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1904

IS THIS RIGHT?

Memorandum submitted by Donald MacMaster, K.C., in connection with the bringing of appeals to the King, thro' the Privy Council Judicial Committee. April, 1904.

SECOND ISSUE

The following communication shows the action taken by the Toronto Bar Association in regard to the proposed reforms:

THE TORONTO BAR ASSOCIATION

TORONTO, June 10th, 1904.

Donald MacMaster, Esq., K.C.,
MONTREAL, P.Q.

DEAR SIR :—

I am instructed to forward to you a copy of a resolution passed at the regular quarterly meeting of our Association, as follows:—

"Moved by Mr. W. B. Raymond,
"Seconded by Mr. Frank E. Hodgins, K.C.,
"That the Toronto Bar Association heartily endorse "the suggestions made in Mr. Donald MacMaster's "memorandum recommending decreases in the cost of "appeals to the King in Council and reforms in the "practice relating thereto and request the Trustees of "the Association to co-operate with Mr. MacMaster "in the matter."

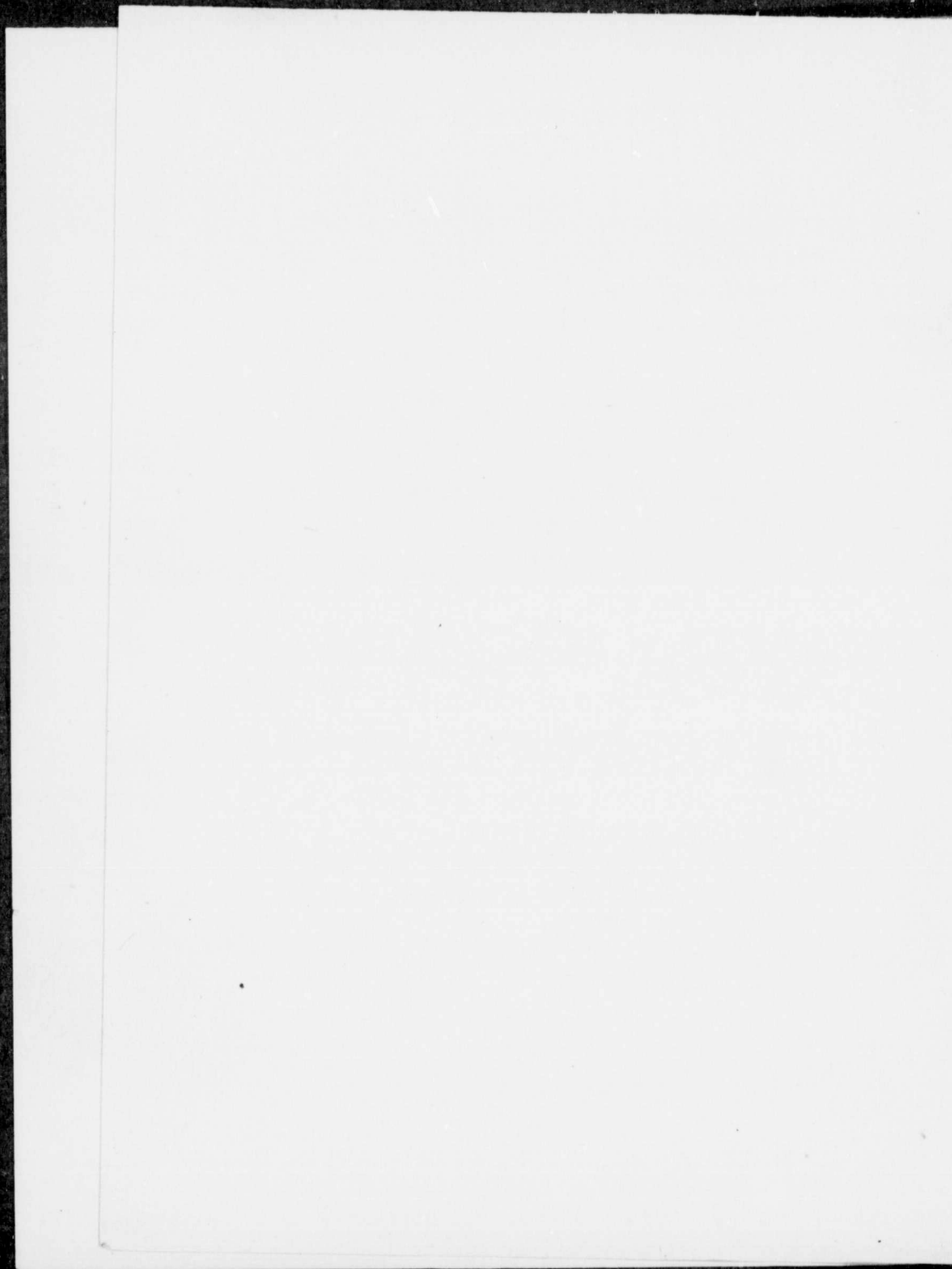
I may also say that the Board of Trustees have dealt with the matter as follows:—

