the exact form of the decision, I will reserve that. What I say "now is that I feel that I am right to accept Mr. Wallbridge's version of what "took place at the time referred to." (P. 82, l. 26-29.)

In his decision filed some time later, the learned Judge says: "The "only difficulty I have at all with the case is the apparent conflict of evidence "between Mr. Wallbridge on the one side and Messrs. Garrett and King on "the other. But after a very careful consideration of all the circumstances I "conclude that there is a misunderstanding only as between them and that "the inherent probabilities of the case are in favor of the view I now find "that the Plaintiff was not in a position on the 1st of May to redeem his "his mortgage, and that he did not offer to do so." (P. 107, l. 8-15).

The learned Judge at the trial said "The whole amount of King's evidence is that he doesn't know," (p. 59, l. 26-27), and he felt obliged, when the evidence was fresh in his memory, to accept Mr. Wallbridge's statement of what took place as correct, but in the end he is overborne by the idea of Respondent's impecunious condition and concludes that he could not have been prepared to redeem on May 1st.

As to the point which turned the trial Judge, namely, Respondent's inability to redeem, it is submitted that the learned Judge has overlooked the uncontradicted testament on this point, which shows that, while Respondent had no money, he had friends who were able and willing to raise for him what was required, such testimony being so clear that at the time he thought further corroboration unnecessary. The learned Judge in his decision puts aside Mr. Wallbridge's evidence of what took place between him and Mr. Garrett by saying that there was a misunderstanding between them, but we

also have Mr. Wallbridge's evidence that "The financial part was arranged by the night of the 30th between ourselves" (p. 32, l. 17-18).

Then we have the evidence of P. H. Allman (p. 26, l. 31) who testifies that he was prepared prior to May 1st to advance Respondent the money to pay off the Chattle Mortgage, taking security by Chattel Mortgage on the same property, and transfer of a timber license held by Respondent. The actual arrangement to obtain the money to redeem the Chattel Mortgage was made through T. Kato, who owned valuable real estate in Vancouver and had arranged to obtain a loan upon it and to lend the money to Respondent. Respondent testifies that the arrangement was made and that Kato was borrowing the money on his real estate from a Mr. Grossman, whose solicitor was Mr. Donaghy. (See p. 15, l. 12, to p. 16, l. 7.) Kato was called to corroborate this but his evidence was objected to by Appellant's Counsel, and was not received, and the following dialogue then took place between Respondent's Counsel and the trial Judge:

"Mr. Macdonald: I want to show that Harry Ishitaka was actually in a "position to redeem this Mortgage.

"Court: The Plaintiff says there were negotiations to raise $1,500 on "Kato's property on Powell Street. Kato was willing to let that go in as "security for the loan." (P. 37, l. 26-30.) Then Mr. Donaghy was called to prove that Kato arranged for the loan from Grossman to obtain money for Respondent, and this was also objected to by Appellant's Counsel, and was not received. (See page 42.) The Judge, probably after these incidents of

"Kato's property on Powell Street. Kato was willing to [illegible]
"security for the loan." (P. 37, l. 26-30.) Then Mr. Donaghy was called to prove that Kato arranged for the loan from Grossman to obtain money for Respondent, and this was also objected to by Appellant's Counsel, and was not received. (See page 42.) The Judge, probably after these incidents of

the trial had passed out of his mind, influenced by the consideration of Respondent's financial difficulties concludes that the inherent probabilities of the case are in favor of the view that Respondent did not offer to redeem; the result is that the learned Judge, after refusing to hear further evidence of the way in which the money for Respondent to redeem the Chattel Mortgage was to be obtained, says that the inherent probabilities established that Respondent could not have obtained it.

In the Court of Appeal Mr. Justice Martin says: "There is a case in "which I feel I must bring myself to say, with all deference to the learned "trial Judge, that the weight of evidence is clearly against his finding and "the facts respecting the important interview between the solicitors when "the Plaintiff was endeavoring to redeem the mortgage must be found "substantial as testified to by the Plaintiff's solicitor." (P. 113, l. 3-8.) Chief Justice Macdonald accepts Mr. Wallbridge's evidence as correct and says: "The evidence of Mr. Garrett falls far short of contradicting that of "Mr. Wallbridge, and that of Mr. King, his partner, does not touch upon this "point because he was not present when this conversation took place." (P. 110. l. 34 to p. 111, l. 2.)

It is submitted that the view taken by Mr. Justice Martin is perfectly correct, namely, that when it is established that Respondent was prevented by Appellant from redeeming, it is clear that Appellant cannot justify under sale which went into effect by virtue of the failure to redeem. Appellant in answer to claim for taking goods out of possession of Respondent must set up

that the goods, under power of sale in the Chattel Mortgage, were sold and delivered to Bowes, but the sale to Bowes was conditional upon Respondent's failing to redeem on or before May 1st, and Appellant to make out his defence must allege failure to redeem and that failure was caused by its own act, and as far as the Appellant is concerned Respondent is in the same position as if he had redeemed.

If a man to whom money should be paid prevents the making of tender he cannot be heard to say that the tender was not made. In Bac. Ab. 7, 722, it is said that if the debtor is prevented from making tender by the creditor saying "I cannot take it"; this is a good tender for the creditor's words worked a dispensation.

In *Ex Parte* Danks (1852) 2 De G. M. and G. 936: A debtor went to his creditor to make payment but was told that it was no use to do so, that it was too late and that debtor must see his solicitor, and it was held that under such circumstances it was of no consequence whether the money was actually produced, that such conduct on the part of the creditor amounted to a clear dispensation with the production of the money. (See Harris on Tender, pages 69-70.) The principle involved is one of general application, namely, that a man cannot complain of a thing not being done if he himself has caused that result. (See Leake on Contracts, 5th ed., p. 469).

As to the cases referred to by Mr. Justice Irving in his dissenting judgment:

pages 69-70.) The principle involved is [illegible] that a man cannot complain of a thing not being done if he himself has caused that result. (See Leake on Contracts, 5th ed., p. 469).

As to the cases referred to by Mr. Justice Irving in his dissenting judgment :

In Major v. Ward, 5 Hare, 598, a sale subject to right of redemption as in this case was upheld, but only because the sale was not a fair price. The Vice Chancellor (Sir James Wigram) in giving judgment said :

"The next ground of objection was that the agreement for sale being "before the expiration of the period fixed by the notice, the sale was void. "I do not give any opinion how it would be, if an undervalue or any special "circumstances were suggested, calculated to impeach the sale. But here the "question is put in the abstract, that a mortgagee with a power of sale may "not, a day before the power of sale is to arise, make a conditional agreement "with a purchaser that he shall have the estate at an agreed price, if the "mortgagor do not redeem it. I cannot go the length of saying such an agree-"ment is, *ispo facto*, void."

Williams v. Stern, (1879), 5 Q.B.D., 409, was simply a case of a mortgagee not waiting as he promised to do. No payment had been offered and in the words of Bramwell, L.J.,: "The plaintiff was not induced to alter his posi-"tion." In the case at bar there was a mis-statement that the property had been sold, and it was that mis-statement which really caused the sale because it prevented redemption. Lord Esher, then Brett, L. J., differentitates such a case when he says "On behalf of the Plaintiff reliance was placed upon the "circumstances that the Defendant had promised to wait for a week. This was "not a mis-statement as to existing facts; it was a mere naked promise, not "binding upon the Defendant."

Independently of the impropriety of the sale arising from its being brought about by the mistake made by Mr. Garrett it is submitted that Appellant owed a duty to the Respondent to sell fairly and to make reasonable steps to obtain a proper price, and that the evidence shows that Appellant failed in the performance of this duty.

The duties of a mortgagee under power of sale are thus expressed by Lord Justice Lindley, Kennedy vs. De Trafford (1896), 1, Ch. 762, at p. 772, as follows: "A mortgagee is not a trustee of a power of sale for the mortgagor "at all; his right is to look after himself first. But he is not at liberty to "look after his own interests alone, and it is not right or legal or proper for "him either fraudulently or wilfully or recklessly to sacrifice the property of "the mortgagor; that is all."

See Latch vs. Furlong, 12, Grant, Ch. 303; Aldridge vs. Canada Permanent Loan & Savings Co., 24 Ont. Appeals, 1903.

Respondent testified that the value of his outfit at Jervis Inlet (Kato's Camp) was $3,500 to $4,000, of which about $3,000 was covered by Chattel Mortgage. (P. 18, l. 15-18.)

P. H. Allman, evidently referring to the whole outfit, makes the same valuation of $3,500 to $4,000 and says of that the donkey engine alone was worth $2,500. (P. 24, l. 13.)

Henry Cook, one of the former owners of the property covered by Chattel Mortgage, was called by Appellant and gave evidence that the value was

valuation of $3,500 to $4,000 and says of that the donkey engine alone was worth $2,500. (P. 24, l. 13.)

Henry Cook, one of the former owners of the property covered by Chattel Mortgage, was called by Appellant and gave evidence that the value was

$3,500. (P. 44, l. 10-11.) He corroborates Allman that the donkey engine alone was worth $2,500. (P. 46, l. 13-14.)

The only other evidence as to the value is that of the purchaser Bowes, who admitted on cross-examination that he thought he was getting a highly desirable bargain. (P. 70, l. 9-11.)

The price at which the Appellant sold was not fixed with any regard to the value of the property, but simply at sufficient to cover the estimated balance due on Chattel Mortgage and expenses of foreclosure.

Appellant's bookkeeper allowed Allman to inspect the ledger showing a balance due of a little over $1,100 (p. 27, l. 5-15), and the expenses of foreclosure amounted to $327.

It is clear that the property was worth more than $1,500 and that Bowes would have given more. He admits that he was very anxious to buy. (P. 71, l. 13-14.) He had given his solicitor $100 to put up as a forfeit about 1st of April, "when he found out about the outfit," (p. 71, l. 1-26), and his solicitors were repeatedly urging that the matter be closed (p. 58, l. 21-23), but no effort whatever was made to realize a better price; on the contrary, Appellant precluded themselves from getting more by agreement to sell to Bowes for $1,500 if Respondent did not redeem.

This agreement, according to Bowes, was made out about the 18th or 19th of April (p. 68, l. 1-13). It was the day Bowes and the Sheriff went up to the camp; according to Respondent and Allman it was the 23rd or 24th of April.

It is not clear whether Bowes was bound to purchase under this agreement or whether it was a mere option

It was a further term of this agreement that if the property was redeemed within the time fixed, Bowes was to be paid his expenses of going up to the camp to get the property (p. 71, l. 10 to 15). The very day that the Sheriff was being sent up to the camp with Bowes, Respondent was at the office of Appellant's Solicitor's with Allman, who was willing to advance the money, but they would not delay longer than until nine o'clock that night, and the money could not be raised in that time. (See evidence Respondent, p. 13, l. 15, to p. 15, l. 8, and Allman, p. 27, l. 6, to p. 28, l. 12.)

When it is borne in mind that the expenses of foreclosure were more than one quarter of the whole amount due on the mortgage, the unreasonableness of insisting without any show of justification, upon incurring these expenses, without waiting even for a day or two for Respondent to endeavor to reedeem, becomes more apparent.

As to the claim for property seized and sold, not included in the Chattel Mortgage, it is submitted that it is established by the evidence.

Bowes and Johnson, the Sheriff's officer, admit that pike poles and blacksmith's tools were taken (p. 65, l. 17-32; p. 62, l. 2-23). These articles are not included in the list on pages 86 and 87 sworn by Cook to be a true inventory of the chattels included in the mortgage. (See p. 43, l. 5 to p. 44,

Bowes and Johnson, the Sheriff's officer, admit that pike poles and blacksmith's tools were taken (p. 65, l. 17-32; p. 62, l. 2-23). These articles are not included in the list on pages 86 and 87 sworn by Cook to be a true inventory of the chattels included in the mortgage. (See p. 43, l. 5 to p. 44, l. 12.) Respondent testifies that there were articles to the value of from $500 to $1,000 at the camp not covered by the Chattel Mortgage, and that they were all taken except about $150 worth (p. 18, l. 4, to p. 19, l. 9.

It is submitted that the judgment of the Court of Appeal should be affirmed.

BOWSER, REID & WALLBRIDGE,

Respondent's Solicitors.

Appendix C.

PRIVY COUNCIL RULES AND FORMS.

C. (1).

STATUTORY RULES AND ORDERS, 1908.

No. 1268.

JUDICIAL COMMITTEE.

Jurisdiction and Procedure General Rules as to Appeals.

THE JUDICIAL COMMITTEE RULES, 1908.

AT THE COURT AT BUCKINGHAM PALACE.

The 21st day of December 1908.

Present

THE KING'S MOST EXCELLENT MAJESTY

AACHBISHOP OF CANTERBUAY.	LORD CHAMBERLAIN.
LORD PRESIDENT.	LORD FITZMAURICE.

WHEREAS there was this day rerd at the Board a represent tion from the Judicial Committee of the Privy Council the words following, viz.:—

"The Lords of the Judicial Committee having taken in consideration the Practice and Procedure in accordan with which the general Appellate Jurisdiction of Yo Majesty in Council is now exercised and being opinion that the Rules regulating the said Practice a Procedure ought to be consolidated and amended The Lordships do hereby agree humbly to recommend Your Majesty that with a view to such consolidati and amendment certain Orders of Her late Majes Queen Victoria in Council regulating the said Practi

and Procedure, viz., the Orders in Council dated respectively the 11th day of August 1842 the 13th day of June 1853 the 31st day of March 1855 the 24th day of March 1871 and the 26th day of June 1873 and also the Order of Your Majesty in Council dated the 20th day of March 1905 amending the said Practice and Procedure ought to be revoked and that the several Rules hereunto annexed ought to be substituted therefor."

HIS MAJESTY having taken the said representation into consideration was pleased by and with the advice of His Privy Council to approve thereof and to order as it is hereby ordered that the said Orders in Council in the said representation mentioned be and the same are hereby revoked and that the Rules hereunto annexed be substituted therefor.

1.—(1) In these Rules, unless the context otherwise requires:—

"Appeal" means an Appeal to His Majesty in Council;

"Judgment" includes decree, order, sentence, or decision of any Court, Judge, or Judicial Officer;

"Record" means the aggregate of papers relating to an Appeal (including the pleadings, proceedings, evidence and judgments) proper to be laid before His Majesty in Council on the hearing of the Appeal;

"Registrar" means the Registrar or other proper officer having the custody of the records in the Court appealed from;

"Abroad" means the country or place where the Court appealed from is situate;

"Agent" means a person qualified by virtue of Her late Majesty's Order in Council of the 6th March 1896 to conduct proceedings before His Majesty in Council on behalf of another;

"Party" and all words descriptive of parties to proceedings before His Majesty in Council (such as "Petitioner," "Appellant," "Respondent") mean, in respect of all acts proper to be done by an Agent, the Agent of the party in question where such party is represented by an Agent;

"Month" means calendar month;

Words in the singular shall include the plural, and words in the plural shall include the singular.

(2) Where by these Rules any step is required to be taken in England in connection with proceedings before His Majesty in Council, whether in the way of lodging a Petition

or other document, entering an Appearance, lodging secur
ity, or otherwise, such step shall be taken in the Registry o
the Privy Council, Downing Street, London.

Leave to appeal.

2. All appeals shall be brought either in pursuance o
leave obtained from the Court appealed from, or, in th
absence of such leave, in pursuance of special leave t
appeal granted by His Majesty in Council upon a Petitio
in that behalf presented by the intending Appellant.

Special Leave to appeal.

3. A Petition for special leave to appeal to His Majes
in Council shall state succinctly and fairly all such facts
it may be necessary to state in order to enable the Judici
Committee to advise His Majesty whether such leave ought
to be granted. The Petition shall not travel into extraneo
matter, and shall deal with the merits of the case only
far as is necessary for the purpose of explaining and su
porting the particular grounds upon which special leave
appeal is sought.

4. The Petitioner shall lodge at least three copies of t
Petition for special leave to appeal together with the A
davit in support thereof prescribed by Rule 50 hereinaft
contained.

5. A Petition for special leave to appeal may be lodg
at any time after the date of the judgment sought to
appealed from, but the Petitioner shall, in every case, lod
his Petition with the least possible delay.

6. Where the Judicial Committee agree to advise H
Majesty to grant special leave to appeal, they shall, in th
Report, specify the amount of the security for costs (if an
to be lodged by the Petitioner, and the period (if an
within which such security is to be lodged and shall, unl
the circumstances of a particular case render such a com
unnecessary, provide for the transmission of the Record
the Registrar of the Court appealed from to the Regist
of the Privy Council and for such further matters as
justice of the case may require.

7. Save as by the four last preceding Rules otherw
provided, the provisions of Rules 47 to 50 and 52 to 59
inclusive) hereinafter contained shall apply *mutatis mut*
dis to Petitions for special leave to appeal.

8. Rules 3 to 7 (both inclusive) shall apply *mutatis mutandis* to Petitions for leave to appeal *in formâ pauperis*, but in addition to the Affidavit referred to in Rule 4 every such Petition shall be accompanied by an Affidavit from the Petitioner stating that he is not worth £25 in the world excepting his wearing apparel and his interest in the subject-matter of the intended Appeal, and that he is unable to provide sureties, and also by a certificate of Counsel that the Petitioner has reasonable ground of appeal.

9. Where a Petitioner obtains leave to appeal *in formâ pauperis*, he shall not be required to lodge security for the costs of the Respondent or to pay any Council Office fees.

10. A Petitioner whose Petition for leave to appeal *in formâ pauperis* is dismissed may, notwithstanding such dismissal, be excused from paying the Council Office fees usually chargeable to a Petitioner in respect of a Petition for leave to appeal, if His Majesty in Council, on the advice of the Judicial Committee, shall think fit so to order.

Record.

11. As soon as an Appeal has been admitted, whether by an Order of the Court appealed from or by an Order of His Majesty in Council granting special leave to appeal, the Appellant shall without delay take all necessary steps to have the Record transmitted to the Registrar of the Privy Council.

12. The Record shall be printed in accordance with Rules I. to IV. of Schedule A. hereto. It may be so printed either abroad or in England.

13. Where the Record is printed abroad, the Registrar shall, at the expense of the Appellant, transmit to the Registrar of the Privy Council 40 copies of such Record, one of which copies he shall certify to be correct by signing his name on, or initialling, every eighth page thereof and by affixing thereto the seal, if any, of the Court appealed from.

14. Where the Record is to be printed in England, the Registrar shall, at the expense of the Appellant, transmit to the Registrar of the Privy Council one certified copy of such Record, together with an index of all the papers and exhibits in the case. No other certified copies of the Record shall be transmitted to the Agents in England by or on behalf of the parties to the Appeal.

15. Where part of the Record is printed abroad and part is to be printed in England, Rules 13 and 14 shall, as

far as practicable, apply to such parts as are printed abroad and such as are to be printed in England respectively.

16. The reasons given by the judge, or any of the judges, for or against any judgment pronounced in the course of the proceedings out of which the Appeal arises, shall by such judge or judges be communicated in writing to the Registrar and shall by him be transmitted to the Registrar of the Privy Council at the same time when the Record is transmitted.

17. The Registrar, as well as the parties and their Agents, shall endeavour to exclude from the Record all documents (more particularly such as are merely formal) that are not relevant to the subject-matter of the Appeal, and, generally, to reduce the bulk of the Record as far as practicable, taking special care to avoid the duplication of documents and the unnecessary repetition of headings and other merely formal parts of documents; but the documents omitted to be printed or copied shall be enumerated in a list to be placed after the index or at the end of the Record.

18. Where in the course of the preparation of a Record one party objects to the inclusion of a document on the ground that it is unnecessary or irrelevant, and the other party nevertheless insists upon its being included, the Record, as finally printed (whether abroad or in England), shall, with a view to the subsequent adjustment of the costs of and incidental to such document indicate, in the index of papers, or otherwise, the fact that, and the party by whom, the inclusion of the document was objected to.

19. As soon as the Record is received in the Registry of the Privy Council, it shall be registered in the said Registry, with the date of arrival, the names of the parties, the date of the judgment appealed from, and the description whether "printed" or "written." A Record, or any part of a Record, not printed in accordance with Rules I. to IV of Schedule A hereto, shall be treated as written. Appeals shall be numbered consecutively in each year in the order in which the Records are received in the said Registry.

20. The parties shall be entitled to inspect the Record and to extract all necessary particulars therefrom for the purpose of entering an Appearance.

21. Where the Record arrives in England either wholly written, or partly written and partly printed, the Appellant shall, within a period of four months from the date of such arrival in the case of Appeals from Courts situate in any of the countries or places named in Schedule B hereto, and

within a period of two months from the same date in the case of Appeals from any other Courts, enter an Appearance and bespeak a type-written copy of the Record, or of such parts thereof as it may be necessary to have copied, and shall engage to pay the cost of preparing such copy at the following rates per folio typed (exclusive of tabular matter)—1½*d.* per folio of English matter, 2*d.* per folio of Indian matter, and 3*d.* per folio of foreign matter.

22. The Appellant shall forthwith, after entering his Appearance, give notice thereof to the Respondent, if the latter has entered an Appearance.

23. As soon as the Appellant has obtained the type-written copy of the Record bespoken by him, he shall proceed, with due diligence, to arrange the documents in suitable order, to check the index, to insert the marginal notes and check the same with the index, and, generally, to do whatever may be required for the purpose of preparing the copy for the Printer, and shall, if the Respondent has entered an Appearance, submit the copy, as prepared for the Printer, to the Respondent for his approval. In the event of the parties being unable to agree as to any matter arising under this Rule, such matter shall be referred to the Registrar of the Privy Council, whose decision thereon shall be final.

24. As soon as the type-written copy of the Record is ready for the Printer, the Appellant shall lodge it, with a request to the Registrar of the Privy Council to cause it to be printed by His Majesty's Printer or by any other printer on the same terms, and shall engage to pay at the price specified in Rule V. of Schedule A. hereto the cost of printing 50 copies thereof, or such other number as in the opinion of the said Registrar the circumstances of the case require.

25. Whenever it shall be found that the decision of a matter on appeal is likely to turn exclusively on a question of law, the parties, with the sanction of the Registrar of the Privy Council, may submit such question of law to the Judicial Committee in the form of a Special Case, and print such parts only of the Record as may be necessary for the discussion of the same. Provided that nothing herein contained shall in any way prevent the Judicial Committee from ordering the full discussion of the whole case, if they shall so think fit, and that, in order to promote such arrangements and simplification of the matter in dispute, the said Registrar may call the parties before him, and having heard

them, and examined the Record, may report to the Judicial Committee as to the nature of the proceedings.

26. The Registrar of the Privy Council shall, as soon as the proof prints of the Record are ready, give notice to all parties who have entered an Appearance requesting them to attend at the Registry of the Privy Council at a time to be named in such notice in order to examine the said proof prints and compare the same with the certified Record, and shall, for that purpose, furnish each of the said parties with one proof print. After the examination has been completed, the Appellant shall, without delay, lodge his proof print, duly corrected and (so far as necessary) approved by the Respondent, and the Registrar of the Privy Council shall thereupon cause the copies of the Record to be struck off from such proof print.

27. Each party who has entered an Appearance shall be entitled to receive, for his own use, six copies of the Record.

28. Subject to any special direction from the Judicial Committee to the contrary, the costs of and incidental to the printing of the Record shall form part of the costs of the Appeal, but the costs of and incidental to the printing of any document objected to by one party, in accordance with Rule 18, shall, if such document is found on the taxation of costs to be unnecessary or irrelevant, be disallowed to, or borne by, the party insisting on including the same in the Record.

Petition of Appeal.

29. The Appellant shall lodge his Petition of Appeal—

(*a*) Where the Record arrives in England printed, within a period of four months from the date of such arrival in the case of Appeals from Courts situate in any of the countries or places named in Schedule B. hereto, and within a period of two months from the same date in the case of Appeals from any other Courts;

(*b*) Where the Record arrives in England written, within a period of one month from the date of the completion of the printing thereof

Provided that nothing in this Rule contained shall preclude an Appellant from lodging his Petition of Appeal prior to the arrival of the Record, if there are special reasons why it should be desirable for him to do so.

30. The Petition of Appeal shall be lodged in the form prescribed by Rule 47 hereinafter contained. It shall recite succinctly and, as far as possible, in chronological order, the principal steps in the proceedings leading up to the Appeal from the commencement thereof down to the admission of the Appeal, but shall not contain argumentative matter or travel into the merits of the case.

31. The Appellant shall, after lodging his Petition of Appeal, serve a copy thereof without delay on the Respondent, as soon as the latter has entered an Appearance, and shall endorse such copy with the date of the lodgment.

Withdrawal of Appeal.

32. Where an Appellant, who has not lodged his Petition of Appeal, desires to withdraw his Appeal, he shall give notice in writing to that effect to the Registrar of the Privy Council, and the said Registrar shall, with all convenient speed after the receipt of such notice, by letter notify the Registrar of the Court appealed from that the Appeal has been withdrawn, and the said Appeal shall thereupon stand dismissed as from the date of the said letter without further Order.

33. Where an Appellant, who has lodged his Petition of Appeal, desires to withdraw his Appeal, he shall present a Petition to that effect to His Majesty in Council. On the hearing of any such Petition a Respondent who has entered an Appearance in the Appeal shall, subject to any agreement between him and the Appellant to the contrary, be entitled to apply to the Judicial Committee for his costs, but where the Respondent has not entered an Appearance, or, having entered an Appearance, consents in writing to the prayer of the Petition, the Petition may, if the Judicial Committee think fit, be disposed of in the same way *mutatis mutandis* as a Consent Petition under the provisions of Rule 56 hereinafter contained.

Non-Prosecution of Appeal.

34. Where an Appellant takes no step in prosecution of his Appeal within a period of four months from the date of the arrival of the Record in England in the case of an Appeal from a Court situate in any of the countries or places named in Schedule B. hereto, or within a period of two months from the same date in the case of an Appeal from any other Court, the Registrar of the Privy Council

shall, with all convenient speed, by letter notify the Registrar of the Court appealed from that the Appeal has not been prosecuted, and the Appeal shall thereupon stand dismissed for non-prosecution as from the date of the said letter without further Order.

35. Where an Appellant who has entered an Appearance—

(*a*) fails to bespeak a copy of a written Record, or of part of a written Record, in accordance with, and within the periods prescribed by, Rule 21; or

(*b*) having bespoken such copy within the periods prescribed by Rule 21, fails thereafter to proceed with due diligence to take all such further steps as may be necessary for the purpose of completing the printing of the said Record; or

(*c*) fails to lodge his Petition of Appeal within the periods respectively prescribed by Rule 29:

the Registrar of the Privy Council shall call upon the Appellant to explain his default, and, if no explanation is offered, or if the explanation offered is, in the opinion of the said Registrar, insufficient, the said Registrar shall, with all convenient speed, by letter notify the Registrar of the Court appealed from that the Appeal has not been effectually prosecuted, and the Appeal shall thereupon stand dismissed for non-prosecution as from the date of the said letter without further Order, and a copy of the said letter shall be sent by the Registrar of the Privy Council to all the parties who have entered an Appearance in the Appeal.

36. Where an Appellant, who has lodged his Petition of Appeal, fails thereafter to prosecute his Appeal with due diligence, the Registrar of the Privy Council shall call upon him to explain his default, and, if no explanation is offered or if the explanation offered is, in the opinion of the said Registrar, insufficient, the said Registrar shall issue a Summons to the Appellant calling upon him to show cause before the Judicial Committee at a time to be named in the said Summons why the Appeal should not be dismissed for non-prosecution. Provided that no such Summons shall be issued by the said Registrar before the expiration of one year from the date of the arrival of the Record in England. If the Respondent has entered an Appearance in the Appeal the Registrar of the Privy Council shall send him a copy of the said Summons, and the Respondent shall be entitled to be heard before the Judicial Committee in the matter of the said Summons at the time named and to ask for his costs

and such other relief as he may be advised. The Judicial Committee may, after considering the matter of the said Summons, recommend to His Majesty the dismissal of the Appeal for non-prosecution, or give such other directions therein as the justice of the case may require.

37. An Appellant whose Appeal has been dismissed for non-prosecution may present a Petition to His Majesty in Council praying that his Appeal may be restored.

Appearance by Respondent.

38. The Respondent may enter an Appearance at any time between the arrival of the Record and the hearing of the Appeal, but if he unduly delays entering an Appearance he shall bear, or be disallowed, the costs occasioned by such delay, unless the Judicial Committee otherwise direct.

39. The Respondent shall forthwith after entering an Appearance give notice thereof to the Appellant, if the latter has entered an Appearance.

40. Where there are two or more Respondents, and only one, or some, of them enter an Appearance, the Appearance Form shall set out the names of the appearing Respondents.

41. Two or more Respondents may, at their own risk as to costs, enter separate Appearances in the same Appeal.

42. A Respondent who has not entered an Appearance shall not be entitled to receive any notices relating to the Appeal from the Registrar of the Privy Council, nor be allowed to lodge a Case in the Appeal.

43. Where a Respondent fails to enter an Appearance in an Appeal, the following Rules shall subject to any special Order of the Judicial Committee to the contrary, apply:—

(*a*) If the non-appearing Respondent was a Respondent at the time when the Appeal was admitted, whether by the Order of the Court appealed from or by an Order of His Majesty in Council giving the Appellant special leave to appeal, and it appears from the terms of the said Order, or Order in Council, or otherwise from the Record, or from a Certificate of the Registrar of the Court appealed from, that the said non-appearing Respondent has received notice, or was otherwise aware, of the Order of the Court appealed from admitting the Appeal, or of the Order of His Majesty in Council giving the Appellant special leave to appeal, and has also received notice, or was

otherwise aware, of the dispatch of the Record to England, the Appeal may be set down *ex parte* as against the said non-appearing Respondent at any time after the expiration of three months from the date of the lodging of the Petition of Appeal;

(*b*) if the non-appearing Respondent was made a Respondent by an Order of His Majesty in Council subsequently to the admission of the Appeal, and it appears from the Record, or from a Supplementary Record, or from a Certificate of the Registrar of the Court appealed from, that the said non-appearing Respondent has received notice, or was otherwise aware, of any intended application to bring him on the Record as a Respondent, the Appeal may be set down *ex parte* as against the said non-appearing Respondent at any time after the expiration of three months from the date on which he shall have been served with a copy of His Majesty's Order in Council bringing him on the Record as a Respondent.

Provided that where it is shown to the satisfaction of the Judicial Committee, by Affidavit or otherwise, either that an Appellant has made every reasonable endeavour to serve a non-appearing Respondent with the notices mentioned in clauses (*a*) and (*b*) respectively and has failed to effect such service, or that it is not the intention of the non-appearing Respondent to enter an Appearance to the Appeal, the Appeal may without further Order in that behalf and at the risk of the Appellant, be proceeded with *ex parte* as against the said non-appearing Respondent.

44. A Respondent who desires to defend an Appeal *in formâ pauperis* may present a Petition to that effect to His Majesty in Council, which Petition shall be accompanied by an Affidavit from the Petitioner stating that he is not worth £5 in the world excepting his wearing apparel and his interest in the subject-matter of the Appeal.

Petitions generally.

45. All Petitions for orders or directions as to matters of practice or procedure arising after the lodging of the Petition of Appeal and not involving any change in the parties to the Appeal shall be addressed to the Judicial Committee. All other Petitions shall be addressed to His Majesty in Council but a Petition which is properly addressed to His Majesty

Council may include, as incidental to the relief thereby sought, a prayer for orders or directions as to matters of practice or procedure.

46. Where an Order made by the Judicial Committee does not embody any special terms or include any special directions, it shall not be necessary to draw up such Order, unless the Committee otherwise direct, but a Note thereof shall be made by the Registrar of the Privy Council.

47. All Petitions shall consist of paragraphs numbered consecutively and shall be written, type-written, or lithographed, on brief paper with quarter margin and endorsed with the name of the Court appealed from, the short title and Privy Council number of the Appeal to which the Petition relates or the short title of the Petition (as the case may be), and the name and address of the London Agent (if any) of the Petitioner, but need not be signed. Petitions for special leave to appeal may be printed and, shall, in that case, be printed in the form known as Demy Quarto or other convenient form.

48. Where a Petition is expected to be lodged, or has been lodged, which does not relate to any pending Appeal of which the Record has been registered in the Register of the Privy Council, any person claiming a right to appear before the Judicial Committee on the hearing of such Petition may lodge a Caveat in the matter thereof, and shall thereupon be entitled to receive from the Registrar of the Privy Council notice of the lodging of the Petition, if at the time of the lodging of the Caveat such Petition has not yet been lodged, and, if and when the Petition has been lodged, to require the Petitioner to serve him with a copy of the Petition, and to furnish him, at his own expense, with copies of any papers lodged by the Petitioner in support of his Petition. The Caveator shall forthwith after lodging his Caveat give notice thereof to the Petitioner, if the Petition has been lodged.

49. Where a Petition is lodged in the matter of any pending Appeal of which the Record has been registered in the Registry of the Privy Council, the Petitioner shall serve any party who has entered an Appearance in the Appeal with a copy of such Petition, and the party so served shall thereupon be entitled to require the Petitioner to furnish him, at his own expense, with copies of any papers lodged by the Petitioner in support of his Petition.

50. A Petition not relating to any Appeal of which the Record has been registered in the Registry of the Privy Council, and any other Petition containing allegations of fact

which cannot be verified by reference to the registered Rec
or any certificate or duly authenticated statement of the Co
appealed from, shall be supported by Affidavit. Where
Petitioner prosecutes his Petition in person, the said Affida
shall be sworn by the Petitioner himself and shall state th
to the best of the deponent's knowledge, information, a
belief, the allegations contained in the Petition are tr
Where the Petitioner is represented by an Agent, the s
Affidavit shall be sworn by such Agent and shall, besides st
ing that, to the best of the deponent's knowledge, informati
and belief, the allegations contained in the Petition are tr
show how the deponent obtained his instructions and the
formation enabling him to present the Petition.

51. A Petition for an Order of Revivor or Substituti
shall be accompanied by a certificate or duly authenticat
statement from the Court appealed from showing who, in
opinion of the said Court, is the proper person to be subs
tuted, or entered, on the Record in place of, or in addition
a party who has died or undergone a change of status.

52. The Registrar of the Privy Council may refuse
receive a Petition on the ground that it contains scandalo
matter but the Petitioner may appeal, by way of motion, fr
such refusal to the Judicial Committee.

53. As soon as a Petition is ready for hearing, the Pe
tioner shall forthwith notify the Registrar of the Privy Coun
to that effect, and the Petition shall thereupon be deemed
be set down.

54. On each day appointed by the Judicial Committee f
the hearing of Petitions the Registrar of the Privy Coun
shall, unless the Committee otherwise direct, put in the pap
for hearing all such Petitions as have been set down. Provid
that, in the absence of special circumstances of urgency to
shown to the satisfaction of the said Registrar, no Petition
unopposed, shall be so put in the paper before the expiration
three clear days from the lodging thereof, or, if oppose
before the expiration of ten clear days from the lodgi
thereof unless, in the latter case, the Opponent consents to th
Petition being put in the paper on an earlier day not being le
than three clear days from the lodging thereof.

55. Subject to the provisions of the next following Rul
the Registrar of the Privy Council shall, as soon as th
Judicial Committee have appointed a day for the hearing
a Petition, notify all parties concerned by Summons of the da
so appointed.

56. Where the prayer of a Petition is consented to in writing by the opposite party, or where a Petition is of a formal and non-contentious character, the Judicial Committee may, if they think fit, make their Report to His Majesty on such Petition, or make their Order thereon, as the case may be, without requiring the attendance of the parties in the Council Chamber, and the Registrar of the Privy Council shall not in any such case issue the Summons provided for by the last-preceding Rule, but shall with all convenient speed after the Committee have made their Report or Order notify the parties that the Report or Order has been made and of the date and nature of such Report or Order.

