

# Canada Law Journal

VOL. LVIII.

TORONTO, MAY, 1922.

No. 5

## THE QUORUM OF THE COURT IN BANCO.

By Hon. Mr. Justice Russell.

The remarks that follow will have reference to the Province of Nova Scotia. How far they are applicable to other jurisdictions the writer will not presume to say. Furthermore, they are offered in no dogmatic spirit. It may be that they present only a one-sided view of the question discussed and that when, if ever, the other side is presented the author may be obliged to change his opinion.

The rule made under the authority of the Judicature Act provides that four judges shall constitute a quorum to decide all matters requiring to be heard by the court *in banco*, but if the attendance of four judges at any time cannot be obtained, owing to absence illness or other cause, sufficient in the estimation of the judges present, three shall constitute a quorum. (Order LVIII, Rule 7).

Until quite recently this rule has governed the judges of the Supreme Court. On rare occasions it has happened that five judges have been present, and once, within the recollection of the present writer, an extra chair has been brought in and six judges have attended. It has never been considered that the rule was violated by the attendance of a greater number than four, but there are good reasons why the Court *in banco* should consist of an even number of judges.

Let us consider first the case of a plaintiff appealing from the decision of the trial judge. The defendant has succeeded in the court below. There are five judges sitting on the appeal, two of them agree with the trial judge. Three of them decide for the plaintiff. That decision for the plaintiff is final so far as the Nova Scotia Court is concerned. If no appeal lies, the plaintiff is finally successful. He has beaten the defendant, although he had no more judges supporting his views than the defendant had. The burden should be upon the plaintiff, and