> "The Board of Trustees of the Toronto Bar Associ-
> "ation having read and considered the memorandum
> "submitted by Mr. Donald MacMaster, K.C., to the
> "Council of the Montreal Bar on the 29th of April,
> "1904, unanimously concur in the same and in the de-
> "sirability of the changes suggested therein and in-
> "struct their Secretary to send copies of this reso-
> "lution to the Minister of Justice for Canada and to
> "the Attorney General of Ontario."

Our Association will be pleased to hear from you if any further action on their part can be taken in further co-operation with you as set forth in the above resolution.

Yours truly,

(Sgd.) **THOS. REID,**
Secretary Toronto Bar Association.



MEMORANDUM

SUBMITTED BY

DONALD MACMASTER, K.C., Batonnier of the Montreal Section of the Bar, to the Council of the Bar, on 29th April, 1904.

Gentlemen:—I beg to call your attention to some anomalies and encumbrances in connection with the bringing of appeals to His Majesty, the King, through the Judicial Committee of the Privy Council. In making these observations, it must be distinctly understood that I have no criticism to make of the manner in which the appeals are heard and despatched when they reach their Lordships. Nothing could be more satisfactory, though, in my humble opinion, the Committee would be strengthened by the addition of adequate representation from the Colonies. That, however, is not the subject that I wish to bring to your attention.

It is this: the difficulties that hinder access to their Lordships' Bar, and the amount of unnecessary expense incurred, *en route,* by litigants.

In the first place, it must be remembered that this approach to the King in Council is a right assured to all subjects of His Majesty, and, for that matter, to all other persons who feel aggrieved by decisions rendered in His Majesty's Colonial Courts. Residents in the Colonies have no representation in the Imperial Parliament, and their approach is, therefore, to the King in Council. On the other hand, those who reside within the United Kingdom have, in the last resort, an appeal from the highest Courts of Appeal in England, Ireland and Scotland, to the House of Lords—that is, to the King in Parliament. It is at once obvious that the approach to the Sovereign should be as free from obstruction as possible, and that the aggrieved litigant should not be subjected to any unnecessary expense.

What is the present situation?

A case for an amount warranting an appeal to the King in Council is decided, say, by the Court of Appeal of the Province of Quebec. The losing party decides to appeal to the King in Council. If it is an important matter, it is usual for the clients to send Canadian Counsel across the ocean to argue the case. Sometimes the Canadian Counsel are aided by English Counsel. It is, however, becoming more and more the rule for Canadian Counsel to argue their own cases, though this is often done in association with English Counsel. The present practice is, in addition, to engage a firm of Solicitors, and, in seven cases out of ten, you have three sets of legal gentlemen engaged in connection with bringing the appeal to the notice of the King: first, the Canadian Counsel; secondly, the English Solicitor; and, thirdly, the English Counsel. It is unnecessary to say that this inevitably means, to the client or to his adversary, a considerable expenditure, and in most cases, to both.

Is there not a way by which the expense can be reduced?

I suggest that there is,—that under the rules governing the procedure in the Privy Council an agent may be appointed to represent the party appealing, and another to represent the Respondent, and that these agents might be two of the Clerks in connection with the Canadian High Commissioner's Office in London. Their main function would be to file the Record, and the Cases or Factums of the parties—to receive notice from the Privy Council Office when the case is coming on for hearing—to give notice to their respective principals—to arrange for consultations between Counsel—and to report the result of the hearing. The charge for attendances would be nominal, and it would not be necessary that these agents should read the Record, spend days at the hearing, or even attend consultations—for all which items, and many others, the charges are now considerable.