57. A Petitioner who desires to withdraw his Petition shall give notice in writing to that effect to the Registrar of the Privy Council. Where the Petition is opposed, the Opponent shall, subject to any agreement between the parties to the contrary, be entitled to apply to the Judicial Committee for his costs, but where the Petition is unopposed, or where, in the case of an opposed Petition, the parties have come to an agreement as to the costs of the Petition, the Petition may, if the Judicial Committee think fit, be disposed of in the same way *mutatis mutandis* as a Consent Petition under the provisions of the last-preceding Rule.

58. Where a Petitioner unduly delays bringing a Petition to a hearing, the Registrar of the Privy Council shall call upon him to explain the delay, and, if no explanation is offered, or if the explanation offered is, in the opinion of the said Registrar, insufficient, the said Registrar may treat the said Petition as set down and may, after duly notifying all parties interested by Summons of his intention to do so, put the Petition in the paper for hearing on the next following day appointed by the Judicial Committee for the hearing of Petitions for such directions as the Committee may think fit to give thereon.

59. At the hearing of a Petition not more than one Counsel shall be admitted to be heard on a side.

Case.

60. No party to an Appeal shall be entitled to be heard by the Judicial Committee unless he has previously lodged his Case in the Appeal. Provided that where a Respondent is merely a stakeholder or trustee with no other interest in the Appeal, he may give the Registrar of the Privy Council notice in writing of his intention not to lodge any Case, while reserving his right to address the Judicial Committee on the question of costs.

61. The Case may be printed either abroad or in Englan
and shall, in either event, be printed in accordance with Rul
I. to IV. of Schedule A. hereto, every tenth line thereof ben
numbered in the margin, and shall be signed by at least o
of the Counsel who attends at the hearing of the Appeal or
the party himself if he conducts his Appeal in person.

62. Each party shall lodge 40 prints of his Case.

63. The Case shall consist of paragraphs numbered co
secutively and shall state, as concisely as possible, the circu
stances out of which the Appeal arises, the contentions to
urged by the party lodging the same, and the reasons
appeal. References by page and line to the relevant portio
of the Record as printed shall, as far as practicable, be print
in the margin, and care shall be taken to avoid, as far
possible, the reprinting in the Case of long extracts from t
Record. The taxing officer, in taxing the costs of the Appe
shall, either of his own motion, or at the instance of t
opposite party, inquire into any unnecessary prolixity in t
Case, and shall disallow the costs occasioned thereby.

64. Two or more Respondents may, at their own risk as
costs, lodge separate Cases in the same Appeal.

65. Each party shall, after lodging his Case, forthw
give notice thereof to the other party.

66. Subject as hereinafter provided, the party who lod
his Case first may, at any time after the expiration of th
clear days from the day on which he has given the other pa
the notice prescribed by the last-preceding Rule, serve su
other party, if the latter has not in the meantime lodged
Case, with a "Case Notice," requiring him to lodge his C
within one month from the date of the service of the said C
Notice and informing him that, in default of his so doing,
Appeal will be set down for hearing *ex parte* as against h
and if the other party fails to comply with the said C
Notice, the party who has lodged his Case may, at any t
nfter the expirntion of the time limited by the said Case No
for the lodging of the Case, lodge an Affidavit of Serv
(which shall set ont the terms of the said Case Notice),
the Appeal shall thereupon, if all other conditions of its be
set down are satisfied, be set down *ex parte* as against
party in default. Provided that no Case Notice shall
served until after the completion of the printing of the Rec
and that it shall be open to the Taxing Officer, in adjust
the costs of the Appeal, in inquire, generally, into the circ
stances in which the said Case Notice was served and
satisfied that there was no reasonable neeessity for the

Case Notice, to disallow the costs thereof to the party serving the same. Provided also that nothing in this Rule contained shall preclude the party in default from lodging his Case, at his own risk as regards costs and otherwise, at any time up to the date of hearing.

67. Subject to the provisions of Rule 43 and of the last-preceding Rule, an Appeal shall be set down *ipso facto* as soon as the cases on both sides are lodged, and the parties shall thereupon exchange Cases by handing one another, either at the Offices of one of the Agents or in the Registry of the Privy Council, ten copies of their respective Cases.

Printing Records, &c.

68. As soon as an Appeal is set down, the Appellant shall attend at the Registry of the Privy Council and obtain ten copies of the Record and Cases to be bound for the use of the Judicial Committee at the hearing. The copies shall be bound in cloth or in half leather with paper sides, and six leaves of blank paper shall be inserted before the Appellant's Case. The front cover shall bear a printed label stating the title and Privy Council number of the Appeal, the contents of the volume, and the names and addresses of the London Agents. The several documents, indicated by inents, shall be arranged in the following order: (1) Appellant's Case; (2) Respondent's Case; (3) Record; (4) Supplemental Record (if any); and the short title and Privy Council number of the Appeal shall also be shown on the back.

69. The Appellant shall lodge the bound copies not less than four clear days before the commencement of the Sittings during which the Appeal is to be heard.

Hearing.

70. As soon as the Judicial Committee have appointed a day for the commencement of the sittings for the hearing of Appeals, the Registrar of the Privy Council shall, as far as in him lies, make known the day so appointed to the Agents of all parties concerned, and shall name a day on or before which Appeals must be set down if they are to be entered in the List of Business for such Sittings. All Appeals set down on or before the day named shall, subject to any directions from the Committee or to any agreement between the parties to the contrary, be entered in such List of Business and shall, subject to any direction from the Committee to the contrary, be heard in the order in which they are set down.

71. The Registrar of the Privy Council shall, subject to
provisions of Rule 42, notify the parties to each Appeal
Summons, at the earliest possible date, of the day appoin
by the Judicial Committee for the hearing of the Appeal,
the parties shall be in readiness to be heard on the day
appointed.

72. At the hearing of an Appeal not more than
Counsel shall be admitted to be hard on a side.

73. In Admiralty Appeals the Judicial Committee m
if they think fit, require the attendance of two Naut
Assessors.

Judgment.

74. Where the Judicial Committee, after hearing
Appeal, decide to reserve their judgment thereon, the Re
trar of the Privy Council shall in due course notify
parties who attended the hearing of the Appeal by Summ
of the day appointed by the Committee for the delivery of
Judgment.

Costs.

75. All Bills of Costs under the orders of the Judi
Committee on Appeals, Petitions, and other matters, shall
referred to the Registrar of the Privy Council, or such o
person as the Judicial Committee may appoint, for taxati
and all such taxations shall be regulated by the Schedule
Fees set forth in Schedule C hereto.

76. The taxation of costs in England shall be limited
costs incurred in England.

77. The Registrar of the Privy Council shall, with
convenient speed after the Judicial Committee have gi
their decision as to the costs of an Appeal, Petition, or ot
matter, issue to the party to whom costs have been awarded
Order to tax and a Notice specifying the day and h
appointed by him for taxation. The party receiving s
Order to tax and Notice shall, not less than 48 hours bef
the time appointed for taxation, lodge his Bill of C
(together with all necessary vouchers for disbursements), a
serve the opposite party with a copy of his Bill of Costs a
of the Order to tax and Notice.

78. The Taxing Officer may, if he think fit, disallow to a
party who fails to lodge his Bill of Costs (together with
necessary vouchers for disbursements) within the time p
scribed by the last-preceding Rule, or who in any way del

or impedes a taxation, the charges to which such party would otherwise be entitled for drawing his Bill of Costs and attending the taxation.

79. Any party aggrieved by a taxation may appeal from the decision of the Taxing Officer to the Judicial Committee. The Appeal shall be heard by way of motion, and the party appealing shall give three clear days' Notice of Motion to the opposite party, and shall also leave a copy of such Notice in the Registry of the Privy Council.

80. The amount allowed by the Taxing Officer on the taxation shall, subject to any appeal from that taxation to the Judicial Committee and subject to any directions to the contrary, be inserted in His Majesty's Order in Council determining the Appeal or Petition.

81. Where the Judicial Committee directs costs to be taxed on the pauper scale, the Taxing Officer shall not allow any fees of Counsel, and shall only award to the Agents out-of-pocket expenses and a reasonable allowance to cover office expenses, such allowance to be taken at about three-fifths of the usual professional charges in ordinary Appeals.

82. Where the Appellant has lodged security for the Respondent's costs of an Appeal in the Registry of the Privy Council, the Registrar of the Privy Council shall deal with such security in accordance with the directions contained in His Majesty's Order in Council determining the Appeal.

Miscellaneous.

83. The Judicial Committee may, for sufficient cause shown, excuse the parties from compliance with any of the requirements of these Rules, and may give such directions in matters of practice and procedure as they shall consider just and expedient. Applications to be excused from compliance with the requirements of any of these Rules shall be addressed in the first instance to the Registrar of the Privy Council, who shall take the instructions of the Committee thereon and communicate the same to the parties. If, in the opinion of the said Registrar, it is desirable that the application should be dealt with by the Committee in open Court, he may, and if he receives a written request in that behalf from any of the parties, he shall, put the application in the paper for hearing before the Committee at such time as the Committee may appoint, and shall give all parties interested Notice of the time so appointed.

84. Any document lodged in connection with an App
Petition, or other matter pending before His Majesty
Council or the Judicial Committee, may be amended by le
of the Registrar of the Privy Council, but if the said Re
trar is of opinion that an application for leave to amend sho
he dealt with by the Committee in open Court, he may, an
he receives a written request in that behalf from any of
parties, he shall, put such application in the paper for hear
before the Committee ot such time as the Committee
appoint, and shall give all parties interested Notice of the
so appointed.

85. Affidavits relating to any Appeal, Petition or o
matter pending before His Majesty in Council or the Judi
Committee may he sworn hefore the Registrar of the P
Council.

86. Where a party to an Appeal, Petition, or other ma
pending before His Majesty in Council changes his Ag
such party, or the new Agent, shall forthwith give the R
trar of the Privy Council notice in writing of the change.

87. Subject to the provisions of any Statute or of
Statutory Rule or Order to the contrary, these Rules s
apply to all matters falling within the Appellate Jurisdi
of His Majesty in Council.

88. These Rules may he cited as the Judicial Commi
Rules, 1908, and they shall come into operation on the 1st
of January, 1909.

Schedule A.

Rules as to Printing.

I. All Records and other proceedings in Appeals or o
matters pending before His Majesty in Council or the Jud
Committee which are required by the above Rules to be pri
sball bencefortb be printed in the form known as Demy Qu
(*i.e.*, 54 ems in length and 42 in width).

II. Tbe size of the paper used sball be such tbat the si
wben folded and trimmed, will be 11 incbes in beight and
incbes in width.

III. The type to be used in the text sball be Pica type.
Long Primer sball be used in printing accounts, tabular ma
and notes.

IV. The number of lines in each page of Pica type shall b
or tbereabouts, and every tenth line shall be numbered in
margin.

V. The price in England for the printing by His Maje
Printer of 50 copies in the form prescribed by these Rules
be 38s. per sbeet (eight pages) of pica with msrginal n
not including corrections, tabular matter, and other extras

Schedule B.

Countries and Places referred to in Rules 21, 29, *and* 34.

Australia (and the constituent States thereof).
Basutoland.
British East Africa.
British Honduras.
British North Borneo.
Brunei.
Ceylon.
China.
Eastern Africa Protectorate.
Falkland Islands.
Federated Malay States.
Fiji.
Hong Kong.
India.
Mauritius.
New Zealand.
Persia.
Seychelles.
Somaliland Protectorate.
Straits Sttlements.
Zanzibar.

Schedule C.

I.

Fees allowed to Agents conducting Appeals or other matters before the Judicial Committee of the Privy Council.

	£	*s.*	*d.*
Retaining Fee	0	13	4
Perusing written Record, at the rate of, for every 25 folios	0	6	8
Perusing printed Record, at the rate of, for every printed sheet of 8 pages	1	1	0
Attendances at the Council Office, or elsewhere, or ordinary business, such as to enter an Appearance, to make a search, to lodge a Petition or Affidavit, or to retain Counsel	0	10	0
Attending at the Council Office to examine proof print of Record, with the certified Record.....*per diem*	3	3	0
Attending at the Council Chamber on Summons for the hearing of a Petition	1	6	8
Attending at the Council Chamber all day on an Appeal not called on	2	6	8
Attending the Hearing of an Appeal.....*per diem*	3	6	8
Attending a Judgment	1	6	8
Correcting English proofs, at the rate of, for every printed sheet of 8 pages	0	10	6
Correcting Foreign or Indian proofs, at the rate of, for every printed sheet of 8 pages	1	1	0

	£	s.	d.
Instructions for Petition	0	10	0
Drawing Petition, Case, or Affidavit ..... *per folio*	0	2	0
Copying Petition, Case, or Affidavit ..... *per folio*	0	0	6
Instructions for Case	1	0	0
Instructions to Counsel to argue an Appeal	1	0	0
Instructions to Counsel to argue a Petition	0	10	0
Attending Consultation	1	0	0
Sessions Fee for each year or part of a year from the date of Appearance	3	3	0
Drawing Bill of Costs ..... *per folio*	0	1	0
Copying Bill of Costs ..... *per folio*	0	0	6
Attending Taxation of Costs of an Appeal	2	2	0
Attending Taxation of Costs of a Petition	1	1	0

II.

Council Office Fees.

Entering Appearance	0	10	0
Lodging Petition of Appeal	2	0	0
Lodging any other Petition	1	0	0
Lodging Case	2	0	0
Setting down Appeal (chargeable to Appellant only)	1	0	0
Setting down Petition (chargeable to Petitioner only)	0	10	0
Summons	1	10	0
Committee Report	4	0	0
Original Order of His Majesty in Council determining an Appeal	2	0	0
Any other Original Order of His Majesty in Council	0	5	0
Plain Copy of an Order of His Majesty in Council	1	10	0
Original Order of the Judicial Committee	0	5	0
Plain copy of Committee Order	0	10	0
Lodging Affidavit	0	10	0
Certificate delivered to Parties	2	0	0
Committee References	1	0	0
Lodging Caveat	0	10	0
Subpœna to Witnesses	3	0	0
Taxing Fee in Appeals	2	0	0
Taxing Fee in Petitions			

C. (2).

NOTICE OF MOTION TO FIX BAIL.

IN THE SUPREME COURT OF CANADA.

Between:—

(Plaintiff or defendant) Appella

And

(Defendant or plaintiff) Respond

Take notice that an application on behalf of the ab named (plaintiff or defendant) appellant will be made to

Supreme Court of Canada or (to the Honourable Mr. Justice one of the Judges of the Supreme Court of Canada) at Ottawa, on the day of 19 . at eleven o'clock in the forenoon, or so soon thereafter as the motion can be heard, for an order fixing the bail to be given by the above named (plaintiff or defendant) appellant upon the appeal of the said (plaintiff or defendant) appellant to His Majesty in Council from the judgment of this Honourable Court pronounced and made in this action on the day of , A. D. 19 .

And further take notice that upon such application leave will be craved to refer to the Notice of Appeal filed herein.

Dated this day of 19 .

Solicitor for the above named appellant

To

Solicitor for the respondent.

C. (3).

ORDER FIXING BAIL.

IN THE SUPREME COURT OF CANADA.

the day of . A.D. 19 .

Before the Honorable Mr. Justice in Chambers.

Between:—

(Plaintiff or defendant) Appellant;

And

(Defendant or plaintiff) Respondent.

Upon motion made by Mr. , of counsel for the appellant, for an order fixing the bail to be given by the appellant upon his appeal to His Majesty the King in Council, from the judgment of this Court dated the day of 19 . to answer the costs of said appeal:

Upon hearing read the said judgment of this Court, the notice of appeal served on the day of 19. the notice of application to fix the bail served herein on the day of 19 . filed, and upon hearing counsel for the appellant and Respondent.

It is ordered that the above named appellant, , do give bail to answer the costs of appeal to His Majesty the

King in Council in the aum of pounds sterling t
the aatiafaction of the Registrar of this Court, on or before th
day of 19 .

And it is further ordered that the costs of this applicatio
be costs in the cause.

(Signed)

C. (4).

BAIL.

IN THE SUPREME COURT OF CANADA.

ON APPEAL TO HIS MAJESTY'S PRIVY COUNCIL.

Between:—

(Plaintiff or defendant) Appellan

And

Plaintiff or defendant Respondent

Know all men by these presents that we
(insert names, addresses and descriptions of the sureties
full) hereby jointly and severally submit ourselves to t
jurisdiction of this Court and consent that if the said
(insert name of party for whom bail is to be given, and sta
whether plaintiff or defendant) ahall not pay what may
adjudged against him in the above action, for costs, executi
may issue against us, our heirs, executors and administrato
goods and chattels for a sum not exceeding (sta
sum in letters) pounds.

C. (5).

ORDER ALLOWING BOND.

IN THE SUPREME COURT OF CANADA.

E. R. CAMERON, Esquire,
Registrar in Chambers.

Between:—

(Plaintiff or defendant) Appella

AND

(Defendant or plaintiff) Respond

Upon the application of counsel on behalf of the ab
named Appellant in the presence of Counsel for the ab

named Respondent, upon hearing what was alleged by Counsel aforesaid,

It is ordered that a certain Bond bearing date the day of , A.D. and filed this day of , A.D. , in which is Obligor and the above named Respondent is Obligee, as security that the above named Appellant will effectually prosecute its appeal to His Majesty in Council from the judgment of this Court hearing date the day of , A.D. , and will pay such costs and damages as may be awarded against them by His Majesty in Council, be and the same is hereby approved and allowed as good and sufficient security.

And it is further ordered that the costs of this application be costs in the said appeal.

C. (6).

PETITION FOR SPECIAL LEAVE TO APPEAL TO PRIVY COUNCIL.

IN THE PRIVY COUNCIL.

FROM THE SUPREME COURT OF CANADA.

BETWEEN

THE MONTREAL GAS COMPANY (Defendant) Appellant,

AND

HECTOR G. CADIEUX . . (Plaintiff) Respondent.

TO THE KING'S MOST EXCELLENT MAJESTY IN COUNCIL.

The Humble Petition of the Montreal Gas Company for Special Leave to Appeal.

Sheweth,—

(1) That your petitioner is a Corporation incorporated in 1847 by Statute of Canada, 10 & 11 Vict., cap. 79, under the name of The New City Gas Company of Montreal, which name was afterwards changed to that of The Montreal Gas Company by 42 & 43 Vict., cap. 81, sec. 10, and it is, under a contract

with the City of Montreal, the only gas company manufactu
ing and selling gas in that city.

(2) That on the 4th May, 1887, the Respondent Hect
G. Cadieux agreed with your Petitioner "to consume gas
meter at his residence or place of business in the city, or wh
he might remove to," and under this agreement gas was s
plied to the Respondent on the 8th November, 1894, at 2
St. Charles Borromée Street, and on the 8th July, 1895, t
Respondent signed an order to your Petitioner to supply hi
with gas at another house, being 1125 Notre Dame Street, a
he was supplied accordingly.

(3) That on the 19th September, 1895, the gas at t
house in Notre Dame Street was cut off for non-payment
$21.34, being the amount due to your Petitioner for gas co
sumed by the Respondent at that house, and after sever
notices from your Petitioner to the Respondent who s
neglected to pay the said account, more than 24 hours' noti
having been given, the gas at the house in St. Charles B
romée Street was on the 22nd December, 1895, also cut off,
default being the failure to pay the account for gas suppli
to the house in Notre Dame Street.

(4) That the said sum of $21.34 due to your Petitio
has never been paid, and the Respondent, in December, 18
without tendering payment thereof, instituted in the Superi
Court of Quebec proceedings in a mandamus to compel yo
Petitioners to supply him with gas at the house in St. Char
Borromée Street.

(5) That the Superior Court by Matthieu J., deliver
judgment on the 4th May, 1896, granting a peremptory M
damus compelling your Petitioners to supply the gas to
Respondent at the St. Charles Borromée house.

(6) That your Petitioner appealed to the Court
Queen's Bench, and that court, composed of Lacoste, C
Bossé, Blanchet, Hall and Wurtele, JJ., gave judgment
the 29th October, 1896, unanimously quashing the writ
Mandamus, and dismissing the Respondent's action with co

(7) That the Respondent H. G. Cadieux, appealed to
Supreme Court of Canada, and the appeal was argued on
28th February, 1898, before Taschereau, Gwynne, Sedgewi
King and Girouard, five of the justices of the said Court, a
on the 16th May, 1898, judgment was delivered Tasch

J., dissenting), reversing the judgment of the Court of Queen's Bench and restoring the judgment of the Superior Court with costs before all the Courts.

(8) It thus appears that six out of eleven Judges have decided in favour of your Petitioner.

(9) There is no dispute as to the fact, the only question being one of law, namely, whether under the provisions of 12 Viet., cap. 183, your Petitioner is compelled to supply gas to a person in one place, when he neglects and refuses to pay the sum due by him for gas supplied in another place.

(Paragraphs 10 to 13 recite the sections of the Acts, above referred to and the text of the judgment).

(14) That the Petitioner submits that the unanimous judgment of the Court of Queen's Bench, and the views expressed by Hall, J., in that Court, and by Taschereau, J., in the Supreme Court are correct.

(15) That the authorizations of the company to cut off the supply of gas from a consumer in default is not in principle a special or extraordinary statutory power conferred only upon your Petitioner and as Hall, J., points out in his judgment, the same principle has been applied generally in charters incorporating gas and water companies and in the general Act respecting incorporated Joint Stock Companies for supplying cities and villages with gas or water.

(16) That the question is of general importance, affecting as it does not only a very large number of the gas consumers in the City of Montreal and the rights and obligations of your Petitioner with reference to that large number of persons, but also those consumers and companies in a like position throughout the Province, and it is to the public interest that the question be finally settled:—

Your Petitioner, therefore, humbly prays that your Most Gracious Majesty in Council will be pleased to order that your Petitioner shall have special leave to appeal from the said judgment of the Supreme Court of Canada of the 6th May, 1896, and that the certified transcript of the proceedings produced on the hearing of this petition may be used upon the hearing of the appeal; and that your Majesty may be graciously pleased to make such further or other order as to your Majesty in Council may appear fit and proper.

And your Petitioner will ever pray, etc., etc.

C. (7).

AFFIDAVIT LODGED WITH PETITION FOR SPECIAL LEAVE TO APPEAL.

IN THE PRIVY COUNCIL.

FROM THE SUPREME COURT OF CANADA.

In the matter of—

HECTOR G. CADIEUX,

v.

THE MONTREAL GAS COMPANY.

I, (*name of Petitioners' Solicitor*) of (*address*), *solicitor* for the above named Montreal Gas Company, make oath and say that:

I received from Canada certain packets of papers relating to a suit between the parties above named, with instructions to present a petition for special leave to appeal to His Majesty in Council from the decree of the Supreme Court of Canada dated the 6th May, 1898.

That to the best of my knowledge, information, and belief the allegations and statementa contained in the petition for special leave to appeal, which I lodge herewith, are true, and all extracts therein from such papers are true extracts.

Sworn at the Privy Council Office, Whitehall, this 8th July, 1898.

Before me,

Registrar, P. C.

C. (8)

CAVEAT AGAINST GRANTING SPECIAL LEAVE TO APPEAL.

IN THE PRIVY COUNCIL.

In the matter of a proposed petition of the Montreal Gas Company for Special Leave to appeal from a judgment or decree of the Supreme Court of Canada, dated the 6th day of May, 1898, in the suit of

HECTOR G. CADIEUX,

v.

THE MONTREAL GAS COMPANY,

from Quebec.

Caveat lodged on behalf of Hector G. Cadieux.

Let nothing be done in reference to the petition for special leave to appeal in this matter, without notice to the undersigned.

Dated the 11th day of July, 1898.

(Signed) B. B. and Co.

Solicitors for Caveator.

(*Address.*)

To the Registrar of Her Majesty's Privy Council.

C. (9).

INDEX IN APPEAL TO THE PRIVY COUNCIL.

IN THE PRIVY COUNCIL.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

BETWEEN

JOSEPH BARRETTE . . . . . *Appellant*

AND

THE SYNDICAT LYONNAIS DU KLONDIKE . . . *Respondent*

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RECORD OF PROCEEDINGS.

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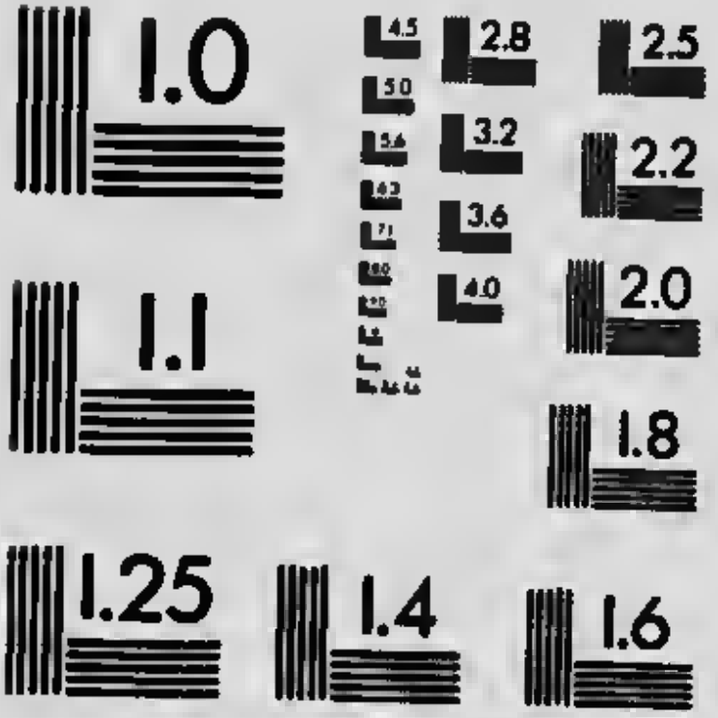

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C. (10).

SPECIMEN SHEET GIVING RECORD OF PROCEEDINGS.

In the Privy Council

ON APPEAL FROM THE HIGH COURT OF JUDICATURE, AT FORT WILLIAM IN BENGAL.

BETWEEN

MAHARANEE INDURJEET KOONWUR - - - *Appellant.*

AND

MUSST. AMEEROONISSA BEGUM *alias* NUNKOO SAHEBA, Widow of TALIB ALLY KHAN *alias* KHAWJEH SULTAN JAN, deceased; MUSST. AFZULUN NISSA BEGUM and SYUD MAHOMED HOSSEIN KHAN Heiress and Heir respectively of SYUD KASIM ALLY KHAN, deceased - - - - - - - *Respondents.*

KHAWJEH SULTAN JAN, deceased; MUSST. AFZULUN NISSA BEGUM and SYUD MAHOMED HOSSEIN KHAN Heiress and Heir respectively of SYUD KASIM ALLY KHAN, deceased - - - - - - - *Respondents.*

No. 305 of 1865.

RECORD OF PROCEEDINGS.

PART I.

IN THE COURT OF THE PRINCIPAL SUDDER AMEEN OF BEHAR.

In the Court of the Principal Sudder Ameen of Zillah Behar.

Pleadings and Proceedings.

No 1. Plaint on behalf of Maharajah Hetnarain Singh Bahadoor, dated the 20th of Feb., 1861.

PLEADINGS AND PROCEEDINGS.

No. 1.

PLAINT on behalf of Maharajah Het Narain Sing Bahadoor
No. 75 of 1861 A.D., Regular.

Maharajah Het Narain Sing Bahadoor, Zemingar of Purgunnah Sunote, &c., inhabitant of Kusba Tekaree of the said Purgunnah, Zillah Behar, professionally a Zemindar: - - *Plaintiff,*

versus

Mussumat Ameeroon Nessa Begum *alias* Nunkoo Sahiba, pleading the collusive Kobalah, dated 18th November, 1847 A.D. - - - - - - - - - *Appellant.*

Claim to recover Rs. 2,49,800, the principal and interest of a decree, and the cost of a decision passed by the Principal Sudder Ameen of Zillan Behar, dated 30th December, 1856 A.D., and of the Decision passed by (Dewanee) 1825;

SPECIMEN FROM ANOTHER RECORD

but there is nothing in the donation to show that Pierre Roy had any idea curtailing the powers which by his will he had previously given to his son. The reasons for giving those powers were as cogent at the date of the donation as at the date of the will. And the confidence which the father reposed in the prudence and discretion of his son appears not to have decreased, but on the contrary to have increased, in the period that intervened between the will and the donation. The object of the donor as expressly avowed in the donation was to acknowledge "les bons et essentials services" which Joseph Roy had rendered to his father, and to recompense him for those services, "l'en recompenser," and this object was carried out by giving to Joseph Roy the power to appropriate to himself during his father's lifetime such portion of the property mentioned in the donation as he might require for building lots, and by giving him an irrevocable title to the deed of donation to the property therein mentioned, of which previously he had only an expectation under his father's will. And yet it is contended that although the will affords proof of the father's confidence in his son having increased, and although the avowed and direct object of it was to recompence him for the important services which

by giving him an irrevocable title to the deed of donation to the property therein mentioned, of which previously he had only an expectation under his father's will. And yet it is contended that although the will affords proof of the father's confidence in his son having increased, and although the avowed and direct object of it was to recompence him for the important services which he rendered to his father, yet that it indirectly deprived him in the event of his

not having children of the power respecting his father's property which under the will he was to have had in that case.

Schedule No. 8.

No. 10. Donation by Pierre Roy to his son Joseph Roy Dated 21st May, 1825, filed 24th September, 1861

Paradevant les notaires de la ville et district de Montreal, dans la province du Bas Canada, y residant, soussignes fut present le Sieur Pierre Roy, ci-devant marchand, demeurant au Fauxbourg St. Laurent en cette cite de Montreal. Lequel desirant reconnoitre les bons et essentiels services qui lui a rendus Mtre. Joseph Roy, notaire de cette ville, son fils, et l'en recompenser a reconnu it confesse avoir fait et donation entre vifs, et pour plus grande validite a promis et promet garantir de tous troubles, dons, douaires, dettes, hypotheques, evictionss substitutions, alienations et autres empecoements generalements quelconque au dit Mtre. Joseph Roy son fils, a ce present et acceptant donataire pour lui et ses hoirs et ayant cause a l'avenir un terrain scis et scitue au dit Fauxbourg St. Lautent en cette cite de Montreal de la contenance qu'il peut avoir tant en front qu'en profondeur, tenant d'un bout au Sud Est a la rue Dordhester dautre bout au Nord Ouest a la rue Ste. Catherine d'un cote au Sud Ouest a la rue Ste. Elizabeth d'autre cote au Nord Est a la rue Sanguinet avec cinq maisons et autres batiments dessus construits et le reste du terrain occupe en pairies, verger, et jardin ainsi que le tout se poursuit et comporte et etend de toutes parts circonstances et dependances que le dit cessionaire a dit bien scavoiretconnoitre pour l'avoir vu et visite en est content et satisfait pour du dit terrain et jouir, user, faire, et disposer. par le dit Mtre. Joseph Roy a titre

C. (11).

In the Privy Council.

No. 12 of 1906

ON APPEAL FROM THE SUPREME COURT OF CANADA.

BETWEEN

JOSEPH BARRETTE . . . . . *Appellant,*

AND

THE SYNDICAT LYONNAIS DU KLONDIKE . . *Respondents.*

APPELLANT'S CASE

10

1. This is an appeal by special leave from a judgment of the Supreme Court of Canada, dated 2nd May, 1905, reversing a judgment of the Territorial Court of the Yukon Territory and restoring in part the judgment

Record, p. 421, l. 46. p. 370, l. 35. p. 337, l. 42.

APPELLANT'S CASE

1. This is an appeal by special leave from a judgment of the Supreme Court of Canada, dated 2nd May, 1905, reversing a judgment of the Territorial Court en banc of the Yukon Territory and restoring in part the judgment of the Trial Judge. Record, p. 421, l. 46. p. 370, l. 35. p. 337, l. 12.

2. In June 1901, the Appellant sold a number of mining claims and other property in the Yukon Territory to the Respondents for the sum of $167,500, of which $75,000 was paid in cash and the remaining $92,500 was secured by a promissory note and a mining and a chattel mortgage payable on the 1st October, 1901. The Respondents thereupon entered into possession and worked the mining claims. p. 3, l. 18. p. 375, l. 36, *et. seq.* p. 376, l. 9.

3. The note and mortgages having been transferred by the appellant to the Canadian Bank of Commerce and default having been made in payment, the Bank brought an action in October, 1901, against the Respondents and the Appellant to recover the sum of $92,500 and interest due under the said note and mortgages. p. 500, l. 15. p. 2, l. 23.

4. The Respondents by their defence dated 20th June, 1902, alleged (inter alia) that the note and Mortgages in question were made by their Manager named Paillard, without authority; that the note was collateral to the mortgages; that they had been induced to make the note and give the mortgages by the false and fraudulent representations of the Appellant in reference to the property sold and that the Appellant in selling the mining claims acted for himself and as agent for the Bank; and the Respondents counterclaimed against the Bank for the amount of the note and mortgages and against the Appellant for the sum of $400,000 damages for the alleged false representations. p. 3, l. 14. p. 4, l. 4. *et. seq.* Record, p. 4, l. 31. *et. seq.* p. 9, l. 4.

5. The rule governing counterclaims is rule 109 of the Rules of the Yukon Territorial Court, as follows:—

109. A Defendant in an action may set off or set up by way of counterclaim against the claims of the Plaintiff any right or claim wether such set-off or counterclaim sounds in damages or not, and such set-off or counterclaim shall have the same effect as a cross action so as to enable the Judge to pronounce final judgment in the same action both on the original and cross claims; but the Judge may on application of the Plaintiff before trial if in his opinion such set-off or counterclaim cannot be conveniently disposed of in the pending action or ought not to be allowed, refuse permission to the Defendant to avail himself thereof; and if in any case in which the Defendant sets up a counterclaim the action of the Plaintiff is stayed, discontinued or dismissed the counterclaim may nevertheless be proceeded with.

6. The Appellant, who had not been personally served with the counterclaim appeared in Court by counsel on the fourth day of the trail of the action and, waiving the want of service, lodged a defence denying misrepresentation and alleging that any representations made were not material and had not been relied upon, and that the respondents made an independent examination of the property.

p. 336, l. 8.
p. 51, l. 20.
p. 11, l. 35, *et. seq.*

7. Particulars of the alleged misrepresentations, said to have been made verbally during the visits extending over several days made to the mining claims by two representatives of the Respondents. are given in the Respondents' defence and counterclaim. Between the dates of these visits and the

p. 4, l. 31. *et. seq.*
p. 154, l. 17.

of the property.

7. Particulars of the alleged misrepresentations, said to have been made verbally during the visits extending over several days made to the mining claims by two representatives of the Respondents. are given in the Respondents' defence and counterclaim. Between the dates of these visits and the trail some fifteen months elapsed and there was a conflict of evidence between the Respondents' representatives and the Appellant as to the substance and effect of the conversations which took place. p. 4, l. 31. *et. seq.* p. 154, l. 17. p. 302, l. 17. p. 337, l. 1.

8. In the result the great majority of the alleged misrepresentations were disproved or not established, but the Trial Judge (Mr. Justice Craig) found that in respect of two of the mining claims sold certain misstatements of fact had been made by the Appellant and he came to the conclusion that the true facts must have been known to the Appellant. In respect of the mining claim No. 32 below Upper discovery on Dominion Creek the trial Judge found that the Appellant had falsely represented that, having prospected the claim all over, he found the "pay" even the extensive from rim to rim of the claim; that it was as good in the part unworked as in the part already worked and would yield profits exceeding $400,000 and a certain working by a former owner did not exceed 900 feet in area. In respect of the mining claim No. 12 above Lower Discovery on Dominion Creek his Lordship also found that an old working, from which $11,000 had been won by third parties, had not been pointed out and the ground covered by it had been represented to be unworked. p. 376. l. 43. p. 305, l. 41. *et. seq.* p. 308, l. 42. p. 304, l. 45. p. 305, l. 9.

9. The representatives of the Respondents Syndicat. Paillard and Tarut, to whom, as already mentioned, these representations were alleged to have been made and on whose recollection the Case of the Respondents in this respect depended, were gentlemen of considerable experience in mining matters. employed by the Respondents expressly to purchase mining property. They had first visited these properties in April, 1901, and had then. to some extent, examined them. They did not then contemplate buying. though it appears Rec..., pp. 56-59.

APPENDIX C.

the Appellant mentioned to them that he would sell, as the properties then stood, for $260,000. In June, 1901, they returned as intending purchasers and made an elaborate examination lasting four days. It was during this latter examination that the representations are alleged to have been made. p. 39, l. 37. p. 60, l. 8.

10. Paillard kept a memorandum of the facts communicated to himself and his colleague by the Appellant during their visit and stated in his evidence that in this he put down "everything of moment" that the Appellant said. The memorandum, which was in the form of notes on rough plans entered in a note book (Exhibit F 3), was produced at the trial and does not contain a record of any one of the misrepresentations of which the Appellant has been found guilty. The original leaves of the note book have been transmitted and a facsimile is with the record. No correspondence between these two gentlemen and their principles was produced, but it was admitted that they had been blamed for making the purchase. It was said that no copies had been kept of the letter reporting the purchase, and that a letter received in reply had been lost. It was not alleged that any specific complaint of misrepresentation was made to the Appellant before action except verbally as to the amount taken out of a drift on Claim 12, not now in question. p. 61, ll. 25-32. p. 430, l. 20. p. 90, ll. 25-27. p. 68, l. 19. p. 288, l. 4. p. 80, l. 15-21.

11. The Appellant denied making the representations alleged. With regard to the richness of the ground he admitted saying that he had no reason to believe the pay was not as good beyond his workings as it was where he had worked, because he did not know. The learned Judge however not only p. 180, ll. 4-8.

amount taken out of a drift on Claim 12, not now in question.

11. The Appellant denied making the representations alleged. With regard to the richness of the ground he admitted saying that he had no reason to believe the pay was not as good beyond his workings as it was where he had worked, because he did not know. The learned Judge however not only found that these representations of fact had been made but that the Appellant knew they were false. There were five holes in the unworked ground, and the learned Judge drew the inference that the Appellant "must have known" of them. These holes however (as the learned Judge conceded in his judgment when sitting en banc) were in fact made after the sale.

p. 180, ll. 4-8.

p. 308, l. 29. p. 357, ll. 3-10.

12. With regard to the representations as to the extent of working in Claim 32 the evidence of Paillard and Tarut was that the Appellant showed them an old drift in which they could see the ice about thirty feet each way, telling them that it was one of the earliest drifts on the claim and did not exceed thirty feet by thirty. The Appellant said that he had been shown the hole by the former owner when he (the Appellant) bought and that he showed Paillard and Tarut the tailings that had come out and said he did not think, judging by the tailings, the drift could be large. He had been told by the former owner that it was between nine and ten box lengths but did not know what amount of excavation that represented. The working subsequently turned out to be larger than 900 square feet but there was in any case no evidence to show that the Appellant knew this. The Trial Judge, however, found that the misrepresentation was made as alleged and adds that the Appellant "must have known" the extent of the working.

p. 41, ll. 3-7.

p. 170, ll. 9-33. p. 94, l. 45. p. 195, l. 18.

p. 305, l. 7.

13. With regard to the old working on Claim No. 12, this was a shaft formerly worked by one Cassidy and the workings adjoined those of one Lemar. It was conceded that Paillard and Tarut were shown Lemar's workings and there is independent evidence that the name Cassidy was mentioned and the two workings shown. Moreover some plant left by Cassidy was still

Record, p. 93, l. 20. p. 210, ll. 1-10. p. 220,

visibly projecting from the old shaft. The learned Judge felt considerable doubt with regard to this point but he ultimately found against the Appellant. The evidence with regard to various allegations is collected in greater detail in the factum of the now Appellant (then Respondent) in the Supreme Court. The factum is printed in the record. ll. 26, 27. p. 265, l. 44. p. 211, ll. 37-41. pp. 402-419.

14. In the result the Trial Judge gave judgment in favour of the Plaintiffs, the Canadian Bank of Commerce, both on the claim ahd counterclaim, but against the now Appellant on the counterclaim for $40,500 damages. The Respondents have not appealed from this decision and the only subsisting issues are those arising between the Appellant and Respondents on the counterclaim as to the issues found against the Appellant. p. 347, l. 40, *et seq.* p. 375, l. 22.

15. The $40,500 damages awarded by the Trial Judge was made up of $35,000 in respect of Claim 32 and $5,500 in respect of Claim 12. The sum of $35,000 was fixed in respect of Claim 32 on the ground that of the total purchase price that sum might be allocated to that claim. The sum of $5,500 represented the value to the owner of the mineral worked out from Claim 12. Now the purchase included six claims (Nos. 12, 32 and four others), a fifth interest in 150 other claims, and a road-house or hotel with provisions and other personal property and it is conclusively established by the evidence of both parties that $167,500 was a lump sum price payable in consideration of the transfer of the whole of the properties and that no separate value was put upon each particular parcel. It was never suggested that the other parcels might have been or, but for the misrepresentations, would have been purchased p. 67, l. 1. p. 333, l. 6.

other personal property and it is conclusively established by the evidence of both parties that $167,500 was a lump sum price payable in consideration of the transfer of the whole of the properties and that no separate value was put upon each particular parcel. It was never suggested that the other parcels might have been or, but for the misrepresentations, would have been purchased

p. 67, l. 1.
p. 333, l. 6.

apart from claim 32 or that they would have been purchased for $35,000 less than was actually given. The Respondents have retained the whole property and no evidence was given to show that its actual value as a whole was less than the sum given for it. Consistently with the evidence the Respondents may not have lost anything by the transaction.

p. 333, l. 37.
p. 370, l. 36.

16. On appeal to the Territorial Court en banc that Court, composed of Dugas, Craig (the Trial Judge) and Macaulay, JJ., gave judgment on the 16th June, 1904, reversing the judgment below. Mr. Justice Craig adhered to his original decision adding only an explanation with reference to an admitted misapprehension in his judgment at the trial. Dugas and Macaulay, JJ., came to the conclusion that no fraudulent misrepresentation had been proved and that, apart from the question of fact, the Respondents, not having shown that they had suffered any loss on the purchase as a whole, could not recover damages.

p. 357.
p. 355, l. 24.
p. 367, l. 25.
p. 355, l. 37.
p. 368, l. 21.
p. 369, l. 38.

17. On the Respondents' appeal to the Supreme Court of Canada that Court on the 2nd May, 1905, gave judgment, by a majority of three to two, restoring the judgment of the Trial Judge but reducing the amount of damages in respect of Claim 32 by the sum of $13,317, to which extent it was admitted that profit had been made by the Respondents out of that claim.

p. 421, l. 45.

18. The majority of the Judges in the Supreme Court, disregarding the findings on appeal to the Territorial Court en banc, accept the findings of fact of the Trial Judge apparently almost entirely on the ground that he alone had the opportunity of observing the demeanour of the witnesses. Chief Justice

p. 423.
ll. 1 & 7.
p. 427, l. 35.

Taschereau and Mr. Justice Idington dissented. Upon the facts the Chief Justice would not have reversed the decision of the majority of the Territorial Court en banc. Mr. Justice Idington upon an independent examination of the evidence considered that the weight of evidence was against the Appellants (the present Respondents) and that the claims of misrepresentation fell to the ground.

Record, p. 442, l. 39.

p. 435, l. 4.

19. The Judges of the Supreme Court also differed in their views of the proper principle on which damages should be assessed in cases where two or more parcels have been sold for a lump sum price. The Chief Justice and Mr. Justice Idington considered that, as it had not been shown that the value of the property purchased was as a whole less than the price paid, the Syndicat could not recover damages. Mr. Justice Davis and Mr. Justice Nesbitt were of opinion that for the purpose of assessing damages the several parcels might be considered separately and that the proper measure of damages was the difference between the actual value of each parcel and the amount at which that parcel was assumed to have been taken into account in making up the lump sum price. Although Mr. Justice Davies at least did not consider the evidence clear and conclusive upon the point, they accepted the Trial Judge's view that the price for Claim 32 might be put at $35,000, and deducted from this the sum of $13,317, as above mentioned. Mr. Justice Girouard would have restored the judgment of the Trial Judge purely and simply, but, as the

p. 423, l. 39.
p. 435, l. 25.

p. 423, l. 34.
p. 426, l. 25. *et seq*

p. 423, l. 38.

p. 423, l. 1.

evidence clear and conclusive upon the point, they accepted the Trial Judge's view that the price for Claim 32 might be put at $35,000, and deducted from this the sum of $13,317, as above mentioned. Mr. Justice Girouard would have restored the judgment of the Trial Judge purely and simply, but, as the majority of the Court thought that the amount of damages should be reduced he did not dissent. p. 423, l. 1.

20. The Appellant submits that the judgments of the Supreme Court and of the Trial Judge are wrong and should be reversed and that the judgment of the Territorial Court en banc should be restored for the following amongst other

REASONS.

1. Because the making of the representations alleged has not been proved.
2. Because it has not been proved that any representations that were made by the Appellant were not made honestly.
3. Because the findings of the Trial Judge as to the representations made and the knowledge possessed by the Appellant are against the weight of evidence.
4. Because the purchase of the properties and chattels in question was a single transaction for a lump sum price and no evidence was given that their actual value was less than the price paid.
5. Because there was no evidence that the Respondents were induced to pay or ever did pay $35,000 for Claim 32.
6. Because loss of profit is not the measure of damages applicable.
7. Because there was no evidence of any damage.
8. Because the counterclaim having been dismissed against the Plaintiff should also have been dismissed against the Appellant (co-Defendant).
9. For the reasons contained in the judgments of Taschereau, C.J., Idington, J., and Dugas and Macaulay, JJ.

S. A. T. ROWLATT.

C. (12).

In the Privy Council.

No. 12 of 1906.

ON APPEAL

FROM THE SUPREME COURT OF CANADA.

BETWEEN

JOSEPH BARRETTE (Defendant) (Defendant to Counterclaim) *Appellant.*

AND

THE SYNDICAT LYONNAIS DU KLONDIKE (Defendant)
(Plaintiff in Counterclaim) - - - - - - - *Respondent.*

CASE FOR THE RESPONDENT.

SHEWETH :—

1. This is an appeal from a judgment of the Supreme Court of Canada,

CASE FOR THE RESPONDENT.

SHEWETH :—

1. This is an appeal from a judgment of the Supreme Court of Canada, delivered on 2nd May, 1905, whereby the said Court allowed the present Respondent's appeal from a Judgment of the Territorial Court dated 16th June, 1904, and affirmed the Judgment of the Trial Judge Craig, J., dated 16th February, 1903, and 2nd March, 1903, but varied the damages thereby awarded in favour of the Respondent against the Appellant from $40,500 to $27,183. The Respondent does not appeal against such reduction of the damage awarded to them by the Trial Judge.

2. The issues raised in this appeal are substantially three :—

(1) Whether owing to the form of procedure the Appellant is in law entitled to have the counterclaim on which the Judgment is founded dismissed because the Trial Judge dismissed such counterclaim against the Plaintiffs in the Action, the Canadian Bank of Commerce.

(2) Whether there was evidence on which Craig, J., could properly find that the Appellant made certain fraudulent misrepresentations and that the Respondent acted thereon.

(3) Whether $27,183 was properly recoverable by the Respondent against the Appellant as damages for such misrepresentation.

3. In reference to the first point the facts of the case are as follows :—

On 23rd June, 1901, the Respondent acting by their authorized agent purchased from the Appellant certain property in Klondyke for a sum of $167,500, of which $75,000 was paid to the Appellant on completion, and $92,500 secured to the Appellant by a promissory note to his order dated 22nd June, 1901, payable on 1st October, 1901, and a mortgage. The Appellant endorsed the note and transferred the mortgage to the Canadian Bank of

Commerce. The Respondent having refused to pay the said $95,000, the Canadian Bank of Commerce sued both the Respondent and the Appellant. The Statement of Claim was delivered on 16th May, 1902. The Respondent on 20th June, 1902, delivered a defence and counterclaim joining the Appellant its co-Defendant as Defendant to such counterclaim and counterclaiming against him $400,000 as damages for fraudulent misrepresentations for inducing it to enter into the contract dated 23rd June, 1901. Such counterclaim was not served upon the Appellant and the trial began on September 9th, 1902. On 12th September, 1902, the Appellant delivered a defence to the counterclaim and applied by counsel to strike out the counterclaim. Craig, J., refused to strike out the counterclaim, and the Appellant thereupon attended by counsel and exercised his full rights as a party, and on 18th September, 1902, expressly waived all irregularities as to service of the counterclaim. Craig, J., after a hearing of 10 days reserved Judgment, and on the 2nd May, 1905, he delivered Judgment in favour of the Plaintiffs against the Respondent and dismissed the Respondent's counterclaim against the Plaintiffs, and he gave Judgment for the Respondent on its counterclaim for damages for fraudulent misrepresentation against the Appellant and assessed the damages at $40,500.

Rec. p. 106.

4. It was not contended before Craig, J., that the counterclaim should be dismissed, and he gave no Judgment on the point, but he did incidentally find the following facts relevant to such contention. if it be now put forward by the

Respondent on its counterclaim for damages [illegible]
against the Appellant and assessed the damages at $40,500.

4. It was not contended before Craig, J., that the counterclaim should be dismissed, and he gave no Judgment on the point, but he did incidentally find the following facts relevant to such contention. if it be now put forward by the Appellant as a ground of appeal, viz.: (1) That the Appellant was by consent a party regularly to the suit. (2) That the counterclaim was practically a cross-action. (3) That the damages for deceit against the Appellant, arose out of one transaction, and that no further evidence could have been given upon the case which would throw any light upon the parties than had been given. Rec. p. 336. Rec. p. 336. Rec. p. 336.

5. On the entry of the formal Judgment in the presence of Counsel for all parties on 16th February, 1903, no objection was taken that by reason of the dismissal of the Counterclaim against the Plaintiffs the Counterclaim against the Appellant should also be dismissed, nor was any such contention raised as a ground of appeal to the Territorial Court either in the first notice of appeal dated 1st April, 1903, or in the second notice of appeal dated 21st September, 1903. Rec. p. 337. Rec. pp. 340, 341.

6. For the first time this question was raised by the Judgment of Dugas, J., in the Territorial Court of Yukon *en banc* on the 16th June, 1904, and then rather as a matter of prejudice than as a point of law, although he does say, without deciding the point, that such a contention might be upheld. The question is not dealt with by Macaulay, J., or Craig, J., and although it finds mention in the factum of the Appellant and in the factum of the Respondent, none of the Judges of the Supreme Court of Canada refer to it at all except Nesbitt, J., who at the end of his Judgment treats the jurisdiction as one given by consent and therefore not appealable. Rec. p. 344, l. 41-45, 1-17. Rec. p. 375. Rec. pp. 402, 403.

7. In reference to the appeal on the merits the misrepresentations were made in the following circumstances:—

A French gentleman named Louis Paillard represented the Respondent Syndicate in Klondyke and he desired in the year 1901 to acquire and work

on its behalf mining concessions. The Appellant at this time was the owner, amongst other property, of four claims which it had partially worked out on Dominion Creek, situate some four days' journey from Dawson City. Louis Paillard was introduced to the Appellant by Dugas, J., and met him frequently at his house. Louis Paillard again and again stated most emphatically that this introduction gave him a complete confidence in the integrity and truthfulness of the Appellant. The result of this introduction was an invitation by the Appellant to Louis Paillard to visit his Dominion Creek claims, and in April, 1901, he accompanied by his assistant Alfred Tarut spent three days in the camp with the Appellant.

Craig, J., finds that although at that time Louis Paillard was, and was known by the Appellant to be, a prospective purchaser of mining properties, he had not at that time any intention of buying the Appellant's property, nor did he inspect the property a that visit for the purpose carrying out a purchase at that time. The property was indeed under snow, and the dumps resulting from the winter working were still intact. Both Paillard and Tarut admit that during the two or three days of that visit they were shown by the Appellant his four claims, and that they went down into some of the drifts, saw some gold, and that the Appellant on claim 12 took a pan which went between $5 and $6. A conversation also took place as to a purchase of the property with the dumps for $260,000.

Rec. p. 301, l. 30 to 45.

8. From April till June no material fact occurred, but in that month

Appellant his four claims, and that they [illegible] saw some gold, and that the Appellant on claim 12 took a pan which went between $5 and $6. A conversation also took place as to a purchase of the property with the dumps for $260,000.

8. From April till June no material fact occurred, but in that month Paillard and Tarut again went to the properties, and the direct result of what

was said and done during this visit and on the subsequent days in Dawson City was the contract of purchase and sale dated 23rd June, 1901. The Respondent's case at the trial was that in conversation during this visit and at Dawson prior to the contract the Appellant made many verbal representations to its agent L. Paillard concerning these properties by which it was induced to enter into that contract, and that these representations were fraudulent and caused it damage. The Appellant's case was that he did not make any representations and that if he did the Respondent did not act on them or believe them, but acted solely upon its investigation of the various properties. After an exhaustive trial Craig, J., was satisfied (1) that the Appellant had stated as a fact known to himself by having prospected that the unworked portion of claim No. 32 contained as much pay as the portion he had worked out, or as it was put in more technical language, that the pay in the claim was even and extensive from rim to rim. (2) That the Appellant had stated that only 30 by 30 feet, in all 900 square feet, had been worked out of the drift marked 9 in claim No. 32 whereas about 8,000 square feet had been in fact worked out, and (3) that the Appellant in pointing out what ground had been worked and what ground was virgin, represented on claim No. 12 that a drift marked 3 had alone been worked and did not point out or mention that an adjacent drift marked 4 had been worked, out of which a layman named Cassidy had under a working agreement with the Appellant himself extracted $11,000 at a profit of $5,500. Craig, J., further found that these representations were fraudulent, and induced Paillard to enter into the contract. The second

misrepresentation as to the ground worked in drift 9 is nst material in this Appeal inasmuch as the Respondent is not appealing against the reduction of the damages by $13,317 made by the Supreme Court of Canada. Craig, J., had set off this $13,317 against damages for this and other misrepresentations as to the quantities of unworked ground.

9. In June it is common ground that Paillard, accompanied by Tarut, did inspect the properties with a view to purchase, and no serious dispute arose as to what was done on that occasion. The result of the material evidence is shortly as follows:—

Paillard states that the Appellant took him over the properties, and shewed him on Claim No. 32 the various drifts that he had worked, and which are indicated on Exhibit H. 2, namely, 1, 2, 3, 4, 5, 6, 8 and 9 marked in straight lines, and that he noted the amounts of gold which the Appellant told him had been won from the difts and their size, and that he went down a shaft marked O in drift 7 which the Appellant had just begun to work by two shafts marked O and N, and that the Appellant pointed out shaft B at the limit between the creek and the hill side as a place where he rocked out $25 in 1½ hours, and shaft F. as a place where rich pay had been found. Paillard entered this information in the memorandum Exhibit F.3, which he stated that he made in order to have an idea of the ground worked out, and to see how much ground was left to work, and to see how much the claim had yielded, and to see how much it would yield. He made no entry of the verbal representations as to

Rec. pp. 40, 41.

Rec. p. 61.

Rec. p. 78.

hours, and shaft F. as a place where rich pay had been found. Paillard entered Rec. p. 91.
this information in the memorandum Exhibit F.3, which he stated that he made
20 in order to have an idea of the ground worked out, and to see how much ground
was left to work, and to see how much the claim had yielded, and to see how Rec. p. 78.
much it would yield. He made no entry of the verbal representations as to
quality. Paillard says the Appellant showed him his books but that he took

his figures from the Appellant himself, and Tarut corroborates the evidence of Paillard. There was no dispute as to the amount of gold that had been taken from the claim by the Appellant.

'0. It is also common ground that no inspector was made by Paillard of the unworked ground. The proportion on claim 32 was approximately 303,000 feet unworked to 72,000 worked. The configuration of the drifts was a line some 200 feet broad across the centre of the claim. The subject matter of the purchase in claim No. 32 was the unworked ground on either side of the
10 existing drifts, and the main misrepresentation which Craig, J., held to be proved was as to the value of this underworked ground. The evidence in support was the clear and precise statement of Paillard, corroborated by Tarut that Rec. pp. 41, 44, 73, 74, 92.
the Appellant stated over and over again as a fact to his knowledge that the pay extended through the unworked ground, and was even and extensive from rim to rim. The appellant denied that he had asserted this fact, but admitted that something had been said as to the richness of the unworked ground, and that he had said he had no reason to believe it was not as good, because he did Rec. p. 180.
not know.

Paillard also stated, that Craig, J., accepted his word, that he believed
20 implicitly what the Appellant said, and that but for his assurance that the pay which had been obtained from the portion already worked extended over the portion unworked, he would not have entered into the contract. Craig, J., also found that the unworked ground on claim 32 was practically a worthless

mining property, and that the representation made by the Appellant were faudulent.

11. The evidence as to the third fraudulent misrepresentation found by Craig, J., again depends upon the credibility attached by him to Paillard and Tarut. They both swear that the Appellant indicating the area of ground work out on claim No. 12 pointed out a drift numbered 3 in Exhibit J. 2 as the only ground worked, and did not point out a working marked 4 which is on the left of the creek. Both Paillard and Tarut are positive that this area marked as 3 was stated by the Appellant as the only ground that had been worked on that part of claim No. 12. It was proved by Cassidy that he had worked out 4, and that a net profit in gold of $5,500 had been extracted from it under an agreement between himself and the Appellant, and that since his operations the creek had altered its course so that in 1901 his working would appear on the left and under the creek and not on the right of the creek. Soper, a witness called by the Appellant, stated that the Appellant, in pointing out the area worked, indicated work on the right and no work on the left side of the creek. This witness, and another witness Renaud, gave somewhat vague evidence as to conversations either at the first visit in April or in June, when they say that Cassidy's name was mentioned. This was denied by Paillard. Craig, J., having carefully considered the evidence, found that the Appellant did not point out drift No. 4. The evidence on this question is carefully

Rec. pp. 42, 93.

Rec. p. 108.

Rec. p. 210.

Rec. p. 305.

evidence as to conversations either at the first visit in April or in June, when they say that Cassidy's name was mentioned. This was denied by Paillard. Rec. p. 305.
Craig. J., having carefully considered the evidence, found that the Appellant did not point out drift No. 4. The evidence on this question is carefully summarized in the Appellant's Factum. Record, pages 387, line 40 to page 389, line 22.

12. In the Territorial Court, Dugas, J., and Macaulay, J., overruled Craig, J., and set aside his findings of fact. These Judgments are exhaustively dealt with in the factum of the Appellant. Record, page 374 to 401.

The written Judgment of Craig, J., was wrong on one point. He is reported as having stated: "The laymen swear that the lays extended up the creeks from the lower part—three 50 foot lays which would take in 150 feet of the claim, and that Barrett must have known of the holes G. F. H. K. and I. J." Rec. p. 308.
In an earlier part of the Judgment where the Judge is dealing with the question whether the results of the prospecting done by the Respondent sufficiently proved that the unworked portion of claim 32 was worthless refers to these very holes F. G. H. I. J. and K., and those marked 1, 2, 3 and 4, as places Rec. p. 307.
from which the Respondent drifted and got no pay. Upon his attention being called to this point Craig, J., sitting in the Territorial Court makes a personal explanation and says that that passage in the Judgment did not correctly state his views or his knowledge of the evidence, and he then corrects the mistake.

Apart from the error so explained it is not suggested that Craig, J., in coming to his conclusions was in error as to the facts or omitted to consider any material circumstance or applied his mind to the questions for his decision under any misapprehension as to the law: The only difference between Craig, J., and the Appellate Judges who overruled his findings of fact is that the former saw and heard the witnesses, and the latter formed their opinions upon the report of the evidence. In overruling his carefully considered judgment it is

submitted that Dugas, J., by his own candid admissions were disqualified from judicially considering the moral aspects of the case and that he misconceived the law as to proof of the guilty intentions of the Vendor who remains in possession, and that Macaulay, J , lays a stress unwarranted by Craig, J.'s, Judgment taken as a whole on the opinion expressed by the Judge that "Barrett's manner of giving evidence was not dishonest." The keynote of Craig, J.'s, Judgment is to be found in the sentences: "It did not occur to them that Mr. Barrett might have been imposing on the good nature not only of themselves but of the Judge, and under the cloak of this good company he was endeavouring to unload upon them properties which he had worked out," and "I believe he made the representations which they said he made and that he knew at the time he was making it that it was not correct. There is no doubt in my mind that these parties have been overreached, that they have acquired in a practically worthless property."

Rec. p. 343.

Rec. p. 310.

Rec. p. 309.

In the Supreme Court of Canada, Idington, J., in a dissenting Judgment gave his reasons for overruling Craig, J., on these questions of fact. He says that he had no doubt that Paillard discarded as of no consequence what he was told, and the reason for this opinion is that in the memo exhibit "F. 3" Paillard only entered the information relative to quantities and did not make a note of the verbal representations, and he discarded Craig, J.'s, personal explanation of the omitted error in his Judgment as reported and says that it deprives his Judgment of the weight which it is usual to give to the Trial

Rec, p. 433.

was told, and the reason for this opinion is that in the memo exhibit "P-3" Paillard only entered the information relative to quantities and did not make a note of the verbal representations, and he discarded Craig, J.'s, personal explanation of the omitted error in his Judgment as reported and says that it deprives his Judgment of the weight which it is usual to give to the Trial Judge's opinion. Rec, p. 433.

In the Supreme Court of Canada, Girouard, J., Davies, J., and Nesbitt concurred in restoring Craig, J.'s, Judgment on the facts, and Nesbitt, J., said: "I do not think we can in view of the authority substitute ourselves in such a Rec. p. 427.
"case as this for the Trial Judge, and I think the findings of fact should not "have been interfered with, and they should be restored by this Court. The "memorandum book so much relied on does not impress me in the same way "it has my brother Idington. The entries made in it are of an entirely dis-"tinct character from the representatives relied on."

13. The third question namely the damages has caused difierences of opinion in the Courts below.

Craig, J., in awarding $40,500 apparently regarded the $13,317 an admitted profit taken out of claim 32 as a set off against the value of ground taken out of drift 9 and in other places in excess of the representation. Apparently however the learned Judge did not assess $13,317 as damages for these misrepresentations and stated that the excess in drift 9 and the excess in other parcels would have to be the subject matter of calculation requiring a reference. In the Supreme Court of Canada the damages were reduced by this amount and the Respondent does not appeal against such reduction.

In the Supreme Court of Canada Chief Justice Taschereau dismissed the Appeal upon the ground that the Respondent had not proved that it suffered any loss over the contract as a whole, i.e., that the whole property was not worth the price paid, and Idington, J., who concurred with the Chief Justice, dismissed the Appeal on the ground that on the facts of the case there was no

evidence of damage. On the question of damage they practically concurred in the opinion of Dougas, J., and Macaulay, J.

On the other hand subject to the reduction by $13,317, Nesbitt, J., and Davies, J., restored the Judgment of Craig, J., while Girouard, J., was of opinion that no reduction should be ordered.

14. The fact upon which the assessment of damages depend are not in dispute except the finding of Craig, J., that claim No. 32 was practically worthless as a mining property. This finding of fact is in entire accordance with the evidence, and it is difficult to see what other conclusion Craig, J., could have drawn from the evidence. Apart from Tarut, Hilditch, Gatin, Wilkins, Johnstone, and Bell all give testimony to the effect that the unworked portion of claim No. 32 was worthless, and although their opinions were criticised as being founded upon insufficient data no evidence was tendered in support of the criticism. Craig, J., describes in detail this evidence. Rec. pp. 114-120. 121-124, 124-128, 147.

15. Assuming therefore that the unworked portion of claim 32 was worthless except as to $13,137 won from it, the facts are as follows :—

The Appellant by fraudulently puffing the value of claim 32 induced Paillard to buy in one contract for $165,000 five separate properties. The lying statements as to the value of claim 32 were the bait. It is true that in form all the properties were included in one contract at a lump sum for the whole, but it is also clear that the Appellant himself before the $165,000 was Rec. p. 190.

Paillard to buy in one contract for $165,000 five separate properties. The lying statements as to the value of claim 32 were the bait. It is true that in form all the properties were included in one contract at a lump sum for the whole, but it is also clear that the Appellant himself before the $165,000 was agreed had put $35,000 as the separate value for each of the four claims. The Appellant's evidence as to this is clear and he states that the conversation

took place in June, while Paillard agrees that the Appellant the first interview said he valued the four claims at $35,000 each, and that he was sure that 32 would yield a net profit of $400,000. It is hardly overstating the facts to say that the fraudulent statements as to the richness of claim 32 and the anticipated returns from it overshadowed the other parcels passed by the contract. Rec. p. 177. Rec. p. 74.

Craig, J., further points out that in case the equities of Willett and Curry should prevail against this claim $35,000 was the sum. The equity of Willett and Curry if it was an equity at all went to the whole claim, and he further points out that one Starnes was the owner of a half interest, and that half interest was got in at $17,500. He concludes, "All these various pieces of evidence coming together would lead me to believe that the value fixed by Barrett to the knowledge of the Respondent for this claim in estimating the total value was $35,000." Rec. p. 133.

Dugas, J., and Macaulay, J., appear to think that inasmuch as all the properties were admittedly brought for a lump sum, and that no formal separate valuation was made of claim 32, the evidence as to $35,000 being in fact the value fixed to the knowledge of Paillard was irrelevant and inadmissible. Rec. p. 355. Rec. p. 369.

16. Davies, J., says:—

In the case now before us the trial Judge found that the price paid for the property "No. 32" was $35,000. He also found that the purchaser had before the trial realised a net profit from the working of part of that lot of $13,317 and that the property as it then stood after deducting that $13,317 was practically worthless. This net profit being deducted from the price paid would Rec. p. 424.

leave the damages on lot "No. 32" at $21,683, which was the actual loss or damage sustained by the Plaintiff on that lot. Then, as to the damages on the other property "Claim No. 12 for the Cassidy drift known as No. 4" he finds on the same principle the damages to be $5,500 which added to the $21,683 would make $27,183 for which amount Judgment should be entered. Rec. p. 426.

Nesbitt, J., page 426, line 25, to page 427, deals exhaustively with this question, says :—

"It was urged very strenuously that the rule laid down in Peek v. Derry (37 Ch. D. 541) in the Court of Appeal in England, was the rule applicable here, and that the Plaintiffs were compelled to show that the balance of the property remaining in their hands was not of such value that no loss might ultimately be suffered. I do not think that this is correct. I think that as to the balance of the property, although the purchase money is a lump sum, as the trial Judge has found, that in making up that lump sum, 32 was taken at $35,000, that in absence of proof to the contrary by the Plaintiffs it must be presumed that the representation as to the balance of the property was true, and that the property is worth the price agreed upon between the parties, and that as the Plaintiffs could not claim for speculative profits in connection with it, so the Defendant cannot claim that there may be speculative value over and above the value at which it was taken between the parties, and the Plaintiffs are entitled by their bargain to any speculative values which may exist in

and that the property is worth the price agreed upon [illegible]
that as the Plaintiffs could not claim for speculative profits in connection with it, so the Defendant cannot claim that there may be speculative value over and above the value at which it was taken between the parties, and the Plaintiffs are entitled by their bargain to any speculative values which may exist in the properties, or to any enhanced value which may arise after the sale. The Defendant cannot claim these enhanced values as an offset to the damage

arising from fraudulent representation in respect to a distinct and separate parcel. The price at which the proerty is sold is not conclusive as to its value though very strong evidence, and so thought Lord Derman in Clare v. Maynard (7 C. & P. 741 at page 743). Had the sale been of all the properties for a lump sum without referring to the price separate as to one of them, I still think it is a question of evidence entirely as to damages suffered in respect of one parcel. It may be difficult of proof. It cannot be the law that if I purchase five undivided mining properties and in developing the first one at a large expense I find I have been swindled and an action of deceit lies against the seller, that I cannot recover the damages I have suffered from such fraud in respect of that property. I think the rule would be in such case that if I could prove that the fair proportionate value of such property was to the other properties included in the purchase, and so establish what my loss was in respect of that one, I am entitled I think to assume that the representations as to the others are correct, and that there is no loss to me in regard to them. But surely I cannot be compelled, at a vast expenditure of money, to go on and explore these properties to show that they too are worthless, or if I do go on and explore them and find speculative value in them that this can be set off against my loss on the one on which loss has been occasioned. I am entitled by my bargain to get the benefit of any such speculative values if they should be found. The seller cannot claim the benefit of them. He is entitled, on the contrary, until his representations are proved to be false and fraudulent, to have it assumed that the properties are of the character represented, and if the

true proportionate value can be established at which they were taken in making up the lump sum, then the difference between the true proportionate value and the lump sum which I have paid for the whole would be my actual loss by reason of the fraud in reference to one, if that one were worthless. I could also add the legitimate expense I have undertaken by reason of the fraud such as was necessary to be expected to be undertaken as attributable to defendant's fraud.

"Mr. Aylesworth illustrated a case of purchase of fifty shares of stock in one company and fifty shares in another company, and the purchaser retaining both stocks and bringing an action for deceit. One stock proved, at the trial, to be utterly worthless and the other to have risen largely in value since the date of the purchase. He claimed that as it was only the actual loss which could be recovered in an action of deceit, that the person committing the fraud was entitled to set off the loss arising from the worthlessness of one stock by appealing to the enhanced value of the other. I do not think this is sound. I think the purchaser is entitled to the benefit of the bargain of the fifty shares, with all its possibilities and that the vendor is liable for the fraudulent deceit in reference to the other. We are not, however, in view of the trial Judge's finding in this case, driven to solve difficulty because he finds that "claim 32" had a price set apart for it and we are able to arrive at the damage arising to the purchaser from the fraud which has been practised."

in reference to the other. We are not, however, in view of the trial Judge's finding in this case, driven to solve difficulty because he finds that "claim 32" had a price set apart for it and we are able to arrive at the damage arising to the purchaser from the fraud which has been practised."

17. The difficulty lies not in the principle of assessment but in the application of the principle to the facts of this case. The general rule is that the

damage recoverable is the direct loss arising from having acted upon the misrepresentation, and where the misrepresentation induces a purchase of property, the measure of the loss is the difference between the real value of the property passed by the contract and the price paid.

It is clear in this case if the sale had been of claim No. 32 alone, at a price of $35,000 the measure of damage would have been on the facts found $35,000 less $13,317. i.e., the difference between the price paid and the actual value.

Inasmuch however as the action was tried when no evidence was available as to whether the balance of the property was in actual value more or less than the balance of price paid $164,000 it is contended by the Appellant that some rule of law prohibited enquiry as to the loss then actually proved. Such a contention amounts to an untenable proposition that proof of loss on a part is as matter of law no evidence of lass on the whole, and that the tortfeasor could legally defeat a present claim upon a nebulous anticipation of a future value which should make the other parcels exceed in value the price paid and thus re-adjust the balance.

The Respondent submits that the Judgment below should be maintained and the appeal dismissed for the following among other

REASONS.