I would not, willingly, make any reflection on English Solicitors, who are an honourable class of men in whom great confidence—a confidence seldom betrayed—is reposed by the British public. But, while that is so, there is no reason why the Canadian litigant should pay out unnecessary fees or disbursements in connection with the Appeal, or why the English system of Solicitor and Counsel should be grafted on the Canadian system.

In the old days it was customary, on bringing an appeal to the King or Queen, to send over a copy of the Record, certified by the Registrar of the Court appealed from, in longhand—that is, unprinted. When it arrived in England the Solicitors instructed to take charge of the appeal, as well as those to oppose it, inspected this Transcript Record, read it at length, came to an agreement as to what portions of it should be printed, and had fair copies of it made. These fair copies were placed in the hands of the printer, and the printed Transcript

henceforth was called the Record. The Record was then delivered to Counsel on each side, to prepare what is called there the Case, that is, the printed Argument to be filed in the Privy Council Office. The Case was usually drawn by the English Junior, and settled by the English Senior. When the respective Cases were filed, the Registrar placed the appeal in the list for hearing at an early term.

The whole course of actual practice has, in recent years, been changed. Now, as a rule, the examination, copying and printing of the Record are done here, not in England. The lawyers here prosecuting the appeal procure from the Registrar of the Court appealed from a verified copy of the Record, and cause it to be printed in this country, after which the Registrar sends two certified copies directly to the office of the Judicial Committee of the Privy Council in London. The Appellant's lawyers deliver copies of the printed Record to the Respondent's lawyers here and send fifty copies to

the Privy Council Office. Then, as a rule, the Cases or Factums on each side are drawn in this country, and printed here. These are despatched to the Solicitors or agents in London for deposit in the Privy Council Office—so that, practically, (apart from orders of course, when necessary) all the work on the appeal, up to the actual hearing stage, is done in this country. Notwithstanding this, the English Solicitor's bill still contains the old entry for "perusing the Record," though, as a matter of fact, he may never have done so, and is not required to do so, because that perusal has been done in this country before the Record was printed.

I have, for example, before me a Solicitor's Bill in which there is this entry:

"Perusing Record . . . . . £17.7.0"

This was a small Record. Sometimes the item passes the £100 limit. To my personal knowledge the Record in that case was perused and printed in this country. If the English Solicitor ever perused it after it

was sent to England, his subsequent conduct showed that he knew little or nothing about the issues, or the contents of the Record. My clients, the Appellants, won the case, and consequently this charge was payable as part of the costs taxed against the Respondents. When I remonstrated against the impropriety of this charge, the Solicitor rejoined that he did not "appreciate the objection" to the charge of seventeen guineas for perusing the Record, naively adding that my clients had not to pay that charge. I give only a single instance of this abuse. There are others.

Then again, what function has a Solicitor in connection with the proceedings? In the consultations he is not consulted. He is a mere bystander. I am not disparaging his usefulness in a case tried or heard at the English Bar—when he is in active communication with Counsel. It is otherwise in the Privy Council. There he sits as dumb as an oyster—turning over the leaves of the Appeal Book—but never uttering a

word, or furthering the discussion in any way. But, all the same, he draws his £3 6s. 8d. in good sterling money for every day he is present at the argument, as well as for the day on which he attends to hear the Judgment—to say nothing of the numerous "Ten Shillings" for "attendances" often performed by deputy, (his clerk), including attendances "bespeaking" something, that in this country would be asked for over the telephone. The Solicitor's Bill is a curiosity. The items are numerous—many, small—others, of respectable dimensions. For additional example, "Sessions Fee," three guineas. But the aggregate mounts up to a neat round sum. Remember, I am not opposing the payment of a proper recompense for services rendered. "The laborer is worthy of his hire". I am simply protesting against a practice that imposes on Colonial litigants unnecessary expense. The Canadian Barrister and Advocate is also a Solicitor, and his standing or that of his Agent should be recognized in

an Imperial Court for the hearing of Colonial Appeals, without the intervention of an additional Solicitor.

By the plan that I suggest, many of the charges now made could be greatly reduced, and others dispensed with altogether. The fees of the Privy Council Office, which are not heavy, could be assured, if necessary, by each Agent making a small deposit.