BECAUSE :—

1. On the facts found the relief by way of counterclaim was within the jurisdiction conferred upon the Judge of the Yukon Judicature Ordinance (Consolidated Ordinances, 1902, cap. 17, Rule of Law 8 (3).)

2. The Appellant consented to the jurisdiction of the judge to try the counterclaim as if it were in form as well as in substance an indpendent action.

10 3. The Appellant is not entitled to rely upon a contention not raised before the Trial Judge or in the notice of appeal to the Territorial Court.

4. The findings of fact of the Trial Judge are right and are supported by ample evidence, and his conclusions are based upon the credibility he attached to the witnesses after ful consideration of all material circumstances.

5. The assessment of damages is upon the facts proved right.

G. A. SCOTT.

the credibility he attached to the witnesses after ful consideration of all material circumstances.

5. The assessment of damages is upon the facts proved right.

G. A. SCOTT.

C. (13).

BILL OF APPELLANT'S COSTS TAXED IN PRIVY COUNCIL.

COSTS OF SUCCESSFUL APPELLANT.

RECORD OF PROCEEDINGS PRINTED ABROAD, SHOWING ITEMS TAXED OFF.

IN THE PRIVY COUNCIL

NO. of 1 .

ON APPEAL FROM

BETWEEN

A. B. - - - - - - - *Appellant,*

AND

Y. Z. - - - - - - - *Respondent.*

Bill of Costs of the *Appellant* to be taxed as between party and party in accordance with an Order of Judicial Committee dated day of 1 .

APPENDIX C.

Taxed off £ s. d.		Disbursements £ s. d.	Charges £ s. d.
	21st April—Retainer fee		13 4
	Drawing and fair copy Appearance for appellant		5 0
	Attending at Council Office entering Appearance		10 0
	Paid fee	10 0	
	Attending obtaining six prints of Record		10 0
	Perusing Record, 25 quarto sheets of 8 pages		26 5 0
	Instructions for Petition of Appeal		10 0
	Drawing same, folios 9, at 2s. per folio		18 0
	Attending Counsel therewith to settle		10 0
	Paid his fee and clerk	5 15 6	
	Attendance on p[illegible]ing fee		10 0
	Copy Petition of Appeal to lodge folios 9		6
	Attending lodging Petition		10 0
	Paid lodging fee	1 1 0	
	Paid entering fee	1 1 0	
	Attending searching if Respondents had appeared; found they had not		10 0
	Drawing petition for Order summons to Respondents to appear		10 0
	Copy to lodge		5 0
			10 0

Attending searching if Respondents had appeared; found they had not						10	0
Drawing petition for Order summons to Respondents to appear						10	0
Copy to lodge						5	0
Attending lodging Petition						10	0
Paid lodging Petition				1	1	0	

Paid for Committee Order				1	12	6	
Having received Order and Summons from the Privy Council Office—Copy Summons to affix at the Royal Exchange						2	6
The like, Lloyd's Coffee House						2	6
Attending at the Royal Exchange, affixing one copy						10	0
Paid affixing fee				1	1	0	
Attending at Lloyd's Coffee House, affixing the other copy						10	0
Paid fee					2	6	
Instructions for case						1	0	0
Drawing same, folios 24						2	8	0
Copy Petition of Appeal aa lodged for counsel, folios 9			10	0			4	6
Attending him with papers to settle draft case						1	0	0
Paid his fee and clerk				11	0	6		
Attendance paying fees							10	0
Having received notice from Messrs. that they had entered appearance for the Respondents—Making copy Petition of Appeal, folios 9							4	6
Attending serving them therewith							10	6
Making copy case as settled by counsel, folios 24							12	0
Attending him for appointment for conference							10	0
Paid his conference fee and clerk				5	15	6		
Attendance paying fees							10	0
Attending conference when case settled						1	0	0
Making copy case as settled in conference for the printer, folios 24							12	0
Attending printer therewith instructing him to strike off proof							10	0
Revising proof of case (4 pp.)			10	6		1	1	0

Taxed off £ s. d.		Disbursements £ s. d.	Charges £ s. d.
	Attending printer with revised proof instructing him to strike off 75 copies		10 0
	Paid printer's bill	1 12 6	
	Attending at Council Office, and lodging 40 copies of the Appellant's Case		10 0
	Paid lodging fee	1 1 0	
	Paid setting down fee	10 0	
	Writing to Respondent's solicitors that F. had lodged Appellant's Case, and with appointment to exchange Cases		5 0
	Attending Respondent's solicitors, exchanging Cases		10 0
	Perusing Respondent's Case		1 1 0
	Attending for 10 sets of Records and papers for binding		10 0
	Attending binder with 13 sets of proceedings and with instructions as to binding same with labels, &c.		10 0
	Paid binder's bill (part of)	1 2 0	
	Instructions to counsel to argue		1 0 0
10 0	Attending counsel with brief		1 0 0
	Paid his fee and clerk	27 11 0	
	Attending counsel with Case		10 0

		structions as to binding same with labels, &c.						
		Paid binder's bill (part of)	1	2	0			
		Instructions to counsel to argue				1	0	0
10	0	Attending counsel with brief				1	0	0
		Paid his fee and clerk	27	11	0			
		Attending paying fees					10	0
		Attending counsel for appointing conference					10	0

		Paid his conference fee and clerk	5	15	6			
		Attendance paying fees					10	0
		Attending conference				1	0	0
		Attending lodging 10 bound sets of cases and records					10	0
		Paid summons to attend hearing		10	0			
		Paid Privy Council Messenger with summons to attend hearing		2	6			
		Copy summons for counsel					2	6
		Attending him therewith					10	0
		Attending Council Chamber when Appeal called on and heard, and judgment reserved				3	6	8
		Dec. 8—Paid summons to hear judgment		10	0			
		Paid Privy Council Messenger with same		2	6			
		Copy summons for counsel					2	6
		Attending him therewith					10	0
10	0	Attending marking counsel's brief to hear judgment					10	0
		Paid his fee and clerk	5	15	6			
		Attendance paying fees					10	0
		Attending Council Chamber when judgment given for the Appellant with costs				1	6	8
		Attending at the Privy Council Office, paying fees and obtaining receipt					10	0
		Drawing bill of costs and fair copy for taxation, folios 16				1	4	0

Taxed off		Disbursements			Charges		
£ s. d.		£	s.	d.	£	s.	d.
	Attending to lodge bill for taxation and obtaining appointment to tax					10	0
	Paid for Committee Report	1	10	0			
	Paid for Order to tax	1	12	6			
	Copy thereof for service on Respondent					5	0
	Copy Bill of Costs for Respondent's solicitors					8	0
	Attending Respondent's solicitors therewith, and with appointment to tax					10	0
	Attending taxation of costs at Privy Council Office				2	2	0
	Paid fee on taxation	3	3	0			
	Paid fee for Final Order of His Majesty in Council	3	2	6			
	Paid Privy Council Messenger with same		2	6			
	Attending bespeaking two copies of the Order					10	0
	Paid for same		10	0			
	Writing to Appellant's Agent in with original Order					10	0
	Sessions fee				3	3	0

Attending bespeaking two copies of the Order								
Paid for same			10	0				
Writing to Appellant's Agent in with original Order						10	0	
Sessions fee					3	3	0	
Letters, postage, messengers, and other incidental expenses throughout the Appeal					2	2	0	

SUMMARY.

Page in Bill	Taxed off			Payments			Charges		
	£	s.	d.	£	s.	d.	£	s.	d.
Page 1									
" 2									
" 3									
" 4									
" 5									
" 6									
" 7									
	£								

Payments brought down ..... £

Total of Solicitors' Fees and Payments ..... £
Taxed off ..... £

Allowed ..... £
Agreed at £ s. d.

Signed by Solicitors on both sides.

C. (14).

PRIVY COUNCIL APPEAL.

COSTS INCURRED IN CANADA.

BILL OF SUCCESSFUL APPELLANT'S COSTS.

	Paid.	Disbursements
Fee on motion granting stay of execution....	$10 00	
Paid on order.		
Judge having fixed amount of security, fee on paying money into court, or preparing, executing and allowing of bond.....	5 00	
Paid.		
Fee on order allowing security, and paid.....	5 00	
Paid commission to Security Co.....		
Attending to bespeak and for certified copy of case, factums and judgment, for the purposes of application for leave to appeal	1 00	
Paid.		
Order having been made granting leave to appeal, attending Registrar of Supreme Court to file order and to bespeak transcript record.....	1 00	
Paid.		
Attending Registrar's clerk to pay fees and to order the forwarding of transcript record and exhibits to Privy Council.....	1 00	
Paid.		
Appeal having been allowed by the Judicial Committee, letter to Ottawa agents with King's Order to be field.....		50
Agent's letter acknowledging		50
Paid.		
Agents attending to file King's Order.....		50
Paid		
Fee on application to have King's Order made Order of the Supreme Court.....	10 00	
Paid on order.....		
Drafting bill of costs, 20 cents a folio.....		
Engrossing, 10 cents a folio		
Copy to serve, 10 cents a folio.....		
Copy for taxing officer, 10 cents a folio.....		

	Paid.	Disburse-ments.
Attending for appointment to tax	$0 50	
Attending to serve appointment	50	
Paid		$0 50
Attending on taxation (not exceeding)	2 00	
Paid		1 00
Paid filings		
Paid postage, telegrams and cablegrams (not exceeding)		5 00
Attending to bespeak and for allocatur and paid	1 00	1 00

C. (15).

BILL OF APPELLANT'S COSTS INCURRED IN CANADA (ADMIRALTY).

(Privy Council Appeal.)

IN THE SUPREME COURT OF CANADA.

BETWEEN

UNION DAMPSCHIFFSRHEDERI ACTIEN GESELLSCHAFT, a body corporate ..... *Appellants;*

AND

THE STEAMSHIP "PARISIAN" AND HER FREIGHT *Respondents.*

Appellants' Costs of Appeal to Privy Council incurred in Canada.

Off.		Fees.	Paid.	Add.
	Appeal to the Supreme Court of Canada having been dismissed with costs			
$2.50	*(1) Attg for copy of Reasons for judgment and paid	$2.50	$5.00	
5.00	*(2) Instructions for appeal to Privy Council	5.00		
	Drawing notice of appeal.	1.00		$3.00

Off.			Fees.	Paid.
		Copy to serve 3 folios	$0.25	
$1.50	*(3)	Letter to Agents with to file and serve.....	1.50	
2.00		Attg to file and paid	2.50	$0.10
2.10	*(4)	Attg to serve and paid....	2.50	.10
1.50		Affidavit to service	2.50	
1.25		Engrossing	1.25	
2.50	*(5)	Attg to serve	2.50	
2.50	*(6)	Attg to ascertain amount of bail required in other cases where security allowed in Supreme Court	2.50	
2.50	*(7)	Attg Mr. Roach, Appellant's Agent at Halifax, to advise him as to amount of security required and as to arranging for	$2.50	
$2.50	*(8)	Attg U.S. Fidelity & Guaranty Co. as to providing security	2.50	
2.50	*(9)	Attg at Supreme Court to enquire as to acceptability of U.S. Fidelity & Gusranty Bond as security	2.50	
2.50	*(10)	Attg Mr. Roach *re* prepsration of bond	2.50	
2.50	*(11)	Attg Agent U.S. Fidelity & Guaranty Co. as to execution of bonds	2.50	
		Drawing bond	1.50	
.05		Engrossing	.35	
.60		Drg Notice of tender of bail	1.50	
.05		Engrossing	.35	
.05		Copy to serve	.35	
1.50		Attg to serve	2.50	
.60		Drg notice of Motion for order fixing bail	1.50	
.05		Engrossing	.35	
.05		Copy to serve	.35	

Vide Observations, *infra*, p. 747.

Off.			Fees.	Paid.	Add.
$2.00		Attg to serve notice of motion to fix bail	$2.50		
1.50		Attg for appointment to pass on sufficiency of bail	2.50		
.10		Drg notice as to date fixed by Registrar to pass on sufficiency of bail	1.00		
.25		Engrossing	.25		
.25		Copy to serve	.25		
2.50		Attg to serve	2.50		
2.50	*(12)	Attg Agent of U.S. Fidelity & Guaranty Co. to arrange for execution of bond	2.50		
		Fee on application for order Fixing bail	10.00		$5.00
.60	*(13)	Drg order fixing bail	1.50		
1.00		Copy	1.00		
1.50		Attg to get order fixing bail signed (spl)	2.50		
		And paid		2.00	
1.50		Attg to execute bail bond before Registrar (spl)	2.50		
1.50		Attg on appointment to have sufficiency of bail passed upon and filing bond (spl.)	2.50	.10	
		Paid commission on bail		10.00	
2.50		Attg to bespeak certified copies of Reasons for judgment	2.50		
		1906			
1.50	*(14)	Ap. 3 Attg to bespeak, certified copy of transcript record	2.50		
2.50	*(15)	25 Attg Supreme Court to inquire if transcript record ready	2.50		
2.50	*(16)	26 Attg Supreme Court to urge preparation of transcript record	2.50		

Off.		Fees.	Paid.
$1.50	27 Attg to have certified copy of transcript record forwarded to London and paid	$2.50	$17.50
2.50 *(17)	28 Attg Supreme Court, record not yet complete to be forwarded to-day ...	2.50	
	Paid Registrar		3.93
1.50	Letter from Agents advg.	1.50	
	Appeal to Privy Council having been allowed and King's Order received		
	Letter to Agents with King's Order	1.50	
5.00	Instructions for motion to having King's Order made an order of the Supreme Court	5.00	
1.50	Drg. Notice of Motion	1.50	
.35	Engrossing	.35	
.35	Copy	.35	
2.00	Attg to file King's Order and paid..	2.50	.1
2.00	Attg to serve notice of motion	2.50	
	Fee on motion.....	10.00	
7.50 *(18)	Drg Order, 15 fols..	7.50	
1.80	Copy of Order.....	1.80	
2.50	Attg to have signed Paid on order.....	2.50	2.0
2.50	Attg to serve copy of order	2.50	
	Bill of costs, 10 fols.	1.50	
	Copy for taxing officer	.75	
	Copy to serve	.75	

Off.		Fees.	Paid.	Add.
$1.50	Attg for appointment to tax and paid	$2.50	$0.50	
5.50	Attg on taxation	10.50		
	Paid on taxation		1.00	
	Paid filings			
	Paid Registrar's postage			
5.00	Paid postages, telegrams and cablegrams		10.00	
15.75	Extra letters	15.75		

Note.—In addition to the items taxed off pursuant to the observations of the Privy Council Taxing Master which follow, the other items having been taxed on the basis of similar charges incurred in Canadian Superior Courts and not according to the tariff in England.

OBSERVATIONS.

(1) Appears to be either a charge in the Appeal to the Supreme Court, not in the Appeal to His Majesty in Council; or in the alternative a charge in connection with preliminary work done to ascertain the expediency of appealing from the Supreme Court, and, as such, not a proper charge in a "party and party" taxation.

(2) It seems doubtful whether this should be allowed in addition to the "Instructions" allowed in the Privy Council.

(3) Letters to the solicitor's own agents would not be allowed in the Privy Council (party and party).

(4) The amounts is very small but it is not apparent what the .10 is paid for, on serving.

(5) Should that not be "attending to *file*"?

(6) This seems an attendance at the Supreme Court to obtain information as to the practice of the Court: a like attendance would not be allowed in the Privy Council on party and party scale.

(7-11) Do not seem to be charges which can be treated
party and party charges.

(12) do. do.

(13) Such an Order would be drawn in the Privy Cou
Office.

(14) It would seem that this attendance was unneces
in addition to that last charged for.

(15), (16) and (17) Would not in ordinary practic
allowed in the Privy Council (party and party)

(18) See note on (13).

Appendix D.

Exchequer Appeals

THE EXCHEQUER COURT ACT.

R.S. c. 140.

Appeals from the Exchequer Court of Canada are regulated by ss. 82, 83, 84, 85 and 86 of the Exchequer Court Act.

82. Any party to any action, suit, cause, matter or other judicial proceeding, in which the actual amount in controversy exceeds five hundred dollars, who is dissatisfied with any final judgment or with any judment upon any demurrer given therein by the Exchequer Court, in virtue of any juriediction now or hereafter, in any manner, vested in such court, and who is desiroue of appealing againet such judgment, may, within thirty days from the day on which euch judgment has heen given, or within such further time as the judge or ench court allowe, deposit with the Registrar of the Supreme Court the sum of fifty dollars hy way of security for costs.

2. The Regietrar ehall thereupon set the appeal down for hearing by the Supreme Court at the neareet convenient time according to the Rulee in that hehalf of the Supreme Court; and the party appealing shall within ten days after the said appeal hae heen eo set down as aforeeaid or within such other time as the Court or a judge thereof ehall allow, give to the parties affected hy the appeal, or their respective attorneye or solicitors, hy whom such parties were repreeented hefore the Exchequer Conrt, a notice in writing that the case has heen eo set down to he heard in appeal as aforeaaid, and the eaid appeal ehall thereupon he heard and determined hy the Supreme Conrt.

3. In each notice the said party so appealing may, if h
desires, limit the subject of the appeal to any special de
question or questions.

4. A judgment shall be considered final for the purpose
this section if it determines the rights of the parties, excep
to the amount of the damages or the amount of liability, 5
c. 35, s. 1, 2 Edw. VII., c. 8, s. 2, 6 Edw. VII., c. 11, s. 1.

Canadian Pacific Railway Co. v The King, 38 Can. S.C.R. 13

A contract for the construction of a part of the plain
railway line provided as follows: "That upon the perform
ond observance by the Company to the satisfaction of
Governor in Council of the foregoing clauses of this a
ment, His Majesty will, in accordance with and subject t
provisions of sections one, two and four of the Subsidy Ac
to the Company so much of the subsidies or subsidy h
before set forth and referred to, as the Governor in Co
having regard to the cost of the work performed, shal
sider the Company to be entitled to, in pursuance of th
Act." The Subsidy Act referred to provided as follows

2. The Governor in Council may grant a subsidy of
per mile towards the construction of each of the undermen
lines of railway (not exceeding in any case the number of
hereinafter respectively stated) which shall not cost m
the average than $15,000 per mile for the mileage subs
and towards the construction of each of the said lines of r
not exceeding the mileage hereinafter stated which shal
more on the average than $15,000 per mile for the r
subsidized, a further sum of $3,200 per mile of fifty pe
on so much of the average cost of the mileage subsidize
in excess of $15,000 per mile, such subsidy not exceeding
whole the sum of $6,400 per mile.

3. The Governor in Council may grant the subsidies
after mentioned towards the construction of the bridge
hereinafter mentioned, that is to say, etc.

4. The subsidies hereby authorized towards the const
of any railway or bridge shall be payable out of the Consc
Revenue Fund of Canada, and may, unless otherwise ex
provided in this Act, at the option of the Governor in Co
the report of the Minister of Railways and Canals, be
follows:

(a) Upon completion of the work subsidized, or

(b) By instalments on the completion of each ten m
tion of the railway, in the proportion which the costs
completed section bears to that of the whole work unde
or

(c) Upon progress estimates on the certificate of th
Engineer of the Department of Railways and Canals, the

opinion, having regard to the whole work undertaken and the aid granted, the progress made justifies the payment of a sum not less than thirty thousand dollars; or

(d) With respect to (b) and (c) part one way, part the other.

The line of railway having been completed the Chief Engineer in certifying the cost of construction for the purpose of estimating the subsidy, did not allow for the cost of rolling stock and equipment. This sum, amounting to $264,088.00, was the question in dispute and having been claimed by the Company, the Minister of Railways and Canals referred the claim to the Exchequer Court. The parties agreed to a stated case.

The Crown contended that the Exchequer Court under the jurisdiction vested in it by the Exchequer Court Act, had no jurisdiction to review the discretion of the Governor in Council or to direct any payment in addition to that which the Governor in Council had, pursuant to this clause, authorized.

As to this the Supreme Court judgment pronounced by Mr. Justice Davies, said: "I entertain very grave doubts as to the jurisdiction of the Exchequer Court and consequently of this Court to decide the questions submitted by the special case agreed upon between the parties. In view, however, of the firm conclusion I have reached upon the merits, and that my doubts as to our jurisdiction do not appear to be shared by all the members of the Court, and that the point does not seem to have been taken before the Exchequer Court, but arises under a case stated by the parties, I will shortly state my reasons for coming to the conclusion I have reached."

"*Any judgment upon any demurrer.*"

The Act 50-51 V. c. 16 (1887), which deliminated the Supreme Court from the Exchequer Court of Canada, provided by section 51 as follows:

"Any party to a suit in the Exchequer Court in which the actual amount in controversy exceeds $500, who is dissatisfied with the decision therein and desirous of appealing against the same, may within 30 days from the day on which such decision has been given or within such further time as the judge of such court allows, deposit with the Registrar of the Supreme Court the sum of $50 by way of security for costs.

In 1890, by 53 V., c. 35, s. 51, this was amended giving an appeal only from a final judgment. So this remained the law until 1902, when by 2 Edw. VII., c. 8. s. 2, an appeal was given from any judgment upon a demurrer.

Toronto Type Fonndry v. Mergenthaler Linotype Co., 36 C S.C.R. 593.

In this case the judge of the Exchequer Court made order postponing his decision upon certain issues raised demurrer to the plaintiff's statement of claim until the t of the action. An application was made before Maclennan in Chambers, for leave to appeal under 50-51 V. c. 16, s. sub-s. 2 (now s. 83 *infra*). The judge held that the orde question was not a judgment upon a demurrer, and that learned judge had expressed no final opinion on the is raised by the demurrer, and that therefore no appeal w lie.

It will be perceived that sub-section 2 has been re-dra by the Commissioners for the revision of the statutes. the section originally stood it was the duty of the Regi to set the case down for the first day of the next sessio the Court even when the deposit on the appeal was mad late as the day preceding the beginning of the session, notwithstanding the fact that it was impossible to comply the latter part of the section which gave the party appe ten days after the deposit in which to give notice of the a being set down. In such case a strict compliance with terms of the statute was impossible. The Commissi accordingly have wisely, in redrafting the section, pro that the appeal shall be set down to be heard by the Cou for the first day of the next session, but for the nearest venient time; and the time within which the notice of a is required to be given runs from the setting down appeal and not from the date of the deposit.

McLean v. The King, 38 Can. S.C.R. 542.

A statement of claim which alleges that the Crown, granting a lease of areas for subaqueous mining and that lease was in force, in derogation of the rights of the to peaceable enjoyment thereof, interfered with the vested in him by transferring the leased area to placer who were put in possession of them by the Crown to his ment, discloses a sufficient cause of action in support petition of right for the recovery of damages claimed in quence of such subsequent grants.

Extending time for bringing appeal.

Clarke v. The Queen, 3 Can. Ex. R. 1.

The fact that a solicitor who has received instruct appeal has fallen ill before carrying out such instru

affords a sufficient ground for granting an extension of the time for bringing the appeal.

Also pressure of public business preventing a consultation between the Attorney-General and his solicitor was held to be a sufficient reason for granting an extension.

Held, also, that the order granting the extension may be made after the expiry of the 30 days within which the appeal is required to be brought.

MacLean & Roger v. The Queen, 4 Can. Ex. R. 257.

Where an application was made by the Crown for an extension of time within which to bring an appeal to the Supreme Court after the period prescribed had long expired and the material read in support of such application did not disclose any special grounds or reasons why an extension should be granted, the application was refused.

Vaughan v. Richardson, 17 Can. S.C.R. 703.

Held, per Ritchie, C.J., and Strong, J., that the judge having power to extend the time for bringing the appeal under s. 70 of the Supreme Court Act, may do so even after the time within which the appeal should be brought has expired.

The Queen v. Woodburn, 29 Can. S.C.R. 112.

In this case, by a judgment of the Exchequer Court in April, 1896, which after making certain findings directed a reference. The report of the referee was confirmed in November, 1897. The Crown appealed from part of the judgment of November, 1897, and after the appeal had been set down by the Registrar of the Supreme Court, the Crown applied to the judge of the Exchequer Court to extend time for appealing from part of the judgment of 1896, which was granted. A motion to quash the appeal to the Supreme Court from the judgment of 1896 was dismissed, the Court holding that the Exchequer Court judge had jurisdiction to make the order enlarging the time for appealing from the judgment in question.

"*The Registrar shall set the appeal down.*"

Berlinguet v. The Queen, 13 Can. S.C.R. 26.

In pronouncing the judgment in this case Strong, J., for the Court said:

"This is an application for a direction to the Registrar to set down for hearing an appeal from a judgment of the

Exchequer Court on a petition of right. This petiti
right was a Quebec case and the judgment on it was
nounced at Quebec where the case was hesrd befor
Justice Tascbereau on the 17th October, 1877. It has
to this dsy bcen drawn up or entered . . . . On t
November, 1877, the deposit of $50, required by s. 68 (n
of the Supreme Court Act ss security for costs, was
with the Registrar . . . . I sm of opinion that th
pliant took every step it was ohligatory on him to t
bring the appeal to a hearing. The deposit was made
time . . . . This heing so, the question is whet
deposit for seeuring the costs having been made, as r
by section 68 of the Act, and the Registrar not having
the judgment and not having set down the appeal to h
ss reqnired by section 68, the suppliant's appeal is n
jure out of court by the operation of Rule 44 of the S
Court rules. That rule provides that unless an appe
be hrought on for hearing within one year after the
shall have been allowed, it shall he held to have bee
doned without any order to dismiss heing required, u
Court or a judge shall otherwise order.

"According to the procedure prescribed by secti
was impossible for the suppliant to take sny step in t
until the Registrar had set the appeal down to be h
required by said section 68. The next step to be take
suppliant according to that section was one consequen
setting down by the Registrar, and one which could
larly be taken until the appeal had been set down; t
of the section, after providing for the deposit,
follows:

"'And thereupon tbc Registrar shall set the s
for hearing bcfore the Supreme Court on the first d
next session and the psrty appealing shall thereupo
the party or parties affected by the appesl, or their
attorneys, hy whom such parties were represente
Exchequer Court notice in writing that the case ha
set down to be heard in appeal ss aforesaid."

"Thus by the express words of the ststute the
not to be given until after a certain step had been ta
Court or its officer.

"In my opinion the suppliant is in strictness a
entitled now to have this motion granted in order t
proceed with his appeal; he is shewn to be in no d
he is within the equity of the rule that the act of
can csuse no prejudice.

"It is true he might have made this motion earlier, but I apprehend he is not to be prejudiced because he did not earlier invoke the aid of the Court to enforce that which it was the statutory duty of the officer of the Court to do of his own motion, immediately on receiving the payment of the deposit without any further application from the appellant.

"The judgment in the Exchequer Court ought also at once to be entered on the judgment book in the Exchequer Court—of course this can and must be done *nunc pro tunc*.

"Rule 156 of the Exchequer Court is very explicit as to this. That rule says that every judgment shall he entered hy the proper officer in the book to he kept for the purpose. This entry is the record of the judgment and the entering of it is to be the act of the court or officer and not of the parties.

"The entry is to be by the Registrar without waiting for any application from the parties, and if the party in whose favour the judgement is, requires an office copy it is t be delivered to him.

"I think the motion to set the appeal down to be heard at the next session of the Court should be granted, hut without costs, as the point of practice involved in the motion is a new one."

Poirier v. The King.

In this case the appellant's solicitor, on the 2nd of March, 1911, paid into Court $50 as security for costs, and on the 7th day of March gave the following notice to the Attorney-General. "Take notice the suppliant is dissatisfied with the judgment rendered by the Honourable Mr. Justice Cassels on the 9th day of February, 1911, and intends appealing from the same to the Supreme Court of Canada." On the 30th March the Deputy Attorney-General signed a consent as regards the documents to form the case, and subsequently he appeared before the Registrar on an application to dispense with the printing of certain material forming part of the case. On the 21st April, the Deputy Attorney-General moved before the Registrar that the appeal which had been placed on the printed list of cases set down for hearing at the May session of the Court should be struck from said list. The motion was refused by the Registrar, but was reheard by the Honourable Mr. Justice Duff on the 8th of May. On the argument of the motion it was stated by the Registrar that the practice in his office had been to treat the appeal as set down as of the date of the deposit of the security, without any formal act by the Registrar setting the appeal down. The judge expressed the

opinion that the proper construction of sec. 82 of the
chequer Court Act required the Registrar to do some
which should form the basis from which time should
within which notice should be given, but gave lea
appellant to serve a notice of motion upon respondent a
that in the event of it being held that the appeal had not
regularly set down, that the Registrar be instructed to
and he enlarged the motion a week. The appellant gav
notice just mentioned, and after argument judgment
given following *Berlinguet* v. *The Queen*, directing the
trar to set the appeal down for the October session and ex
ing the time for giving notice of setting down until Sept
5th.

By 6 Edw. VII., c. 11, s. 1, sub-s. 4 was added
original section. The effect of this amendment will be
away with the difficulty found in determining whether a
ment is final or interlocutory where the amount of da
or liability is the subject of a reference, a difficulty
will still subsist in such cases brought from any other
to the Supreme Court. *Vide* cases cited under *Final*
ment, *supra*, p. 9.

As to the weight which will be attached by the Su
Court to findings of fact by a judge of the Exchequer
vide supra, p. 377, under the head of "*Jurisprudence*
ally—where the trial judge has seen and heard the witn

83. No appeal shall lie from any judgment of the Ex
Court in any action, suit, cause, matter or other judici
ceeding, wherein the actual amount in controversy does
ceed the sum or value of five hundred dollars, unless su
is allowed by a judge of the Supreme Court, and such acti
cause, matter or other judicial proceeding,—

(a.) involves the question of the validity of an Act
Parliament of Canada, or of the Legislature of any of
vinces of Canada, or of an Ordinance or Act of any of the
or legislative bodies of any of the Territories or dist
Canada; or—

(b.) relates to any fee of office, duty, rent, revenue
sum of money payable to His Majesty, or to any title
tenements or annual rents, or to any question affecting an

of invention, copyright, trade-mark or industrial design, or to any matter or thing where rights in future might be bound. 50-51 V., c. 16, s. 52;—54-55 V., c. 26, s. 8.

Future Rights.

It will be noted that the provision allowing an appeal where rights in future might be bound, is independent of the class of subjects which precede these words in this subsection and that the decisions under section (*b.*), *supra*, where it was held that the legal maxim *noscitur a sociis* was applicable, does not apply here.

83 (a) and (b).

With respect to the limitations placed upon appeals under $500, *vide* notes to section 46 (*a.*) and (*b.*), *supra*, pp. 210 and 216.

Leave to appeal.

For the facts which will be deemed sufficient for granting leave to appeal, *vide* notes to section 48 (*c.*), *supra*, p.

"In the first edition of this work it is said that it has not been expressly decided whether an application for leave to appeal under this section can be made after the expiration of the 30 days from the delivery of the judgment of the Exchequer Court."

"Where it is impossible to apply for leave within the 30 days, it is advisable to obtain from the judge of the Exchequer Court an order extending the time for appealing, pursuant to the provisions of section 80, *supra*."

But since then the point has been decided in the affirmative *vide Gilbert* v. *The King*, 38 Can. S.C.R. 207; *Stratton* v. *Burnham*, 41 Can. S.C.R. 410.

Schulze v. The Queen, 6 Exch. C.R. 268.

Leave to appeal to the Supreme Court in this case was refused by Gwynne, J., who gave the following oral judgment:—

"I think in all applications to this Court for leave to appeal from the Exchequer Court, when the amount involved is under $500, leave should not be granted unless the judge before whom the motion is made is of the opinion that the judgment of the court below is so clearly erroneous that there

is reasonable ground for believing that a court of a
should reverse the judgment upon a point of law, or
the ground that the evidence does not all warrant the
clusions of fact arrived at. In the present case no
grounds appeal, and the motion for leave will, therefo
refused with costs."

When the pleadings or judgment do not disclos
amount involved the practice has been followed of m
an application under this subsection for leave to a
and by affidavit shewing that the amount involved e
$500.

Dreschell v. Aner Incandescent Light Mfg. Co., 28 Can.
288.

On a motion to quash an appeal where the respo
filed affidavits stating that the amount in controvers
less than the amount fixed by the statute as necess
give jurisdiction to the appellate court, and affidavit
also filed by the appellants shewing, that the amount i
troversy was sufficient to give jurisdiction under the
the motion to quash was dismissed, but the appellant
ordered to pay the costs as the jurisdiction of the C
hear the appeal did not appear until the filing of the
lants' affidavits in answer to the motion.

Chamberlain Metal Weather Strip Co. v. Peace, June 8th,

The statement of claim prayed a declaration t
defendants had infringed their patent and for an
tion; also unnamed damages, with a reference to h
amount fixed. The Exchequer Court dismissed the
The plaintiff applied to Mr. Justice Idington for l
appeal and in support of his application filed a
which alleged, 1. that the American plaintiff had sol
Ontario plaintiff the rights for the Province of Ont
$6,000. 2. That the patent of invention was worth
Province of Ontario alone a sum much in excess of t
chase price paid by the Ontario Company. 3. T
whole value of the letters patent was involved in the
action. These facts were not denied by the defenda
an order accordingly was made by the judge granti
to appeal and ordered the plaintiff to give security
costs of appeal in the amount of $500, and that in th
time all proceedings be stayed.

Copeland-Chatterson Co. v. Paquette and Gnertin, 38 Can. S.C.R. 451.

The atatement of claim prayed a declaration that the defendants had infringed the plaintiffa' patent, and an injunction, damages and a reference to fix the amount of same. The action was dismissed by the Exchequer Court.

On material similar to that mentioned in the next preceding case, the Honourable Mr. Justice Maclennan gave leave to appeal.

Indiana Manufactnring Co. v. Smith, 9 Ex. C.R. 154.

This was an action to prevent an infringement of a patent originally assigned by the defendant to the plaintiffs. It was was conceded that under these circumstances the defendant could not as against the plaintiffs set up in this action or ahew that the alleged invention was not new or useful or that there was no invention or that he was not the first or true inventor, nor attack the specifications for insufficiency or otherwise, but he contended it was open to him to contend that on a fair construction of the patent he had not infringed. The court found for the plaintiffs.

An application was made before Mr. Justice Idington for leave to appeal and the only material filed in support of the application was an affidavit of the solicitors aetting out the pleadings and judgment and stating that the appeal was desirable to protect the defendant's interests. The application was refused.

A special appeal on behalf of the Crown to the Supreme Court is given by the following section of the Exchequer Court Act:

84. Notwithstaading anything in this Act contained, an appeal shall lie on hehalf of the Crown from any final jndgment given by the Cc.irt in any action, suit, canse, matter or other judicial proceeding wherein the Crown is a party, in which the actnal amount in controversy does not exceed five hnndred dollars, if

(a.) such final judgment or the principal affirmed therehy affects or is likely to affect any case or class of cases then pending or likely to he institnted wherein the aggregate amonnt claimed or to he claimed exceeds or will prohahly exceed five hundred dollars; or

(h.) in the opinion of the Attorney-General of Canada, certi
in writing, the principls affirmed hy the decision is of gen
pnhlic importance; and

(c.) snch appeal is allowed hy a judge of the Supreme Cour

2. In case of snch appeal heing allowed hy a jndge of
Supreme Conrt, he may imposs such terms ae to coets and ot
wise ae he thinks the justics of the cass reqnires. 2 Edw. V
c. 8, e. 4.

The following sections of the Exchequer Court Act re
to appeals to the Supreme Court.

85. If the appsal is hy or on hehalf of the Crown no dep
shall he necessary, hnt the person acting for the Crown shall
with the Rsgistrar of ths Snpreme Conrt a notice stating
ths Crown is diseatisfisd with ench decision, and intends to ap
against the same, and thsrenpon the like procesdings shall he
as if such notics were a deposit hy way of secnrity for c
50-51 V., c. 16, s. 53.

86. Every appeal from the Excheqner Court set down
hsaring hsfore ths Snprems Court shall hs entersd hy the R
trar on the list for ths province in which the action, matte
proceeding ths snhject of ths appeal, was tried or heard hy
Exchequer Court; or if such action, mattsr or proceeding
partly hsard or tried in one province and partly in another,
on euch list ae tns Registrar thinks most convenient for the
tiee in the appeal. 54-55 V., c. 26, e. 9.

Jurisdiction.

In the matter of the *South Shore Rly. Co.* and the *Qu*
Southern Rly. Co., Morgan v. *Beique,* March 1st, 1
3 Edw. VII., c. 21, s. 1, confers jurisdiction upon
Exchequer Court in connection with the sale or foreclo
of railways, and by 4 & 5 Edw. VII., c. 158, after rec
that certain railways were in the hands of a receiver.
that it was desirable that they should be sold under
order of the Exchequer Court, it is provided that the
chequer Court might order the sale of the railways
that they might be sold separately or together as in
opinion of the Exchequer Court would be for the best

terests of the creditors, and that the sale should have the same effect as a sheriffs' sale of immovables under the laws of the Province of Quebec, and that the buyer should have, under such sale, clear title free from all charges, hypothees, privileges and incumbrances whatever.

The judge of the Exchequer Court having accepted a certain tender for the combined railways, although having separate tenders which together amounted to more than the tender accepted, parties who were creditors appealed from his order to the Supreme Court objecting to the discretion exercised by him in accepting the tender in question. The respondents moved to quash on the ground that the Exchequer Court was *curia designata*, and that no appeal lay from the order of the Exchequer Court judge. The Supreme Court, without determining the motion to quash, gave judgment dismissing the appeals with costs.

Admiralty jurisdiction.

The Exchequer Court has admiralty jurisdiction under the provisions of the Admiralty Act, R.S., c. 141, and an appeal lies to the Supreme Court in Admiralty cases from the judge of the Exchequer Court and from a local judge in admiralty.

The following are sections of the Admiralty Act:

3. The Exchequer Court is and shall be, within Canada, a Colonial Court of Admiralty, and as a Court of Admiralty shall, within Canada, have and exercise all the jurisdiction, powers and authority conferred by the *Colonial Court of Admiralty Act, 1890*, and by this Act. 54-55 V., c. 29, s. 3.

8. The Governor in Council may, from time to time, appoint any judge of a Superior or County Court, or any barrister of not less that ceven years' standing, to be a local judge in Admiralty of the Exchequer Court in and for any Admiralty district.

(2) Every such local judge shall hold office during good behaviour, but shall be removable by the Governor General, on address of the Senate and House of Commons.

(3) Such judge shall be designated a local judge in Admiralty of the Exchequer Court. 54-55 V., c. 29, s. 6.

20. An appeal from any final judgment, decree or order of any local judge in Admiralty, may be made.

(*a.*) to the Exchequer Court, or

(*b.*) subject to the provisions of the Exchequer Court Act regarding appeals, direct to the Supreme Court of Canada.

(2) On security for costs being first given, and subje
such provisions as are prescribed by general rules and or
an appeal, with the leave of the judge of the Exche
Court or of any local judge, may be made to the Exche
Court from any interlocutory decree or order of such
judge.

Controversies between the Dominion and a province.

The Supreme Court has jurisdiction by way of a
from the Exchequer Court, under the following section o
Exchequer Court Act:

32. When the Legislature of any province of Canad
passed an Act agreeing that the Exchequer Court shall
jurisdiction in cases of controversies.

(*a.*) between the Dominion of Canada and such prov

(*b.*) between such Province and any other Provin
Provinces which have passed a like Act;

the Exchequer Court shall have jurisdiction to dete
such controversies.

2. An appeal shall lie in each case from the Exch
Court to the Supreme Court. R.S., c. 135, s. 72.

Supreme Court Rule 45 reads as followa:

"The foregoing rules shall he applicable to appeals
the Exchequer Court of Canada, except in so far as th
has otherwise provided."

Appendix E.

Election Appeals

THE DOMINION CONTROVERTED ELECTIONS ACT, R.S., c. 7.

17. An election petition under this Act, and notice of the date of the presentation thereof, and a copy of the deposit receipt shall be served as nearly as possible in the manner in which a writ of summons is served in civil matters, or in such other manner as is prescribed.

18. Notice of the presentation of a petition under this Act, and of the security, accompanied with a copy of the petition, shall, within ten days after the day on which the petition has been presented, or within the prescribed time, or within such longer time as the court, under special circumstances of difficulty in effecting service, allows, be served on the respondent or respondents at some place within Canada.

"2. If service cannot be effected on the respondent or respondents personally within the time granted by the court, then service upon such other person, or in such manner, as the court on the application of the petitioner directs, shall be deemed good and sufficient service upon the respondent or respondents.

19. Within five days after the service of the petition and the accompanying notice, the respondent may present in writing any preliminary objections or grounds of insufficiency which he has to urge against the petition or the petitioner, or against any further proceeding thereon, and shall, in such case, at the same

tims file a copy thereof for the petitioner, and the conr hear the parties upon such objections and grounds, and decids the same in a summary manner."

West Peterborough Election. Stratton v. Burnham, 4 S.C.R. 410.

The provisions in s. 18, ss. 2 of the Controverted El Act, (R.S.C. (1906), c. 7, for substitutional service of s tion petition where the respondent cannot be served p nlly is not exclusive and an order for such service ground that prompt personal service could not be m as in the case of a writ in civil matters may be made s. 17.

The time for service may be extended, under the pro of s. 18, after the period limited by that section has e *Gilbert* v. *The King*, (38 Can. S.C.R. 207) followed.

64. An appeal by any party to an election petition dissatisfied with the decision shall lie to the Supreme from,—

(a.) the judgment, rule, order or decision on any prel objection to an election petition, the allowance of which o has been final and conclusive and has put an end to such or which objection if it had been allowed would have be and conclusive and have put an end to such petition: P that, unless it is otherwise ordered an appeal in the last-me case shall not operate as a stay of proceedings, nor shall the trial of the petition; and

(b.) the judgment or decision on any question of la fact of the judges who have tried such petition. R.S., c.

Halifax Election Case, Roche v. Hetherington; Carney v. ington, 39 Can S.C.R. 401.

No appeal lies to the Supreme Court of Canada order of the judges assigned to try an election petitio the date for such trial.

Trial within six months.

Sections 39 and 40 of the Dominion Controverted E Act, R.S., c. 7, provide as follows:

39. The trial of every election petition shall be co within six months from the time when such petition

presented, and shall be proceeded with from day to day until such trial is over; but if, at any time, it appears to the court, that the respondent's presence at the trial is necessary, such trial shall not be commenced during any session of Parliament if the respondent is a member; and in the computation of any time or delay allowed for any step or proceeding in respect of any such trial, or for the commencement thereof as aforesaid, the time occupied by such session of Parliament shall not be included:

2. If at the expiration of three months after such petition has been presented, the day for trial has not been fixed, any elector may, on application, be substituted for the petitioner on such terms as the court thinks just. R.S., c. 9, s. 32.

40. The Court may, notwithstanding anything in the next preceding section, from time to time enlarge the time for the commencement of the trial, if, on application for that purpose supported by affidavit, it appears to such court that the requirements of justice render such enlargement necessary.

2. No trial of an election petition shall be commenced or proceeded with during any term of the court of which either of the trial judges who are to try the same is a member, and at which such judge is by law bound to sit. R.S., c. 9, s. 33.

Glengarry Election Case, Purcell v. Kennedy, 14 Can. S.C.R. 453.

Held, 1st. That the decision of a judge at the trial of an election petition overruling an objection taken by the respondent to the jurisdiction of the judge to go on with the trial on the ground that more than six months had elapsed since the date of the presentation of the petition is appealable to the Supreme Court of Canada under s. 50 (*b*), c. 9, R.S.C. (now s. 64). Gwynne, J., dissenting.

2nd. In computing the time within which the trial of an election petition shall be commenced the time of a session of parliament shall not be excluded unless the court or judge has ordered that the respondent's presence at the trial is necessary. Gwynne, J., dissenting.

3. The time within which the trial of an election petition must be commenced cannot be enlarged beyond the six months from the presentation of the petition unless an order has been obtained on application made within said six months; an order granted on an application made after expiration of

the said six months is an invalid order and can give no ju
diction to try the merits of the petition, which is then ou
court. Ritchie C.J., and Gwynne, J., dissenting.

[An application made to the Judicial Committee for le
to appeal in this case was refused. See 59 L.T., N.S. 2
4 Times L.R. 664.]

L'Assomption Election Case, Gauthier v. Normandeau; Qu
County Election Case, O'Brien v. Caron, 14 Can. S.C.R. 42

An order in a controverted election case made by
court below or a judge thereof not sitting at the time for
trial of the petition, and granting or rejecting an applica
to dismiss the petition on the ground that the trial had
been commenced within six months from the time of its
sentation, is not an order from which an appeal will lie to
Supreme Court of Canada under section 50 of the Domi
Controverted Elections Act, R.S.C., c. 9 (now s. 64). Four
and Henry, JJ., dissenting.

Re Joliette Election, Gailbault v. Dessert, 15 Can. S.C.R. 45

Where the proceedings for the commencement of the
have been stayed during a session of parliament by an o
of a judge, and a day has been fixed for the trial within
statutory period of six months as so extended, on which
the petitioners proceeded, with their *enquête* and exam
two witnesses after which the hearing was adjourned
day beyond the statutory period as so extended to allow
petitioners to file another bill of particulars, those alr
filed being declared insufficient. *Held*, there was a suffi
commencement of the trial within the proper time and
future proceedings were valid under section 32 of the Co
verted Elections Act, R.S.C., c. 9 (now s. 39).

Laprairie Election Case, Gibeault v. Pelletier, 20 Can. S.C.R.

On the 23rd April, 1891, after the petition in this
was at issue, the petitioners moved to have the respon
examined prior to the trial so that he might use the de
tion upon the trial. The respondent moved to postpone
examination until after the session on the ground that h
attorney in his own case it would not "be possible for hi
appear, answer the interrogatories and attend to the ca
which his presence was necessary before the closing of
session." This motion was supported by an affidavit o
respondent stating that it would be "absolutely neces

for him to be constantly in court to attend to the present election trial" and that it was not possible "for him to attend to the present case for which his presence is necessary before the closing of the session," and the court ordered the respondent not to appear until after the session of Parliament. Immediately after the session was over, on the 1st October, 1891, an application was made to fix a day for the trial, and it was fixed for the 10th of December, 1891, and the respondent was examined in the interval. On the 10th of December the respondent objected to the jurisdiction of the court on the ground that the trial had not commenced within six months following the filing of the petition and the objection was maintained.

Held, reversing the judgment appealed from, that the order was in effect an enlargement of the time for the commencement of the trial until after the session of Parliamen and therefore in the computation of time for the commencement of the trial the time occupied by the session of Parliament should not be included.

Pontiac Election Case, 20 Can. S.C.R. 626.

The facts of this case were as follows:

Petition presented on the 18th April, 1891.

Petition was presented to the court on October 6th that the time for the commencement of the trial should be enlarged until the 30th November.

Judgment on October 10th on the motion provided that the delay for commencing the trial upon the petition is for the present postponed until the 4th day of November.

On the 19th October petitioner moved, notice of which was given on the 16th, that it is expedient that the 4th November or such other date as to the court should seem fit, should be fixed for the trial, and that it should take place at Shawville in the County of Pontiac, in Hodgins' Hall.

In answer to this petition, the respondent said, that the day ought not and could not be fixed as the petition was filed and presented on the 18th April and the petitioner did not have a day fixed for commencement of the trial within six months from the filing and presentation of the election petition, and the said delay having expired without the trial having been so fixed, and without it having been so fixed to commence within said delay of six months, the petition was out of court; that the order of the 10th Oc-

tober extending the time for the commencement of the
to the 4th November was *ultra vires*.

Upon this, on the 19th October the Superior C
judge made the order that the trial should commenc
the 4th November at 10 o'clock and continue from da
day.

Upon appeal to the Supreme Court of Canada it
held that the orders made were valid.

Bagot Election Case, Dupont v. Morin; Rouville Election Brodeur v. Charbonneau, 21 Can. S.C.R. 28.

Appeals from the judgments of the Superior Cour
Lower Canada.

In these two cases the trials were commenced o
22nd day of December, 1891, more than six months
the filing of the petition, and subject to the objection
by the respondents that the court had no jurisd
more than six months have elapsed since the filing
petition and no order made enlarging the time for the
mencement of the trial; the respondents consented
their elections be voided by reason of corrupt acts
mitted by their agents without their knowledge.

On appeal to the Supreme Court upon the qu
of jurisdiction the petitioner's counsel signed and f
consent to the reversal of the judgment appealed
without costs, admitting that the objection was well

Upon the filing of an affidavit as to the facts sta
the respondent's consent the appeal was allowed an
election dismissed without costs.

Re Beauharnois Election, 32 Can. S.C.R. 111.

A judge of the Superior Court made an order pro
that the election trial should proceed 30 days fro
date of a judgment in an appeal then pending
Supreme Court. The trial not having been proceede
in the 30 days, if non-juridical days were counted, h
sequently, by order, held that such days should
counted. On appeal from that order to the Supreme
it was held that they were not orders appealable
Supreme Court under the provisions of the Contr
Elections Act.

Held, also, that an order fixing a date for the t
an election petition beyond the six months fixed by t
had the effect to enlarge the time of trial although
expressly stated.

Re Richelieu Election, 32 Can. S.C.R. 118.

Held, that an appeal does not lie to the Supreme Court from a judgment dismissing an election petition for want of prosecution within the six months prescribed by section 32 of the Controverted Elections Act (now s. 39).

St. James Election Case, 33 Can. S.C.R. 137.

Preliminary objections to an election petition filed on 22nd February, 1902, were diamissed by Loranger, J., on April 24th, and an appeal was taken to the Supreme Court of Canada. On 31st May, Mr. Justice Loranger ordered that the trial of the petition be adjourned to the thirtieth juridical day after the judgment of the Supreme Court was given, and the same was given dismissing the appeal on October 10th, making November 17th the day fixed for the trial under the order of 31st May. On November 14th, a motion was made before Lavergne, J., on behalf of the member elect to have the petition declared lapsed for non-commencement of the trial within six months from the time it was filed. This was refused on 17th November, but the judge held that the trial could not proceed on that day as the order for adjournment had not fixed a certain time and place, and on motion by the petitioner he ordered that it be commenced on December 4th. The trial was begun on that day and resulted in the member elect being unseated and disqualified. On appeal from such judgment the objection to the jurisdiction of the trial judges was renewed. *Held*, that the effect of the order of May 31st was to fix November 17th as the date of commencement of the trial; that the time between May 31st and October 10th when the judgment of the Supreme Court on the preliminary objections was given, should not be counted as part of the six months within which the trial was to be begun, and that December 4th on which it was begun was therefore within the said six months.

Held, also, that if the order of 31st May could not be considered as fixing a day for the trial it operated as a stay of proceedings and the order of Mr. Justice Lavergne on November 17th was proper. As to the disqualification of the member elect by the judgment appealed from the members of the Court were equally divided and the judgment stood affirmed.

Re Halifax Election, Hetherington v. Roche, 37 Can. S.C.R. 6

The facts of the case were as follows: In Nove
1905, the time for beginning the trial of the electio
tition was extended for eight months and expired o
14th July, 1906. On the 25th May, 1906, the Su
Court of Nova Scotia ordered "that the time and
for the trial of the said petition be and the same is h
fixed and appointed for the 17th day of July, A.D. 1
On the 3rd July, the petitioner moved before the Ho
Justice Russell in Chambers for an order extendin
time for commencing the trial for 30 days, alleging
affidavit that the date fixed for the trial hy the or
the 25th May was three days after the expiration
time fixed by the order of November. Upon this m
an order was made on the 6th July, "that the time f
commencement of the trial of the said petition be a
same is hereby enlarged and extended for 30 days
the date of this order." When the cause came
hearing, objection was taken to the jurisdiction of th
judges on the ground that the order of the 25th M
void inasmuch as it fixed a day for the commencem
the trial heyond the last day within which the trial
commence under the order of November, and that th
of the 6th July was also void as it was only made
plementary to the order of the 25th May, and fell
The trial judges held "that the time for the commen
of the trial of the petition herein has expired, and
been validly enlarged and that there is no power, j
tion or authority in said judges to try said petitio
fix a date for the trial thereof, and that the said
not further proceeded with, and that the petition
missed for want of jurisdiction."

Held, by the Supreme Court that the case was g
hy the *Beauharnois Election Case*, *supra*, p. 768, and
and that the order made hy Mr. Justice Russell exten
time for 30 days was a valid extension and allow
appeal directed the trial to be proceeded with.

Roche v. Bordea; Carney v. O'Mullin; Halifax Electio
Cout. Cas. 421.

On motions to vary the minutes of judgment as s
The Halifax Election Cases (37 Can. S.C.R. 601), i
as they directed that the election trials should he p
with in regard to the cross-petitions, and to vary the

the parties should be sent back to the Controverted Elections Court in the same position as they were before the appeals, and that the said court should be directed, simply, to take such further proceedings as to law and justice might appertain, it was contended that such alterations were necessary because trial proceedings on the cross-petitions had never been actually commenced in the court below in so far as the issues thereon were concerned. The court dismissed the motions with costs.

Preliminary objections.

Previous to 42 V., c. 39, s. 10 (1879), no express provision was made for an appeal to the Supreme Court from a judgment upon a preliminary objection.

In re Charlevoix Election Case, 2 Can. S.C.R. 319.

On the 21st April, 1877, an election petition was filed in the prothonotary's office of Murray Bay, district of Saguenay against the respondent. The latter pleaded by preliminary objections that this election petition, notice of its presentation and copy of the receipt of the deposit had never been served upon him. Judgment was given maintaining the preliminary objections and dismissing the petition with costs. The petitioners, thereupon, appealed to the Supreme Court under 38 V., c. 11, s. 48.

Held, that the said judgment was not appealable, and that under that section an appeal will lie only from the decision of a judge who has tried the merits of an election petition. (Taschereau and Fournier, JJ., dissenting.)

Per Strong, J., (Richards, C.J., concurring,) that the hearing of the preliminary objections and the trial of the merits of the election petition are distinct acts of procedure.

Status of petitioner—stare decisis.

Stanstead Election Case, Rider v. Snow, 20 Can. S.C.R. 12.

By preliminary objections to an election petition the respondent claimed the petition should be dismissed because the said petitioner had no right to vote at said election. On the day fixed for proof and hearing of the preliminary objections the petitioner adduced no proof and the respondent declared that he had no evidence and the preliminary objections were dismissed.

Held, per Sir W. J. Ritchie, C.J., and Taschereau Patterson, JJ., that the *onus probandi* was upon the tioner to establish his status, and that the appeal sh be allowed and the election petition dismissed.

Per Strong, J., that the *onus probandi* was upon petitioner, but in view of the established jurisprudence appeal should be allowed without costs.

Fournier and Gwynne, JJ., *contra*, were of opinion the *onus probandi* was on the respondent. *The Meg Election Case* (8 Can. S.C.R. 169), discussed.

When the Supreme Court of Canada in a case in ap is equally divided so that the decision appealed ag stands unreversed the result of the case in the Sup Court affects the actual parties to the litigation only the Court, when a similar case is brought before it, is bound by the result of the previous case.

Glengarry Election Case (McLennan v. Chisholm), 20 Can. S 38.

The petition in this case simply stated that it wa petition of Angus Chisholm, of the township of Lochi the county of Glengarry, without describing his occup and it was shewn by affidavit that there are two or other persons of that name on the voters' list for that ship.

Held, affirming the judgment of the court below, the petition should not be dismissed for the want of a particular description of the petitioner.

Bellschasss Election Cass, Amyot v. Labrecque, 20 Can. S.C.

The petition was served upon the appellant on th of May, 1891, and on the 16th May the appellant file liminary objections, the first being as to the status petitioners. When the parties were heard upon the of the preliminary objections no evidence was given the status of the petitioners and the court dismiss objections. On appeal to the Supreme Court

Held, reversing the judgment of the court Gwynne, J., dissenting, that the onus was on the peti to prove their status as voters. *The Stanstead Co* Can. S.C.R. 12, followed.

Prescott Elsction Cass (Proulx v. Frassr), 20 Can. S.C.R.

In this case the respondent, by preliminary obj objected to the status of the petitioner, and the case

at issue copies of the voters' lists for said electoral district were filed but no other evidence offered, and the court set aside the preliminary objection "without prejudice to the right of the respondent if so advised to raise the same objection at the trial of the petition." No appeal was taken from this decision and the case went to trial, where the objection was renewed but was overruled by the trial judges who held that they had no right to entertain it. and on the merits they allowed the petition and voided the election. Thereupon the appellant appealed to the Supreme Court of Canada on the ground that the onus was on the respondents to prove their status, and that their status had not been proved.

Held, affirming the judgment of the court below, that the objection raising the question of the qualification of the petitioner was properly raised by preliminary objection aad disposed of and the judges at the trial had no jurisdiction to entertain such objection.

Richelieu Election Case, Paradis v. Bruneau, 21 Can. S.C.R. 168.

Held, affirming the decision of Gill, J., that where the petitioner's statua in an election petition is objected to by preliminary objection, such status should be established by the production of the voters' list actually used at the election, or a copy thereof certified by the clerk of the Crown in Chancery, R.S.C., c. 8, ss. 41, 58 & 56, R.S.C., s. 5, s. 32, and the production at the *enquête* of a copy certified by the revising officer of the list of voters upon which his name appears, but which has not been compared with the voters' liat ,actually used, at said ,election is insufficient proof. Gwynne and Patterson. JJ.. dissenting.

Winnipeg Election Case; Macdonald Election Case, 27 Can. S.C.R. 201.

On the hearing of preliminary objections to an election petition to prove the status of the petitioner a list of voters was offered with a certificate of the Clerk of the Crown in Chancery, which, after stating that said list was a true copy of that finally revised for the district, proceeded as follows: "And is also a true copy of a list of voters which was used at said polling division at and in relation to an election of a member of the House of Commons of Canada for the aaid electoral district . . . which original list of voters was returned to me by the returning officer for said

electoral district in the same plight and condition as it appears, and said original list of voters is now on record my office."

Held, that this was, in effect, a certificate that the offered in evidence was a true copy of a paper returned the Clerk of the Crown by the returning officer as the list used by the deputy returning officer at the polling trict in question, and that such list remained of record possession of said clerk. It was then a sufficient certifi of the paper offered being a true copy of the list actu used at the election. *Richelieu Election Case* (21 S.C.R. 168), followed.

Re Two Mountains Election, 31 Can. S.C.R. 437.

Held, that the status of the petitioner was sufficie proved by the production of a list of voters bearing imprint of King's printer, certified by the Clerk of Crown in Chancery to be a copy of the voters' list use the election and upon which the name of the petit appears.

Semble, that a jurat of the affidavit accompanying petition subscribed by Grignon & Fortier, prothonot waa not objectionable.

Re Beauharnois Election, 31 Can. S.C.R. 447.

A preliminary objection having been taken to the s of the petitioner on the ground that he had been guil corrupt practices, the Supreme Court, approving o judgment of the court below, that corrupt practices not been proved, refrained from expressing an opinion the question argued, viz., whether under the Franchis or the Dominion Elections Act a person guilty of co practices could vote, and consequently could not ma a petition against the return.

Yukon Election Case, Grant v. Thompson, 37 Can. S.C.R. 4

On the hearing of preliminary objections to an el petition the status of the petitioner may be establish oral evidence not objected to by the respondent.

Quebec West Election; Price v. Neville, 42 Can. S.C.R. 140

By a preliminary objection to an election petit was claimed that the petitioner was not a person entit

vote at the election and the next following objection charged that he had disqualified himself from voting by treating on polling day.

It was held that the second objection was not merely explanatory of the first but the two were separate and independent: that the second objection was properly dismissed as treating only disqualifies a voter after conviction and not *ipso facto;* and that the first objection should not have been diamissed the respondent to the petition being entitled to give evidence as to the status of the petitioner.

The respondent, by cross-petition, alleged that the defeated candidate personally and by agents "committed acts and the offence of undue influence."

Filing of petitions.

Vide Re Montmorency Election, 3 Can. S.C.R. 90. *Re West Huron Election,* 8 Can. S.C.R. 126. *Re Lisgar Election,* 20 Can. S.C.R. 1. *Re Vaudreuil Election,* 22 Can. S.C.R. 1. *Re Marquette Election,* 27 Can. S.C.R. 219. *Re West Assiniboia Election,* 27 Can. S.C.R. 215. *Re Nicolet Election,* 29 Can. S.C.R. 178. *Re Burrard Election,* 31 Can S.C.R. 459. *Re Two Mountains Election,* 32 Can. S.C.R. 55.

Form of petition.

Re King's Election, 8 Can. S.C.R. 192. *Re Gloucester Election,* 8 Can. S.C.R. 204. *Re Lisgar Election,* 20 Can. S.C.R. 1. *Re Lunenburg Election,* 27 Can. S.C.R. 226. *Re West Durham Election,* 31 Can. S.C.R. 314. *Re Two Mountains Election,* 31 Can. S.C.R. 437.

Service of petition.

Re Montmagny Election, 15 Can. S.C.R. 1. *Re King's Election,* 19 Can. S.C.R. 526. *Re Queen's and Prince Election,* 20 Can. S.C.R. 26. *Re Glengarry Election,* 20 Can. S.C.R. 38. *Re Shelburne Election,* 20 Can. S.C.R. 169. *Re Beauharnois Election,* 27 Can. S.C.R. 232. *Re Laval Election,* Cout. Dig. 529.

Deposit.

Re Argenteuil Election, 20 Can. S.C.R. 194. *Re Halton Election,* Cout. Dig. 516.

Practice and procedure generally.

Gloucester Election Case, 8 Can. S.C.R. 204.

A judgment of the Supreme Court of New Brunsw
setting aside an order of a judge rescinding a previ
order made, authorizing the withdrawal of the dep
money and removal of the petition off the files, is no
judgment on a preliminary objection within the mean
of the Act.

King's County (N.S.) Case, 8 Can. S.C.R. 192.

Nor a judgment of the Supreme Court of Nova Sco
making absolute a rule to set aside an order extending
time for service of a petition.

Vaudreuil Election Case, 22 Can. S.C.R. 1.

Two election petitions were filed against the appell
one by A. C., filed on the 4th April, 1892, and the other
A. V., the respondent, filed on the 6th April, 1892.
trial of the A. V. petition was by an order of a judge
Chambers, dated the 22nd September, 1892, fixed for
26th October, 1892. On the 24th October the appel
petitioned the judge in Chambers to join the two petit
and have another date fixed for the trial of both petiti
This motion was referred to the trial judges, who, on
26th October, before proceeding with the trial, dismi
the motion to have both petitions joined and proceeded
try the A. V. petition. Thereupon the appellant obje
to the petition being tried then as no notice had been g
that the A. C. petition had been fixed for trial, and,
ject to such objection filed an admission that suffic
bribery by the appellant's agent without his knowledge
been committed to avoid the election. The trial ju
then delivered judgment setting aside the election.

On an appeal to the Supreme Court,

Held, 1st. That under s. 30, of c. 9, R.S.C. (now s.
the trial judge had a perfect right to try the A. V. peti
separately.

2nd. That the ruling of the court below on the objec
relied on in the present appeal, viz.: That the trial ju
could not proceed with the petition in this case, because
two petitions filed had not been bracketed by the proth
tary as directed by s. 30 of c. 9, R.S.C., was not an sp
able judgment or decision. Sedgewick, J., doubting.

West Assiniboia Election Case, 27 Can. S.C.R. 215.

The Supreme Court refused to entertain an appeal from the decision of a judge in Chambers granting a motion to have preliminary objections to an election petition struck out for not being filed in time. Such decision was not one on preliminary objections within section 50 of the Controverted Election Act (now s. 64), and if it were, no judgment on the motion could put an end to the petition.

Marquette Election Case, 27 Can. S.C.R. 219.

The appeal given to the Supreme Court of Canada by the Controverted Elections Act R.S.C., c. 9, s. 50 (now s 64), from a decision on preliminary objections to an election petition can only be taken in respect to objections filed under section 12 of the Act. No appeal lies from a judgment granting a motion to dismiss a petition on the ground that the affidavit of the petitioner was untrue.

Two Mountains Election Case, 32 Can. S.C.R. 55.

The record in the case of a controverted election was produced in the Supreme Court of Canada on appeal against the judgment on preliminary objections and, in re-transmission to the court below, the record was lost. Under the procedure in similar cases in the province where the petition was pending, a record was reconstructed in substitution of the lost record, and upon verification as to its correctness, the court below ordered the substituted record to be filed. Thereupon the respondent in the court below raised preliminary objections traversing the correctness of a clause in the substituted petition which was dismissed by the judgment appealed from. *Held*, that as the judgment appealed from was not one upon a question raised by preliminary objections, nor a judgment upon the merits at the trial, the Supreme Court of Canada had no jurisdiction to entertain the appeal, nor to revise the discretion of the court below in ordering the substituted record to be filed.

Deposit—Petition—Abatement of Petition.

Re Halton Election, 19 Can. S.C.R. 557.

Parliament having been dissolved before the appeal came on for hearing in the Supreme Court. *Held*, that by the effect of the dissolution the petition dropped, and that

the appellant, petitioner, was not entitled to have the rec
sent back to the court below with a view of being rep
his deposit, but it was proper that the Registrar sho
certify to the court below that the appeal to the Supr
Court had not been heard and that petition dropped
reason of the dissolution of Parliament so that the c
below might be in a position to make an order dispo
of the money in Court.

Halton Election Case, 19 Can. S.C.R. 557.

The petitioner subsequently moved the Supreme C
of Canada for an order directing the re-payment to
of the deposit in the court below, shewed that a si
application in the High Court of Justice for Ontario
been dismissed and that the order by Patterson, J., ha
been appealed from. On 15th March, 1893, the Sup
Court ordered that a certificate should issue recitin
proceedings that had taken place and declaring tha
petitioner was entitled to have his deposit returned.

Lisgar Election, Wood v. Stewart, 1904.

Before the appeal in this case came on for he
Parliament was dissolved, and an application was ma
the appellant for an order allowing him to withdra
deposit on the ground that the appeal had abated by
of the dissolution of Parliament, and after argume
Court delivered judgment declaring that the petitio
abated, and the petitioners were entitled to be pa
sum of $1,300 and accrued interest deposited with th
of the Court of King's Bench, Manitoba, for the c
the petition and of the appeal.

Formal judgment as follows:

"Upon the application of the above named peti
appellants upon hearing what was said by Mr. E
Counsel for the petitioners and Mr. Howell of Cou
the respondent, and it appearing that a petition w
sented in the Court of King's Bench for the Pro
Manitoba in December, 1900, complaining on behal
appellant of the undue return of the respondent as
of the House of Commons for the electorate dis
Lisgar in the Province of Manitoba, and that at the
the presentation of the said petition the sum of o
sand dollars was deposited with the Clerk of the sa
on behalf of the petitioners and that the matter of

petition was tried before the Hon. Mr. Albert Clement Killam, C.J., of His Majesty's Court of King's Bench for Manitoba and the Hon. Joseph Dubue, etc. on the day of when judgment was delivered dismissing the said petition with costs as therein set out. And it further appearing that the appeal was taken from the said judgment to the Supreme Court of Canada and that the sum of three hundred dollars was deposited with the Clerk of the said Court as security for costs of the said appeal and that the said appeal was duly inscribed for hearing at the sittings of the Supreme Court commencing on the fourth day of October, 1904, and it appearing that on the 29th day of September, 1904, the Parliament to which the said respondent had been elected was dissolved; the Court doth declare that the said petition has thereby abated and that the petitioners are entitled to be paid the said sums of one thousand dollars and three hundred dollars respectively deposited with the said Clerk of the Court of King's Bench for the costs of the said petition and for the costs of the said appeal herein respectively, making in all the sum of one thousand three hundred dollars, with accrued interest.'

Motions to dismiss.

In election appeals it was formerly considered that motions to dismiss far want of prosecution must be made to the Court. *North York Election Case*, Cout. Dig. 1113; but in the *Halton Election Case*, 19 Can. S.C.R. 557, the Court referred such a motion to a judge in Chambers, and since then the Registrar has heard them. *Chicoutimi & Saguenay Election Case*, Cout. Dig. 1113. *Martin v. Roy*, Cout. Dig. 1113.

Notice of trial.

Pontiac Election Case, 20 Can. S.C.R. 626.

An objection that the 15 days' notice of trial required by the Rules of Court had not been complied with, is not an objection which can be invoked on an appeal to the Supreme Court where the appeal is taken from the judgment or decision on a question of law or of fact of the judge who tried the petition.

Speeding hearing of election appeals.

Charlevoix Election Case, Brassard v. Langevin, 2 Can. S.C.R. 319.

Per Strong, J.—" It may be truly said that there is no class of litigations in which judicial despatch is more desir-

able than that arising out of controverted elections. interests of all concerned, those of the parties, the and the public, alike require reasonable promptitude cision in such cases."

Re North Ontario Election Case, 3 Can. S.C.R. 374.

Per Taschereau, J.—"Election cases affect interests. That is why Parliament, instead of leavi the parties the power of setting down their case for h as in ordinary cases, has ordered the Registrar to do election cases for the nearest convenient time afte transmission to him of the record. Parliament evi intended that election appeals should not be delayed

Re Pontiac Election Case, 20 Can. S.C.R. 626.

Per Gwynne, J.—" Speedy administration of justi the object of the statute."

Findings of fact in court below.

Bellechasse Election, 5 Can. S.C.R. 91.

Held, that an appellate Court in election cases not to reverse, on mere matters of fact, the findings judge who has tried the petition, unless the court vinced beyond doubt that his conclusions are err and that the evidence in this case warranted the of the court below, that appellant had been guilty sonal bribery.

Berthier Election Case, Genereux v. Cuthbert, 9 Can. S.C

Held, as to three charges, that on the facts the ju of the court below was not clearly wrong and shoul fore not be reversed.

Montcalm Election Case, 9 Can. S.C.R. 93.

Held, that the Supreme Court will not reverse matters of fact the judgment of the judge who election petition unless the matter of the eviden such a nature as to convey an irresistible conviction judgment is not only wrong but is erroneous.

North Perth Election Case, 20 Can. S.C.R. 331.

Per Gwynne, J.—" In all cases of mere matters the finding which depends upon the credibility of

or upon the due balancing of contradictory evidence, the judgment of the learned judge who hears and sees the witnesses should, never, in my opinion, be reversed by an Appellate Court, and the more especially is this the case with judgments rendered upon these election petitions, the trial of which takes place before two judges whose concurrent opinion is necessary to the avoiding of the election; but where the question in issue depends upon the proper inference to be drawn from undisputed facts, the Appellate Court, equally with the trial court is bound to exercise its independent judgment.

For cases on the weight to be attached to findings of the trial judges, *vide* p. 377, *supra*.

Presentation of petition.

Yukon Election Case, Grant v. Thompson, 37 Can. S.C.R. 495.

A petition alleging "an undue election" or "undue return" of a candidate at an election for the House of Commons cannot be presented and served before the candidate has been declared elected by the returning officer. Girouard and Idington, JJ., dissenting.