I next draw your attention to an antiquated and embarrassing procedure in connection with compelling a party to appear and file his Case.

Suppose, for example, that the Appellant takes all the steps necessary to perfect the appeal—that is to say, he causes the Transcript Record to be printed and lodged in the Privy Council Office, prepares his Petition of Appeal, and lodges it; and, further, prepares his Case or Factum, and lodges that; and, in the meantime, notwithstanding the obtaining of leave to appeal, or the

taking the appeal of right, the Respondent does not put in an appearance on the Privy Council proceedings: in that case the Appellant must ask for an order of the Committee for a summons to call on the Respondent to appear within two months. This summons is posted or affixed at two conspicuous places in the City, namely, the Royal Exchange and Lloyd's Coffee House. If, at the end of the time limited by the order, namely, two months, no appearance be made by the Respondent, the Appellant is bound to lodge a petition for a peremptory order for the Respondent's appearance, together with an affidavit of due publication of the summons to appear, and will be entitled to obtain a peremptory order that the Respondent do enter an appearance to the appeal within six weeks from the date of the order. This peremptory order must also be affixed by the Appellant, or his agent, at the Royal Exchange and Lloyd's Coffee House. If the Respondent disregards the peremptory order requiring

his appearance, the Appellant is entitled, upon affidavit of due publication of such peremptory order, to make application, at the end of the time limited thereby, namely, six weeks, to have the cause set down for hearing *ex parte*.

Messrs. Safford & Wheeler, in their book on "Privy Council Practice," state that the above practice accords with the rule laid down by the 6th Clause of the Order-in-Council of 10th April, 1838.

Now, suppose at the lapse of the two periods of two months, and six weeks, the Respondent does appear, the Appellant is still compelled to force him along, for the Respondent is not yet bound to file his Case. The Appellant is compelled to petition for an order requiring him to lodge his printed Case within a month, and, if he fails to lodge it, the Appellant may proceed in like manner for a peremptory order requiring the Respondent to put in his Case within a fortnight, under pain of the appeal being heard *ex parte* in case of default.

Referring to the posting at Lloyd's Coffee House and the Royal Exchange, Mr. Preston, in his book on "Privy Council Appeals," says:

"This quaint old custom dates back to the times when captains of outward-bound ships used to congregate at the Exchange and at Lloyd's, and make a note of these summonses. But the practice of posting the notices is now practically useless, as a Respondent is always duly notified by the Registrar of the Court appealed from that an appeal to the Privy Council is pending in which he is to be Respondent; and it ought to be sufficient if the Registrar of the Colonial Court certifies on the Record that the Respondent had been duly served with notice of the Appeal. As it is, three months and a half are wasted, and the parties put to useless expense."

One would think that if notice is to be given anywhere in England it should be at the office of the High Commissioner or

Agent of the Colony from which the Appeal comes.

But the antiquated practice is still adhered to. It is the regular practice to-day. In these days of fast ships and railroads, to say nothing of telephones and telegraphs—wireless and otherwise—(not to mention bicycles and motor-cars), some more prompt and more practical means should be found of notifying a party to appear and to file his Case, than the hapless chance of the skipper of an outgoing ship discovering the existence of a notice at the Royal Exchange or at Lloyd's Coffee House, and communicating it to a Respondent who may reside thousands of miles from a coast town. Such notices would be equally effective if given in Timbuctoo!

My suggestion, therefore, is that the practice should be revised with a view to the avoidance of delays and unnecessary expense in the approach to the King in Council. Those who desire the presence of the Solicitor could still retain him under the

new conditions. But, the appointment of two agents in connection with the High Commissioner's Office would effect a revolution in the despatch of Privy Council business as well as cause a very considerable saving in the matter of expense. And, surely, the antiquated practice of publishing notices at the Royal Exchange and at Lloyd's Coffee House—a survival of conditions that have ceased to exist—should not be continued in these days of progress, when once the attention of the proper authorities is called to its utter uselessness and absurdity.

I have the honour to be, Gentlemen,
Your obedient servant,
DONALD MACMASTER,
Batonnier.

The Council, by resolution, unanimously concurred in the Batonnier's Memorandum, and instructed the Secretary to send copies of it to the Minister of Justice for Canada, and to the Attorney-General of Quebec.