65. The party so desiring to appeal shall within eight days from the day on which the decision appealed from was given, deposit with the clerk of the court with whom the petition was lodged or with the proper officer for receiving moneys paid into court, at the place where the hearing of the preliminary objections, or where the trial of the petition took place, as the case may be, if in the Province of Quebec, and at the chief office of the court in which the petition was presented, if in any other province, in cases of appeal other than from a judgment, rule, order or decision on any preliminary objection, the sum of three hundred dollars, and in such last mentioned cases, the sum of one hundred dollars, as security for costs, and also a further sum of ten dollars as a fee for making up and transmitting the record to the Supreme Court of Canada; and such deposit may be made in legal tender or in the bills of any chartered bank doing business in Canada. 54-55 V., c. 20, s. 12.

Kingston Election Case, Cout. Cas. 21.

In this case Henry, J., said:

"An application was made, *ex parte*, to me, at Chamber few days ago hy Dr. John Stewart, an elector of the elect division of Kingston, Ontario, for orders for an appeal from decision of the learned Chief Justice of the Court of Com Pleas in the case of two election petitions; one against the re of the sitting member of that district, and the other aga another candidate at the same election.

"Although no notice of the application was shewn to heen given, I permitted the applicant to make the motion an file an affidavit and other documents in support of it, hut with the intention of passing the order, even if I considered t were any grounds for the motion, without hearing the ps interested.

At the hearing, I intimated to the applicant that I ha power in such a case, hut it may prevent any misunderstan if my rejection of the motion he recorded.

"The statutory provision for the appeal to this court in cases is very plain. Within eight days from the day on w the judge has given his decision, the party against whom given is entitled to appeal hy depositing one hundred dolla security for costs, and ten dollars as a fee to the clerk for warding the record to this court. Upon receipt of whic registrar of this court shall inscribe, the case for hea Within three days after such inscription, or such further as the judge who tried the petition may allow, notice th must he given to the opposite party. It is not necessar obtain leave from any judge to appeal. The appeal is a n of right, hut contingent on the prescribed conditions heing filled. If, therefore, the security be not given within the scribed time and the fee paid, no appeal lies, and there power in a judge of this or any other court to order one.

"No security was alleged to have been given or mone posited. The record has not been returned, and ther neither this court nor any judge of it has sny jurisdiction ever in the matter."

66. Upon such deposit being so made, the said clerk or proper officer shall make up and transmit the record of th to the Registrar of the Supreme Court of Canada, who sh down the said appeal for hearing by the Supreme Court of C at the nearest convenient time and according to the rules Snpreme Court of Canada in that behalf. R.S., c. 9, s. 51.

The eight days within which the deposit must be is imperative, and the time cannot be extended Supreme Court.

Motion to dismiss for want of prosecution.

Re Lisgar Election, Wood v. Stewart, 1904.

In this case the judgment was pronounced upon the petition on the 30th day of October, 1902, and on the 7th November following, the petitioner deposited with the Clerk of the Election Court, the necessary security and fees in connection with an appeal to the Supreme Court of Canada. The record was not certified by the Clerk to the Registrar of the Supreme Court until the 9th day of January, 1904, and was only received by the Registrar on the 16th January, 1904, and consequently there elapsed between the day of the giving of the security and the certifying record a period of one year, two months and two days. The respondent moved before the Registrar in Chambers to dismiss the appeal for want of prosecution, and the material filed consisted of an affidavit by the solicitor for the respondent that the Court stenographer had informed him that he had been instructed by the solicitor for the appellants not to proceed with the transcription of his notes of evidence, and that this was the cause of the delay in having the record certified by the election clerk. The solicitor for the appellants, on the contrary, denied that he had even given any such instructions and alleged that he had always been anxious to have the appeal promptly proceeded with. The Registrar made a preliminary order directing the clerk of the Election Court and the stenographer to forward a certificate under their respective hands and seals accounting for delay, if any, in extending the notes of evidence taken at the trial of the election petition. These officers having satisfied the Registrar that the solicitors for the appellants were not responsible for the delay, the motion to dismiss was refused. In his reasons for judgment the Registrar said:

"The appellant is required within eight days from the date of the decision to deposit with the Clerk of the Court or other proper officer the sum of $300 and a further sum of $10 as a fee for making up and transmitting the record to the Supreme Court. Having complied with this the appellant is under no responsibility for any delay which may arise in the office of the clerk of the Election Court. The latter may unnecessarily and unreasonably delay the transmission of the record. He may have trouble in getting the notes of evidence extended. He may be in doubt as to the material contained in the record. He may have to consult the trial judges with respect to this material. This does

not concern the appellant. Neither need he be d
by fear that the clerk will fail to incorporate in the
material which the appellant deems essential bec
will have an opportunity when the record has been
by the Registrar to apply to the Supreme Court a
any error or mistake corrected.

"In the next place it is to be remembered the
interests require that the right of a member to sit
liament should be finally determined at the earliest
possible. This is abundantly clear from the str
visions of the Controverted Elections Act which l
time for each step in the cause. *Vide* sections 9, 10
32, 43. These clearly manifest the intention of Pa
that election trials should be promptly disposed
further authority were required it can be found
decisions of this Court. Mr. Justice Patterson in the
Election Case, 19 Can. S.C.R., p. 557, says: 'I
material to attempt to apportion the responsibility
waste of two years before reaching a decision so n
promptness which is aimed at by the law respect
troverted election.'

"It follows therefore that though an appellant
be held responsible for delays made by the office
Court, yet if he unwarrantably interferes in the pro
in the clerk's office causing an unreasonable and unn
delay he may become liable to have his appeal dism
Vide North Ontario Election Case, infra, p. 785.

Neither can the time be extended by the tria
under section 71, as election petitions are expressly
by this section from the power given to the court
extend the time for bringing an appeal.

Rules 1 to 50 inclusive of the Supreme Cour
Rule 12, do not apply to election appeals. *Vide*
supra, p.

Rule 12 provides for the convening of a specia
of the Court for the hearing of election appeals.

The rules providing for the payment of fees to t
trar and taxation of costs are applicable to election

The Registrar should not set down an electio
until the fee of $10 provided by Rule 56, has been

Re North Ontario Election Case, 3 Can. S.C.R. 374.

The record was transmitted to the Registra
Supreme Court on the 11th June, 1879. On the

tember, 1879, application was made on behalf of the appellant to the Chief Justice, under Rule 55 to dispense with printing part of the record. It appearing, when this application was made, that the fee for entering the appeal had not been paid to the Registrar under Rule 56 and schedule therein referred to, the Chief Justice refused to entertain the application until such fee should be paid, and the appeal duly entered. Thereupon the agent for the appellant's solicitor paid the fee, and the Chief Justice made the order as asked.

67. The party so appealing shall, within three days after the said appeal has been so set down as aforesaid or within such other time as the court or trial judge by whom such decision appealed from was given allow, give to the other parties to the said petition affected by each appeal, or the respective attorneys, solicitors or agents by whom each parties were represented on the hearing of each preliminary objections or at the trial of the petition, as the case may be, notice in writing of such appeal having been so set down for hearing as aforesaid and may in such notice if he so desires, limit the object of the said appeal to any special and defined question or questions.

2. The appeal shall thereupon be heard and determined by the Supreme Court of Canada, which shall pronounce such judgment upon questions of law or of fact, or both, as in the opinion of such Court ought to have been given by the court or trial judges whose decision is appealed from; and the Supreme Court of Canada may make each order as to the money deposited as aforesaid, and as to the costs of the appeal as it thinks just; and in case it appears to the court that any evidence duly tendered at the trial was improperly rejected, the Court may cause the witness to be examined before the Court or a judge thereof, or upon commission. R.S., c. 9, s. 51; 54-55 V., c. 20, s. 17.

Notice of appeal.

North Ontario Election Case, Wheeler v. Gibbs, 3 Can. S.C.R. 374.

On a motion to quash the appeal on behalf of the respondent, on the ground that the appellant had not, within three days after the Registrar of the Court had set down

the matter of the petition for hearing, given notice in w
to the respondent, or his attorney or agent, of such
down, nor applied to and obtained from the judge wh
the petition further time for giving such notice, as re
by the 48th section of the Supreme and Exchequer
Act.

Held, that this provision in the statute was impe
that the giving of such notice was a condition prece
the exercise of any jurisdiction by the Supreme C
hear the appeal; that the appellant having failed to
with the statute, the Court could not grant relief
Rules 56 or 69; and that therefore the appeal could
then heard, but must be struck off the list of appea
costs of the motion.

Subsequent to this judgment the appellant ap
the judge who tried the petition to extend the t
giving the notice, whereupon the said judge gran
application and made an order, "extending the t
giving the prescribed notice till the 10th day of D
then next." The case was again set down by the R
for hearing by the Supreme Court at the February
following, being the nearest convenient time, an
of such setting down was duly given within the ti
tioned in the order. The respondent thereupon m
dismiss the appeal, on the ground that the appellan
delayed to prosecute his appeal, or failed to bring
on for hearing at the next session, and that the ju
tried the petition had no power to extend the
giving such notice after the three days from the firs
down of the case for hearing by the Registrar of th

Held, that the power of the judge who tried the
to make an order extending the time for giving su
is a general and exclusive power to be exercised
to sound discretion, and the judge having made
order in this case, the appeal came properly before
for hearing. Taschereau, J., dissenting.

Costs.

"The usual practice has been to certify the
of the Supreme Court to the court below, and t
the latter court the enforcement of the payment of
But the Court may issue writs to enforce payme
costs of an election appeal. This was done in
Ontario Election Case (*Wheeler* v. *Gibbs*), but the

was etayed by Taschereau, J., to permit an applientton to the Court for an amendment of the judgment, to enable the respondent to set-off against the costs of appeal, costs allowed respondent in court below. The amendment was made, and the execution stayed by the Court, Februnry, 1881. The payment of interlocutory costs will be enforced by writs of execution issued by the Supreme Court. This was done in the *North Ontario Election Case* on the 23rd Jnnuary, 1880." Cass. Prne. 2nd ed., p. 120.

68. If an appeal, as provided by this Act is made to the Snpreme Conrt of Canada from the judgment or decision of the trial jndges, they ehall make to the Snpreme Court of Canada the report and certificate with respect to corrnpt practices hereinhefore directed to he made, and may make the special report as to any matters arising in the course of the trial as hereinhefore provided, and the same, together with the decieion and findings, if any, with reepect to corrupt practicee hy agents hereinbefore provided for, ehall form part of the record in the eaid matter to he transmitted to the Supreme Court on snch appeal. 54-55 V., c. 20, e. 14.

The certificate and report referred to in this section are set out in the following sections of the Dominion Controverted Elections Act.

58. At the conclnsion of the trial, the trial judges ehall determine whether the member whose election or rturn is complained of or any and what other pereon was duly returned or elected, or whether the election wae void, and other matters arising out of the petition, and requiring their determination, and shall, except in the case of appeal hereinafter mentioned, within four days after the expiration of eight days from the day on which they shall so have given their decieion, certify in writing such determination to the speaker, appending thereto a copy of the notes of evidence.

2. **The determinat[illegible]n thus certified shall he final to all intents and purposes. R.S., c. 9, s. 43.**

59. Every certificate and every report sent to the speaker in pursuance of this Act shall be under the hands of hoth jndges.

2. If the trial jndgee differ as to whether the member
return or election is compiained of was duly returned or el
they shall certify that difference, and the member ehall be d
duly elected or returned.

3. If the trial jndges determine that snch member wa
duly elected or returned, bnt differ ae to the rest of the
mination, they ehall certify that difference, and the election
be deemed to be void.

4. If the trial judges differ as to the enbject of a report
Speaker, tbey shall certify that difference and maks no
on the snbject in which they so differ. 54-55 V., c. 20, s. 1

60. When any charge is made in an election petition
corrnpt practice having been committed at the election to
the petition relatee, the trial jndges shall, in addition t
certificate. and at the eame time, report in writing to the S

(a.) Whether any corrupt practice has or has not been
to have been committed by or with the knowledge and
of any candidate at ench election, stating the name of ench
date, and the nature of snch corrupt practice;

(b.) The names of any persone who have been proved
trial to have been guilty of any corrnpt practice;

(c.) Whether corrupt practices have, or whether t
reason to believe that corrnpt practices have extensive
vailed at the election to which ths petition relates;

(d.) Whether thsy are of opinion that the inqniry
circumstances of the election has heen rendered incomp
the action of any of the parties to the petition, and that
inquiry as to whether corrupt practices have extensiveiy p
is desirable. R.S., c. 9, s. 44.

61. The trial jndgee may, at the same time, make a
report to the Speaker as to any matters, arising in the c
the trial, on account of which onght, in their jndgmen
snhmitted to the House of Commons. R.S., c. 9, s. 45.

69. The Registrar ehall certify to the Speaker of tl
of Commons, the jndgment and decision of the Snprem
confirming, changing or annulling any decision, report o

of the trial judges upon the several questions of law as well as of fact upon which the appeal was made, and therein shall certify as to the matters and things as to which the trial judges would have been required to report to the Speaker, whether they are confirmed, annulled or changed, or left unaffected by such decision of the Supreme Court; and such decision shall be final. R.S., s. 9, s. 51;—54-55 V., c. 20, s. 13.

Appeal to Privy Council.

Re Glengarry Election, 59 L.T. 379; 4 Times L.R. 664.

In delivering judgment upon a petition for leave to appeal from the judgment of the Supreme Court of Canada. 14 Can. S.C.R. 453, the Judicial Committee of the Privy Council decided that no appeal in a controverted election case would be entertained.

Appendix F.

Appeals under the Railway Act

THE RAILWAY ACT.

R.S., c. 37.

55. The Board may, of its own motion, or npon ths cation of any party, and npon snch secnrity heing given directs, or at the reqnest of the Governor in Conncil state in writing, for the opinion of the Snprsms Court of Canad any queetion which in ths opinion of ths Bosrd is a ques law.

2. Ths Snpreme Court of Canada shall hear and dst the qnestion or qnestions of law arising therson, and re matter to the Board with the opinion of ths Conrt t 3 E. VII., c. 58, s. 43.

56. Ths Governor in Council may, at any tims, in his tion, either npon pstition of any party, person or compan ested, or of his own motion and withont any pstition or tion, vary or reecind any order, decision, rule or regulation Board, whethsr snch order or dscision is mads inter pa otherwiss, and whether snch rsgulation is general or lin its scope and application; and any or'er which the Gove Conncil may make with rsepsct thersto shall be hinding Board and all parties.

2. An appsal shall lie from the Board to the Snprem of Canada npon a question of jurisdiction, hnt snch appe not lie nnlsss the sams is allowsd by a jndge of ths sa npon application and npon notics to ths parties and th

and hearing such of them as appear and desire to be heard; and the costs of such application shall be in the discretion of the judge.

3. An appeal shall also lie from the Board to such Court upon any question which in the opinion of the Board is a question of law, upon leave therefor having been first obtained from the Board; and the granting of such leave shall be in the discretion of the Board.

Immediately after the decision in the appeal of the *Grand Trunk Rly. Co.* v. *The Department of Agriculture*, 42 S.C.R. 557, *infra*, p. 797, the above subsection 3 was amended so as to read as follows:

3. An appeal shall also lie from the Board to such Court upon any question which in the opinion of the Board is a question of law, upon leave therefor having been first obtained from the Board within one month after the making of such order or decision sought to be appealed from or within such further time as the Board under special circumstances shall allow and after notice to the opposite party stating the grounds of appeal.

3a. No appeal after leave therefor has been obtained under subsection 2 or 3 of this section shall lie unless it is entered in the said Court within thirty days from the making of the granting leave to appeal. (9-10 Ed. VII., c. 50, s. 1.)

4. Upon such leave being obtained the party so appealing shall deposit with the Registrar of the Supreme Court of Canada the sum of two hundred and fifty dollars, by way of security for costs, and thereupon the Registrar shall set the appeal down for hearing at the nearest convenient time; and the party appealing shall, within ten days after the appeal has been so set down, give to the parties affected by the appeal, or the respective solicitors by whom such parties were represented before the Board, and to the Secretary, notice in writing that the case has been so set down to be heard in appeal as aforesaid; and the said appeal shall be heard by such Court as speedily as practicable.

5. On the hearing of any appeal, the Court may draw all such inferences as are not inconsistent with the facts expressly found by the Board, and are necessary for determining the question of

jurisdiction, or law, as the case may be, and shall certify it
opinion to the Board, and the Board shall make an order in ac
cordance with snch opinion.

6. The Board shall be entitlsd to be heard, by connsel o
otherwise, upon the argument of any ench appeal.

7. The Court shall have power to fix the coets and fees to b
taxed, allowed and paid npon ench appeals, and to make rules
practics respecting appeals nnder this section; and until enc
rules are made, the rulee and practics applicable to appeals fro
the Exchsqner Court ehall be applicable to appeale nnder this A

8. Neither the Board nor any member of the Board ehall
any case be liabls to any coets by reason or in reepect of a
appeal or application nnder this ssction.

9. Save as provided in this section,—

(a.) every decision or order of the Board shall be final; a

(b.) no ordsr, dscision or proceeding of the Board ehall
qnestioned or reviewed, restrained or removed by prohibition,
jnnction, certiorari, or any other procese or proceeding in
court. 3 E. VII., c. 58, s. 44.

General Order No. 88 of the Supreme Court, passed
the 14th June 1905, now incorporated in the Rules ae nu
bere 80 and 81, contains the following provisions with reep
to appeals from the Board of Railway Commieeioners
Canada:

" 3. Wherever a reference ie made to the Court by
Governor in Council or by the Board of Railway Comm
sioners for Canada. the case ehall only be inscribed by
Registrar upon the direction and order of the Court
judge thereof, and factums shall thereafter be filed by
parties to the reference in the manner and form and wi
the time required in appeals to the Court.

4. Whenever an appeal is taken from any decisio
the Board of Railway Commissioners for Canada purs
to the provisions of the Railway Act, the appeal shal
upon a case to be etated by the partiee, or in the even
difference, to be settled by the said Board or the chair
thereof. and the case ehall set forth the decieion obj
to and so much of the affidavits, evidence and docun
as are necessary to raise the question for the decision o
Court.

All the rules of the Supreme Court from 1 to 44 both inclusive, shall be applicable to appeals from the said Board of Railway Commissioners for Canada, except in so far as the Railway Act otherwise provides."

Section 55 provides for obtaining the opinion of the Supreme Court of Canada upon any question which in the opinion of the Board is one of law, where the opinion is desired by

(*a.*) The Board.

(*b.*) Any party, or

(*c.*) The Governor in Council.

In any such event the Board states a case for the opinion of the Court which is forwarded to the Registrar of the Supreme Court, and an application should then be made either to the Court or a judge for a direction under the above General Order, No. 88, (now Rule 80) to have the case set down at some sittings of the Court, and after the direction is made, the case and factums should be printed and filed as in ordinary appeals.

C.P. Rly. Co. v. James Bay Rly. Co., 36 Can. B.C.R. 42.

Held, on a refereuce coucerning an applicatiou to the Board of Railway Commissioners for Canada for the approval of deviations from plans of a proposed branch line, uuder section 43 of "The Railway Act, 1903," it is competent for objections as to the expiration of limitation of time to be taken by the said Board, of its own motion, or by any interested party.

Essex Terminal Rly. Co. v. Windsor, Essex & Lake Shore Rapid Rly. Co., 40 Can. S.C.R. 620.

On 12th August, 1905, the Township of Sandwich West passed a by-law authorizing the W.E. etc., Rly. Co. to construct its line along a named highway in the municipality but the powers and privileges conferred were not to take effect unless a formal acceptance thereof should be filed within thirty days from the passing of the by-law. Such acceptance was field on 12th September, 1905. This was too late and on 20th July, 1907, the council of Sandwich West and that of Sandwich East respectively passed by-laws containing the necessary authority.

In April, 1906, the location of the line of the E.T. Rly. Co. was approved by the Board. In June, 1906, the Board made an order allowing the W.E. etc., Rly. Co. to cross the

line of the C.P.R. In March, 1907, another order respe
said crossing was made and also an order approving
location of the W.E. Rly. Co., the municipal consent
obtained three months later.

The E.T. Rly. Co. spplied to the Board to have the c
of June, 1906, and Msrch, 1907, rescinded and for an
requiring the W.E. Rly. Co. to remove its track fro
highway at the point where the applicant proposed to
it, to discontinue its construction at such point or, i
alternative, for an order allowing it to cross the line
W.E. Rly. Co. on said highway. The applicants cl
to be the senior road and that the W.E. Rly. Co. have
obtained the requisite authority for locating its line
a case stated to the Supreme Court by the Board,
held that the Board had power to refuse to set asi
said orders: and that the by-laws pssscd in July,
were sufficient to legalize the construction of the W.E
Co.'s. line on said highway: and that the Bosrd ca
lawfully authorize the latter company to maintain an
ate its railway thereon.

It wss held further that leave of the Board is ne
to enahle the E.T. Rly. Co. to lay its trscks across t
way of the W.E. Rly. Co. on said highway.

It was also held that the Board in exercise of
eretion has power by order to authorize the nain
and operation of the W.E. Rly. Co. along said highw
to give leave to the E.T. Rly. Co. to cross it and the
the C.P.R. near the present crossing and to appor
cost of maintaining such crossing equally between
companies instead of imposing two-thirds thereof u
E.T. Rly. Co. as was done hy a former order not acte
and to order that if the E.T. Rly. Co. finds it nece
its own interest to have the points of crossing di
placed it should hear the expense of removing the li
W.E. Rly. Co. to the new point of crossing.

Appeals.

Section 56 confers an appellste jurisdiction
Supreme Court from the order or decision of th
(ss. 2), 1, by leave of s judge of the Supreme Cou
the jurisdiction of the Board itself is in question;
3) 2, upon leave of the Board first heing had, where
tion involved is one of law in the opinion of the B

Leave granted by a judge of Supreme Court on question of jurisdiction.

It has been the practice of the court when the Board has already granted leave to appeal on a question of law, to grant also leave to appeal on the question of jurisdiction if there is doubt whether the matter in dispute may not be viewed either as a question of law or a question of jurisdiction.

In the case of the *Montreal Street Rly. Co.* v. *Montreal Terminal Rly. Co.*, 35 Can. S.C.R. 478 Mr. Justice Sedgewick, before whom the application was made for leave to appeal, directed the registrar the request the attendance of the solicitor for the Board, as subsection 2 contained the express provision that the Board should be heard on such applications. In the first edition of this work it was said "since the above decision on applications for leave the solicitor for the Board has always been present," but more recently the Board has not been represented.

Montreal Street Rly. Co. v. Montreal Terminal Rly. Co., 35 Can. S.C.R. 478; 36 Can. S.C.R. 369.

The Montreal Terminal Rly Co. by virtue of its charter and an agreement with the town, passed through the town of Maisonneuve and obtained an order from the Board of Railway Commissioners approving of a branch line on Ernest Street in said town. The Montreal Street Rly. operated a tramway which extended into Maisonneuve, and without constructing the intermediate section, proceeded to place a double set of tracks on Pius IX. Avenue, where it crossed Ernest Street thus preventing the Terminal Co. from proceeding with the construction of its road on Ernest Street. The Board directed that the appellants should at their own cost and expense, within forty-eight hours after service of the order, remove the rails, ties, etc., laid by them at the intersection of Ernest Street, and Pius IX. Avenue, and restore the roadway as nearly as possible to its original condition.

In granting leave to appeal Mr. Justice Sedgewick held that there was grave doubt as to the jurisdiction of the Board of Railway Commissioners to make the order complained of, and whether or not the order amounted to an interference with the matter falling exclusively within the jurisdiction of the Superior Court of the Province of Quebec, and that the questions raised were of sufficient public

importance to call for a decision of the Supreme Co
to the conflict of jurisdiction, and the construction
provisions of the statute constituting the Board of R
Commissioners and defined their powers.

The Supreme Court held, Taschereau, C.J., an
ouard, J., dissenting, that the order of the Board of R
Commissioners was without jurisdiction.

The James Bay Rly. Co v. The Grand Trunk Rly. Co., S.C.R. 372.

The Board of Railway Commissioners allowed the
Bay Rly. Co. to cross under the tracks of the Grand
Rly. Co. An application was made by the James B
to Idington, J., for leave to appeal to the Supreme
on the ground that the Board had no jurisdiction t
the order in so far as it directed that the masonry
the under crossing should be sufficient to allow of
struction of an additional track on the line of the
Trunk Rly.

The Supreme Court held that the question inv
the matters in dispute between the companies was
law and not a question of the jurisdiction of the Bo
that therefore there was no appeal to the Supreme
without leave of the Board which had not been obt
this case.

Williams v Grand Trunk Rly. Co., 36 Can. S.C.R. 321.

Held, no appeal lies to the Supreme Court of
from an order of a judge of that Court in Chambe
ing or refusing leave to appeal from a decision of t
of Railway Commissioners.

Canadian Northern Rly. Co. v. Robinson, Cont. Cas. 394

In this case Maclennan, J., said:

"The only ground on which the motion is, or
rested, under the Railway Act, 1903, is a want of
tion on the part of the commissioners. After
the several sections of the Act applicable to the
considering all that was urged with much ability
on both sides, I think the question of jurisdiction
clear that I ought not to allow the railway compa
it discussed before the Supreme Court.

"I therefore grant the leave applied for, the c
motion to be costs on the appeal."

Leave to appeal by a judge of the Supreme Court haa been granted in the following caaes: *Montreal Street Rly. Co.* v. *Montreal Terminal Rly. Co.*, 36 Can. S.C.R. 369; *Canadian Northern Rly. Co.* v. *Robinson*, 37 Can. S.C.R. 541; *James Bay Rly. Co.* v. *Grand Trunk Rly Co.*, 37 Can. S.C.R. 372; *County of Carleton* v. *Ottawa*, 41 Can. S.C.R. 552; *Niagara, St. Catharines Rly. Co.* v. *Davy*, 43 Can. S.C.R. 277; *Montreal Street Rly. Co.* v. *Montreal*, 43 Can. S.C.R. 197; *Blackwoods Limited* v. *Canadian Northern Rly. Co.*, 44 Can. S.C.R. 92; *Clover Bar Coat Co.* v. *Humberstone*, 45 Can. S.C.R. 346.

In *Grand Trunk Pacific Rly. Co.* v. *Fort William*, 43 Can. S.C.R. 412, leave to appeal on a question of jurisdiction was granted by Mr. Justice Anglin on November 25th, 1909. and leave to appeal on a question of law was granted by the Board on November 26th, 1909.

In *Grand Trunk Rly. Co. and Canadian Pacific Rly Co.* v. *City of Toronto*, 42 Can. S.C.R. 613, on the 6th of July, 1909, Mr. Justice Duff granted leave to appeal on a question of jurisdiction, and on the same day the Board gave leave to appeal on a question of law.

In the *Grand Trunk Rly. Co.* v. *Department of Agriculture*, 42 Can. S.C.R. 557, leave having been granted by Board on question of law, on August 7th, on October 13th, the Board made an order extending the time generally for an application to the Supreme Court for leave to appeal on question of jurisdiction, and on October 28th, this time was extended until November 10th. On the 5th Novemher, Mr. Justice Duff granted leave to appeal on a question of jurisdiction, but reserved for the Supreme Court the determination of the question whether the Board had power to extend the time for bringing the appeal beyond the 60 days provided by s. 70 of the Supreme Court Act.

Sir Louis Davies said: "I have reached the conclusion that there being no limitation in the Railway Act upon the power of a judge of this court to grant an order allowing an appeal from an order of the Board of Railway Commissioners on the ground of want of jurisdiction, and no rule of this court limiting the exercise of such power, it remains untrammelled, so far as time is concerned, unless there is something in the rules and practice applicable to appeals from the Exchequer Court, which must be held to limit it. These rules are, under subsection 7, of section 56 of the Railway Act (3 Edw. VII., c. 58), made applicable to ap-

peals such as this until special rules are made with r
to such appeals. I have not been able to find any limi
of time upon the power of a judge of this court to
an appeal upon a question of jurisdiction, apart fro
question whether there has been a legal extension o
by the Board of Railway Commissioners as would s
an appeal from their order on a question of law. I
opinion that the whole question being litigated is p
before us under the order of Mr. Justice Duff on th
tion of want of jurisdiction in the Board and that w
jurisdiction to hear this appeal."

Anglin, J., said: "I am of opinion that the si
limitation imposed by s. 69 of the Supreme Court A
not apply to the appeals from the Board of Railwa
missioners under s. 56 of the Railway Act. Sec. 36
of the Supreme Court Act confer rights of appe
provincial courts. To these appeals s. 69 applies.
of appeal from the Board of Railway Commissione
certain cases, conferred by the Railway Act, which
the condition that in cases where the appeal is upon
tion of jurisdiction the leave of a judge of this co
first be had, and, in cases where the appeal is on a
of law, the leave of the Board shall be obtained.
reason for holding that s. 69 of the Supreme C
applies to these appeals so as to add another c
Ss. 7 of s. 56 of the Railway Act—which makes a
to appeals from the Board of Railway Commissi
rules and practice applicable to appeals from the E
Court—tends to confirm this view.

If s. 82 of the Exchequer Court Act applies, t
probably had jurisdiction to make the ord[illegible] pronc
it, extending the time for appealing. If s. 69 of the
Court Act were applicable, in so far as this appea
a question of law, the Board would probably hav
power under s. 71 of the Supreme Court Act. I
nothing to warrant the view that an appeal wi
under ss. 2 of s. 56 of the Railway Act, unless the
judge of this court be obtained and the appeal brou
sixty days from the date of the judgment appe
The preliminary objection, therefore, in my opin

Leave to appeal granted by the Board on a quest

Leave was granted by the Board in the *Gr*
Rly. Co. v. *Robertson*, 39 Can. S.C.R. 506, and
Trunk Rly. Co. v. *British America Oil Co.*, 43
311.

The question of law must be specifically mentioned.

Canadian Pacific Railway Co. v. City of Ottawa, June 15th, 1910.

In this case the question of law raised by the Board as to which leave to appeal was granted by the Board were as follows:

"1. The Board was in error in holding that the terms upon which a subsidy was granted for the construction of the Alexandra Bridge, or the granting of a bonus in aid of such construction, by the ratepayers of the City of Ottawa, were elements proper to be taken into consideration for the purpose of determining whether the Company's Union Station in the City of Ottawa afforded adequate and suitable accommodation for the accommodation of the passenger traffic of the Company.

"2. The Board was in error in holding the the Union Station of the Company in the City of Ottawa, did not afford adequate and suitable accommodation for the receiving and loading of traffic offered for carriage upon the railway, because certain complainants found it necessary to use the electric cars as a means of going to or of coming away from the said station.

"3. The Board was in error because, although the reasons for judgment admit that it was without power to order the Company to arrange for the arrival and departure of trains from the Central Station, Ottawa, it has ordered the Company to operate all its passenger trains, both north-bound and south-bound, on its Gatineau Branch, from a point at or near Sapper's Bridge in the City of Ottawa, and to furnish adequate and suitable accommodation for receiving and delivering passengers at that point, although the evidence established that there is not, at the said point near Sapper's Bridge, any station of the Company or junction of the Company's Railway with other railways, or any stopping place established for that purpose.

"4. The Board was in error because in making the said order it assumed jurisdiction to order the Company to operate its trains and to furnish adequate and suitable accommodation for receiving and delivering passengers at a point on its main line where no station exists, and where no stopping place has been established."

When the case was called it was announced that "the majority of the Court is of opinion that we cannot hear the appeal at the present time at least as the Railway Board has not submitted any question which in the opinion of the Board is a question of law."

In the case of the *Canadian Pacific Rly. Co. a*
Canadian Northern Rly. Co. v. *The Board of Trade*
City of Regina, 44 Can. S.C.R. 328, Anglin, J., said:

"A motion to extend the time for setting down an
from an order of the Board of Railway Commissioners
to appeal having been granted by the Board on the
that the application before it involved questions
The questions of law in respect of which the Boa
given leave are not stated or otherwise defined in it
granting leave. The statute clearly contemplates t
Board shall, before granting leave to appeal, determi
any question upon which an appeal to this court is
is a question of law. This involves the idea that t
of the Board shall be given in respect of one or more
questions, which should be stated, or otherwise suf
defined, in the order granting the leave. It is not
parties, under a general order for leave to appeal,
such questions as they may wish to prefer, as ques
law; neither is it for this court to decide wheth
question raised upon an appeal is or is not a question
The statute confers this power and imposes this du
the Board whose decision upon it is not open to
Because the order of the Board granting leave to ap
not specify or define, by reference or otherwise, t
tion or questions of law in respect of which leave t
was given this court, in June last, refused to ente
appeal in the Gatineau Valley Railway Case. F
that judgment, the present motion must be refu
however, on application the Board sees fit to make
giving leave to appeal in respect of specific questio
in its opinion are questions of law, this motion
reversed."

It will he perceived that under section 56, subs
the Board may grant leave to appeal when *in its*
question of law is involved, whereas an appeal u
section 2 only will lie if a question of jurisdiction
involved.

Practice.

The first proceeding upon an appeal after leav
under section 56, is the filing in the office of the
of a case certified under the seal of the Board.
tice in this respect is substantially the same as
ordinary appeals. The parties agree as to the c

the case and the appellant has the same printed and certified to the Registrar of the Supreme Court by the Secretary of the Board of Railway Commissioners. If the parties are unable to agree, the case is settled by the Board or the chairman thereof.

S. 56, ss. 4. As they have done with respect to the corresponding section of the Exchequer Court Act, the Commissioners for the Revision of the Statutes have redrafted the original section, 3 Edw. VII., c. 58, s. 44, so as to provide that the time from which notice of appeal runs shall be the date of the setting down of the appeal and not the date of the deposit. *Vide* notes to Exchequer appeals, s. 82, subsection 2, *supra*, p.

Appeal to the Privy Council.

Canadian Pacific Rly. Co. v. City of Toronto and the Grand Trunk Rly. Co. (1911), A.C. 461.

In this case Lord Atkinson said: "The Railway Board is constituted by the Railway Act of 1903 (3 Edw. VII., c. 58). By s. 26 very extensive powers are given to them as to the orders they may make affecting the rights and obligations of railway companies. For the purpose of exercising their jurisdiction they are a Court of record and have all the powers of a Superior Court. By s. 56, subsection 2, an appeal, if allowed by a judge of the Supreme Court, lies to that Court from the Board on any question of jurisdiction, and by subsection 3, on any question of law, leave of the Board to the same tribunal. By subsection of the same section the Supreme Court is to certify to the Board its opinion on the question of jurisdiction or of law so referred to it, and the Board is to make an order in accordance therewith. And by subsection 9 it is provided that the order of the Board as to be final and it is not to be restrained or reviewed, questioned, or removed by prohibition, injunction, etc.

"It is argued that, as the Supreme Court only certifies its opinion, the order made is the order of the Board, and this is declared to be final. But a Court of Appeal, unless empowered to make such an order as they think the Court appealed from should have made, can only certify its opinion to the Court appealed from, leaving it to the latter to act upon the opinion so expressed and to make the proper order. That is merely machinery, however. Moreover, it is expressly provided by subsection 3 of section 56 that the Court

is to determine the questions of jurisdiction and of ferred to it. These determinations are decisions tribunal, and in their Lordships' opinion the langu the section is not sufficient, according to the aut elted, to take away the prerogative of the Crown.

"They therefore think that an appeal to the Cr from the judgments appealed against."

Section 70 of the Supreme Court Act does not appeals from Board of Railway Commissioners

Grand Trunk Rly. Co. v. Department of Agriculture, S.C.R. 557, supra, p.

Other cases.

G.T. Rly. Co. v. Perrault, 36 Can. S.C.R. 671.

Order directing the establishment of farm over railways subject to "The Railway Act, 1903, clusively within the jurisdiction of the Board of Commissioners for Canada.

The right claimed by the plaintiff's action, jus 1904, to have a farm crossing established and m by the railway company cannot be enforced under visions of the Act, 16 V., c. 37 (Can.) incorpor Grand Trunk Railway Company of Canada.

Judgment appealed from reversed, Idington senting in regard to damages and costs.

An application to have the appeal quashe grounds that the costs of the establishing the cr manded together with the damages sought to be by the plaintiff would amount to less than $2,00 the case did not come within the provisions of th Court Act permitting appeals from the Province was dismissed.

Toronto v. Grand Trunk Rly. Co., 37 Can S.C.R. 232.

Sections 187 and 188 of the Railway Act, powering the Railway Committee of the Privy order any crossing over a highway of a railway its jurisdiction to be protected by gates or oth *intra vires* of the Parliament of Canada. Iding senting. (Sections 186 and 187 of the Railway now R.S., c. 37, ss. 232-3), confer similar pow Board of Railway Commissioners.)

Ottawa Electric Rly. Co. v. City of Ottawa, and Canada Atlantic Rly. Co., 37 Can. S.C.R. 354.

The power of the Board of Railway Commissioners, under s. 186 of the Railway Act, 1903, to order a highway to be carried over or under a railway is not restricted to the case of opening up a new highway, but may be exercised in respect to one already in existence.

The application for such order may be made by the municipality as well as by the railway company.

The Board, on application by the City of Ottawa, ordered a subway to be made under the track of the Canada Atlantic Rly. Co. where it crosses Bank Street, the cost to be apportioned among the City, the C. A. Rly. Co. and the Ottawa Electric Rly. Co. By an agreement between the Electric Company and the city the company was given the right to run its cars along Bank Street and over the railway crossing, paying therefor a specific sum per mile. The company appealed from that portion of the order making them contribute to the cost of the subway, contending that the city was obliged to furnish them with a str over which to run their cars and they could not be subjected to greater burdens than those imposed by the agreement.

It was held that the Electric Company was a company "interested or affected" in or by the said work within the meaning of s. 47 of the said Railway Act, and could properly be ordered to contribute to the cost thereof.

It was further held that there was nothing in the agreement between said company and the city to prevent the Board making said order or to alter the liability of the company so to contribute.

Red Mountain Rly. Co. v. Blue, 39 Can. S.C.R. 390. C.R. [1909] A.C. 210.

The question for the jury was whether or not the place of the origin of the fire which caused the damages was within the limits of the "right of way" which the defendants were, by the Railway Act, 1903, obliged to keep free from unnecessary combustible matter, and their finding was that it did, but the charge of the judge was calculated to leave the impression that any space where trees had been cut, under the powers conferred by s. 118 (*j*) of that Act, might be treated as included within the "right of way," and, in effect, made a direction on issues not raised by the pleadings or at the trial, as to negligent exercise of the privilege conferred by that section.

It was held that in consequence of the want of
explicit directions to the jury on the question of law
the misdirection as to the issues, the defendants were
titled to a new trial.

The court refused an application by the respond
on the hearing of the appeal, for leave to supplemen
appeal case by the production of plans of the right of
which had not been produced at the trial, as being con
to the established course of the court. This decision
reversed by the Privy Council (1909) A.C.

Canadian Pacific Rly. Co. v. Carruthers, 39 Can. S.C.R. 251.

C's horses strayed from his enclosed pasture sit
beside a highway which ran parallel to the company's
way, entered a neigbour's field adjacent thereto,
thence upon the track through an opening in the
which had not been provided with a gate by the com
and were killed by a train. There was no person in
of the animals, nor was there evidence that they got at
through any negligence or wilful act attributable to

It was held, affirming the judgment appealed
(16 Man. R. 323) that under the provisions of the
subsection of s. 237 of the Railway Act, 1903, the co
was liable in damages for the loss sustained notwithst
that the animals had got upon the track while at larg
place other than a bighway intersected by the railway

Canadian Pacific Rly. Co. v. The King, 39 Can. S.C.R. 476.

The provisions of s. 2, ss. (2) of c. 87, Con. Ord.
(1898), as amended by the N.W.T. Ordinances, c. 2
sess.) and c. 30, 2nd sess.) in 1903, in so far as they
to fires caused by the escape of sparks, etc., from
locomotives, constitute "railway legislation," stric
called, and, as such, are beyond the competence of th
lature of the North-West Territories. *The Canadian
Rly. Co.* v. *The Parish of Notre Dame de Bonsecours*
A.C. 367, and *Madden* v. *The Nelson and Fort S*
Rly. Co. (1899), A.C. 626, referred to.

The judgments appealed from were reversed ding
dissenting.

Canadian Northern Rly. Co. v. Robinson, 43 Can. S.C.R.

Injuries suffered through the refusal by a railw
pany to furnish reasonable and proper facilities for

ing, forwarding and delivering freight, as required by the Railway Act, to and from a shipper's warehouse, by means of a private spur-track connecting with the railway, do not fall within the class of injuries described as resulting from the construction or operation of the railway, in s. 242 of the Railway Act, 3 Edw. VII., c. 58, and consequently an action to recover damages therefor is not barred by the limitation prescribed by that section for the commencement of actions and suits for indemnity.

Judgments appealed from (19 Man. R. 300) affirmed, Gironard and Davies, JJ., dissenting.

Appendix G.

Winding-Up Act Cases

THE WINDING-UP ACT.

R.S., c. 144.

101. Except in the North-West Territoriee, any person satisfied with an order or decisiou of the court or a single in any proceeding nuder this Act may,—

(a.) if the qneetiou to be raieed on the appeal, involves rights; or

(h.) if the order or decision is likely to affect other cases similar nature iu the winding-up proceedings; or

(c.) if the amonnt involved in the appeal, exceede five dred dollars,

by leave of a judge of the conrt, appeal therefrom. R.S., e. 74.

102. Sncb appeal shall lie.

(a.) in Ontario, to tbe Conrt of Appeal for Ontario;

(b.) in Quebec, to the Conrt of King'e Bench; and

(c.) in Manitoha to the Court of Appeal;

(d.) in British Columhia to the Court of Appeal;

(e.) in any of tbe other Provincee and the Yukou Ter to a Superior Court in hanc. R.S., c. 129, e. 74; 7-8 E. VI

103. In the North-West Territory, any persou disse with au order or decisiou of the court or a eingle jndge, proceeding nnder this Act may, hy leave of a judge of t preme Court of Canada, appeal therefrom to the Supreme of Canada. R.S., c. 129, e. 74.

104. All appeals shall be regulated, as far as possible, according to the practice in other cases of the court appealed to, but no appeal hereinbefore authorized shall be entertained unless the appellant has, within fourteen days from the rendering of the order or decision, or within such further time as the court or judge appealed from or in the North-West Territories a judge of the Supreme Court of Canada allows, taken proceedings therein to perfect his appeal, nor unless within the said time, he has made a deposit or given sufficient security, according to the practice of the court appealed to that he will duly prosecute the said appeal and pay such damages and costs as may be awarded to the respondent. R.S., c. 129, s. 74.

105. If the party appellant does not proceed with his appeal, according to this Act and the rules of practice applicable, the court appealed to, on the application of the respondent, may dismiss the appeal with or without costs. R.S., c. 129, s. 75.

106. An appeal if the amount involved therein exceeds two thousand dollars shall by leave of a judge of the Supreme Court of Canada lie to that court from,—

(a.) the Court of Appeal in the Provinces of Ontario, Manitoba and British Columbia.

(b.) the Court of King's Bench in Quebec; or

(c.) a Superior Court in banc, in any other of the other Provinces or in the Yukon Territory. R.S., c. 129, s. 76; 9-10 E. VII. c. 62.

In re **Montreal Cold Storage & Freezing Co. in liquidation; Ward v. Mullin, Cont. Cas. 341.**

The Registrar:—When the application first came before me it was contended by the petitioner, and this contention is repeated in the written argument filed by his counsel, that upon the petitioner establishing that the amount involved exceeded $2,000 he was practically entitled, as of right, to bring his appeal and have his security allowed.

I do not so construe the section in question. On the contrary I am of the opinion that the words "an appeal shall lie to the Supreme Court of Canada by leave of a judge of the said Supreme Court" must receive the same construction in this section as has been placed upon them in other statutes

that confer jurisdiction upon the Supreme Court only
leave or special leave has been granted by that Court.
60 & 61 V., c. 34, an appeal is given to the Supreme C
from the Court of Appeal for Ontario by apecial leav
the Supreme Court, and quite recently in the case of
Lake Erie and Detroit River Rly. Co. v. *Marsh* (35
S.C.R. 197), Mr. Justice Nesbitt, speaking for the c
laya down some general principles applicsble to applica
of thia sort, and which, it appears to me, when applie
the facts of this case, are conclusive of the application.
saya that "where the case involves matter of public int
or some important question of law, or the application o
perial or Dominion atatutes, or a conflict of provincial
Dominion authority, or questions of law applicable t
whole Dominion, leave may well be granted."

Subsequently (1st February, 1905) the decision o
Registrar was affirmed hy Mr. Justice Girouard in C
bers.

Leave to appeal.

It is doubtful whether the power of a judge in C
bera conferred upon the Registrar by section 109 o
Supreme Court Act, and General Order, No. 83, exte
casea where by another Act, jurisdiction is conferred
a judge of the Supreme Court. Until recently, applic
for leave to appeal under the Winding-up Act. section
were made to the Registrar in Chambera, who granted
fused the applicationa aubject to an appeal to a judge
Court. *Allen* v. *Hanson*, 18 Can. S.C.R. 667; *Ontario*
v. *Chaplin*, 20 Can. S.C.R. 115; *McCaskill* v. *Common*
Prac. 2nd. ed., 123.

In *Common* v. *McArthur*, 29 Can. S.C.R. 239, c
argument of the appeal, Sir Henry Strong expressed
doubts as to the power of the Registrar to grant le
appeal in that case.

Recently, the Registrar has disclaimed jurisdictio
the applications have heen made to a judge in Chamb

Per saltum appeals.

Re Cushing Sulphite Fibre Co., 36 Can. S.C.R. 494.

Leave to appeal *per saltum* under section 26
Supreme Court Act, cannot be granted in a case und
Dominion Winding-up Act. An application under

76 (now 106) of the Winding-up Act, for leave to appeal from a judgment of the Supreme Court of New Brunswick was refused where the judge had made no formal order on the petition for a winding-up order and the proceedings before the full Court were in the nature of a reference rather than of an appeal from his decision.

Time for appealing.

In the first edition of this work it was said "the general procedure relating to appeals to the Supreme Court is applicable to appeals under the Winding-up Act, and the appeal must be brought within 60 days from the signing or entry or pronouncing of the judgment appealed from, as provided in section 69 of the Supreme Court Act. As the court below has no power to grant leave to appeal, it cannot under section 71 of the Supreme Court Act, extend the time for bringing the appeal. *Barrett* v. *Syndicat Lyonnais du Klondike*, 33 Can. S.C.R. 667; and as the Supreme Court itself has no power to allow an appeal to be brought after the 60 days have expired provided for by section 69, it follows that where the appeal is not taken within the time provided by the Supreme Court Act no power exists anywhere to allow the appeal."

This statement was based upon s. 43 of the Supreme Court Act which provides that "Notwithstanding anything in this Act contained, the Court shall also have jurisdiction as provided in any other act conferring jurisdiction," which had been construed in the Registrar's office as having the effect of bringing all such appeals within the purview of all the general provisions of the Supreme Court Act with respect to appeals. In view of the decisions of the *Grand Trunk Rly. Co.* v. *Department of Agriculture*, 42 Can. S.C.R. 557, the view so expressed may well be questioned.

Canadian Mutual Loan Co. v. Lee, 34 Can. S.C.R. 224.

Per Taschereau, C.J.—"The appellant now asks that, failing his maintaining his appeal as of right, we should grant him special leave under subsection (*c.*). But that application is too late, assuming that it could be heard without notice to the respondent. More than sixty days have elapsed since the judgment he would now appeal from; section 40 Supreme Court Act (now section 69); and under a constant jurisprudence, our power to grant special leave is gone, and the time cannot be extended for such a purpose

either under section 42 (now section 71) which appl
clusively to appeals as of right, or under Rule 70 whi
always been construed as not applying to delays fi
statute. Our jurisprudence on the subject under th
tario Act is the same that we have followed as to le
appeal *per saltum* under section 26, subsection 3 (n
tion 42).

Ontario Bank v. Chaplin, 20 Can. S.C.R. 152.

After this appeal had been set down for hearing
Supreme Court, without any leave having been o
from a judge of the Supreme Court in accordan
section 76 (now 106) of the Winding-up Act, the ap
applied for and obtained from a judge of the court b
extension of time for bringing his appeal. The ap
then applied to the Registrar of the Supreme C
Chambers for leave to appeal, which was granted *n*
tunc, and his order, declared that all proceedings ha
the appeal should be considered as taken subseque
the order granting leave to appeal. No objection wa
before the Supreme Court to these orders, and the
was heard on the merits, but the decision in *Barrett*
dicat Lyonnais du Klondike, 33 Can. S.C.R. 667, a
adian Mutual v. *Lee*, 34 Can. S.C.R. 224, above cit
that the order of the judge of the court below e
the time, as well as the order of the Registrar granti
were without jurisdiction, and this decision must
to be overruled.

Amount involved.

Stephens v. Gerth, 24 Can. S.C.R. 716.

Appeal from a decision of the Court of Appeal
tario, reversing the order of the master in ordi
settled the respondents on the list of contributori
Ontario Express and Transportation Co. under the
up Act.

An appeal will only lie to the Supreme Cour
ceedings under the Winding-up Act where the a
volved is $2,000 or over. In this case there were si
on the list hy the master, one for $1,000 and the
$900 each, and all were released from liability b
cision of the Court of Appeal from which this a
brougnt.

The Supreme Court held that the aggregate amount for which the respondents were sought to he made liable exceeding $2,000 did not give it jurisdiction, but that the position was the same ns if proceedings had been taken separately against each.

Appeal quashed with costs.

Re Cushing Sulphite Fibre Co., 37 Can. S.C.R. 427.

Held, that a judgment refusing to set aside a winding-up order does not involvo any amount, and leave to nppeal therefrom cannot be granted. An appeal lies to the Supreme Court only in cases where monetary questions are to be considered as for instance, where the question is as to whether anyone should be placed upon the list of contributories or should be held liable or not liable *quoad* his character as shareholder or where some such similar matter is in controversy. It is regrettable that there is no appeal to the Supreme Court upon all matters under the Winding-up Act, so that there might be a tribunal hy which the practice in all the provincial courts should be made uniform.

In *Shoolbred* v. *Clark,* 17 Can. S.C.R. 265, no question of jurisdiction being raised, the Supreme Court entertained an appeal from the decision of the Court of Appeal for Ontnrio which dismissed an appeal from the judgment of Boyd. C., who made an order for winding-up the Union Fire Ins. Co., under the Dominion Winding-up Act.

Liability of liquidation for costs.

Hood v. Eden, 11th Dec., 1905.

In this case a motion was made to the Court to vary the minutes of judgment of the Registrar who settled the same making the costs payable out of the estate and not against the liquidator personally as asked for by the successful appellants. The master had placed the appellants upon the list of contributories and his judgment had been affirmed by the courts below. The Supreme Court dismissed the motion with costs.

Sections 101. 102, 103 and 104 of the Winding-up Act are reproductions of R.S.. c. 129, s. 74, subsections 1. 2, 3 and 4.

In re Cushing Sulphite Fibre Co., 37 Can. S.C.R. 427.

It was contended on behalf of the respondents on the motion to quash, that the provisions of suhsection 4 requir-

ing that the appeal should be brought within 14 days, a
to appeals to the Supreme Court of Canada, but thi
tention was rejected by the Court.

Section 104 of the Winding-up Act, it will be pe
now makes it clear that the provisions of that sectio
apply to appeals to the provincial courts of appeal a
to the Supreme Court.

**125. The courts of the various Provinces, and the ju
the said courts respectively, shall be auxiliary to one anot
the purposes of this Act; and the winding up of the
of the company or any matter or proceeding relating ther
be transferred from one court to another with the conc
or by the order or orders of the two courts, or by an
the Supreme Court of Canada. R.S., c. 129, s. 84.**

In re British Columbia General Contract Co., Oct. 14th,

The company in this case was incorporated in
Columbia, and carried on business in that province,
in Alberta and Saskatchewan. An order was made
winding up of the company in British Columbia, a
and subsequent thereto, garnishing proceedings in w
Canadian Pacific Rly. Co. were garnishees, were take
courts of Alberta and Saskatchewan. Upon an ap
made by the liquidators, the Supreme Court ordered
winding up of the company, and all matters relatin
be transferred from the said courts of Alberta and
chewan to the Supreme Court of British Columbia.

Appendix H.

Criminal Appeals

THE CRIMINAL CODE.

R.S., c. 146.

Criminal Appeals.

S. 761 of the Criminal Code (R.S.C. 1906, c. 146) reads as follows:—

"**761. Any person aggrievsd, the prosecutor or complainant as well as the defsndant, who desires to qusstion a conviction, order, determination or othsr proceeding of a justics under this Part, on the gronnd that it is erroneous in point of law, or is in excess of jnrisdiction, may apply to snch justice to state and sign a case eetting forth the facts of the cass and the gronnds on which the proceeding is qnsstioned, and if the justice declinss to state the case, may apply to the conrt for an order reqniring the case to be stated.**

"**2. The application shall be made and the cass stated within such tims and in snch manner as is, from time to time, directed by ruies or orders undsr section five hnndred and eeventy-six.**"

Stating a case.

Lafferty v. Lincoln, 38 Can. S.C.R. 620.

Appeal from the judgment of the Supreme Court of the North-West Territories, *in banc*, Harvey and Stuart, JJ., dissenting, on a case stated, whereby the conviction of the respondent by the police magistrate of the City of Calgary, Alta., for an offence under the Medical Profession Act,

6 Edw. VII., c. 28, of the statutes of Alberta (190
quashed and the said Act declared *ultra vires* of th
lative Assembly of the Province of Alberta.

Special leave for the appeal was granted by the ful
under the provisions of the Supreme Court Act, R.S.
c. 193, s. 37 (*c*) (*supra*, p. 106).

1013. An appeal from the verdict or judgment of a
or judge having jurisdiction in criminal cases, or of a m
proceeding under section seven hundred and seventy-s
the trial of any person for an indictable offence, shall
the application of such person if convicted, to the Court o
in the cases hereinafter provided for, and in no others.

2. Whenever the judges of the Court of Appeal are n
in deciding an appeal brought before the said court thei
shall be final.

3. If any of the judges dissent from the opinion of
jority, an appeal shall lie from such decision to the Supre
of Canada as hereinafter provided.

1014. No proceeding in error shall be taken in any
case.

2. The court before which any accused person is t
either during or after the trial, reserve any questio
arising either on the trial or on any of the proceedin
inary, subsequent, or incidental thereto, or arising o
direction of the judge, for the opinion of the court of
manner hereinafter provided.

3. Either the prosecutor or the accused may during
either orally or in writing, apply to the court to reserv
question as aforesaid, and the court, if it refuses so to
shall nevertheless take a note of such objection.

4. After a question is reserved the trial shall pro
other cases.

5. If the result is a conviction, the court may in its
respite the execution of the sentence or postpone s
the question reserved has been decided, and shall in it
commit the person convicted to prison or admit him t
one or two sufficient sureties, in such sums as the cour
to surrender at such time as the court directs.

6. If the question is reserved, a case shall be stated for the opinion of the court of appeal.

Ead v. The King, 40 Can. S.C.R. 272.

By s. 1014 (3) of the Criminal Code either party may "during the trial of a prisoner on indictment apply to have a question which has arisen reserved for adjudication by the Court of Appeal."

It was held, that for the purposes of such provision the trial ends with the verdict after which no such application can be entertained.

1019. No conviction shall be set aside nor any new trial directed, although it appears that some evidence was improperly admitted or rejected, or that something not according to law was done at the trial or some misdirection given, unless, in the opinion of the court of appeal, some substantial wrong or miscarriage was thereby occasioned on the trial: Provided that if the court of appeal is of opinion that any challenge for the defence was improperly disallowed, a new trial shall be granted.

Allen v. The King, 44 Can. S.C.R. 331.

It was held, reversing the judgment appealed from (16 B.C. Rep. 9), Davies and Idington, JJ., dissenting, that where evidence has been improperly admitted or something not according to law has been done at the trial which may have operated prejudicially to the accused upon a material issue, although it has not been and cannot be shewn that it did, in fact, so operate, and although the evidence which was properly admitted at the trial warranted the conviction, the court of appeal may order a new trial.

1024. Any person convicted of any indictable offence, whose conviction has been affirmed on an appeal taken under section ten hundred and thirteen may appeal to the Supreme Court of Canada against the affirmance of such conviction: Provided that no such appeal can be taken if the Court of Appeal is unanimous in affirming the conviction, nor unless notice of appeal in writing has been served on the Attorney-General within fifteen days after such affirmance or such further time as may be allowed by the Supreme Court of Canada or a judge thereof.

2. The Supreme Court of Canada shall make such rule or thereon, either in affirmance of the conviction or for gran new trial, or otherwise, or for granting or refusing such a tion, as the justice of the case requires, and shall make all necessary rules and orders for carrying such rule or ord effect.

3. Unless such appeal is brought on for hearing by the lant at the session of the Supreme Court during which such ance takes place, or the session next thereafter if the said is not then in session, the appeal shall be held to have bee doned, unless otherwise ordered by the Supreme Court or thereof.

4. The judgment of the Supreme Court shall, in all final and conclusive.

Gilbert v. The King, 38 Can. S.C.R. 207.

The power given by s. 1024 of the Criminal Co (1906), c. 146), to a Judge of the Supreme Canada to extend the time for service on the A General of notice of an appeal in a reserved Cr may be exercised after the expiration of the tim by the code for the service of such notice. *Banner ston* L.R. 5 H.L. 157) and *Vaughan* v. *Richardson* S.C.R. 703) followed.

Gilbert v. The King, 38 Can. S.C.R. 284.

Two questions were reserved by the trial judg opinion of the court of appeal, but he refused to third question, as to the correctness of his char ground that no objection to the charge had been the trial. The court of appeal took all three que consideration and dismissed the appeal, there bei sent from the affirmance of the conviction on th third questions, but one of the judges being of op the appeal should be allowed and a new trial ord the second question reserved. On an appeal to th Court of Canada the majority of the court being that the appeal should be dismissed, declined to opinion as to whether or not an appeal woul questions as to which there had been no dissent i appealed from.

1025. Notwithstanding any royal prerogative, or any thing contained in the Interpretation Act or in the Supreme Court Act, no appeal shall be brought in any criminal case from any judgment or order of any court in Canada to any Court of Appeal or authority, by which in the United Kingdom appeals or petitions to His Majesty in Council may be heard.

Section 2 of the Criminal Code contains a definition of the following expressions:

Section 2 subsection (2). "Attorney-General" means the Attorney-General or Solicitor-General of any province in Canada in which any proceedings are taken under this Act, and, with respect to the Territories, the Attorney-General of Canada.

Subsection (5). "Court of Appeal" includes,—

(a.) in the Province of Ontario, the Court of Appeal for Ontario;

(b.) in the Province of Quebec, the Court of King's Bench, appeal side;

(c.) in the Provinces of Nova Scotia and New Brunswick, the Supreme Court in banc;

(c1.) in the Province of British Columbia, the Court of Appeal;

(d.) in the Province of Prince Edward Island, the Supreme Court of Judicature;

(e.) in the Province of Manitoba, the Court of Appeal;

(f.) in the Provinces of Alberta and Saskatchewan, the Supreme Court of the North-West Territories in banc, until the same is abolished, and thereafter such court as is by the legislature of the said provinces respectively substituted therefor;

(g.) in the Yukon Territory, the Supreme Court of Canada;

Laliberte v. The Queen, 1 Can. S.C.R. 117.

Held, that, since the passing of 32 & 33 V., c. 29, s. 80, repealing so much of c. 77 of Cons. Stat. L.C. as would authorize any court of the Province of Quebec to order or grant a new trial in any criminal case, and of 32 & 33 V., c. 36, repealing s. 63 of c. 77 Cons. Stats. L.C., the Court of Queen's Bench of the Province of Quebec has no power to grant a new trial, and that the Supreme Court of Canada,

exercising the ordinary appellate powers of the court, ur
s. 38 (now 51) of 38 V., c. 11, should give the judgm
which the court whose judgment is appealed from ough
have given, viz.: to reverse the judgment which has
given, and order prisoner's discharge.

Amer v. The Queen, 2 Can. S.C.R. 592.

In Michaelmas term, 1877, certain questions of law
served, which arose on the trial of the appellants,
argued before the Court of Queen's Bench for Ont
composed of Harrison, C.J., and Wilson, J., the third j
of said court being absent; and on the 4th February,
the said court, composed of the same judges, delivered j
ment affirming the conviction of the appellants for
slaughter.

Held, that the conviction of the court of Queen's B
although affirmed but by two judges was unanimous,
therefore not appealable.

Viau v. The Queen, 29 Can. S.C.R. 90.

An appeal to the Supreme Court of Canada does n
in cases where a new trial has been granted by the
of Appeal, under the provisions of the Criminal Code,
sections 742 to 750 inclusively (now 1013 to 1024 inclu
The word "opinion" as used in subsection 2 of sectio
of "The Criminal Code, 1892," must be construed as
ing a "decision" or "judgment" of the Court of A
in criminal cases.

Ellis v. The Queen, 22 Can. S.C.R. 7.

Contempt of court is a criminal proceeding and
it comes within the provisions of the Criminal Co
appeal does not lie to the Supreme Court from a jud
in proceedings therefor.

McIntosh v. The Queen, 23 Can. S.C.R. 180.

Where on a criminal trial a motion for a reserve
made on two grounds is refused, and on appeal to the
of Queen's Bench (appeal side), that Court is una
in affirming the decision of the trial judge as to one
grounds but not as to the other, an appeal to the S
Court can only be based on the one as to which the
dissent.

Rice v. The King, 32 Can. S.C.R. 480.

Appeals to the Supreme Court of Canada in criminal cases are regulated solely by the provisions of the Criminal Code.

Gosselin v. The King, 33 Can. S.C.R. 255.

Under the provisions of "The Canada Evidence Act, 1893," the husband or wife of a person charged with an indictable offence is not only a competent witness for or against the person accused but may also be compelled to testify. Mills, J., dissenting.

Evidence by the wife of the person accused of acts performed by her under directions of counsel sent to her by the accused to give the directions is not a communicatioo from the husband to his wife in respect of which the Canada Evidence Act forbids her to testify. Mills, J., dissenting.

Cf. The Canada Evidence Act, 1906, c. 145.

Clement v. La Banque Nationale, 33 Can. S.C.R. 343.

On a contestation of a statement of an insolvent trader by a creditor claiming a sum exceeding $2,000, the judgment appealed from condemned the appellant, under the provisions of Art. 888 C.P.Q., to three months' imprisonmeot for secretion of a portion of his insolvent estate, to the value of at least $6,000.

Held, that there was no pecuniary amount in controversy aod there could be no appeal to the Supreme Court of Canada.

Gaynor & Greer .he United States of America, 36 Can. S.C.R. 247.

A motion for a writ of prohibition to restrain an extradition commissioner from investigating a charge of a criminal nature upon which an application for extradition has been made is a proceeding arising out of a criminal charge within the meaning of section 24 (*g.*) of the Supreme Court Act, as amended by 54 & 55 V., c. 25, s. 2, and, in such a case no appeal lies to the Supreme Court of Canada. In *Re Woodhall* (20 Q.B.D. 832), and *Hunt* v. *The United States* (16 U.S.R. 424) referred to.

The procedure in Criminal appeals in the Supreme Court is regulated by Rules 46, 47, 48 and 49.

No printed case, or factum, is required, and no fees have to be paid to the Registrar and no security has to be given. See section 75, subsection 2, Supreme Court Act.

Appendix I.

R.S.C. c. 139.

AN ACT RESPECTING THE SUPREME COURT CANADA.

SHORT TITLE.

1. This Act may be cited as the Supreme Cour R.S., c. 135, s. 1.

INTERPRETATION.

2. In this Act, unless the context otherwise requ

(*a*) " the Supreme Court " or " the Court " mea Supreme Court of Canada;

(*b*) " judge " means a judge of the Supreme Co Canada and includes the Chief Justice;

(*c*) " Registrar " means the Registrar of the S Court;

(*d*) " judgment " when used with reference to th appealed from, includes any judgment, rule, decision, decree, decretal order or sentence t and when used with reference to the Supreme includes any judgment or order of that court

(*e*) " final judgment " means any judgment, rul or decision, whereby the action, suit, cause, or other judicial proceeding, is finally det and concluded;

(*f*) " appeal " includes any proceeding to set a vary any judgment of the court appealed f

(*g*) " the court appealed from " means the cou which the appeal is brought directly to the S Court, whether such court is one of origina diction or a court of appeal;

(*h*) " witness " means any person, whether a p not, to be examined under the provisions of t R.S., c. 135, ss. 2 and 96.

THE COURT.

3. The court of common law and equity in and for Canada now existing under the name of the Supreme Court of Canada is hereby continued under that name, as a general court of appeal for Canada, and as an additional court for the better administration of the laws of Canada, and shall continue to be a court of record. 6 Edw. VII., c. 50, s. 1.

THE JUDGES.

4. The Supreme Court shall consist of a chief justice to be called the Chief Justice of Canada, and five puisne judges, who shall be appointed by the Governor in Council by letters patent under the Great Seal. 59 V., c. 14, s. 1.

5. Any person may be appointed a judge who is or has been a judge of a superior court of any of the provinces of Canada or a barrister or advocate of at least ten years' standing at the bar of any of the said provinces. R.S., c. 135, s. 4.

6. Two at least of the judges shal be appointed from among the judges of the Court of King's Bench, or of the Superior Court, or the barristers or advocates of the Province of Quebec. R.S., c. 135, s. 4.

7. No judge shall hold any other office of emolument either under the Government of Canada or under the government of any province of Canada. R.S., c. 135, s. 4.

8. The judges shall reside at the city of Ottawa, or within five miles thereof. R.S., c. 135, s. 4.

9. The judges shall hold office during good behaviour, but shall be removable by the Governor-General on address of the Senate and House of Commons. R.S., c. 135, s. 5.

10. Every judge shall, previously to entering upon the duties of his office as such judge, take an oath in the form following:—

"I, , do solemnly and sincerely promise and swear that I will duly and faithfully, and to the best of my skill and knowledge, execute the powers and trusts reposed in me as chief justice (*or* as one of the judges) of

the Supreme Court of Canada. So help me God.'' e. 135, s. 9; 50-51 V., c. 16, s. 57.

11. Such oath shall be administered to the Chief J before the Governor-General, or person administerin Government of Canada, in Council, and to the puisne j by the Chief Justice, or, in his absence or illness, h other judge present at Ottawa. R.S., c. 135, s. 10.

THE REGISTRAR AND OTHER OFFICERS.

12. The Governor in Council may, by an instr under the Great Seal, appoint a fit and proper person a barrister of at least five years' standing, to be Re of the Supreme Court. R.S., c. 135, s. 11.

13. The Registrar shall hold office during pleasu shall reside and keep an office at the city of Ottawa c. 135, s. 11.

14. The Registrar shall have the rank of a depu of a department, and shall be paid a salary beginnin appointment at three thousand five hundred doll annum, with an annual increase of one hundred until a maximum salary is reached of four thousand 3 E. VII., c. 69, s. 1.

15. The Registrar shall, subject to the directio Minister of Justice, oversee and direct the officer and employees appointed to the Court. 3 E. VI s. 3.

16. The Registrar shall give his full time to t service, and shall not receive any pay, fee or allo any form in excess of the amount hereinbefore 3 E. VII., c. 69, s. 3.

17. The Registrar shall, under the supervisi Minister of Justice, have the management and con Library of the Court and the purchase of all book 51 V., c. 37, s. 4.

18. The Registrar shall, until otherwise prov lish the reports of the decisions of the Court. 50-5 s. 57.

19. The Registrar shall have such authority to exercise the jurisdiction of a judge sitting in chambers as may be conferred upon him by general rules or orders made under this Act. 50-51 V., c. 16, s. 57.

20. The Governor in Council may appoint a reporter and assistant reporter, who shall report the decisions of the Court, and who shall be paid such salaries respectively as the Governor in Council determines. 50-51 V., c. 16, s. 57.

21. The Governor in Council may, from time to time, appoint such other clerks and servants of the Court as are necessary, all of whom shall hold office during pleasure. R.S., c. 135, s. 11; 50-51 V., c. 16, s. 57.

22. The provisions of the Civil Service Act and of the Civil Service Superannuation and Retirement Act shall, so far as applicable, extend and apply to such officers, clerks and servants at the seat of Government. R.S., c. 135, s. 14.

23. The Sheriff of the county of Carleton, in the province of Ontario, shall be *ex officio* an officer of the Court and shall perform the duties and functions of a sheriff in connection therewith. R.S., c. 135, s. 15.

BARRISTERS AND SOLICITORS.

24. All persons who are barristers or advocates in any of the provinces of Canada may practise as barristers, advocates and counsel in the Supreme Court. R.S., c. 135, s. 16; 50-51 V., c. 16, s. 57.

25. All persons who are attorneys or solicitors of the superior courts in any of the provinces of Canada may practise as attorneys, solicitors and proctors in the Supreme Court. R.S., c. 135, s. 17; 50-51 V. c. 16, s. 57.

26. All persons who may practise as barristers, advocates, counsel, attorneys, solicitors or proctors in the Supreme Court shall be officers of the Court. R.S., c. 135, s. 18; 50-51 V., c. 16, s. 57.

SESSIONS AND QUORUM.

27. Any five of the judges of the Supreme Court shall constitute a quorum and may lawfully hold the Court. 51 V., c. 37, s. 1.

28. It shall not be necessary for all the judges who h
heard the argument in any case to be present in orde
constitute the Court for delivery of judgment in such
but in the absence of any judge, from illness or any o
cause, judgment may be delivered by a majority of
judges who were present at the hearing. 51 V., c. 37, s

29. Any judge who has heard the case and is absen
the delivery of judgment, may hand his opinion in wr
to any judge present at the delivery of judgment, to he
or announced in open court, and then be left with the R
trar or reporter of the Court. 51 V., c. 37, s. 1.

30. No judge against whose judgment an appe
brought, or who took part in the trial of the cause or m
or in the hearing in a court below, shall sit or take pa
the hearing of or adjudication upon the proceedings i
Supreme Court.

2. In any cause or matter in which a judge is una
sit or take part in consequence of the provisions of thi
tion, any four of the other judges of the Supreme
shall constitute a quorum and may lawfully hold the
52 V., c. 37, s. 1.

31. Any four judges shall constitute a quorum an
lawfully hold the court in cases where the parties c
to be heard before a court so composed. 59 V., c. 14,

32. The Supreme Court for the purpose of hearin
determining appeals, shall hold in each year, at the
Ottawa, three sessions.

2. The first session shal begin on the third Tues
February, the second on the first Tuesday in May, a
third on the first Tuesday in October, in each year.

3. Each of the said sessions shall be continued un
business before the court is disposed of. R.S., c. 135
54-55 V., c. 25, s. 1.

33. The Supreme Court may adjourn any sessio
time to time and meet again at the time appointed
transaction of business.

2. Notice of such adjournment and of the day f
the continuance of such session shall be given by th
trar in the *Canada Gazette*. R.S., c. 135, s. 21.

34. The Court may be convened at any time by the Chief Justice, or, in the event of his absence or illness, by the senior puisne judge, in such manner as is prescribed by the rules of Court. R.S., c. 135, s. 22.

APPELLATE JURISDICTION.

35. The Supreme Court shall have, hold and exercise an appellate, civil and criminal jurisdiction within and throughout Canada. R.S., c. 135, s. 23.

36. Except as hereinafter otherwise provided, an appeal shall lie to the Supreme Court from any final judgment of the highest court of final resort now or hereafter established in any province of Canada, whether such court is a court of appeal or original jurisdiction, in cases in which the court of original jurisdiction is a superior court; Provided that,—

(*a*) there shall be no appeal from a judgment in any case of proceedings for or upon a writ of *habeas corpus, certiorari* or prohibition arising out of a criminal charge or in any case of proceedings for or upon a writ of *habeas corpus*, arising out of any claim for extradition made under any treaty; and.

(*b*) there shall be no appeal in a criminal case except as provided in the Criminal Code. R.S., c. 135, ss. 24 and 31; 54-55 V., c. 25, s. 2; 55-56 V., c. 29, ss. 742 and 750.

37. Except as hereinafter otherwise provided, an appeal shall lie to the Supreme Court from any final judgment of the highest court of final resort now or hereafter established in any province of Canada, whether such court is a court of appeal or of original jurisdiction, where the action, suit, cause, matter or other judicial proceeding has not originated in a superior court, in the following cases:—

(*a*) In the province of Quebec if the matter in controversy involves the question of or relates to any fee of office, duty, rent, revenue, sum of money payable to His Majesty, or to any title to lands or tenements, annual rents and other matters or things where rights in future might be bound; or amounts to or exceeds the sum or value of two thousand dollars;

(*b*) In the provinces of Nova Scotia, New Brunswick, British Columbia and Prince Edward Island, if the

sum or value of the matter in dispute amou
two hundred and fifty dollars or upwards, a
which the court of first instance possesses conc
jurisdiction with a superior court;

(*c*) In the provinces of Saskatchewan and Albe
leave of the Supreme Court of Canada or a
thereof;

(*d*) From any judgment on appeal in a case or p
ing instituted in any court of probate in an
vince of Canada other than the province of
unless the matter in controversy does not exce
hundred dollars,

(*e*) In the Yukon Territory in the case of any ju
upon appeal from the Gold Commissioner. 50
c. 16, s. 57; 51 V., c. 37, ss. 2 and 3; 52 V., c. 3
54-55 V., c. 25, s. 3; 56 V., c. 29, s. 2; 2 E.. VII
s. 4.

38. Except as hereinafter otherwise provided, an
shall lie to the Supreme Court from the judgment,
final or not, of the highest court of final resort now
after established in any province of Canada, wheth
court is a court of appeal or of original jurisdiction
the court of original jurisdiction is a superior court
following cases:—

(*a*) Upon any motion to enter a verdict or non-s
a point reserved at the trial;

(*b*) Upon any motion for a new trial;

(*c*) In any action, suit, cause, matter or other
proceeding originally instituted in any super
of equity in any province of Canada other
province of Quebec, and from any judgmen
action, suit, cause, matter or judicial proce
the nature of a suit or proceeding in equity.
instituted in any superior court in any pr
Canada other than the province of Quebec
c. 135, s. 24; 54-55 V., c. 25, s. 2.

39. Except as hereinafter otherwise provided
shall lie to the Supreme Court,—

(*a*) from the judgment upon a special case,
parties agree to the contrary, and the Supre

shall draw any inference of fact from the facts stated in the special case which the court appealed from should have drawn;

(*b*) from the judgment upon any motion to set aside an award or upon any motion by way of appeal from an award made in any superior court in any of the provinces of Canada other than the province of Quebec;

(*c*) from the judgment in any case of proceedings for or upon a writ of *habeas corpus, certiorari* or prohibition not arising out of a criminal charge;

(*d*) in any case or proceeding for or upon a writ of *mandamus;* and,

(*e*) in any case in which a by-law of a municipal corporation has been quashed by a rule or order of court or the rule or order to quash has been refused after argument. R.S., c. 135, s. 24; 54-55 V., c. 25, s. 2.

40. In the province of Quebec an appeal shall lie to the Supreme Court from any judgment of the Superior Court in Review where the 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. 54-55 V., c. 25, s. 2.

41. An appeal shall lie to the Supreme Court from the judgment of any court of last resort created under provincial legislation to adjudicate concerning the assessment of property for provincial or municipal purposes, in cases where the person or persons presiding over such court is or are by provincial or municipal authority authorized to adjudicate, and the judgment appealed from involves the assessment of property at a value of not less than ten thousand dollars. 52 V., c. 37, s. 2.

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 report: 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 ju
tion by consent of parties;

(*b*) by leave of the Supreme Court or a judge
from any judgment pronounced by a superio
of equity or by any judge in equity, or
superior court in any action, cause, matter o
judicial proceeding in the nature of a suit
ceeding in equity; and,

(*c*) by leave of the Supreme Court or a judge
from the final judgment of any superior court
province other than the province of Quebec
action, suit, cause, matter or other judicial
ing originally commenced in such superio
R.S., c. 135, s. 26.

43. Notwithstanding anything in this Act conta
court shall also have jurisdiction as provided in a
Act conferring jurisdiction. R.S., c. 135, s. 25.

44. Except as provided in this Act or in the
viding for the appeal, an appeal shall lie only f
judgments in actions, suits, causes, matters and othe
proceedings originally instituted in the Superior
the province of Quebec, or originally instituted in a
court in any of the provinces of Canada other than
vince of Quebec. R.S., c. 135, s. 28.

45. No appeal shall lie from any order mad
action, suit, cause, matter or other judicial proceed
in the exercise of the judicial discretion of the court
making the same: but this exception shall not in
crees and decretal orders in actions, suits, causes
or other judicial proceedings in equity, or in actio
causes, matters or other judicial proceedings in
of suits or proceedings in equity instituted in an
court. R.S., c. 135, s. 27.

46. No appeal shall lie to the Supreme Court
judgment rendered in the province of Quebec in
suit, cause, matter or other judicial proceeding
matter in controversy,—

(*a*) involves the question of the validity of an
Parliament of Canada, or of the legislature
the provinces of Canada, or of an ordina

of any of the councils or legislative bodies of any of the territories or districts of Canada; or,

(*b*) relates to any fee of office, duty, rent, revenue, or any sum of money payable to His Majesty, or to any title to lands or tenements, annual rents and other matters or things where rights in future might be bound; or,

(*c*) amounts to the sum or value of two thousand dollars.

2. In the province of Quebec whenever the right to appeal is dependent upon the amount in dispute such amount shall be understood to be that demanded and not that recovered, if they are different. R.S., c. 135, s. 29; 54-55 V., c. 25, s. 3; 56 V., c. 29, s. 1.

47. Nothing in the three sections last preceding shall in any way affect appeals in Exchequer cases, cases of rules for new trials, and cases of *mandamus*, *habeas corpus*, and municipal by-laws. R.S., c. 135, s. 30.

48. No appeal shall lie to the Supreme Court from any judgment of the Court of Appeal for Ontario, unless,—

(*a*) the title to real estate or some interest therein is in question;

(*b*) the validity of a patent is affected;

(*c*) the matter in controversy in the appeal exceeds the sum or value of one thousand dollars exclusive of costs;

(*d*) the matter in question relates to the taking of an annual or other rent, customary or other duty or fee, or a like demand of a general or public nature affecting future rights; or,

(*e*) special leave of the Court of Appeal for Ontario or of the Supreme Court of Canada to appeal to such last-mentioned Court is granted.

2. Whenever the right to appeal is dependent upon the amount in dispute such amount shall be understood to be that demanded and not that recovered, if they are different. 60-61 V., c. 34, s. 1.

49. No appeal shall lie to the Supreme Court from any final judgment of the Territorial Court of the Yukon Terri-

tory, other than upon an appeal from the Gold Co
sioner, unless,—

(*a*) the matter in questio... relates to the taking
annual or other rent, customary or other duty
or a like demand of a public or general nature
ing future rights;

(*b*) the title to real estate or some interest therei
question;

(*c*) the validity of a patent is affected;

(*d*) it is a proceeding for or upon a *mandamus*,
tion or injunction; or,

(*e*) the matter in controversy amounts to the
value of two thousand dollars or upwards. 2
c. 35, s. 4.

JUDGMENTS.

50. The Court may quash proceedings in cases
before it in which an appeal does not lie, or where
proceedings are taken against good faith. R.S., c. 1

51. The Court may dismiss an appeal or give t
ment and award the process or other proceedings w
court, whose decision is appealed against, should ha
or awarded. R.S., c. 135, s. 60.

52. On any appeal, the Court may, in its d
order a new trial, if the ends of justice seem to r
although such new trial is deemed necessary upon th
that the verdict is against the weight of eviden
c. 135, s. 61.

COSTS.

53. The Court may, in its discretion, order the
of the costs of the court appealed from, and al
appeal, or any part thereof, as well when the
appealed from is varied or reversed as when it i
R.S., c. 135, s. 62.

AMENDMENTS.

54. At any time during the pendency of an ap
the Court, the Court may, upon the application of

parties, or without any such application, make all such amendments as are necessary for the purpose of determining the appeal, or the real question or controversy between the parties, as disclosed by the pleadings, evidence or proceedings. R.S., c. 135, s. 63.

55. Any such amendment may be made, whether the necessity for the same is or is not occasioned by the defect, error, act, default or neglect of the party applying to amend. R.S., c. 135, s. 64.

56. Every amendment shall be made upon such terms as to payment of costs, postponing the hearing or otherwise as to the Court seems just. R.S., c. 135, s. 65.

INTEREST.

57. If on appeal against any judgment, the Court affirms such judgment, interest shall be allowed by the Court for such time as execution has been delayed by the appeal. R.S., c. 135, s. 66.

CERTIFICATE OF JUDGMENT.

58. The judgment of the Court in appeal shall be certified by the Registrar to the proper officer of the court of original jurisdiction, who shall thereupon make all proper and necessary entries thereof; and all subsequent proceedings may be taken thereupon as if the judgment had been given or pronounced in the said last mentioned court. R.S., c. 135, s. 67.

JUDGMENT FINAL AND CONCLUSIVE.

59. The judgment of the Court shall, in all cases, be final and conclusive, and no appeal shall be brought from any judgment or order of the Court to any court of appeal established by the Parliament of Great Britain and Ireland, by which appeals or petitions to His Majesty in Council may be ordered to be heard, saving any right which His Majesty may be graciously pleased to exercise by virtue of his royal prerogative. R.S., c. 135, s. 71.

SPECIAL JURISDICTION.

References by Governor in Council.

60. Important questions of law or fact touching,—

(*a*) the interpretation of *The British North A Acts, 1867 to 1886;* or,

(*b*) the constitutionality or interpretation of an minion or provincial legislation; or,

(*c*) the appellate jurisdiction as to educational m by *The British North America Act, 1867,* or l other Act or law vested in the Governor in C or,

(*d*) the powers of the Parliament of Canada, or legislatures of the provinces, or of the respecti ernments thereof, whether or not the particular in question has been or is proposed to be ex or,

(*e*) any other matter, whether or not in the opinion eourt *ejusdem generis* with the foregoing en tions, with reference to which the Governor in cil sees fit to submit any such question;

may be referred by the Governor in Council to the S Court for hearing and consideration; and any touching any of the matters aforesaid, so referred Governor in Council, shall be conclusively deemed t important question.

2. When any such reference is made to the Court be the duty of the Court to hear and consider it, answer each question so referred; and the Court shall to the Governor in Council, for his information, its upon each such question, with the reasons for ea answer; and such opinion shall be pronounced manner as in the case of a judgment upon an appea Court; and any judge who differs from the opinio majority shall in like manner certify his opinion reasons.

3. In case any such question relates to the const validity of any Act which has heretofore been or sh after be passed by the legislature of any province, o provision in any such act, or in case, for any rea government of any province has any special interes

such question, the Attorney-General of such province, shall be notified of the hearing, in order that he may be heard if he thinks fit.

4. The Court shall have power to direct that any person interested, or, where there is a class of persons interested, any one or more persons as representatives of such class, shall be notified of the hearing upon any reference under this section, and such person shall be entitled to be heard thereon.

5. The Court may, in its discretion, request any counsel to argue the case as to any interest which is affected and as to which counsel does not appear, and the reasonable expenses thereby occasioned may be paid by the Minister of Finance out of any moneys appropriated by Parliament for expenses of litigation.

6. The opinion of the Court upon any such reference, although advisory only, shall, for all purposes of appeal to His Majesty in Council, be treated as a final judgment of the said Court between parties. 54-55 V., c. 25, s. 4; 6 E. VII., c. 50, s. 2.

References by Senate or House of Commons.

61. The Court, or any two of the judges thereof, shall examine and report upon any private bill or petition for a private bill presented to the Senate or House of Commons, and referred to the Court under any rules or orders made by the Senate or House of Commons. R.S., c. 135, s. 38.

Habeas Corpus.

62. Every judge of the Court shall, except in matters arising out of any claim for extradition under any treaty, have concurrent jurisdiction with the courts or judges of the several provinces, to issue the writ of *habeas corpus ad subjiciendum*, for the purpose of an inquiry into the cause of commitment in any criminal case under any Act of the Parliament of Canada.

2. If the judge refuses the writ or remands the prisoner, an appeal shall lie to the Court. R.S., c. 135, s. 32.

63. In any *habeas corpus* matter before a judge of the Supreme Court, or on any appeal to the Supreme Court in any *habeas corpus* matter, the Court or judge shall have the same power to bail, discharge or commit the prisoner or

person, or to direct him to be detained in custody or oth
to deal with him as any court, judge or justice of the
having jurisdiction in any such matters in any provi
Canada. R.S., c. 135, s. 33.

64. On any appeal to the court in any *habeas*
matter the Court may by writ or order direct tha
prisoner or person on whose behalf such appeal is mad
be brought before the Court.

2. Unless the Court so direct it shall not be ne
for such prisoner or person to be present in court
shall remain in the charge or custody to which he wa
mitted or had been remanded, or in which he was
time of giving the notice of appeal, unless at liberty
by order of a judge of the court which refused the
cation or of a judge of the Supreme Court. R.S.,
s. 34.

65. An appeal to the Supreme Court in any
corpus matter shall be heard at an early day, wheth
out of the prescribed sessions of the Court. R.S.,
s. 35.

Certiorari.

66. A writ of *certiorari* may, by order of the Co
judge thereof, issue out of the Supreme Court to
any papers or other proceedings had or taken be
court, judge or justice of the peace, and which are co
necessary with a view to any inquiry, appeal or ot
ceeding had or to be had before the Court. R.S.
s. 36.

Cases removed by Provincial Courts.

67. When the legislature of any province of Ca
passed an Act agreeing and providing that the
Court of Canada shall have jurisdiction in any o
lowing cases, that is to say:—

(*a*) Of suits, actions or proceedings in which t
thereto by their pleading have raised the q
the validity of an Act of the Parliament o
when in the opinion of a judge of the court
the same are pending such question is mater

(*b*) Of suits, actions or proceedings in which the parties thereto by their pleadings have raised the question of the validity of an Act of the legislature of such province, when in the opinion of a judge of the court in which the same are pending such question is material;

the judge who has decided that such question is material shall at the request of the parties, and may without such request, if he thinks fit, in any suit action or proceeding within the class or classes of cases in respect of which such Act so agreeing and providing has been passed, order the case to be removed to the Supreme Court for the decision of such question, whatever may be the value of the matter in dispute, and the case shall be removed accordingly.

2. The Supreme Court shall thereupon hear and determine the question so raised and shall remit the case with a copy of its judgment thereon to the court or judge whence it came to be then and there dealt with as to justice appertains.

3. There shall be no further appeal to the Supreme Court on any point decided by it in any such case, nor, unless the value of the matter in dispute exceeds five hundred dollars, on any other point in such case.

4. This section shall apply only to cases of a civil nature. R.S., c. 135, ss. 72, 73 and 74.

PROCEDURE IN APPEALS.

68. Proceedings in appeals shall, when not otherwise provided for by this Act, or by the Act providing for the appeal, or by the general rules and orders of the Supreme Court, be as nearly as possible in conformity with the present practice of the Judicial Committee of His Majesty's Privy Council. R.S., c. 135, s. 39.

69. Except as otherwise provided, every appeal shall be brought within sixty days from the signing or entry or pronouncing of the judgment appealed from. 50-51 V., c. 16, s. 57.

70. No appeal upon a special case, or from the judgment upon a motion to enter a verdict or non-suit upon a point reserved at the trial or from the judgment upon a motion for a new trial, shall be allowed, unless notice thereof is

given in writing to the opposite party, or his attorney
record, within twenty days after the decision complained
or within such further time as the court appealed from,
a judge thereof, allows. R.S., c. 135, s. 41.

71. Notwithstanding anything herein contained
court proposed to be appealed from, or any judge there
may, under special circumstances allow an appeal, altho
the same is not brought within the time hereinbefore
scribed in that behalf.

2. In such case, the court or judge shall impose s
terms as to security or otherwise as seems proper under
circumstances.

3. The provisions of this section shall not apply to
appeal in the case of an election petition. R.S., c. 135, s.

72. No writ shall be required or issued for bringing
appeal in any case to or into the Court, but it shall
sufficient that the party desiring so to appeal shall, wit
the time herein limited in the case, have given the secu
required and obtained the allowance of the appeal.

2. Whenever error in law is alleged, the proceedings
the Supreme Court shall be in the form of an appeal.
c. 135, s. 43.

73. The appeal shall be upon a case to be stated by
parties, or, in the event of difference, to be settled by
court appealed from, or a judge thereof; and the case
set forth the judgment objected to and so much of
pleadings, evidence, affidavits and documents as is neces
to raise the question for the decision of the Court.
c. 135, s. 44.

74. The clerk or other proper officer of the court
pealed from shall, upon payment to him of the proper
and the expenses of transmission, transmit the case f
with after such allowance to the Registrar, and further
ceedings shall thereupon be had according to the practi
the Supreme Court. R.S., c. 135, s. 45.

Security and the Staying of Execution.

75. No appeal shall be allowed until the appellant
given proper security, to the extent of five hundred do
to the satisfaction of the court from whose judgment

about to appeal, or a judge thereof, or to the satisfaction of the Supreme Court, or a judge thereof, that he will effectually prosecute his appeal and pay such costs and damages as may be awarded against him by the Supreme Court.

2. This section shall not apply to appeals by or on behalf of the Crown or in election cases, in cases in the Exchequer Court, in criminal cases or in proceedings for or upon a writ of *habeas corpus*. R.S., c. 135, s. 46; 50-51 V., c. 16, s. 57.

76. Upon the perfecting of such security, execution shall be stayed in the original cause: Provided that,—

(*a*) if the judgment appealed from directs an assignment or delivery of documents or personal property, the execution of the judgment shall not be stayed, until the things directed to be assigned or delivered have been brought into court, and placed in the custody of such officer or receiver as the court appoints, nor until security has been given to the satisfaction of the court appealed from, or of a judge thereof, in such sum as the court or judge directs, that the appellant will obey the order or judgment of the Supreme Court;

(*b*) if the judgment appealed from directs the execution of a conveyance or any other instrument, the execution on the judgment shall not be stayed, until the instrument has been executed and deposited with the proper officer of the court appealed from, to abide the order or judgment of the Supreme Court;

(*c*) if the judgment appealed from directs the sale or delivery of possession of real property, chattels real or immovables, the execution of the judgment shall not be stayed, until security has been entered into to the satisfaction of the court appealed from, or a judge thereof, in such amount as the said last mentioned court or judge directs, that during the possession of the property by the appellant he will not commit, or suffer to be committed, any waste on the property, and that if the judgment is affirmed, he will pay the value of the use and occupation of the property from the time the appeal is brought until delivery of possession thereof, and also, if the judgment is for the sale of property and the payment of a deficiency arising upon the sale, that the appellant will pay the deficiency;

(*d*) if the judgment appealed from directs the paym
of money, either as a debt or for damages or co
execution thereof shall not be stayed, until the app
lant has given security to the satisfaction of the co
appealed from, or of a judge thereof, that if the ju
ment or any part thereof is affirmed, the appell
will pay the amount thereby directed to be paid, or
part thereof as to which the judgment is affirmed
it is affirmed only as to part, and all dama
awarded against the appellant on such appeal.

2. If the court appealed from is a court of appeal
the assignment or conveyance, document, instrument,
perty or thing, as aforesaid, has been deposited in the cust
of the proper officer of the court in which the cause ori
ated, the consent of the party desiring to appeal to
Supreme Court, that it shall so remain to abide the judgm
of the Supreme Court shall be binding on him and shal
deemed a compliance with the requirements in that be
of this section;

3. In any case in which execution may be stayed on
giving of security under this section, such security ma
given by the same instrument whereby the security
scribed in the next preceding section is given. R.S., c.
s. 47.

77. When the security has been perfected and allo
any judge of the court appealed from may issue his fi
the sheriff, to whom any execution on the judgment
issued, to stay the execution, and the execution sha
thereby stayed, whether a levy has been made under
not.

2. If the court appealed from is a court of appeal
execution has been already stayed in the case, such st
execution shall not continue without any new fiat, unt
decision of the appeal by the Supreme Court.

3. Unless a judge of the court appealed from othe
orders no poundage shall be allowed against the appe
upon any judgment appealed from, on which any exe
is issued before the judge's fiat to stay the execut
obtained. R.S., c. 135, s. 48.

78. If, at the time of the receipt by the sheriff of th
or of a copy thereof, the money has been made or re
by him, but not paid over to the party who issued th

cution, the party appealing may demand back from the sheriff the amount made or received under the execution, or so much thereof as is in his hands not paid over, and in default of payment by the sheriff, upon such demand, the party appealing may recover the same from him in an action for money had and received, or by means of an order or rule of the court appealed from. R.S., c. 135, s. 49.

79. If the judgment appealed from directs the delivery of perishable property, the court appealed from, or a judge thereof, may order the property to be sold and the proceeds to be paid into court, to abide the judgment of the Supreme Court. R.S., c. 135, s. 50.

Discontinuance of Proceedings.

80. An appellant may discontinue his proceedings by giving to the respondent a notice entitled in the Supreme Court and in the cause, and signed by the appellant, his attorney or solicitor, stating that he discontinues such proceedings.

2. Upon such notice being given, the respondent shall be at once entitled to the costs of and occasioned by the proceedings in appeal; and may, in the court of original jurisdiction, either sign judgment for such costs or obtain an order from such court, or a judge thereof, for their payment, and may take all further proceedings in that court as if no appeal had been brought. R.S., c. 135, s. 51.

Consent to Reversal of Judgment.

81. A respondent may consent to the reversal of the judgment appealed against, by giving to the appellant a notice entitled in the Supreme Court and in the cause, and signed by the respondent, his attorney or solicitor, stating that he consents to the reversal of the judgment; and thereupon the Court or any judge thereof, shall pronounce judgment of reversal as of course. R.S., c. 135, s. 52.

Dismissal for Delay.

82. If an appellant unduly delays to prosecute his appeal or fails to bring the appeal on to be heard at the first session of the Supreme Court, after the appeal is ripe for hearing, the respondent may, on notice to the appellant,

move the Supreme Court, or a judge thereof in chambe
for the dismissal of the appeal.

2. Such order shall thereupon be made as the said Cou
or judge deems just. R.S., c. 135, s. 53.

Death of Parties.

83. In the event of the death of one of several app
lants pending the appeal to the Supreme Court, a suggesti
may be filed of his death, and the proceedings may thereup
be continued at the suit of and against the surviving app
lant, as if he were the sole appellant. R.S., c. 135, s. 54.

84. In the event of the death of a sole appellant, or
all the appellants, the legal representative of the sole app
lant, or of the last surviving appellant, may, by leave of t
Court or a judge, file a suggestion of the death, and that
is such legal representative, and the proceedings may the
upon be continued at the suit of and against such legal rep
sentative as the appellant.

2. If no such suggestion is made, the respondent m
proceed to an affirmance of the judgment, according to
practice of the Court, or take such other proceedings as
is entitled to. R.S., c. 135, s. 55.

85. In the event of the death of one of several respo
ents, a suggestion may be filed of such death, and the p
ceedings may be continued against the surviving responde
R.S., c. 135, s. 56.

86. Any suggestion of the death of one of several app
lants or of a sole appellant or of all the appellants or of
of several respondents, if untrue, may on motion be set as
by the Court or a judge. R.S., c. 135, ss. 54, 55 and 56.

87. In the event of the death of a sole respondent, or
all the respondents, the appellant may proceed, upon giv
one month's notice of the appeal and of his intention
continue the same, to the representative of the decea
party, or if no such notice can be given, then upon s
notice to the parties interested as a judge of the Supre
Court directs. R.S., c. 135, s. 57.

88. In the event of the death of a sole plaintiff or
fendant before the judgment of the court in which an ac

or an appeal is pending is delivered, and if such judgment is against the deceased party, his legal representatives, on entering a suggestion of the death, shall be entitled to proceed with and prosecute an appeal in the Supreme Court, in the same manner as if they were the original parties to the suit. 52 V., c. 37, s. 3.

89. In the event of the death of a sole plaintiff or sole defendant before the judgment of the court in which an action or an appeal is pending is delivered, and if such judgment is in favour of such deceased party, the other party, upon entering a suggestion of the death shall be entitled to prosecute an appeal to the Supreme Court against the legal representatives of such deceased party: Provided that the time limited for appealing shall not run until such legal representatives are appointed. 52 V., c. 37, s. 4.

ENTRY OF CAUSES.

90. The appeals set down for hearing shall be entered by the Registrar on a list divided into five parts, and numbered as follows:—Number one, Election Cases; Number two, Western Provinces Cases; Number three, Maritime Provinces Cases; Number four, Quebec Province Cases; Number five, Ontario Province Cases; and the Registrar shall enter all Election Appeals on part numbered one, all appeals from the Yukon Territory and the Provinces of British Columbia, Alberta, Saskatchewan and Manitoba on part numbered two, all appeals from the Provinces of Nova Scotia, New Brunswick and Prince Edward Island on part numbered three, all appeals from the Province of Quebec on part numbered four, and all appeals from the Province of Ontario on part numbered five; and such appeals shall be heard and disposed of in the order in which they are so entered, unless otherwise ordered by the court. 7-8, Ed. VII. c. 70.

EVIDENCE.

91. All persons authorized to administer affidavits to be used in any of the superior courts of any province, may administer oaths, affidavits and affirmations in such province to be used in the Supreme Court. R.S., c. 135, s. 91.

92. The Governor in Council may, by commission, fr
time to time, empower such persons as he thinks necessa
within or out of Canada, to administer oaths, and take
receive affidavits, declarations and affirmations in or
cerning any proceeding had or to be had in the Supr
Court.

2. Every such oath, affidavit, declaration or affirma
so taken or made shall be as valid and of the like effect, t
intents, as if it had been administered, taken, sworn, r
or affirmed before the Court or before any judge or
petent officer thereof in Canada.

3. Every commissioner so empowered shall be style
commissioner for administering oaths in the Supreme C
of Canada." R.S., c. 135, s. 92.

93. Any oath, affidavit, affirmation or declaration
cerning any proceeding had or to be had in the Su
Court administered, sworn, affirmed or made out of C
shall be as valid and of like effect to all intents as if
been administered sworn, affirmed or made before a co
sioner appointed under this Act, if it is so adminis
sworn, affirmed or made out of Canada before,—

(*a*) any commissioner authorized to take affidavits
used in His Majesty's High Court of Justice in
land; or,

(*b*) any notary public and certified under his ha
official seal; or,

(*c*) a mayor or chief magistrate of any city, boro
town corporate in Great Britain or Ireland,
any colony or possession of His Majesty
Canada, or in any foreign country, and
under the common seal of such city, boro
town corporate; or,

(*d*) a judge of any court of superior jurisdictio
colony or possession of His Majesty, or depen
the Crown out of Canada; or,

(*e*) Any consul, vice-consul, acting consul, pro-c
consular agent of His Majesty exercising h
tions in any foreign place and certified u
official seal. R.S., c. 135, s. 93.

94. Every document purporting to have affixed, imprinted or subscribed thereon or thereto the signature of any,—

(*a*) commissioner appointed under this Act; or,

(*b*) person authorized to take affidavits to be used in any of the superior courts of any province; or,

(*c*) commissioner authorized to receive affidavits to be used in His Majesty's High Court of Justice in England; or,

(*d*) notary public under his official seal; or,

(*e*) mayor or chief magistrate of any city, borough or town corporate in Great Britain or Ireland, or in any colony or possession of His Majesty out of Canada, or in a foreign country, under the common seal of the corporation; or,

(*f*) judge of any court of superior jurisdiction in any colony or possession of His Majesty, or dependency of the Crown out of Canada under the seal of the court of which he is such judge; or,

(*g*) consul, vice-consul, acting consul, pro-consul or consular agent of His Majesty exercising his functions in any foreign place under his official seal;

in testimony of any oath, affidavit, affirmation or declaration having been administered, sworn, affirmed or made by or before him, shall be admitted in evidence without proof of any such signature or seal or of the official character of such person. R.S., c. 135, s. 94.

95. No informality in the heading or other formal requisites of any affidavit, declaration or affirmation, made or taken before any person under any provision of this or any other Act, shall be an objection to its reception in evidence in the Supreme Court, if the court or judge before whom it is tendered thinks proper to receive it; and if the same is actually sworn to, declared or affirmed by the person making the same before any person duly authorized thereto, and is received in evidence, no such informality shall be set up to defeat an indictment for perjury. R.S., c. 135, s. 95.

96. If any party to any proceeding had or to be had in the Supreme Court is desirous of having therein the evidence of any person, whether a party or not, or whether

resident withia or out of Canada, the Court or any
thereof, if in its or his opinion it is, owing to the ab
age or infirmity, or the distance of the residence of
person from the place of trial, or the expense of takin
evidence otherwise, or for any other reason, convenie
to do, may, upon the application of such party, orde
examination of any such person upon oath, by inte
tories or otherwise, before the Registrar of the Cou
any commissioner for taking affidavits in the Court, o
other person or persons to be named in such order, o
order the issue of a commission under the seal of the
for such examination.

2. The Court or a judge may, by the same or an
sequent order, give all such directions touching th
place and manner of such examination, the attendi
the witnesses and the production of papers thereat,
matters connected therewith, as appears reasonable
c. 135, s. 96.

97. Every person authorized to take the examina
any witness in pursuance of any of the provisions
Act, shall take such examination upon the oath of
ness, or upon affirmation, in any case in which aff
instead of oath is allowed by law. R.S., c. 135, s.

98. The Supreme Court, or a judge thereof, m
is considered for the ends of justice expedient s
order the further examination, before either the Co
judge thereof, or other person, of any witness; an
party on whose behalf the evidence is tendered ne
refuses to obtain such further examination, the
judge, in its or his discretion, may decline to ac
evidence. R.S., c. 135, s. 98.

99. Such notice of the time and place of exa
as is prescribed in the order, shall be given to th
party. R.S., c. 135, s. 99.

100. When any order is made for the exami
a witness, and a copy of the order, together with
of the time and place of attendance, signed by t
or one of the persons to take the examination,
duly served on the witness within Canada, and h
tendered his legal fees for attendance and travel,
or neglect to attend for examination or to a

proper question put to him on examination, or to produce any paper which he has been notified to produce, shall be deemed a contempt of court and may be punished by the same process as other contempts of court: Provided that he shall not be compelled to produce any paper which he would not be compelled to produce, or to answer any question which he would not be bound to answer in court. R.S., c. 135, s. 100.

101. If the parties in any case pending in the Court consent, in writing, that a witness may be examined within or out of Canada by interrogatories or otherwise, such consent and the proceedings had thereunder shall be as valid in all respects as if an order had been made and the proceedings had thereunder. R.S., c. 135, s. 101.

102. All examinations taken in Canada, in pursuance of any of the provisions of this Act, shall be returned to the Court; and the depositions, certified under the hands of the person or one of the persons taking the same, may, without further proof, be used in evidence, saving all just exceptions. R.S., c. 135, s. 102.

103. All examinations taken out of Canada, in pursuance of any of the provisions of this Act, shall be proved by affidavit of the due taking of such examinations, sworn before some commissioner or other person authorized under this or any other Act to take such affidavit, at the place where such examination has been taken, and shall be returned to the Court; and the depositions so returned, together with such affidavit, and the order or commission, closed under the hand and seal of the person or one of the persons authorized to take the examination, may, without further proof, be used in evidence, saving all just exceptions. R.S., c. 135, s. 103.

104. When any examination has been returned, any party may give notice of such return, and no objection to the examination being read shall have effect, unless taken within the time and in the manner prescribed by general order. R.S., c. 135, s. 104.

GENERAL.

105. The process of the Court shall run throughout Canada, and shall be tested in the name of the Chief

Justice, or in case of a vacancy in the office of chief justi
in the name of the senior puisne judge of the Court, a
shall be directed to the sheriff of any county or oth
judicial division into which any province is divided.

2. The sheriffs of the said respective counties
divisions shall be deemed and taken to be *ex officio* offic
of the Supreme Court, and shall perform the duties a
functions of sheriffs in connection with the Court.

3. In any case where the sheriff is disqualified, such p
cess shall be directed to any of the coroners of the cou
or district. R.S., c. 135, s. 105; 50-51 V., c. 16, s. 57.

106. Every commissioner for administering oaths
the Supreme Court, who resides within Canada, may t
and receive acknowledgments or recognizances of bail,
all other recognizances in the Supreme Court. R.S., c.
s. 106; 50-51 V., c. 16, s. 57.

107. An order in the Supreme Court for payment
money, whether for costs or otherwise, may be enforced
such writs of execution as the Court prescribes. 50-51
c. 16, s. 57.

108. No attachment as for contempt shall issue in
Supreme Court for the non-payment of money
50-51 V., c. 16, s. 57.

109. The judges of the Supreme Court, or any fiv
them, may, from time to time, make general rules
orders,—

(*a*) for regulating the procedure of and in the Sup
Court, and the bringing of cases before it from c
appealed from or otherwise, and for the effe
execution and working of this Act, and the at
ment of the intention and objects thereof;

(*b*) for empowering the Registrar to do any such
and transact any such business as is specified in
rules or orders, and to exercise any authority
jurisdiction in respect of the same as is now or
be hereafter done, transacted or exercised by a
of the Court sitting in chambers in virtue of
statute or custom or by the practice in the Co

(*c*) for fixing the fees and costs to be taxed and al
to, and received and taken by, and the rights
duties of the officers of the Court;

(*d*) for awarding and regulating costs in such Court in favor of and against the Crown, as well as the subject;

(*e*) with respect to matters coming within the jurisdiction of the Court, in regard to references to the Court by the Governor in Council, and in particular with respect to investigations of questions of fact involved in any such reference.

2. Such rules and orders may extend to any matter of procedure or otherwise not provided for by this Act, but for which it is found necessary to provide, in order to ensure the proper working of this Act and the better attainment of the objects thereof.

3. All such rules which are not inconsistent with the express provisions of this Act shall have force and effect as if herein enacted.

4. Copies of all such rules and orders shall be laid before both Houses of Parliament at the session next after the making thereof. 50-51 V., c. 16, s. 57; 54-55 V., c. 25, s. 4.

110. Any moneys or costs awarded to the Crown shall be paid to the Minister of Finance, and he shall pay out of any unappropriated moneys forming part of the Consolidated Revenue Fund of Canada, any moneys or costs awarded to any person against the Crown. 50-51 V., c. 16, s. 57.

111. All fees payable to the Registrar under the provisions of this Act shall be paid by means of stamps, which shall be issued for that purpose by the Minister of Inland Revenue, who shall regulate the sale thereof.

2. The proceeds of the sale of such stamps shall be paid into the Consolidated Revenue Fund of Canada. R.S., c. 135, s. 111.

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